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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1940

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ERRATA.

310 U. S. 653, No. 999, change "*Carlton Fox*" to *Newton K. Fox.*
310 U. S. 617, No. 843, citation should be 108 F. 2d 564.
309 U. S. 304, syllabus No. 2, change "§ 276 (a)" to § 275 (a).
270 U. S. 339, syllabus No. 1, change "§ 65" to § 35.

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.

RETIRED

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

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

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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1940

ARKANSAS *v.* TENNESSEE.*

No. 9, Original. In Equity. Decree entered October 14, 1940.

DECREE.

Came on this cause to be heard upon the bill of complaint, the answer and cross-bill of the defendant thereto, the replication of the complainant to such answer and cross-bill, the Report of the Special Master heretofore filed in this cause, the exceptions filed thereto by the complainant and the argument of the parties when, after consideration thereof, the Court doth order, adjudge and decree as follows:

I.

That the exceptions of complainant, State of Arkansas, to the Report of the Special Master herein are hereby overruled and said Report in all things is confirmed and approved.

II.

That the complainant, State of Arkansas, is not entitled to recover of the defendant, State of Tennessee, the lands described in Count I of the complainant's bill but that the State of Tennessee, upon its answer and cross-bill is decreed to be entitled to exercise jurisdiction thereover.

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*For the opinion in this case, see 310 U. S. 563.

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III.

That the boundary between the State of Arkansas and State of Tennessee at the point opposite the lands described in Count I of the bill of complaint in this cause is hereby decreed to be the thalweg or channel of the Mississippi River as the same flowed on October 28, 1935, the date of the filing of the original bill herein.

IV.

That the formation known as Bluegrass Towhead is expressly decreed to be under the jurisdiction and a part of the State of Tennessee.

V.

That the boundary line between the two states at the points described in Count II of the bill of complaint is hereby decreed to run as follows:

"BEGINNING at a point in the Mississippi River at approximate north latitude 35–48–20, west longitude 89–44–12, said point being at the mouth of the chute of said river separating Forked Deer Island from Island 25; running thence through the center of said chute as follows:

North 74 degrees 15 minutes west 6500 feet to monument #1 (not physical); thence north 79 degrees 15 minutes west 2250 feet to monument #2 (not physical); thence south 550 feet to monument #3 on the bank of said chute from which:

South 88 degrees 30 minutes east 21 feet;

South 37 degrees east 14½ feet, cottonwood pointers: thence south 72 degrees west 2400 feet to monument #4 from which:

South 59 degrees 45 minutes west 8 feet;

South 22 degrees 30 minutes east 7 feet;

North 51 degrees east 5 feet, cottonwood pointers, being at a "T" corner of present fence;
thence south 72 degrees west following present fence in general 2761 feet to monument #5, from which:
North 34 degrees east 10 feet;
South 25 degrees west 8 feet;
North 16 degrees 30 minutes west 16 feet;
South 66 degrees 30 minutes west 15 feet, cottonwood pointers:
thence south 43 degrees 45 minutes west following present fence in general 2268 feet to monument #6, from which:
Mississippi River Commissioner's Bench Mark (Forked Deer) bears south 57 degrees 15 minutes east 724 feet;
thence south 43 degrees 45 minutes west following present fence in general 3963 feet to monument #7 from which:
North 2 degrees 30 minutes east 4.5 feet;
North 55 degrees 30 minutes west 12 feet;
South 52 degrees 30 minutes west 10 feet;
South 38 degrees 30 minutes west 14 feet, cottonwood pointers;
thence south 30 degrees 45 minutes west following present fence in general 1400 feet to monument #8, from which:
South 63 degrees west 16 feet;
South 13 degrees 30 minutes east 17 feet, cottonwood pointers;
thence south 30 degrees 45 minutes west 500 feet to monument #9 (not physical) in the center of the chute separating Forked Deer Island from the Arkansas main shore;
thence with the chute as follows:
South 17 degrees 15 minutes east 2650 feet to monument #10 (not physical);
thence south 8 degrees 30 minutes west 800 feet to monument #11 (not physical);
thence south 23 degrees 30 minutes west 600 feet to monument #12 (not physical);

thence south 34 degrees 15 minutes west 1400 feet to monument #13 (not physical);
thence south 50 degrees west 1200 feet to monument #14 (not physical) in said chute, at approximate north latitude 35–46–21, west longitude 89–48–22.

Magnetic variation 5 degrees 15 minutes."

VI.

That W. H. Green of Covington, Tennessee, and O. W. Gauss of Osceola, Arkansas, be and they are hereby appointed Commissioners for the purpose of establishing the boundary above designated in connection with the lands described in Count II. The Commissioners, after first taking an oath to fully and impartially perform the duties required of them by this decree, will go upon the lands in question and designate the boundary herein fixed by the erection of at least four permanent station monuments of concrete or other durable material at angle points upon the line herein decreed to be the true boundary. In addition thereto, they will erect four monuments of like permanent character at points deemed by them to be not subject to erosion by the Mississippi River, as reference monuments, two referring to each terminus of the line herein decreed, which monuments shall be fixed by appropriate courses and distances from the terminal points of the line as herein decreed. The Commissioners herein named are authorized to procure such assistance as may be deemed necessary by them for the effective discharge of the functions herein imposed upon them. In the event of a disagreement between the two Commissioners, either party to the litigation may apply to the Court, if in session or to the Chief Justice thereof in vacation, for the appointment of a third Commissioner.

After completing their labors, the Commissioners will file with the Clerk of this Court a report setting forth

the performance of the duties as herein imposed and a schedule of their disbursements in the premises. Upon application to the Clerk of this Court, the Commissioners or either of them will be furnished with a copy of this decree as their authority for their actions in the premises.

All other matters are reserved until the coming in of the Report of the Commissioners.

CONTINENTAL ASSURANCE CO. *v.* TENNESSEE.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 117. Decided October 21, 1940.

Where a state statute imposes upon a foreign insurance company for the privilege of entering the State and doing local business a license tax measured by a percentage of the premiums that will accrue and be paid to it on policies issued in the State, throughout the lives of such policies, the State may, consistently with due process, continue to collect such percentage on premiums which accrue from such policies after the company's withdrawal from the State, and which are paid to it at its office in another State. P. 6.

176 Tenn. 1; 137 S. W. 2d 277; 138 *id.* 447, dismissed.

APPEAL from the affirmance of a decree of the Court of Chancery of Davidson County, Tennessee, sustaining the right of the State to collect from the Assurance Company 2½% of premiums paid to it by residents of Tennessee after its withdrawal from the State. The case came before this Court on the appellant's Jurisdictional Statement and the appellee's Statement in Opposition.

Messrs. Charles C. Trabue, Jr. and *William P. Smith* were on the brief for appellant.

Messrs. Roy H. Beeler, Attorney General of Tennessee, and *Nat Tipton* were on the brief for appellee.

PER CURIAM.

The State of Tennessee brought this suit to enforce payment of privilege taxes measured by premiums on policies of insurance issued while appellant was doing business within the State, but upon which the premiums were paid after its withdrawal from the State. Appellant contended that since its withdrawal it had transacted no business within the State; that the policyholders there had mailed their premiums on unmatured policies to the home office of appellant in another State; and that to hold it liable for the taxes demanded would deprive it of its property in violation of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Tennessee sustained the tax. It construed the statutory provisions to mean "that the tax is levied upon the right to do business in the state, measured by a percentage of annual premiums to the exclusion of all other taxes, the tax on the annual premiums to be paid throughout the life of policies issued"; that though "measured by two and a half per cent of premiums received on policies issued by the company while exercising its license from the state, the tax was levied upon the privilege of entering the state and engaging in the insurance business, and not upon the annual premiums"; and that the appellant "by its compliance with the statute adopted and agreed to the construction we have given it, and cannot now repudiate its provisions." 137 S. W. 2d 277.

This construction of the statute distinguishes the case from that of *Provident Savings & Life Assurance Society* v. *Kentucky*, 239 U. S. 103. There the question under the statute, as it had been construed by the state court, was whether the insurance company continued to do business within the State for the period under consideration, despite the fact that it had withdrawn from the State, merely because of the receipt of premiums after withdrawal. The

tax was not laid upon the privilege of doing business during the period that the company was actually within the State, the tax on that privilege being measured by the premiums received during the life of the policies. *Id.*, pp. 110, 111. The Supreme Court of Tennessee emphasized the point of this distinction in its opinion on rehearing. 138 S. W. 2d 447. Compare *State* v. *Insurance Company*, 106 Tenn. 282, 333–335; 61 S. W. 75.

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

Dismissed.

REPUBLIC STEEL CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 14. Argued October 17, 1940.—Decided November 12, 1940.

1. The National Labor Relations Board, having ordered the reinstatement with back pay of employees found to have been discharged or denied reinstatement in violation of the National Labor Relations Act, and having directed the employer to deduct from the back pay such amounts as were received by the employees from governmental agencies for services performed meanwhile on work relief projects, was without authority further to require the employer to pay over to the governmental agencies the amounts so deducted. Pp. 9, 12.
2. The National Labor Relations Act is essentially remedial. The provision of § 10 (c) authorizing the Board to order "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act" is remedial, not punitive. Affirmative action to effectuate the policies of this Act is action to achieve the remedial objectives which the Act sets forth. It is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. Pp. 10–11.

The reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work

relief projects and to the practice and aims of the Work Projects Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment.

107 F. 2d 472, modified.

CERTIORARI, 310 U. S. 655, to review a decree enforcing an order of the National Labor Relations Board. 9 N. L. R. B. 219.

Messrs. Luther Day and *Thomas F. Patton*, with whom *Messrs. Joseph W. Henderson* and *Mortimor S. Gordon* were on the brief, for petitioner.

Mr. Thomas E. Harris, with whom *Solicitor General Biddle*, *Assistant Solicitor General Fahy*, and *Messrs. Robert B. Watts*, *Laurence A. Knapp*, *Mortimer B. Wolf*, and *Morris P. Glushien* were on the brief, for respondents.

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

The National Labor Relations Board, finding that the Republic Steel Corporation had engaged in unfair labor practices in violation of § 8(1), 8(2) and 8(3) of the National Labor Relations Act, ordered the company to desist from these practices, to withdraw recognition from a labor organization found to be dominated by the company, and to reinstate certain employees, with back pay, found to have been discriminatorily discharged or denied reinstatement. The Board, in providing for back pay, directed the company to deduct from the payments to the reinstated employees the amounts they had received for work performed upon "work relief projects" and to pay over such amounts to the appropriate governmental agencies. Except for a modification, not now important, the Circuit Court of Appeals directed enforcement of the Board's order. 107 F. 2d 472.

In view of conflict with decisions in *National Labor Relations Board* v. *Leviton Manufacturing Co.,* 111 F. 2d 619 (C. C. A. 2d) and *National Labor Relations Board* v. *Tovrea Packing Co.,* 111 F. 2d 626 (C. C. A. 9th), we granted certiorari limited to the question whether the Board had authority to require the company to make the described payments to the agencies of the Government. 310 U. S. 655.

The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amounts in public or private employment. Further, there is no question that the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary.

The Board urges that the work relief program was designed to meet the exigency of large-scale unemployment produced by the depression; that projects had been selected, not with a single eye to costs or usefulness, but with a view to providing the greatest amount of employment in order to serve the needs of unemployed workers in various communities; in short, that the Work Projects Administration has been conducted as a means of dealing with the relief problem. Hence it is contended that the Board could properly conclude that the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects.

The payments to the Federal, State, County, or other governments concerned are thus conceived as being required for the purpose of redressing, not an injury to

the employees, but an injury to the public,—an injury thought to be not the less sustained although here the respective governments have received the benefit of the services performed. So conceived, these required payments are in the nature of penalties imposed by law upon the employer,—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest. We need not pause to pursue the application of this theory of the Board's power to a variety of circumstances where community interests might be asserted. The question is,—Has Congress conferred the power upon the Board to impose such requirements.

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (§ 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives. This right of the employees is safeguarded through the authority conferred upon the Board to require the employer to desist from the unfair labor practices described and to leave the employees free to organize and choose their representatives. They are thus protected from coercion and interference in the formation

of labor organizations and from discriminatory discharge. Whether the Act has been violated by the employer—whether there has been an unfair labor practice—is a matter for the Board to determine upon evidence. When it does so determine the Board can require the employer to disestablish organizations created in violation of the Act; it can direct the employer to bargain with those who appear to be the chosen representatives of the employees and it can require that such employees as have been discharged in violation of the Act be reinstated with back pay. All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of § 10 (c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—"requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair

labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 235, 236. See, also, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

We think that affirmative action to "effectuate the policies of this Act" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of

their own choice. We find no warrant in the policies of the Act for such an exaction.

In truth, the reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work relief projects and to the practice and aims of the Work Projects Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in relation to the latter. That is not the function of the Board. It has not been assigned a rôle in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects. The function of the Board in this case was to assure to petitioner's employees the right of collective bargaining through their representatives without interference by petitioner and to make good to the employees what they had lost through the discriminatory discharge.

We hold that the additional provision requiring the payments to governmental agencies was beyond the Board's authority, and to that extent the decree below enforcing the Board's order is modified and the cause is remanded with direction to enter a decree enforcing the Board's order with that provision eliminated.

It is so ordered.

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

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS:

It might fairly be implied by the words "reinstatement of employees with or without back pay" that the

employees must themselves be the recipients of the back pay. Were the opinion based on that ground we would acquiesce. But the judgment here does not rest upon such an interpretation. The holding appears to be on the broad ground that the Board may not require full back pay, even to a wrongfully discharged employee, if he has received pay for services performed on a governmental relief project provided exclusively for the needy unemployed. With this conclusion we cannot agree.

The statute commands that the Board must order "back pay" if the policy of the Act will thereby be effectuated. At least two persons are immediately involved in "back pay," as here used; one who pays and one who receives. The propriety of a "back pay" order as an instrumentality for effectuating the Act's policies, must therefore be determined by the manner in which it influences the payor and payee, one, or both. The central policy of the Act is protection to employees from employer interference, intimidation and coercion in relation to unionization and collective bargaining. We cannot doubt but that a back pay order as applied to the employer will effectually aid in safeguarding these rights. We believe, as did the Board and the court below, that it may well be said that the policies of the Act will be effectuated by denying to an offending employer the opportunity of shifting to government relief agencies the burden of supporting his wrongfully discharged employees. The knowledge that he may be called upon to pay out the wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.

And the construction of the provision for back pay is not helped by labeling the Act's purpose or the Board's action as either "punitive" or "remedial." The "back

pay" provision is clear and unambiguous. Hence, it is enough here for us to determine what Congress meant from what it said.

Nor is there substance to the expressed fear that complete acceptance of the words as Congress wrote them would vest unlimited discretion in the Board, because it would not. That discretion is narrowly limited, by the fact that as to "back pay" the Board can in no instance award any greater sum than "back pay" for the period in which the employee was absent from his employer's services by reason of his employer's violation of the law.

FLEISHER ENGINEERING & CONSTRUCTION CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF HALLENBECK.

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

No. 15. Argued October 17, 18, 1940.—Decided November 12, 1940.

1. The Miller Act of 1935, requiring contractors for public work of the United States to furnish a payment bond for the protection of persons supplying labor or materials, provides that a supplier having contractual relationship not with the contractor furnishing such bond but with a subcontractor, "shall have a right of action upon the said payment bond upon giving written notice to said contractor . . ." The Act further provides that "such notice shall be served by mailing the same by registered mail . . ." *Held* that a suit under the Act was maintainable although the notice was sent by ordinary mail and not by registered mail, where it was otherwise sufficient and actually reached one of two joint and several contractors. P. 17.
2. With respect to the manner of giving the prescribed notice, the Act should be liberally construed in aid of its remedial purpose. P. 18.

107 F. 2d 925, affirmed.

CERTIORARI, 309 U. S. 693, to review the affirmance of a judgment on a bond given by two contractors, with sure-

ties, to secure payment for labor and material supplied for the performance of a contract with the United States.

Mr. Frank Gibbons for petitioners.

Mr. Edwin J. Culligan, with whom *Alice B. Marion* was on the brief, for respondent.

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

The United States brought this suit on behalf of George S. Hallenbeck to recover upon a bond given by Fleisher Engineering & Construction Company and Joseph A. Bass, with their sureties, and providing for the payment for labor and material furnished under a contract between the principals on the bond and the United States for the construction of a certain housing project. Part of the labor required by the contract was performed by Hallenbeck for a subcontractor with the approval of the contractors. The suit was brought under the Miller Act of August 24, 1935, 40 U. S. C. 270b. Plaintiff obtained a summary judgment (30 F. Supp. 964) which the Circuit Court of Appeals affirmed. 107 F. 2d 925.

The applicable provision of the Miller Act is set forth in the margin.[1] The question is whether the giving of

[1] Section 2 of the Act of August 24, 1935, c. 642, 49 Stat. 794, 40 U. S. C., § 270b, provides:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Pro-*

the required written notice to the contractor was sufficient, as it was not sent by "registered mail." The Circuit Court of Appeals held that as the receipt of written notice was conceded and the contents of the notice were adequate, the statute was satisfied. In view of alleged conflict with the decision in *United States for the use of John A. Denie's Sons Co.* v. *Bass,* 111 F. 2d 965, we granted certiorari. 309 U. S. 693.

In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally. *United States for the use of Alexander Bryant Co.* v. *New York Steam Fitting Co.,* 235 U. S. 327, 337; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 380; *Fleischmann Construction Co.* v. *United States,* 270 U. S. 349, 360. We recognized that the statute created a new right of action and that compliance with the prescribed limitation was essential to the assertion of the right conferred. Accordingly, as it was provided that a material-man could not bring suit on the contractor's bond in the name of the United States within six months from completion and settlement, the Court held that

vided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

this provision plainly conditioned the right to sue. *United States ex rel. Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 162, 163. That ruling was distinguished in the case of the *Alexander Bryant Company, supra,* where it was held that the provision of the Act requiring notice to be given to other creditors by the creditor availing himself of the right to sue within the specified year, if the Government did not bring suit within six months after completion, was not "of the essence of jurisdiction over the case" or "a condition of the liability" of the surety on the bond. In short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose. "Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." *Illinois Surety Co.* v. *John Davis Co., supra.* The same principle should govern the application of the Miller Act.

In the instant case, we may lay on one side the fact that the notice was addressed to the project engineer. As the court below said, it was admitted that the notice was in writing and was sent by mail and that it reached one of the two contractors who had jointly and severally agreed to perform the contract. And at this bar, the actual receipt of the notice and the sufficiency of its statements have not been challenged.

In giving the statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the statute indicates the distinction. The proviso, which defines the condition precedent to suit, states that the material-man or laborer "shall have a

right of action upon the said payment bond upon giving written notice to said contractor" within ninety days from the date of final performance. The condition as thus expressed was fully met. Then the statute goes on to provide for the mode of service of the notice. "Such notice shall be served by mailing the same by registered mail, postage prepaid," or "in any manner" in which the United States marshal "is authorized by law to serve summons." We think that the purpose of this provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

In this view we conclude that the Circuit Court of Appeals correctly disposed of the case and its judgment is

Affirmed.

WEST INDIA OIL CO. (PUERTO RICO) *v.* DOMENECH, TREASURER OF PUERTO RICO.

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

No. 26. Argued October 23, 24, 1940.—Decided November 12, 1940.

1. Section 3 of the Organic Act of Puerto Rico, as amended by the Act of March 4, 1927, authorizing the insular legislature to levy internal-revenue taxes as soon as the articles to be taxed are manufactured, sold, used, or "brought into the Island," gives the consent of Congress to a nondiscriminatory sales tax so far as it is laid on the delivery, in consummation of sales, of fuel oil imported in bond and withdrawn, duty free (pursuant to the Tariff Act of 1930 and the Revenue Act of 1932), for delivery to vessels in Puerto Rican ports for use as fuel upon their voyages to ports of the United States or foreign countries. *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, distinguished. P. 25.
2. Considering the relationship of general Congressional legislation to legislation specifically applicable to the territories and insular possessions, repeals by implication are not to be favored and will not be adjudged unless the legislative intention to repeal is clear. P. 29.

108 F. 2d 144, affirmed.

THIS was a suit brought by the Oil Company against Bonet, Treasurer of Puerto Rico (for whom Domenech, successor in the office, has been substituted) praying for a determination of the validity of the taxes in question. A declaratory judgment rendered by a District Court of Puerto Rico against the tax was reversed by a judgment of the Supreme Court of the Territory, 54 P. R. Dec. 732, which was in turn affirmed by the court below.

Mr. James R. Beverley for petitioner.

So long as the goods remain under the control of the Customs Service, the merchandise is in process of importation and can not be taxed by States or other taxing

jurisdictions, other than the United States. A territorial tax at this stage either on the property or on a transaction moving the property would be equivalent to an "import duty," which Puerto Rico can not lay. To hold otherwise would be to permit the States and Territories to interfere with and perhaps even prohibit (through taxes or other exactions) the importation of foreign goods,—a power denied to them under the Constitution, Art. I, § 8, Cl. 3. The foreign fuel oil came under the immediate and complete supervision of the United States Customs Service from the moment it entered the harbor of San Juan (or Ponce, as the case may be); and such supervision and control never ceased until the oil was consumed at sea by ships in their journeys. It was never "imported" into Puerto Rico, but was merely entered in bond until such time as it should be delivered to the ships' bunkers. Technically, it never entered the Island and never became a part of the mass of property there, but remained apart under federal control.

The Tariff Act of 1930, as amended, in dealing with certain supplies to ships, including fuel oil, states that such supplies shall be treated as "exported." The Revenue Act of 1932, § 601 (b), provides that the taxes involved "shall be treated for the purposes of all provisions of law relating to customs revenue as a duty imposed by such Act . . ." (Tariff Act of 1930). So far as this fuel oil is concerned, all the provisions of law relating to customs duties apply. Further, Art. 942 of the Customs Regulations of 1931, incorporated by reference in the Tariff Act, provides that "Imported goods in bonded warehouses are exempt from taxation under the general laws of the several States." This regulation also appears in Customs Regulations of 1937 (Art. 940) and in prior regulations (1923). Congress in the title to the Tariff Act of 1930 has asserted that one of the purposes of the Act is to "regulate commerce with foreign countries" and

another purpose is "to encourage the industries of the United States."

The Territory of Puerto Rico is bound by this expressed intention of Congress and is bound to treat this fuel oil as if it were an export. It follows that no tax on any transaction moving this oil in commerce could be laid by Puerto Rico, being prohibited both by the Revenue Act of 1932, and by the Customs Regulations.

The fuel oil never left the channels of interstate or foreign commerce. In such case, a tax can not be validly laid by Puerto Rico on the delivery of the oil to ships' bunkers. It would seem also that a tax on this oil or upon the delivery to ships' bunkers would be a direct burden on interstate and foreign commerce, since the oil is used exclusively in the propulsion of ships in interstate and foreign commerce. From a practical standpoint, if the present tax is valid, the Insular Government could impose such taxes as to make it impossible for ships to fuel in Puerto Rican ports and thus drive them to fuel in foreign or other ports. The debates in Congress on the Revenue Act of 1932 and its amendments show that Congress had precisely this situation in mind when it exempted ships' supplies from taxes.

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, held that the New York City sales tax was applicable to a contract of sale made in New York for delivery in New York from Pennsylvania. But this Court has never held that the State of exit could levy a tax on goods moving in interstate commerce or on the transaction moving them. In the instant case, the fuel oil is moved out of Puerto Rico to the high seas by the transaction attempted to be taxed, and the contract for sale is not made in Puerto Rico; with the added important fact that the fuel oil was never technically in Puerto Rico, but was under the control of the United States Customs Service at all times. On principle, this case is

analogous to the case of *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 414.

Mr. William Cattron Rigby, with whom *Messrs. George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* were on the brief, for respondent.

This tax on sales is an excise.

The power of the Legislature extends to levying an excise on the business activities of a domestic corporation of Puerto Rico, regardless of whether the subject matter of those activities, if, as here, movable personal property, is then actually located within the jurisdictional territorial limits of Puerto Rico, or not. Plaintiff's deposit of the oil in a bonded warehouse is, therefore, immaterial here, for any purpose.

The sales were made "in Puerto Rico," within the meaning of § 62 of the local excise law here involved.

The established rule of the respect to be accorded to the decision of a local territorial supreme court, interpreting local territorial statutes and laws, is peculiarly applicable here.

The levy of this excise on the first sale in Puerto Rico of this oil is within the authority expressly granted by the Congress by the *proviso* added to § 3 of the Organic Act by the Butler Act amendment of March 4, 1927, authorizing the levy and collection of internal-revenue taxes by the Legislature of Puerto Rico, "on the articles subject to said tax, as soon as the same are . . . brought into the island," and directing the officials of the customs and postal services of the United States "to assist the appropriate officials of the Porto Rican government in the collection of these taxes."

That this oil was brought in from a foreign country, and that the sale in Puerto Rico was its first sale after landing, is immaterial.

The legislative history of the Butler Act emphasizes the intention of the Congress.

The commerce clause is not applicable.

It is wholly immaterial that Congress by § 309 of the Tariff Act of 1930 directed that federal tariff taxes and duties should be remitted upon oil imported from foreign countries and used for the propulsion of ships in domestic commerce between Puerto Rico (or other off-shore Territories or possessions) and the mainland. There is no repeal of the local taxing powers expressly granted the Legislature of Puerto Rico.

This case is not governed by *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 414.

Mr. Justice Stone delivered the opinion of the Court.

The question is whether a Puerto Rico sales tax imposed by §§ 16 (a), 62 of the Internal Revenue Act of Puerto Rico, (as amended by Act No. 17 of June 3, 1927, Laws of 1927, Special Session, pp. 458–486), is invalid because as applied it infringes Congressional regulations of foreign and domestic commerce effected by the tariff laws and customs regulations of the United States. The tax is challenged so far as it is laid on the delivery, in consummation of sales, of fuel oil which has previously been imported in bond and then withdrawn, duty free, for delivery to vessels in Puerto Rican ports for use as fuel upon their voyages to ports of the United States or foreign countries. The Court of Appeals for the First Circuit has affirmed the judgment of the Supreme Court of Puerto Rico sustaining the tax, 54 P. R. Dec. 732 (Spanish edition). 108 F. 2d 144. We granted certiorari, 309 U. S. 652, because the question presented is of importance in the administration of the customs laws of the United States and of the revenue laws of Puerto Rico, and because of an asserted conflict with our decision in *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414.

Petitioner brings fuel oil from a foreign country, where it is produced and refined, to Puerto Rico, where it is stored in bonded warehouses in the joint custody of peti-

tioner and the customs officers of the United States, as provided by § 555 of the Tariff Act of 1930, 46 Stat. 743, 19 U. S. C. § 1555, and applicable customs regulations. From time to time petitioner withdraws some of the oil from bond, for disposition and use in Puerto Rico. Petitioner also withdraws some of the oil, with which we are now concerned, and delivers it to vessels in Puerto Rican ports upon sales for use as ships' stores in the manner already indicated. Upon such withdrawal and delivery the import tax imposed on fuel oil by § 601 (a) (c) (4) of the Revenue Act of 1932, 47 Stat. 169, 259–260, and required by § 601 (b) to be "treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by . . . [the Tariff Act of 1930]" is remitted pursuant to § 309 of the Tariff Act of 1930, 46 Stat. 590, 690 and § 630 of the Act of 1932, added by the amendment of June 16, 1933, 48 Stat. 256.

Section 309 authorizes withdrawal from bonded warehouse, duty free under treasury regulations, of articles of foreign manufacture or production for use as ships' supplies, and §§ 601 (b), 630 of the Revenue Act of 1932 extend the benefit of those provisions to fuel oil imported in bond and withdrawn and "sold for use as fuel . . . on vessels . . . engaged in foreign trade or trade . . . between the United States and any of its possessions." See *McGoldrick* v. *Gulf Oil Corp., supra,* 423 *et seq.*

It is true, as petitioner urges, that in *McGoldrick* v. *Gulf Oil Corp., supra,* we held that the provisions of the Tariff Act of 1930 and of the Revenue Act of 1932, and the customs regulations relating to bonded manufacturing warehouses, when applied to crude oil imported into New York and there manufactured into fuel oil in bonded warehouses and withdrawn duty free for sale as ships' stores, manifested an intention of Congress to regulate the foreign commerce involved, in the interest of and for the protection of American manufacturers, and that a

state tax on the sale was invalid because in conflict with such regulation. We do not stop to consider whether, as respondent insists, a different result should be reached here because the imported oil was imported in its manufactured state and was not, as in the *Gulf Oil* case, earmarked for manufacture in bonded warehouse and withdrawn after manufacture for sale as ships' stores. We need not now determine whether standing alone the statutory characterization of the oil sold as ships' supplies as "exports" within the meaning of the customs laws, § 309 (b) Tariff Act of 1930; § 630 of the Revenue Act of 1932, does more than make applicable to it the provisions of the Tariff Act of 1930 for remission of customs duties upon merchandise imported in bond and later exported. Nor is it necessary to examine the various arguments advanced that the tax, without the consent of Congress, is an infringement of its constitutional power over commerce. For we think a sufficient answer to all the contentions of petitioner is to be found in the Congressional consent to the tax given by the March 4, 1927 amendment of § 3 of the Organic Act of Puerto Rico, 44 Stat. 1418.

Before the amendment, § 3 had prohibited duties "on exports from Puerto Rico," but had provided that "taxes and assessments on property, internal revenue" etc., "may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico. . . ." Congress, by the amendment, added to § 3 a proviso "that the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination be made between the articles imported

from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes."

The plain purport of the words of this proviso is that any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles "as soon as . . . [they] . . . are manufactured, sold, used, or brought into the island" provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the Island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of § 10 of Art. I of the Constitution, to tax imports and exports without the consent of Congress. S. Rept. No. 1011, 69th Cong., 1st Sess., p. 2. Cf. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, with *Baldwin* v. *Seelig*, 294 U. S. 511, 526. These questions were involved in *Puerto Rico Tax Appeals*, 16 F. 2d 545, decided January 7, 1927, shortly before the amendment of § 3 of the Organic Act. The judgments in that case were reversed and the suits ordered dismissed by this Court for want of jurisdiction, October 24, 1927 (275 U. S. 56), after the amendment to the Organic Act of March 4, 1927, which deprived the federal courts of jurisdiction in the pending and other like suits to restrain the assessment and collection of Puerto Rico taxes.

Moreover practical difficulties appear to have been experienced in levying insular taxes upon goods on their arrival from the United States and while in the custody or control of postal or customs officers, due to the fact that the local tax while in its practical effect a customs duty was not collected by postal or customs officials. S. Rept. No. 1011, 69th Cong., 1st Sess. The doubts and the difficulty were removed by the amendment to § 3, giving the Congressional consent that articles should be subject to the taxing jurisdiction of the Puerto Rico legislature as soon as brought into the Island whether from the United States or from foreign countries, and directing that the United States customs officials and postal service should aid local officers in the collection of the tax. The effect of the broad language of the amendment was not only to subject to taxation all imported goods, whether from the United States or foreign countries, when brought into the Island in the original package, but to neutralize the regulatory effect of the customs laws and regulations in so far as they protected articles from local taxation after their arrival. Merchandise in the original package was thus subjected to tax when brought into the Island without regard to customs regulations. It would seem plain that other merchandise not in the original package was left in no more favorable situation and in the face of the broad and unambiguous language of the statute we cannot say that the one, more than the other, is immune from local taxation. Even if the oil sold as ships' stores were to be regarded as "exported," cf. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 145; *United States* v. *Chavez,* 228 U. S. 525; *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, the tax is one clearly within the terms of the proviso added to § 3 and so is one consented to by the United States.

The procedure for segregating imported merchandise in bond without payment of customs duties pending its

withdrawal and shipment out of the country is old, long antedating the amendment of § 3 of the Organic Act. See *McGoldrick* v. *Gulf Oil Corp., supra.* The later Acts of 1930 and 1932 thus placed fuel oil, so far as Puerto Rico is concerned, in the same category as other merchandise brought into the Island in the original package or in bond which, by virtue of the proviso of § 3 of the Organic Act, was made subject to local taxation as soon as brought into the Island. The extension by Congress to fuel oil of the benefits of the customs laws and regulations affecting merchandise imported in bond did not imply that those laws and regulations were to be given any different effect in Puerto Rico than they then were permitted to have under § 3 of the Organic Act. In any event, considering the relationship of general Congressional legislation to legislation specifically applicable to our territories and possessions, repeals by implication are not to be favored and will not be adjudged unless the legislative intention to repeal is clear. *Posadas* v. *National City Bank,* 296 U. S. 497, 501 *et seq.*

Affirmed.

MR. JUSTICE REED, dissenting.

This judgment should be reversed on the authority of *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414. That case has just established the superiority of a federal statute for the protection of commerce over a state's right to levy a sales tax. In it we pointed out that it was inconsistent with the plenary power of Congress over commerce to permit local exactions to cut into the competitive advantages provided through the remission of customs duties to suppliers and exporters by the ship stores and fuel oil provisions of § 309 of the Tariff Act of 1930 and § 601 (b) and § 630 of the Revenue Act of 1932. Congress authorized these advantages to give our ship chan-

dlers opportunity to compete for this trade on an even basis with nonresidents. The *Gulf Oil* case held that imported fuel oil carried in New York bonded warehouses for export might be sold, under Treasury oversight, to noncoastwise shipping without payment of the city sales tax. The opinion demonstrated that the purpose of Congress would be thwarted if local taxation were permitted to interfere. The same holding in my opinion is required here.

Fuel oil imports into Puerto Rico are governed by the same tariff provisions, regulations for bonded warehouses and deliveries in bond to purchasers for use in overseas voyages as are those into the continental United States. The language of the Butler Act is held by the Court to require different treatment in New York or Puerto Rico of the same situation, despite the tax inequality produced between the respective taxing units. One would expect that Puerto Rico would have no more authority than a state to levy a sales tax on bonded fuel oil; but this Court's ruling permits it to tax where New York failed.

The authority is said to lie in the grant by Congress to Puerto Rico of the right to tax "as soon as the same [articles subject to tax] are manufactured, sold, used, or brought into the Island." As the fuel oil is brought into the Island, this Court's opinion concludes, it is taxable. The report upon the Butler Act points out the reason for its enactment.[1] It was to enable Puerto Rico to tax

[1] "In making use of the authority granted by section 3 to levy and collect internal-revenue taxes the government of Porto Rico has found itself unable to collect said taxes on articles purchased in and sent from the United States to Porto Rico by mail, or sometimes when said articles are sent by vessel, as the courts have held that the post-office or customs officials have no authority to withhold [the] delivery of such articles subject to the internal-revenue tax until the tax is paid, as such tax collected in this manner is in effect a customs duty. In other words, the courts have held that the internal-revenue tax can

in the original package. It should take more than a general tax authorization to destroy the symmetry of the federal control over imports bonded for export and to permit local taxation in Puerto Rico of what is free from local taxation in New York. "Brought" should be construed to mean when goods pass from the customs control to private control, or the authority to tax of the Butler Act should be held to be subject to the federal power of tax exemption exercised generally in favor of fuel oil by § 309 of the Tariff Act of 1930 and § 601 (b) and § 630 of the Revenue Act of 1932. Since the right to tax imports in the original package, granted Puerto Rico by the Butler Act, merely makes goods in the original package in Puerto Rico taxable as other goods in the common mass of taxable property, the Butler Act gives to Puerto Rico no broader power to tax oil sales than was

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not be collected while the article subject to the tax is in the original package.

"This condition of affairs has practically nullified the power of the insular government to levy internal-revenue taxes, and therefore the efficacy of this source of revenue has been seriously impaired.

"For the purpose of righting this situation, a new provision is added to section 3, which states as follows:

"*And it is further provided,* That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination in rates be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.

"It is expected that the government of Porto Rico will so make use of this power as not to unnecessarily place any barriers in the way of the free-trade conditions now existing between [Porto Rico] and the mainland, which is the principal factor in the progress and prosperity of Porto Rico." (Senate Rep. No. 1011, 69th Cong., 1st Sess., p. 2.)

possessed by New York, by virtue of its sovereign power, in the *Gulf Oil* case. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. Nothing requires us to frustrate the legislative policy of free competition in world markets.

The decree below should be reversed.

MR. JUSTICE ROBERTS joins in this opinion.

HANSBERRY ET AL. *v.* LEE ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 29. Argued October 25, 1940.—Decided November 12, 1940.

Numerous owners of lots in a particular area agreed in writing, each severally with each of the others, that their lots should not be sold to or occupied by Negroes, the effectiveness of the agreement being conditioned, however, upon signing by owners of a specified percentage of the lot frontage. In a case in a state court, tried upon an agreed statement of facts, in which it was stipulated (erroneously) that this condition had been complied with, and in which the issue litigated was whether the agreement had ceased to be enforceable in equity by reason of changes in the restricted area, an owner of one of the lots, suing in behalf of himself and of others in like situation, obtained a decree enjoining violation of the agreement by four individuals, who asserted an interest in the restricted land through another signer of the agreement, but who were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others, and whose interest in defeating the contract did not appear to outweigh their interest in sustaining it. *Held:*

1. That others who were privy to the agreement, but not made parties to the litigation, and whose substantial interest was in resisting performance of the agreement, could not be bound by the decree upon the theory that the suit was a class suit in which they were duly represented. Pp. 39, 44.

2. That a decree of the state court in a second, similar suit, adjudging such other persons estopped by the former decree as *res judicata* from defending upon the ground that the condition precedent of the agreement had not been fulfilled, was in violation of the due process clause of the Fourteenth Amendment. Pp. 40, 44.

372 Ill. 369; 24 N. E. 2d 37, reversed.

CERTIORARI, 309 U. S. 652, to review the affirmance of a decree in equity enjoining a violation of an agreement of lot-owners restricting the sale and use of lots in a particular area.

Mr. Earl B. Dickerson, with whom *Messrs. Truman K. Gibson, Jr., C. Francis Stradford, Loring B. Moore,* and *Irvin C. Mollison* were on the brief, for petitioners.

The application of the doctrine of *res judicata* was not due process of law. *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464, 476; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 679–682; *Chase National Bank* v. *Norwalk,* 291 U. S. 431; *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Fayerweather* v. *Ritch,* 195 U. S. 276.

Burke v. *Kleiman,* 277 Ill. App. 519, was not a class or representative suit.

This Court in *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, 58, has sounded a warning in respect to the doctrine of *res judicata* in representative suits.

The holding of the *Burke* v. *Kleiman* suit to be a representative suit and *res judicata* against the petitioners, deprived the petitioners of the benefit of notice and a real opportunity to defend. *Windsor* v. *McVeigh,* 93 U. S. 274, 277.

A restrictive agreement between 500 or more different property owners owning as many or more different and dissimilar parcels of real estate can not be the subject-matter of a class or representative suit, there being no common *res,* no common subject matter, and no identity of interest among them. In order to bring a representative suit there must be some common right, *res,* title or common subject matter or identical interest in all of the members of the class. See *Smith* v. *Swormstedt,* 16 How. 288, 303; *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, 57–59; *Christopher* v. *Brusselback,* 302 U. S. 500, 505; *Hale* v. *Hale,* 146 Ill. 227, 258; *Weberpals* v.

Jenny, 300 Ill. 157; *Saunders* v. *Poland Park Co.,* 198 A. 269.

See also: Pomeroy, Equity Jurisprudence, 4th Ed. (1918), Vol. 1, § 268, p. 498. See *Scott* v. *Donald,* 165 U. S. 107, 115–117; *Cutting* v. *Gilbert,* 5 Blatchford 259, 261.

An allegation in a complaint that a plaintiff brings the action on behalf of himself and all others similarly situated does not in itself make an action a class suit. See *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, 57–59; *Hammer* v. *New York Railway Co.,* 244 U. S. 266, 273.

A representative or class suit if permitted and sustained in a case like this would destroy, essentially, all the personal defenses to which each owner is entitled, namely: forgery of signatures, fraud and trickery in obtaining signatures, signing upon the condition that a certain number of other owners would sign, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood which would render inequitable the enforcement of the purported agreement. Each individual party signatory is entitled to prove as to these, not only in respect to himself but in respect to all other purported parties signatory, by whom and with whom he is sought to be bound. He is entitled to require proof of or to disprove the existence of the agreement.

Mere number of parties does not sustain a representative or class suit. See *Matthews* v. *Rodgers,* 284 U. S. 521, 529–530; *Hale* v. *Allinson,* 188 U. S. 56, 77 *et seq.; St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight,* 244 U. S. 368, 375; *Kelley* v. *Gill,* 245 U. S. 116–120.

The proof showed that the condition precedent was not complied with. Consequently, no agreement ever came into effect and there was no class to be represented by any one. The court had no jurisdiction to bind the

petitioners and their privies, who were not parties and not served with summons or process in the first cause. The decree of *Burke* v. *Kleiman* was therefore void and could not be pleaded as *res judicata* against these petitioners. See *Scott* v. *McNeal,* 154 U. S. 34, 48–51; *Galpin* v. *Page,* 18 Wall. 350, 365, 366; *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 14–18, 22, 23. *Thompson* v. *Whitman,* 18 Wall. 457.

A judgment void for want of jurisdiction may be collaterally attacked at any time and in any court. See *Galpin* v. *Page,* 18 Wall. 350, 366, 367. Presumptions will not be indulged to supply a proper or valid subject-matter or jurisdictional fact where the evidence and record in the case show the contrary. *Galpin* v. *Page, supra,* 266.

Such fraudulent proceedings and decree can not be *res judicata* against any one. *Hatfield* v. *King,* 184 U. S. 162; *Geter* v. *Hewitt,* 22 How. 364; *Lord* v. *Veasie,* 8 How. 251, 253.

The decree entered by the Chancellor in the trial court deprived the petitioners of their rights by the arbitrary seizure of their property by a Master in Chancery. The result of this action was the forceful transfer of the property of one citizen to another. This harsh and oppressive action violated the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 236, 237; *Missouri Pacific Railway Co.* v. *Nebraska,* 164 U. S. 403.

The enforcement of the restrictive agreement abridged the rights, privileges and immunities of petitioners as citizens of the United States, in violation of the Fourteenth Amendment.

Mr. McKenzie Shannon, with whom *Messrs. Angus Roy Shannon, William C. Graves,* and *Preston B. Kavanagh* were on the brief, for respondents.

Restrictive covenants such as this are valid and do not offend the federal Constitution. *Corrigan* v. *Buckley,*

299 F. 899; 271 U. S. 323, 330; *Parmalee* v. *Morris,* 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724; *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Koehler* v. *Rowland,* 275 Mo. 573; *Burke* v. *Kleiman,* 277 Ill. App. 519; *Lee* v. *Hansberry,* 291 Ill. App. 517.

Petitioners contend that one member of a class may not be sued by representatives of the class to enforce a common right. The reasoning that the interests of the person sued are necessarily in conflict with those of the class would prevent all manner of class suits. Such is not the law of Illinois, which considers all members of a class having common rights needing protection bound by the doctrine of *res judicata* in a proper representative suit. *Groves* v. *Farmers State Bank,* 368 Ill. 35, 47, 49; *Leonard* v. *Bye,* 361 Ill. 185, 190, 192; *Schmidt* v. *Modern Woodmen,* 261 Ill. App. 276, 281; *Greenberg* v. *Chicago,* 256 Ill. 213, 219; *People ex rel. Modern Woodmen* v. *Circuit Court,* 347 Ill. 34, 46; *Hanna* v. *Read,* 102 Ill. 596, 602, 606; *Harding Co.* v. *Harding,* 352 Ill. 417, 426; *Bayer* v. *Block,* 246 Ill. App. 416, 421, 423, 424; *People* v. *Prather,* 343 Ill. 443, 447; *Klus* v. *Ruszel,* 353 Ill. 179, 183.

Res judicata is a question of state law. *Kersh Lake Drainage Dist.* v. *Johnson,* 309 U. S. 485, 491; *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 8; *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.

The decision below was rested upon a point of state law adequate to support it. There was no fraud (except such as can be imputed to the petitioners); and, in the absence of fraud, no federal question for review by this Court is presented.

The opinion of the Supreme Court of Illinois does not mention petitioners' contention that the application of the doctrine in this case denies their rights to due process

of law as citizens of the United States. The contention was forcibly urged below and it can not be assumed to have been ignored. On the contrary, in balancing the equities, the court must have considered that petitioners' own misconduct estopped them from attacking respondents' plea of *res judicata,* and that the decree binding them as members of a class whose rights were represented in the prior suit does not offend the Fourteenth Amendment.

The decree does not offend the Fourteenth Amendment. *Corrigan* v. *Buckley,* 299 F. 899; *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 166; *Colgate* v. *Harvey,* 296 U. S. 404, 427.

Specific performance was proper. Hansberry was not required to convey his fraudulently acquired title without compensation. He was afforded thirty days in which to comply with the covenant, by conveying to any person other than a Negro for any consideration of his choice.

Cf., *Cornish* v. *O'Donoghue,* 30 F. 2d 983; *Torrey* v. *Wolfes,* 6 F. 2d 702; *Russell* v. *Wallace,* 30 F. 2d 981; *Fox River Co.* v. *Railroad Commission,* 274 U. S. 651, 657.

Mr. Justice Stone delivered the opinion of the Court.

The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment.

Respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the landowners. The agreement stipulated that for a specified period no part of the land should be "sold, leased to or permitted to be occupied by any person of the colored

race," and provided that it should not be effective unless signed by the "owners of 95 per centum of the frontage" within the described area. The bill of complaint set up that the owners of 95 per cent of the frontage had signed; that respondents are owners of land within the restricted area who have either signed the agreement or acquired their land from others who did sign; and that petitioners Hansberry, who are Negroes, have, with the alleged aid of the other petitioners and with knowledge of the agreement, acquired and are occupying land in the restricted area formerly belonging to an owner who had signed the agreement.

To the defense that the agreement had never become effective because owners of 95 per cent of the frontage had not signed it, respondents pleaded that that issue was *res judicata* by the decree in an earlier suit. *Burke* v. *Kleiman,* 277 Ill. App. 519. To this petitioners pleaded, by way of rejoinder, that they were not parties to that suit or bound by its decree, and that denial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. It does not appear, nor is it contended that any of petitioners is the successor in interest to or in privity with any of the parties in the earlier suit.

The circuit court, after a trial on the merits, found that owners of only about 54 per cent of the frontage had signed the agreement, and that the only support of the judgment in the *Burke* case was a false and fraudulent stipulation of the parties that owners of 95 per cent had signed. But it ruled that the issue of performance of the condition precedent to the validity of the agreement was *res judicata* as alleged and entered a decree for respondents. The Supreme Court of Illinois affirmed. 372 Ill. 369; 24 N. E. 2d 37. We granted certiorari to resolve the constitutional question. 309 U. S. 652.

The Supreme Court of Illinois, upon an examination of the record in *Burke* v. *Kleiman, supra,* found that that suit, in the Superior Court of Cook County, was brought by a landowner in the restricted area to enforce the agreement, which had been signed by her predecessor in title, in behalf of herself and other property owners in like situation, against four named individuals, who had acquired or asserted an interest in a plot of land formerly owned by another signer of the agreement; that, upon stipulation of the parties in that suit that the agreement had been signed by owners of 95 per cent of all the frontage, the court had adjudged that the agreement was in force, that it was a covenant running with the land and binding all the land within the described area in the hands of the parties to the agreement and those claiming under them, including defendants, and had entered its decree restraining the breach of the agreement by the defendants and those claiming under them, and that the appellate court had affirmed the decree. It found that the stipulation was untrue but held, contrary to the trial court, that it was not fraudulent or collusive. It also appears from the record in *Burke* v. *Kleiman* that the case was tried on an agreed statement of facts which raised only a single issue, whether by reason of changes in the restricted area, the agreement had ceased to be enforcible in equity.

From this the Supreme Court of Illinois concluded in the present case that *Burke* v. *Kleiman* was a "class" or "representative" suit, and that in such a suit, "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings"; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree, which had rendered

the issue of performance of the condition precedent to the restrictive agreement *res judicata,* so far as petitioners are concerned. The court thought that the circumstance that the stipulation in the earlier suit that owners of 95 per cent of the frontage had signed the agreement was contrary to the fact, as found in the present suit, did not militate against this conclusion, since the court in the earlier suit had jurisdiction to determine the fact as between the parties before it, and that its determination, because of the representative character of the suit, even though erroneous, was binding on petitioners until set aside by a direct attack on the first judgment.

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata,* is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp,* 235 U. S. 261, 273.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer* v. *Neff,* 95 U. S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. § 905, 28 U. S. C. § 687, pre-

scribe, *Pennoyer* v. *Neff, supra; Lafayette Ins. Co.* v. *French,* 18 How. 404; *Hall* v. *Lanning,* 91 U. S. 160; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464; *Old Wayne Mutual Life Assn.* v. *McDonough,* 204 U. S. 8.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Smith* v. *Swormstedt,* 16 How. 288; *Royal Arcanum* v. *Green,* 237 U. S. 531; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662; *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146; *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356; cf. *Christopher* v. *Brusselback,* 302 U. S. 500.

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will

proceed to a decree. *Brown* v. *Vermuden,* Ch. Cas. 272; *City of London* v. *Richmond,* 2 Vern. 421; *Cockburn* v. *Thompson,* 16 Ves. Jr. 321; *West* v. *Randall,* Fed. Cas. No. 17,424; 2 Mason 181; *Beatty* v. *Kurtz,* 2 Pet. 566; *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben-Hur* v. *Cauble, supra;* Story, Equity Pleading (2d ed.) § 98.

It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; cf. *Brown* v. *New Jersey,* 175 U. S. 172; *Brown* v. *Mississippi,* 297 U. S. 278; *United Gas Public Service Co.* v. *Texas,* 303 U. S. 123; *Avery* v. *Alabama,* 308 U. S. 444, 446, 447, nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, cf. *Jackson County* v. *United States,* 308 U. S. 343, 351, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235.

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation

may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, *Plumb* v. *Goodnow's Administrator,* 123 U. S. 560; *Confectioners' Machinery Co.* v. *Racine Engine & Mach. Co.,* 163 F. 914; 170 F. 1021; *Bryant Electric Co.* v. *Marshall,* 169 F. 426, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Smith* v. *Swormstedt, supra;* cf. *Christopher* v. *Brusselback, supra,* 503, 504, and cases cited.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit See *Bernheimer* v. *Converse,* 206 U. S. 516; *Marin* v. *Augedahl,* 247 U. S. 142; *Chandler* v. *Peketz,* 297 U. S. 609. Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. Compare *New England Divisions Case,* 261 U. S. 184, 197; *Taggart* v. *Bremner,* 236 F. 544.

We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements.

The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an

asserted obligation. *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben-Hur* v. *Cauble, supra; Groves* v. *Farmers State Bank,* 368 Ill. 35; 12 N. E. 2d 618. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. See *Terry* v. *Bank of Cape Fear,* 20 F. 777, 781; *Weidenfeld* v. *Northern Pacific Ry. Co.,* 129 F. 305, 310; *McQuillen* v. *National Cash Register Co.,* 22 F. Supp. 867, 873, aff'd 112 F. 2d 877, 882; *Brenner* v. *Title Guarantee & Trust Co.,* 276 N. Y. 230; 11 N. E. 2d 890; cf. *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. *Tumey* v. *Ohio,* 273 U. S. 510.

The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs

in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE ROBERTS and MR. JUSTICE REED concur in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHWEST STEEL ROLLING MILLS, INC.

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

No. 121. Argued October 23, 1940.—Decided November 12, 1940.

1. Provisions of tax statutes granting exemptions are to be strictly construed. P. 49.
2. Section 26 (c) (1) of the Revenue Act of 1936 allows, in the computation of the tax imposed by § 14 on undistributed profits, a credit for such undistributed earnings as the corporation could not distribute without violating "a provision of a written contract executed by the corporation . . ., which provision expressly deals with the payment of dividends." *Held* that, where the restriction on distribution by the corporation was the result of a prohibition by state law, the credit was not allowable. P. 49.
3. The corporation's charter, taken together with the state law, does not in such case constitute, within the meaning of § 26 (c) (1),

"a written contract executed by the corporation" which "expressly deals with the payment of dividends." P. 51.

4. The conclusion that § 26 (c) (1) does not authorize a credit when the distribution of profits is prohibited by state law is further supported by consideration of § 26 (c) (2) of the Act and by the legislative history of the section. P. 49.
5. As here construed and applied, the taxing Act does not violate the Fifth Amendment, (a) by discriminating, in the allowance of a credit, between corporations which are barred from distributing dividends by "written" contracts and those which are restrained by oral contracts or by state law; or (b) by imposing a tax on undistributed "income" of a corporation which has an existing deficit. P. 52.
6. Nor does it violate the Tenth Amendment, since the reserved powers of the States over corporations—to prescribe their powers and condition the exercise thereof—are not infringed. P. 53.
7. The tax is authorized by the Sixteenth Amendment. Although imposed on the income only if not distributed, the tax nevertheless is on income and not on capital, it being imposed on profits earned during a definite period—the tax year. P. 53.

110 F. 2d 286, reversed.

CERTIORARI, *post*, p. 629, to review the reversal of a decision of the Board of Tax Appeals which sustained the Commissioner's determination of a tax deficiency.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *L. W. Post* were on the brief, for petitioner.

Mr. Walser S. Greathouse, with whom *Mr. D. G. Eggerman* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent corporation, because of a previously existing deficit, was prohibited by state law [1] from distributing

[1] "No corporation shall pay dividends . . . except from the surplus of the aggregate of its assets over the aggregate of its liabilities. . . ." Wash. Rev. Stat. Ann. (Remington, 1932), tit. 25, § 3803–24.

as dividends its profits earned in 1936. Notwithstanding this state prohibition, the Commissioner held respondent liable under the 1936 Revenue Act [2] for surtax on undistributed profits. The Board of Tax Appeals sustained the Commissioner; [3] the Circuit Court of Appeals reversed.[4] On a similar state of facts the Court of Appeals for the Eighth Circuit held undistributed profits taxable.[5] We granted certiorari in both cases to resolve this conflict.[6]

Section 14 of the 1936 Act imposed a general surtax on corporate profits earned but not distributed as dividends during the tax year. Section 26 (c) (1) of the Act relieved from such surtax all undistributed profits which the corporation could not distribute as dividends "without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

The only "written contract executed by the corporation" upon which respondent relies for its claimed exemption is its corporate charter, granted by the State of Washington. Upon the premises that respondent's Washington charter was a written contract, and that the Washington laws prohibiting dividend payments were by operation of law a part of that contract, the court below concluded that the taxpayer had satisfied the requirements of § 26 (c) (1).

We must therefore decide whether § 26 (c) (1) authorized a credit or deduction to corporations prohibited by

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[2] 49 Stat. 1648, 1655.

[3] The memorandum opinion of the Board is not officially reported; the Board relied on its earlier opinion in Crane-Johnson Co. *v.* Commissioner, 38 B. T. A. 1355.

[4] 110 F. 2d 286.

[5] *Crane-Johnson Co.* v. *Commissioner,* 105 F. 2d 740.

[6] 309 U. S. 692; *post,* p. 629.

state law from distributing dividends. And respondent strongly urges that the Act, if construed to deny such credit, is unconstitutional.

First. It is material that we are dealing here with a generally imposed surtax upon the undistributed net income of corporations, and that respondent's claim is for a credit in the nature of a specially permitted deduction. It has been said many times that provisions granting special tax exemptions are to be strictly construed.[7]

Measured by this sound standard it is probably not necessary to go beyond the plain words of § 26 (c) (1) in search of the legislative meaning. Certainly, at first blush, few would suppose that when Congress granted a special exemption to corporations whose dividend payments were prohibited by executed written contracts, it thereby intended to grant an exemption to corporations whose dividend payments were prohibited by state law. The natural impression conveyed by the words "written contract executed by the corporation" is that an explicit understanding has been reached, reduced to writing, signed and delivered. True, obligations not set out at length in a written contract may be incorporated by specific reference, or even by implication. But Congress indicated that any exempted prohibition against dividend payments must be expressly written in the executed contract. It did this by adding a precautionary clause that the granted credit can only result from a provision which "expressly deals with the payment of dividends."

That the language used in § 26 (c) (1) does not authorize a credit for statutorily prohibited dividends is further supported by a consideration of § 26 (c) (2). By this section, a credit is allowed to corporations contractually

[7] E. g., *Deputy* v. *du Pont*, 308 U. S. 488, 493; *White* v. *United States*, 305 U. S. 281, 292; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440.

obligated to set earnings aside for the payment of debts.[8] That this section referred to routine contracts dealing with ordinary debts and not to statutory obligations is obvious—yet the words used to indicate that the section had reference only to a "written contract executed by the corporation" are identical with those used in § 26 (c) (1). There is no reason to believe that Congress intended that a broader meaning be attached to these words as used in § 26 (c) (1) than attached to them under the necessary limitations of 26 (c) (2).

Respondent urges that the legislative history of § 26 (c) (1) supports its contention. But, on the contrary, that history points in the other direction. The original House Bill contained separate relief provisions (1) for deficit corporations such as respondent; (2) for corporations contractually obligated to pay debts; and (3) for corporations contractually prohibited from paying dividends.[9] The Senate Finance Committee struck out all three of these House provisions, but substituted an equivalent for the third.[10] An amendment from the Senate floor restored an equivalent of the second.[11] But the bill as finally passed contained no express relief provision relating to deficit corporations.

It is true, as respondent contends, that a charter has been judicially considered to be a contract insofar as it

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[8] 49 Stat. 1664. The credit allowed is "An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside."

[9] H. R. 12395, 74th Cong., 2d Sess., §§ 14, 15, and 16; see H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 8–9.

[10] See S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 12–13, 15–16.

[11] 80 Cong. Rec. 9071, 74th Cong., 2d Sess.

grants rights, properties, privileges and franchises.[12] To this extent it has been said that an Act of Incorporation is a contract between the state and the stockholders.[13] But it does not follow that Congress intended to include corporate charters and related state laws in the cautiously limited area permissible for tax credits and deductions under this section. Nor have the courts considered that all the provisions of laws providing for the grant of corporate franchises are necessarily contractual in their nature. The same legislative Act is a law as well as a grant, and this Court has held that the same legislative enactment may be both a contract—which cannot be impaired—and a law, subject to repeal, modification, alteration, or amendment within the general legislative powers.[14] Respondent's chief reliance is upon that charter provision which required that it conform to the existing and future laws of Washington. But that provision is not a grant and is not a contract. With or without such a charter provision, it was the duty of the corporation to conform to valid Washington statutes. The corporation was subject to the law of Washington; it could not rise above it. A corporate charter to operate a particular business in a particular manner does not deprive the state of its inherent power of legislation touching corporate activities. And the grant of a franchise does not exempt the corporation from the requirement that it obey state legislation validly adopted in the interests of the public welfare.[15] It cannot be said, therefore, that the charter provision that the corporation should obey Washington law, including the statutory prohibition

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[12] *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 429.

[13] *The Binghamton Bridge,* 3 Wall. 51, 73.

[14] *Oregon & California Railroad Co.* v. *United States,* 238 U. S. 393, 427.

[15] *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 345.

against distributing dividends, was a provision of a written contract executed by respondent. More, the Constitution of the State of Washington under which the general corporation laws were enacted provides that "All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law." [16] It is clear, therefore, that what prohibited respondent from distributing dividends was not the provision of an executed written contract expressly dealing with the payment of dividends. On the contrary, what prohibited respondent from paying dividends was a valid law of the State of Washington.[17]

Second. Respondent contends that the tax statute, as construed, offends the Fifth, Tenth and Sixteenth Amendments. None of those contentions is valid.[18]

It is argued that the Act offends the Due Process clause of the Fifth Amendment because it permits credits or deductions in the case of corporations restrained from a distribution of dividends under a given type of written contract, while not permitting any credit or deduction to corporations restrained from distribution by oral contracts or by the laws of a state. This contention is without merit. It is not necessary to point out the many obvious reasons that might underlie the distinctions here drawn in granting special deductions from a generally imposed tax.

Respondent also urges that the tax as applied to it amounts to a confiscation of its property without Due Process of law because the tax is imposed, not on income,

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[16] Washington Constitution, Article 12, § 1.

[17] Respondent contended that the stock certificates satisfied the statutory requisites even if the charter did not; but what we have here said with respect to the charter applies equally to the certificates.

[18] Cf. *Helvering* v. *National Grocery Co.*, 304 U. S. 282.

but only on undistributed income, and that there can be no undistributed income so long as the corporation has an existing deficit. But the surtax here is imposed upon the undistributed net income of the corporation "for each taxable year." It is true that the surtax is imposed upon the annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true, as respondent urges, that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax here under consideration was imposed on profits earned during a definite period—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment.

It is contended that the statute as here applied violates the Tenth Amendment because it interferes with the authority of the states to prescribe the powers of corporations and the conditions under which their powers may be exercised. But the statute in no way limits the powers of the corporation. It imposes a tax as authorized by the Sixteenth Amendment and does not infringe upon the powers reserved to the state by the Tenth Amendment.[19] The court below was in error; its judgment is reversed and the cause is remanded with directions to affirm the judgment of the Board of Tax Appeals.

Reversed.

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[19] *Helvering* v. *National Grocery Co., supra,* at 286–287. And cf. *Florida* v. *Mellon,* 273 U. S. 12, 17: "Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax."

CRANE-JOHNSON COMPANY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 8. Argued October 23, 1940.—Decided November 12, 1940.

Decided on the authority of *Helvering* v. *Northwest Steel Rolling Mills, ante,* p. 46.
105 F. 2d 740, affirmed.

CERTIORARI, 309 U. S. 692, to review the affirmance of a decision of the Board of Tax Appeals, 38 B. T. A. 1355, which sustained the Commissioner's determination of a tax deficiency.

Mr. John E. Hughes for petitioner.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* and *Miss Helen R. Carloss* were on the brief, for respondent.

By leave of Court, *Mr. Thomas H. Remington* filed a brief on behalf of Bastian Brothers Company, as *amicus curiae,* in support of petitioner.

MR. JUSTICE BLACK delivered the opinion of the Court.

Because of a previously existing deficit, petitioner corporation was prohibited by state law [1] from distributing as dividends its profits earned in 1936. Notwithstanding this state prohibition, the Commissioner held respondent liable under the 1936 Revenue Act [2] for surtax on undistributed profits. The Board of Tax Appeals sustained

[1] "The directors of corporations must not make dividends except from the surplus profits arising from the business thereof . . ." N. D. Comp. Laws (Supp. 1925) § 4543.

[2] 49 Stat. 1648, 1655.

the Commissioner,[3] and the Circuit Court of Appeals affirmed.[4] On a similar state of facts the Court of Appeals for the Ninth Circuit held undistributed profits exempt from surtax.[5] We granted certiorari in both cases to resolve this conflict.[6] The legal questions here presented are in all respects the same as those presented in *Helvering* v. *Northwest Steel Rolling Mills, ante,* p. 46, and on the authority of that case the decision below is

Affirmed.

J. E. RILEY INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 50. Argued October 25, 1940.—Decided November 12, 1940.

1. In the computation of net income in the case of mines, § 114 (b) (4) of the Revenue Act of 1934 permits deductions for depletion on a percentage basis provided that the taxpayer in making his "first return" under the Act elects to avail of that basis. *Held* that an amended return, filed after the expiration of the statutory period for filing the original return, including such extension of the period as the Commissioner was empowered to grant, was not a "first return" within the meaning of the section. P. 57.
2. That in the circumstances of this case the construction thus given the statute works a hardship on the taxpayer, may be the basis of an appeal to Congress for relief but not to the courts. P. 59.
3. The judgment of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals in this case was correct and must be sustained whether or not the court gave a wrong reason for its action. P. 59.

110 F. 2d 655, affirmed.

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[3] 38 B. T. A. 1355.

[4] 105 F. 2d 740.

[5] *Northwest Steel Rolling Mills* v. *Commissioner,* 110 F. 2d 286.

[6] 309 U. S. 692; *post,* p. 629.

CERTIORARI, 310 U. S. 619, to review the affirmance of a decision of the Board of Tax Appeals which, on petition for redetermination of income tax, upheld the Commissioner's ruling denying percentage depletion.

Mr. Robert Ash for petitioner.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Joseph M. Jones* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on certiorari to resolve the conflict of the decision below (110 F. 2d 655) with *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. 2d 388.

Petitioner is engaged in the business of mining gold at Flat, Alaska. The winter mail service to and from that remote place was so uncertain and slow that, in order to avoid delinquency in income tax returns, petitioner's officers were accustomed to use the forms for an earlier year. Consequently petitioner's original return for the calendar year 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector at Tacoma, Washington. This return was executed on January 2, 1935, and reached Tacoma on January 29, 1935. When it was executed petitioner did not know of the provision [1] in the Revenue

[1] Section 114 (b) (4) provided:

"The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the

Act of 1934 (48 Stat. 680) allowing percentage depletion. But petitioner did know that unless the law had been changed it was not entitled to depletion, as it had no basis for cost depletion. The Collector in sending the 1933 forms had not advised petitioner with respect to percentage depletion. And it was found that if petitioner had known of the statutory provision for percentage depletion, it would have elected to take advantage of it. Petitioner first actually learned of the provision in August, 1935. On March 3, 1936, petitioner filed an amended return for 1934 upon which a deduction of percentage depletion was taken; and it asked for a refund. The Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion and the Circuit Court of Appeals affirmed.

Sec. 114 (b) (4) of the 1934 Act required the taxpayer to elect in his "first return" whether the depletion allowance was to be computed with or without regard to percentage depletion. The method so elected is applicable not only to the year in question but to all subsequent taxable years.

We think that petitioner's amended return, filed on March 3, 1936, was not a "first return" within the meaning

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property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section."

of § 114 (b) (4). By § 53 (a) (1) of the 1934 Act, the return was due on or before March 15, 1935. By § 53 (a) (2) the Commissioner was empowered to grant a reasonable extension for filing returns [2] but, so far as applicable here, not exceeding six months. *Haggar Co.* v. *Helvering,* 308 U. S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a "first return" within the meaning of § 114 (b) (4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return.

We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.[3] This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they existed. Petitioner is seeking by this amendment not only to change the basis upon which its taxable income was computed for 1934 but to adopt a new method of computation for all subsequent years. That opportunity was afforded as a matter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of § 114 (b) (4) would be timely only if filed within the

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[2] See Treasury Regulations No. 86, Arts. 53–1—53–4 inc.

[3] See, for example, Treasury Regulations No. 86, Art. 43–2, governing the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year. Cf. Union Metal Mfg. Co., 1 B. T. A. 395.

period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative, not a judicial, function.

Strong practical considerations support this position. If petitioner's view were adopted, taxpayers with the benefit of hindsight could shift from one basis of depletion to another in light of developments subsequent to their original choice. It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.

Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it by § 114 (b) (4) of the 1934 Act and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

Finally, petitioner asserts that we cannot consider the question of the timeliness of the amended return since before the Board of Tax Appeals and the Circuit Court of Appeals respondent urged only that petitioner's claim was based upon an amended, rather than an original, return. But even on the assumption that that issue did not embrace the question of timeliness, the Circuit Court of Appeals was justified in affirming the decision of the Board of Tax Appeals. Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. *Helvering* v. *Gowran,* 302 U. S. 238, 245–246.

Affirmed.

UNITED STATES *v.* STEWART.

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

No. 13. Argued October 17, 1940.—Decided November 12, 1940.

1. The exemption from taxation granted by § 26 of the Farm Loan Act of 1916 to farm loan bonds and the "income derived therefrom," does not apply to income derived from dealings or transactions in such bonds, and such income is taxable under § 22 (a) of the Revenue Act of 1928. Applying *Willcuts* v. *Bunn*, 282 U. S. 216. Pp. 61, 63.
2. Acts of Congress which are *in pari materia* are to be taken together, as if they were one law. P. 64.
3. The later of Acts which are *in pari materia* may be regarded as a legislative interpretation of the earlier, and is entitled to great weight in resolving doubts and ambiguities. P. 64.
4. The Farm Loan Act of 1916 and the Revenue Act of 1916 (enacted shortly afterward at the same session of Congress) are *in pari materia*. That in the case of farm loan bonds the latter Act, like the Revenue Act of 1928, expressly exempts income from "interest" alone is persuasive that the former does not exempt capital gains. P. 64.
5. The conclusion that § 26 of the Farm Loan Act does not exempt income derived from dealings or transactions in farm loan bonds is not inconsistent with its legislative history or administrative interpretation. P. 65.
6. The provision of § 817 of the Revenue Act of 1938, that "all income, except interest, derived" from farm loan bonds shall be included in gross income, can not be regarded as having been intended to change the previously existing law, so far as the question involved in this case is concerned. P. 66.
7. An analysis of numerous other exemption statutes is of little weight under the circumstances in determining the meaning of "income derived therefrom" in § 26. P. 69.
8. The Farm Loan Board was without authority to make representations that capital gains from dealings in farm loan bonds were not taxable, and statements by the Board, which a purchaser so interpreted and on which he relied, can not be accorded the weight of uniform and long established administrative treatment. P. 70.
9. An officer or agency of the United States to whom no administrative authority has been delegated can not, even by an affirmative

undertaking, waive or surrender a public right and thereby estop the United States. P. 70.

10. Exemptions from taxation may not rest upon mere implication; and statutory provisions granting exemptions are to be strictly construed. P. 71.

106 F. 2d 405, reversed.

CERTIORARI, 309 U. S. 647, to review the reversal of a judgment against the taxpayer, 24 F. Supp. 145, in a suit to recover a refund of income taxes.

Assistant Attorney General Clark, with whom *Solicitor General Biddle* and *Messrs. Sewall Key* and *Arnold Raum* were on the brief, for the United States.

Messrs. W. Glenn Harmon and *Ernest L. Wilkinson,* with whom *Mr. John W. Cragun* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on certiorari to resolve a conflict of the decision below (106 F. 2d 405) with *Stern Brothers & Co.* v. *Commissioner,* 108 F. 2d 309.

During the year 1930 respondent purchased farm loan bonds issued by joint-stock land banks under the Federal Farm Loan Act of 1916 (39 Stat. 360). The purchases were made for the prospective increment to the bonds and not for their interest. At the time the purchases were made the banks were in receivership. The bonds were acquired at prices substantially below par. In making these purchases respondent relied upon statements contained in circulars and bulletins issued by the Farm Loan Board, reasonably believing that he was purchasing securities the profit upon which in case of sale would be exempt income. A part of the bonds so purchased, with their appurtenant coupons, was sold in 1931; and a part was surrendered in that year to the receiver of the issuing

bank in exchange for cash paid to respondent "under and pursuant to the covenants contained" in the bonds. Each of these transactions resulted in a profit to respondent.[1] The Commissioner held that those gains were taxable income. Consequently, respondent included them in his income tax return for the year 1931 and claimed a refund. On disallowance of that claim, this suit for refund was instituted. The District Court determined that the gains so realized were income and taxable. 24 F. Supp. 145. The Circuit Court of Appeals reversed.

Sec. 22 (a) of the Revenue Act of 1928 (45 Stat. 791) includes in gross income "gains, profits, and income derived from . . . sales, or dealings in property, whether real or personal." Sec. 22 (b) (4) exempts from taxation "Interest upon . . . securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended."

If those two sections are controlling, it is clear that respondent is taxable on these gains, for they fall squarely within the definition of gross income contained in § 22 (a) and they are not "interest"[2] within the meaning of § 22 (b) (4). But respondent places his main reliance on § 26 of the Federal Farm Loan Act which provides that "farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from

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[1] These purchases were for respondent and his wife who filed separate returns for the year in question.

[2] The record does not show what portion, if any, of the sums received on the sale or on the exchange of the bonds and appurtenant coupons was received as payment on accrued interest. Nor did the complaint allege that any portion of the sums received was exempt because it was "interest" on the bonds. Hence that point was not raised below or here.

Federal, State, municipal, and local taxation." It is urged that the gains here involved were "income derived" from the bonds within the meaning of that section.

We disagree with that conclusion. It is our view that under § 26 respondent is entitled to an exemption only for interest on the bonds.

To be sure, "income" is a generic term amply broad to include capital gains for purposes of the income tax. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509. It is likewise true that Congress will be presumed to have used a word in its usual and well-settled sense. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552; *Deputy* v. *du Pont,* 308 U. S. 488. But § 26 does not exempt simply "income"; it exempts the bonds and the "income derived therefrom." Analytically, income derived from mere ownership of the bonds is clearly different from income derived from dealings or transactions in the bonds. As stated in *Willcuts* v. *Bunn,* 282 U. S. 216, 227–228:

"The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as 'the creation of capital, industry and skill.' *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531."

True, the *Bunn* case dealt only with the alleged constitutional inhibition against taxation of capital gains on municipal bonds and not with a specific statutory exemption. But its analysis is cognate here as indicating that, in absence of clear countervailing evidence, an exemption of "income derived" from a security does not embrace "income derived" from transactions in that security.

There are no circumstances here which should make the reasoning of the *Bunn* case inapplicable.

The Revenue Act of 1916 (39 Stat. 756) was enacted shortly after the Farm Loan Act by the same Congress and at the same session.[3] Sec. 2 of that Act, like § 22 (a) of the 1928 Act, included in taxable income "gains, profits, and income derived from . . . sales, or dealings in property." And § 4 of that Act, like § 22 (b) (4) of the 1928 Act, exempted from taxation "interest upon . . . securities issued under the provisions of the Federal farm loan Act." It is clear that "all acts *in pari materia* are to be taken together, as if they were one law." *United States* v. *Freeman,* 3 How. 556, 564. That these two acts are *in pari materia* is plain. Both deal with precisely the same subject matter, *viz.,* the scope of the tax exemption afforded farm loan bonds. The later act can therefore be regarded as a legislative interpretation of the earlier act (*Cope* v. *Cope,* 137 U. S. 682, 688; cf. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331–332) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting.[4] It is therefore en-

[3] The Farm Loan Act became law on July 17, 1916, the Revenue Act of 1916 on September 8, 1916.

[4] It should be noted in this connection that the exemption of "interest" contained in § 4 of the 1916 Act was continued in each subsequent Revenue Act until 1934. Sec. 213 (b) (4), Revenue Act of 1918 (40 Stat. 1057, 1065); § 213 (b) (4), Revenue Act of 1921 (42 Stat. 227, 238); § 213 (b) (4), Revenue Act of 1924 (43 Stat. 253, 268); § 213 (b) (4), Revenue Act of 1926 (44 Stat. 9, 24); § 22 (b) (4), Revenue Act of 1928 (45 Stat. 791, 798; § 22 (b) (4), Revenue Act of 1932 (47 Stat. 169, 178). By § 22 (b) (4) of the Revenue Act of 1934 (48 Stat. 680, 687) the exemption was generalized so as to include interest on obligations of any federal corporation which is an instrumentality of the United States, subject to the limitation that interest is exempt only if and to the extent provided for in the acts of Congress authorizing the issuance of such obligations. The Senate Committee (S. Rep. No. 558, 73d Cong., 2d Sess., pp. 23–24; Internal Rev. Bull., Cum. Bull. 1939–1, Part 2, p. 604) made the following comment on that change:

titled to great weight in resolving any ambiguities and doubts. Cf. *United States* v. *Stafoff,* 260 U. S. 477, 480. In that view the express exemption of interest alone makes tolerably clear that capital gains are not exempt.

In support of the contrary view great stress is placed on the legislative history of § 26. Extensive references are made to the hearings on this bill and to the debates in Congress. Typical are the statements or criticisms that the bill gave "these investments a distinct advantage over other investments," [5] that the exemption provision was important,[6] that maintenance of a market for the bonds was desirable,[7] that the exemption was too broad.[8] These comments, however, are inconclusive. They are not suf-

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"This is merely a clarifying change made by the House. Under the language of this section, as contained in existing law, interest on securities issued under the Federal Farm Loan Act, or such Act as amended, is expressly excluded from gross income and thereby made exempt from the income tax. Other Acts have been enacted which also exempt the interest on obligations issued thereunder from tax. In order to bring the section into accord with the Acts authorizing such exemptions and to avoid the necessity of referring to all such Acts, a general provision has been inserted by the House excluding from gross income the interest upon the obligations of a corporation organized under Act of Congress if such corporation is an instrumentality of the United States; subject to the limitation, however, that the interest is exempt only to the extent provided for in the Acts of Congress authorizing the issuance of such obligations."

[5] Cong. Record, 64th Cong., 1st Sess., Vol. 53, Part 8, p. 7312. And see H. Rep. No. 630, 64th Cong., 1st Sess., p. 8.

[6] Joint Hearings before Sub-Committees of the Committees on Banking and Currency, Rural Credits, 63d Cong., 2d Sess., pp. 95–97; S. Doc. No. 380, 63d Cong., 2d Sess., Agricultural Credit, Rep. U. S. Commission, pp. 17, 33.

[7] H. Doc. No. 679, 63d Cong., 2d Sess., pp. 15, 16.

[8] Cong. Record, *op. cit., supra,* note 5, pp. 6850, 7311. Nor is it significant that substitute bills were offered (Cong. Record, *op. cit., supra,* note 5, pp. 7385, 7387; S. 4061, 63d Cong., 2d Sess.) by the terms of which "interest" was exempted. These were overall substitutes. Therefore the implication is not warranted that the failure of their adoption was due to the desire of Congress to grant a broader exemption than "interest."

ficiently discriminating in their analysis or criticism to throw light on the narrow issue involved here.

Respondent's resort to administrative interpretation of § 26 is equally unproductive. No established administrative practice is shown. The holding of the unpublished memorandum [9] of the General Counsel of the Bureau of Internal Revenue relied upon is not precisely in point, even were we to assume that it is entitled to authoritative weight.[10] It merely ruled that a joint-stock land bank was not taxable on gains from purchases of its own bonds. And when the question of the taxability of an individual on his capital gains from sales of these bonds was raised less than two years later, another such ruling was issued to the effect that he did not have the benefit of any exemption.[11]

Nor is respondent materially aided by the change in § 26 made by § 817 of the Revenue Act of 1938 (52 Stat. 447, 578). That amendment provides that "all income, except interest, derived" from such bonds, shall be included in gross income.[12] It is urged that this amendment is affirmative recognition by the Congress that § 26 exempts these capital gains. But here again the legislative record is ambiguous and hence inconclusive. The purpose of § 817, as originally introduced, clearly was to

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[9] This is reproduced, so far as material here, in S. Hearings, Committee on Finance, 75th Cong., 3d Sess., H. R. 9682, Part 4, pp. 619–621.

[10] See *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468.

[11] See Agricultural Securities Corp. *v.* Commissioner, 39 B. T. A. 1103, 1111.

[12] This amendment is prospective only. It provides:

"Notwithstanding the provisions of section 26 of the Federal Farm Loan Act, as amended, in the case of mortgages made or obligations issued by any joint-stock land bank after the date of the enactment of this Act, all income, except interest, derived therefrom shall be included in gross income and shall not be exempt from Federal income taxation."

make certain that capital gains realized by joint-stock land banks on transactions in their own obligations would not be exempt.[13] The section was amended on the floor of the Senate to its present form on the suggestion that "perhaps the language is not as broad as it should be." [14]

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[13] S. Rep. No. 1567, 75th Cong., 3d Sess., p. 47. This report clearly indicates that the Committee was of the view that under § 26 joint-stock land banks were exempt from capital gains resulting from purchases of their own obligations. A change in that regard was clearly intended, for the Committee said, p. 47:

"This section subjects to Federal income taxation the capital gain realized by a joint-stock land bank on the purchase of its own obligations or of mortgages made by it. It has been brought to the attention of the committee that these banks have been purchasing their own bonds at below par and issuing new bonds at or above par. Gain realized on such a purchase is, under the law, taxable income and in the case of an ordinary corporation, is taxed. Under the Federal Farm Loan Act, however, which governs the taxability of obligations of joint-stock land banks, such income is exempt. The committee is of the opinion that such income ought to be taxed."

The Committee draft of § 817 (then § 816) provided for that change as follows (H. R. 9682, 75th Cong., 3d Sess.):

"Notwithstanding the provisions of section 26 of the Federal Farm Loan Act, as amended, gain realized on the acquisition by a joint-stock land bank of obligations issued by it or mortgages made by it, if such obligations or mortgages are made or issued after the date of the enactment of this Act, shall not be exempt from Federal income taxation."

As indicated, *supra,* note 9, the unpublished memorandum of the General Counsel of the Bureau of Internal Revenue ruling that a joint-stock land bank was not taxable on gains from purchases of its own bonds was before the Senate Committee. Cf. the recommendation made to the Committee, S. Hearings, *op. cit., supra,* note 9, pp. 614, 615.

[14] Statement by Senator King, member of the Committee on Finance, Cong. Record, Vol. 83, 75th Cong., 3d Sess., p. 4959. When Senator King offered the amendment, he gave the following explanation (*id.* p. 5174):

"The bill as reported subjected to Federal income taxation capital gains realized by a joint-stock land bank on obligations issued and mortgages made by it after the date of enactment of the act. The

The purpose of the amendment may well have been to clarify the doubtful and uncertain status of capital gains which were not covered by the Committee's recommendation. There is no clear and convincing evidence that it was designed to change existing law, so far as these other categories of capital gains were concerned. But even if a contrary implication were to be assumed, it would not override so belatedly the clear inference, based on a long series of revenue acts exempting only interest, that capital gains were taxable.

Respondent further argues that comparison of other exemption statutes with the language of § 26 reinforces the view that these capital gains are exempt. In that connection our attention is called to numerous statutes—some exempting only bonds [15] and others exempting principal and interest; [16] some exempting a corporation, "including the capital stock and surplus therein, and the income derived therefrom," [17] and others [18] containing

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effect of the amendment is not only to tax that gain but also to tax gain realized by another joint-stock land bank or by an individual or corporation which itself is not exempt from Federal taxation. Thus, gain on a sale of such a joint-stock land bank bond by an investor is subject to tax. The amendment continues the present provision of law under which interest on such bonds and mortgages is exempt from Federal taxation."

[15] Statutes governing Panama Canal Toll Bonds (32 Stat. 481, 484; 36 Stat. 11, 117) and Postal Savings Bonds (36 Stat. 814, 817) are cited.

[16] Reference is made to various statutes including those pertaining to Treasury notes (38 Stat. 251, 269) and several of the Liberty loans (40 Stat. 35; 40 Stat. 288, 291; 40 Stat. 1309, 1310).

[17] Federal Reserve Act of December 23, 1913 (38 Stat. 251, 258). And see Bankhead-Jones Farm Tenant Act of July 22, 1937 (50 Stat. 522, 528); Agricultural Adjustment Act of 1938 (52 Stat. 31, 75).

[18] Reference is made to the War Finance Corporation Act of April 5, 1938 (40 Stat. 506, 511); Reconstruction Finance Corporation Act of January 22, 1932 (47 Stat. 5, 9); Home Owners' Loan Act of June 13, 1933 (48 Stat. 128, 130).

somewhat similar exemptions for the corporation but only an exemption as to principal and interest for its bonds; and still others [19] containing the same kind of exemption as § 26 of the Farm Loan Act. From this painstaking review respondent argues that where Congress has desired to exempt only "interest" it has said so and where it has intended to grant a broader exemption it has used the word "income"; that statutes exempting only "interest" have a narrower meaning than those exempting "income"; and that this long and recurrent legislative practice discloses a clear design on the part of Congress to draw distinctions and to shape the various exemptions to suit its differing policy in divers situations.

Suggestive as this analysis is, it is entitled to little weight. No mere collation of other statutes can be decisive in determining what the instant statute means. The meaning of each phrase must be closely related to the time and circumstance of its use. The phrase "income derived therefrom" as used in § 26 clearly has taken on coloration from the express exemption for nearly a quarter century of only interest on these bonds. We have no occasion to intimate an opinion as to the meaning of other similar statutes. It is sufficient here to note that in another legislative setting "income derived" from bonds may or may not be synonymous with "interest" on bonds. That must necessarily be dependent on a host of factors which only a minute scrutiny of the particular legislative scheme would reveal. For this reason the fact that the same Congress which in 1938 amended § 26 granted an exemption to another federal instrumentality [20] couched in the identical language of the original § 26 is merely a straw in the wind. So far as the instant

[19] Federal Farm Mortgage Corporation Act of January 31, 1934 (48 Stat. 344, 347); Commodity Credit Corporation Act of March 8, 1938 (52 Stat. 107, 108).

[20] Commodity Credit Corporation, *supra,* note 19.

bonds are concerned, that in itself is entitled to little weight as against the long standing express exemption in successive revenue acts of interest alone.

Respondent also stresses the fact that circulars, prepared and distributed by the Farm Loan Board "advising investors of the merits and advantages of farm loan bonds," [21] stated that these bonds and their income were "free from all forms of taxation" including the income tax, that "this exemption is complete," etc. As we have said, it was found that respondent relied upon such statements reasonably believing that capital gains would not be taxable. But aside from the fact that those statements are hardly more specific than the statute itself, they cannot be accorded the weight of uniform and long standing administrative treatment.[22] There was no authority for the board to make representations that capital gains were or were not tax exempt. That administrative function resided only in the Treasury. An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right. *Utah* v. *United States,* 284 U. S. 534, 545–546; *Wilber National Bank* v. *United States,* 294 U. S. 120, 123–124.

We return to our conclusion that the weight of these various considerations leans to the view that only interest is exempt. The cumulative strength of the several factors urged by respondent is not such clear evidence

[21] Pursuant to the authority vested in the Federal Farm Loan Board by § 3 of the Act.

[22] Nor can the casual statement by the Secretary of the Treasury, in the course of a Congressional hearing on the Revenue Act of 1918, to the effect that "Land bank bonds carry a wider exemption than Liberty bonds," (S. Hearings, H. R. 12863, 65th Cong., 3d Sess., Part 4, p. 117) carry authoritative weight, as it does not even purport to be a discriminating analysis of this problem in its various aspects.

of Congressional purpose as to make inapposite the application of the reasoning of *Willcuts* v. *Bunn, supra,* to this situation. In that posture of the case, respondent has succeeded only in casting some doubt on the proper construction of the statute. Yet those who seek an exemption from a tax must rest it on more than a doubt or ambiguity. *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; 163 U. S. 416, 423. Exemptions from taxation cannot rest upon mere implications. *United States Trust Co.* v. *Helvering,* 307 U. S. 57, 60. As stated by Mr. Justice Cardozo in *Trotter* v. *Tennessee,* 290 U. S. 354, 356, "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced." And see *Pacific Co., Ltd.,* v. *Johnson,* 285 U. S. 480, 491. Hence broad, generalized statutory exemptions have frequently been construed narrowly and confined to those situations where the subject matter of the exemption was directly, not indirectly or remotely, involved. *Murdock* v. *Ward,* 178 U. S. 139; *Hale* v. *State Board of Assessment and Review,* 302 U. S. 95; *United States Trust Co.* v. *Helvering, supra.* The exemption contained in § 26 of the Farm Loan Act must be so construed.

For these reasons the challenged judgment must be

Reversed.

Mr. Justice Roberts is of opinion that the judgment should be affirmed on the grounds stated by the Circuit Court of Appeals in its opinion below, 106 F. 2d 405.

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL AND DIE MAKERS LODGE NO. 35, ETC. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 16. Argued October 24, 1940.—Decided November 12, 1940.

1. The National Labor Relations Board, finding that a labor organization, having a closed-shop contract with an employer, had been "assisted" in its organizational drive by unfair labor practices of the employer, was authorized to order the employer to cease and desist from giving effect to the contract. P. 75.
2. The finding of the National Labor Relations Board in this case that a labor organization had been "assisted" by unfair labor practices of the employer is supported by substantial evidence. P. 75.
3. The Board's findings in this case having been confirmed by the court below, there is no need here to review the evidence in detail. P. 75.
4. In determining, upon the record of this case, whether a labor organization was "assisted" by unfair labor practices of the employer, the Board could properly consider not only the employer's activities during the organization's membership drive but also previous and subsequent activities. P. 79.
5. That, in respect of the period between the time as of which a labor organization claims to have obtained a majority of the workers in an appropriate unit and the date of the execution of a closed-shop contract between it and the employer, the Board made no finding that the claimed majority was maintained by unfair labor practices, is not material in this case. The finding of the Board that the labor organization did not represent an uncoerced majority of the employees in such unit when the closed-shop contract was executed is adequate to support the conclusion that the maintenance as well as the acquisition of the alleged majority was wrongfully achieved. P. 78.
6. An employer may be found under the National Labor Relations Act to have "assisted" a labor organization by unfair labor practices, even though the employees through whose activities the employer is regarded as having so assisted were not employed in a "supervisory" capacity, and even though their acts were not

expressly authorized or were not such as might constitute a basis of employer liability under the doctrine of *respondeat superior*. Pp. 79–80.

7. Where, as here, there is ample evidence to support an inference that the employees believed that certain solicitors, though *bona fide* members of a labor organization and professedly acting therefor, were in fact acting for and on behalf of the employer, the Board may justifiably find that the employees did not have the complete and unhampered freedom of choice which the Act contemplates. P. 80.

8. Where, in a proceeding under § 10 of the National Labor Relations Act, the Board finds that a labor organization has been assisted by unfair labor practices of the employer, it may order the employer to deal exclusively, for purposes of collective bargaining, with a rival labor organization; and the Board may properly refuse to act upon a notice received from the first labor organization, prior to the issuance of its order, that that organization has obtained a majority of the employees in an appropriate bargaining unit. P. 81.

71 App. D. C. 175; 110 F. 2d 29, affirmed.

CERTIORARI, 309 U. S. 649, to review a decision affirming an order of the National Labor Relations Board.

Mr. Joseph A. Padway, with whom *Mr. Herbert S. Thatcher* was on the brief, for petitioners.

Mr. Robert B. Watts, with whom *Solicitor General Biddle, Assistant Solicitor General Fahy,* and *Messrs. Thomas E. Harris, Laurence A. Knapp, Mortimer B. Wolf* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

There are two questions here for decision: (1) whether on the facts of this case the National Labor Relations Board was without authority in finding that an industrial unit was appropriate for collective bargaining purposes to the exclusion of a craft unit; and (2)

whether the Board had authority to require the employer to bargain with that industrial unit, despite a claim submitted to the Board by the craft unit before the order issued that the latter then had been designated by a majority of all the employees. We granted certiorari because of the importance of these questions in the administration of the National Labor Relations Act (49 Stat. 449) and because of an asserted conflict between the decision below (71 App. D. C. 175; 110 F. 2d 29) and *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. 2d 49, on the second question.

The Board found, in proceedings duly had under § 10 of the Act, that the employer, Serrick Corporation, had engaged in unfair labor practices within the meaning of the Act. It ordered the employer to cease and desist from those practices and to take certain affirmative action. More specifically, it directed the employer to cease giving effect to a closed-shop contract with petitioner [1] covering the toolroom employees; to deal with U. A. W., an industrial unit,[2] as the exclusive bargaining agent of its employees, including the toolroom men; to desist from various discriminatory practices in favor of petitioner and against U. A. W.; and to reinstate and make whole certain employees who had been improperly discharged. The employer has complied with the Board's order. But petitioner, an intervener in the proceedings before the Board, filed a petition in the court below to review and set aside those portions of the order which direct the employer to cease and desist from giving effect to its closed-shop contract with petitioner and to bargain exclusively with U. A. W. The court below affirmed the order of the Board.

[1] Petitioners, labor organizations affiliated with the American Federation of Labor, are treated herein in the singular.

[2] United Automobile Workers of America, Local No. 459 (herein called U. A. W.) is affiliated with the Congress of Industrial Organizations (C. I. O.).

Abrogation of petitioner's closed-shop contract.—The Board found that the closed-shop contract between petitioner and the employer was invalid under § 8 (3) of the Act [3] because it had been "assisted" by unfair labor practices of the employer, because petitioner did not represent an uncoerced majority of the toolroom employees at the time the contract was executed, and because for this and other reasons it was not an appropriate bargaining unit. We think there was substantial evidence that petitioner had been assisted by unfair labor practices of the employer and that therefore the Board was justified in refusing to give effect to its closed-shop contract.

Since the court below has confirmed the findings of the Board there is no need to review the evidence in detail. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 357. It is clear that the employer had an open and avowed hostility to U. A. W. It is plain that the employer exerted great effort, though unsuccessfully, to sustain its old company union, the Acme Welfare Association, as a bulwark against U. A. W. And it is evident that the employer, while evincing great hostility to U. A. W. in a contest to enlist its production force, acqui-

[3] Sec. 8 (3) provides:

"It shall be an unfair labor practice for an employer— . . .

"(3) 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: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

esced without protest in the organization by petitioner of the toolroom employees. The main contested issue here is narrowly confined. It is whether or not the employer "assisted" the petitioner in enrolling its majority.

Fouts, Shock, Dininger, Bolander, Byroad and Baker were all employees of the toolroom. Four of these—Fouts, Shock, Byroad and Bolander—were old and trusted employees. Fouts was "more or less an assistant foreman," having certain employees under him. Shock was in charge of the toolroom during the absence of the foreman. Dininger and Bolander were in charge of the second and third shifts respectively, working at night. Prior to mid-July, 1937, they had been actively engaged on behalf of the company union. When it became apparent at that time that the efforts to build up that union were not successful, Fouts, Shock, Byroad and Bolander suddenly shifted their support from the company union to petitioner and moved into the forefront in enlisting the support of the employees for petitioner. The general manager told Shock that he would close the plant rather than deal with U. A. W. The superintendent and Shock reported to toolroom employees that the employer would not recognize the C. I. O. The superintendent let it be known that the employer would deal with an A. F. of L. union. At the same time the superintendent also stated to one of the employees that some of the "foremen don't like the C. I. O." and added, with prophetic vision, that there was "going to be quite a layoff around here and these fellows that don't like the C. I. O. are going to lay those fellows off first." During working hours, Byroad conducted a straw vote among the employees and under the direction of Fouts and Shock left the plant to seek out an organizer for petitioner. Fouts solicited among workmen in the toolroom stating that his purpose was to "beat" the U. A. W. For a week preceding August 13, Shock spent much time, as did Byroad, going "from one

bench to another soliciting" for petitioner. Baker likewise solicited. Dininger offered an employee a "good rating" if he would join petitioner. Not less than a week before August 13, the personnel director advised two employees to "join the A. F. of L." Byroad spent considerable time during working hours soliciting employees, threatening loss of employment to those who did not sign up with petitioner and representing that he was acting in line with the desires of the toolroom foreman, McCoy. This active solicitation for petitioner was on company time and was made openly in the shop. Much of it was made in the presence of the toolroom foreman, McCoy, who clearly knew what was being done. Yet the freedom allowed solicitors for petitioner was apparently denied solicitors for U. A. W. The plant manager warned some of the latter to check out their time for a conference with him on U. A. W. and questioned their right to discuss U. A. W. matters on company property. The inference is justified that U. A. W. solicitors were closely watched, while those acting for petitioner were allowed more leeway.

Five U. A. W. officials had been discharged in June, 1937, because of their union activities. The known antagonism of the employer to U. A. W. before petitioner's drive for membership started made it patent that the employees were not free to choose U. A. W. as their bargaining representative. Petitioner started its drive for membership late in July, 1937, and its closed-shop contract was signed August 11, 1937.[4] On August 10, 1937, the U. A. W., having a clear majority of all the employees, presented to the employer a proposed written contract for collective bargaining. This was refused. On August 13, 1937, all toolroom employees who refused membership in petitioner, some 20 in number, were discharged.

[4] The contract, though dated August 6, 1937, was actually executed on August 11, 1937.

On August 15, 1937, the management circulated among the employees a statement which, as found by the Board, was a thinly veiled attack on the U. A. W. and a firm declaration that the employer would not enter into any agreement with it.

Petitioner insists that the employer's hostility to U. A. W. cannot be translated into assistance to the petitioner and that none of the acts of the employees above mentioned, who were soliciting for petitioner, can be attributed to the employer.

We disagree with that view. We agree with the court below that the toolroom episode was but an integral part of a long plant controversy. What happened during the relatively brief period from late July to August 11, 1937, cannot properly be divorced from the events immediately preceding and following. The active opposition of the employer to U. A. W. throughout the whole controversy has a direct bearing on the events during that intermediate period. Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure. The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances.

To be sure, it does not appear that the employer instigated the introduction of petitioner into the plant. But the Board was wholly justified in finding that the employer "assisted" it in its organizational drive. Silent approval of or acquiescence in that drive for membership and close surveillance of the competitor; the intimations of the employer's choice made by superiors; the fact that the employee-solicitors had been closely identified with

the company union until their quick shift to petitioner; the rank and position of those employee-solicitors; the ready acceptance of petitioner's contract and the contemporaneous rejection of the contract tendered by U. A. W.; the employer's known prejudice against the U. A. W. were all proper elements for it to take into consideration in weighing the evidence and drawing its inferences. To say that the Board must disregard what preceded and what followed the membership drive would be to require it to shut its eyes to potent imponderables permeating this entire record. The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency.

Petitioner asserts that it had obtained its majority of toolroom employees by July 28, 1938, and that there was no finding by the Board that that majority was maintained between then and the date of execution of the closed-shop contract by unfair labor practices. In this case, however, that is an irrelevant refinement. The existence of unfair labor practices throughout this whole period permits the inference that the employees did not have that freedom of choice which is the essence of collective bargaining. And the finding of the Board that petitioner did not represent an uncoerced majority of toolroom employees when the closed-shop contract was executed is adequate to support the conclusion that the maintenance as well as the acquisition of the alleged majority was contaminated by the employer's aid.

Petitioner attacks the Board's conclusion that its membership drive was headed by "supervisory" employees—Fouts, Shock, Dininger and Bolander. According to petitioner these men were not foremen, let alone supervisors entrusted with executive or directorial functions, but merely "lead men" who by reason of long experience were skilled in handling new jobs and hence directed the set-up of the work. Petitioner's argument is that since these

men were not supervisory their acts of solicitation were not coercive and not attributable to the employer.

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.[5] Here there was ample evidence to support that inference. As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that. Moreover, three of them—Fouts, Shock and Bolander—had been actively engaged during the preceding

[5] See *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. 2d 38, 44. *Cf. Swift & Co.* v. *National Labor Relations Board*, 106 F. 2d 87, 93.

weeks in promoting the company union. During the membership drive for petitioner they stressed the fact that the employer would prefer those who joined petitioner to those who joined U. A. W. They spread the idea that the purpose in establishing petitioner was "to beat the C. I. O." and that the employees might withdraw from the petitioner once this objective was reached. And in doing these things they were emulating the example set by the management. The conclusion then is justified that this is not a case where solicitors for one union merely engaged in a zealous membership drive which just happened to coincide with the management's desires. Hence the fact that they were *bona fide* members of petitioner did not require the Board to disregard the other circumstances we have noted.

By § 8 (3) of the Act discrimination upon the basis of union membership constitutes an unfair labor practice unless made because of a valid closed-shop contract. But that section authorizes an order under § 10 abrogating such a contract with a labor organization which has been assisted by unfair labor practices. The presence of such practices in this case justified the Board's conclusion that petitioner did not represent an uncoerced majority of the toolroom employees. §§ 7, 8 (1). This conclusion makes it unnecessary to pass upon the scope of the Board's power to determine the appropriate bargaining unit under § 9 (b).

Alleged change in status of petitioner.—Petitioner challenges the order directing the employer to bargain exclusively with U. A. W., on the ground that prior to the issuance of the order petitioner had obtained an overwhelming majority of the production employees and had so notified the Board. Petitioner made no showing at the hearing that a majority of the employees had shifted to it after the employer refused to bargain with U. A. W. Nor did it seek leave from the court below to adduce

such additional evidence pursuant to § 10 (e). Nevertheless it contends that the Board on receipt of the notification should have ordered an election or at least have made an investigation.

We agree with the court below that the Board in failing to act on this request did not commit error. This was not a certification proceeding[6] under § 9 (c); it was an unfair labor practice proceeding under § 10. Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines,* 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates. Hence the failure of the Board to recognize petitioner's notice of change was wholly proper. *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 339–340.

[6] U. A. W. did in fact file a petition for certification under § 9 (c). But this was dismissed by the Board since it found for reasons stated that U. A. W. was the appropriate bargaining unit.

Sec. 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice.

Affirmed.

NEUBERGER *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 5. Argued October 16, 17, 1940.—Decided November 12, 1940.

1. Under § 23 (r) (1) of the Revenue Act of 1932, a taxpayer's distributive share of partnership profits derived from sales or exchanges of stocks and bonds that were not capital assets (as defined in § 101), is a "gain" to the extent of which he is entitled to a deduction of a loss sustained by him in similar transactions for his individual account. P. 88.
2. That §§ 184–188 of the Revenue Act of 1932 advert to instances in which partnership income retains its identity in the individual partner's return, does not by application of the maxim *expressio unius est exclusio alterius* require disallowance of the deduction here claimed. The maxim is not a rule of law but an aid to construction, and may not override the clear intent of Congress. P. 88.
3. Where the intent of Congress is plain, the scope of an Act may not be narrowed by administrative interpretation. P. 89.
4. Cases variously emphasizing the character of partnerships as business units, or as associations of individuals, but not involving § 23 (r) (1), are of little aid in ascertaining its meaning. P. 89.
5. The findings of the Board of Tax Appeals in this case show that the allowance of a deduction of the amount claimed would not exceed the limit prescribed by § 23 (r) (1). P. 89.
6. The construction here given § 23 (r) (1) is consistent with the legislative history of amendatory legislation as well as that of the section itself. P. 89.
7. *Shearer* v. *Burnet*, 285 U. S. 228, distinguished. P. 90.

104 F. 2d 649, reversed.

CERTIORARI, 310 U. S. 655, to review the affirmance of a decision of the Board of Tax Appeals, 37 B. T. A. 223, sustaining the determination of a deficiency in income tax.

Mr. Wilbur H. Friedman, with whom *Mr. Jacob P. Aronson* was on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Maurice J. Mahoney* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, a resident of New York, was a member of the New York Stock Exchange. He was engaged in the business of trading in securities on the floor of the Exchange for the partnership of Hilson & Neuberger, of which he was a member, executing orders on behalf of customers of the partnership. In addition he made numerous purchases and sales of securities for his own account.

During the year 1932, the one here in question, Hilson & Neuberger derived a profit of $142,802.29 from the sale of securities which were not capital assets as defined in § 101 of the Revenue Act of 1932. 47 Stat. 169, 191. The firm had other income of $170,830.65 and deductions of $203,981.78, or net income of $109,651.16. Petitioner's distributive share was $44,158.55. During the same year petitioner sustained a net loss of $25,588.93 on his private transactions in stocks and bonds which were not capital assets as defined in § 101.

In his income tax return for the year 1932 petitioner deducted from gross income the loss of $25,588.93. The Commissioner disallowed the deduction and assessed a deficiency. The Board of Tax Appeals upheld the action of the Commissioner. 37 B. T. A. 223. On appeal the

Second Circuit Court of Appeals affirmed. 104 F. 2d 649. Because of substantial conflict with *Jennings* v. *Commissioner,* 110 F. 2d 945, and *Craik* v. *United States,* 31 F. Supp. 132, we granted certiorari limited to the questions whether § 23 (r) (1) of the Revenue Act of 1932, 47 Stat. 169, 183, authorized the claimed deduction, and whether, in the event that it did not, the statute as so construed was constitutional. 310 U. S. 655.

Section 23 of the Revenue Act of 1932 sets out the allowable deductions from gross income. Section 23 (r) (1) provides:

"Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed [as deductions from gross income] only to the extent of the gains from such sales or exchanges . . ."

The basic and narrow question is whether, in computing the income of an individual partner, the word "gains" in § 23 (r) (1) includes gains from sales or exchanges of partnership stocks and bonds which are not capital assets as defined in § 101. We are of opinion that it does.

In computing gross income prior to the Revenue Act of 1932, subject to certain limitations a taxpayer was entitled to deduct the full amount of his losses from transactions in securities. Revenue Act of 1928, §§ 23 (e), 23 (g), 101 (b), 113. But the growing custom of diminishing ordinary income by deducting losses realized on the sale of securities which had shrunk in value, due no doubt to the fall in prices after 1929, led Congress to provide in § 23 (r) (1) that deductions for such losses should be limited to gains from similar transactions.

That this was the purpose and the only purpose of § 23 (r) (1) abundantly appears from the Report of the Senate Finance Committee accompanying the bill.[1] Nowhere

[1] Report of Senate Finance Committee (72d Congress, 1st Sess.), Number 665, p. 10:

"Your committee believes that security gains and losses should be segregated, that security losses should be deducted solely from

does there appear any intention to deny to a taxpayer who chooses to execute part of his security transactions in partnership with another the right to deductions which plainly would be available to him if he had executed all of them singly. Nowhere is there any suggestion that Congress intended to tax noncapital security gains until they exceeded similar losses. The language of § 23 (r) (1) does not require such a construction. Nor do the available evidences of Congressional intent indicate such a purpose.

Respondent points out, however, that under §§ 181–189 of the Revenue Act of 1932, 47 Stat. 169, 222–223,[2] part-

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security gains; but that security gains should not be taxed until they actually exceed security losses."

See also Report of House Ways and Means Committee (72d Congress, 1st Sess.), Number 708, pp. 12–13:

"There are no provisions in existing law corresponding to section 23 (r), . . . Many taxpayers have been completely or partially eliminating from tax their income from salaries, dividends, rents, etc., by deducting therefrom losses sustained in the stock and bond markets, with serious effect upon the revenue. Your committee is of the opinion that some limitation ought to be placed on the allowance of such losses."

[2] Sec. 181. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

Sec. 182. (a) There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

(b) . . .

Sec. 183. The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except that the so-called "charitable contribution" deduction provided in section 23 (n) shall not be allowed.

Sec. 184. The partner shall, for the purpose of the normal tax, be allowed as a credit against his net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts of dividends and interest specified in section 25 (a) and (b) as are received by the partnership.

Sec. 185. In the case of the members of a partnership the proper part of each share of the net income which consists of earned income

nership income is computed on an entity basis, that items of partnership gross income do not appear on a partner's return, that only partnership net income is reflected in the individual partner's income and is reported only in the form of a distributable or distributed share. He contends that since partnership income is computed in the same way as an individual's the deduction afforded by § 23 (r) (1) to the partnership is a distinct privilege not to be confused or combined with that afforded to the individual. Thus, he argues, the deduction claimed here is inconsistent with the general scheme created for reporting partnership income as well as, in effect, a second or double use of § 23 (r) (1).

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shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement.

Sec. 186. In the case of the members of a partnership the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under the rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

Sec. 187. The benefit of the special deduction for net losses allowed by section 117 shall be allowed to the members of a partnership under regulations prescribed by the Commissioner with the approval of the Secretary.

Sec. 188. The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in section 131.

Sec. 189. Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

It is not to be doubted that in the enactment of § 23 (r) (1) Congress intended not only to deal with individual security gains and losses, but also to permit losses suffered in partnership security transactions to be applied against partnership gains in like transactions. It does not follow, however, and the language of the statute does not provide, either expressly or by necessary implication, that losses sustained in an individual capacity may not be set off against gains from identical though distinct partnership dealings. If the individual losses are actually incurred in similar transactions it cannot justly be said that the same deduction is taken a second time, or that the real purpose of the statute, which is ultimately to tax the net income of the individual partner, would thereby be impaired.

Sections 181–189 of the Revenue Act of 1932, 47 Stat. 169, 222–223, provide generally for computation and reporting of partnership income. In requiring a partnership informational return although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals. This weakens rather than strengthens respondent's argument that the privileges are distinct or that the unit characteristics of the partnership must be emphasized. Compare *Jennings* v. *Commissioner,* 110 F. 2d 945; *Craik* v. *United States,* 31 F. Supp. 132; *United States* v. *Coulby,* 251 F. 982 (affirmed, 258 F. 27). Nor is the deduction claimed here precluded because Congress, in §§ 184–188, has particularized instances where partnership income retains its identity in the individual partner's return. The maxim *expressio unius est exclusio alterius* is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent. *United States* v. *Barnes,* 222 U. S. 513.

It is true that the Treasury Department adopted a contrary position and denied the claimed deduction. G.

C. M. 14012, XIV–1 Cum. Bull. 145; I. T. 2892, XIV–1 Cum. Bull. 148. Under different circumstances great weight has been attached to administrative practice and Treasury rulings, but beyond question they cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Rasquin* v. *Humphreys,* 308 U. S. 54; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294.

It is true, too, that in some cases the characteristics of partnerships as business units have been emphasized, Forres *v.* Commissioner, 25 B. T. A. 154; Wilson *v.* Commissioner, 17 B. T. A. 976 (appeal dismissed, 55 F. 2d 1086); Burns *v.* Commissioner, 12 B. T. A. 1209; Appeal of Menken, 8 B. T. A. 1062, while in others the characteristics of partnerships as associations of individuals have been stressed. *United States* v. *Coulby, supra.* Compare *Bence* v. *United States,* 18 F. Supp. 848. These cases, not decided under the Revenue Act of 1932, and turning, as they must, on their own peculiar facts, are little aid in ascertaining the effect to be given to § 23 (r) (1).

It is not true, however, as respondent argues, that the asserted deduction cannot be allowed because petitioner has suggested no way to calculate it properly or to import items of gross income from the partnership informational return. The Board of Tax Appeals expressly found the amount of partnership gains from security transactions and the proportion in which petitioner was to share in the profits of the partnership. 37 B. T. A. 223, 224. Since petitioner's share of these noncapital security gains is greater than his loss of $25,588.93, the limit on deductions set by § 23 (r) (1) is not exceeded.

Our conclusion that this is the proper construction of § 23 (r) (1) is confirmed by the action of Congress since 1932. In 1933 Congress amended § 182 (a) of the Revenue Act of 1932 to deny to individual partners deductions for partnership losses which had been disallowed in the

partnership return, the converse of the instant case. 48 Stat. 195, 209.[3] More significantly, in 1938, after the Treasury Department had ruled to the contrary, G. C. M. 14012, XIV–1 Cum. Bull. 145; I. T. 2892, XIV–1 Cum. Bull. 148, Congress expressly provided for the deduction of individual security losses from similar partnership gains. Revenue Act of 1938, §§ 182–183; 52 Stat. 447, 521.[4] That the amendment of 1933 changed and the Revenue Act of 1938 restored the law of 1932 as we have explained it is plain from the legislative history of the two Acts and of § 23 (r) (1).

Shearer v. *Burnet,* 285 U. S. 228, is not contrary to the conclusion we reach here. There the decision turned on the proper construction to be given to § 218 (a) of the Revenue Act of 1924, 43 Stat. 253, 275, and the court correctly concluded that Congress had not intended to allow the asserted credit.

We conclude that petitioner is entitled to the deduction. The decision of the Second Circuit Court of Appeals is reversed, and the case is remanded with directions

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[3] In Senate Finance Committee Report Number 114 (73rd Congress, 1st Sess.) accompanying the bill, it is stated at page 7:

"Subsection (d) amends the partnership provisions of existing law. Under existing law the individual members of a partnership are entitled to reduce their individual net incomes by their distributive shares of a net loss incurred by the partnership."

[4] In House Ways and Means Committee Report Number 1860 (75th Congress, 3rd Sess.) accompanying the bill, it is stated at pages 42–43:

"The method of treatment provided in these sections of the bill is a logical corollary of the principle that only the partners as individuals, not the partnership as an entity, are taxable persons and is necessary to give the partners as individuals the benefit of the alternative tax in the case of net long-term capital gains, provided in section 117 (c), with respect to such gains realized upon the sale or exchange of partnership capital assets. It should be noted that this method involves a departure from the principle adopted in the Revenue Acts of 1934 and 1936 . . ."

to remand to the Board of Tax Appeals for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of opinion that the judgment should be affirmed.

MILK WAGON DRIVERS' UNION, LOCAL NO. 753 ET AL. *v.* LAKE VALLEY FARM PRODUCTS, INC. ET AL.

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

No. 20. Argued October 21, 22, 1940.—Decided November 18, 1940.

A union of milk-wagon drivers, employed by local dairies in delivering milk, mainly from door to door to retail customers, picketed a large number of retail stores which sold, at cut prices on the cash-and-carry plan, milk bought at wholesale from individuals, called "vendors," who delivered it by their own trucks from supplies bought from other dairies under an arrangement whereby the milk that they did not sell was taken back at full purchase price by the dairies that supplied it. This "vendor system" had made inroads on the business of union dairies and affected unfavorably the wages and employment of members of the drivers' union. The union claimed that it constituted unfair competition—a device to escape union wages and union working conditions—and through the picketing it sought to compel the "vendors" to join it for the purpose of improving their wages and working conditions. Two of the "cut-price" dairies joined with an industrial union (organized by their employees, including "vendors") and a coöperative association of another State from which they obtained their supplies of milk, in a suit charging the drivers' union and its officers with a conspiracy to restrain interstate commerce in milk in violation of the Sherman Act, and seeking an injunction against the picketing and attendant trespasses. *Held:*

1. That there existed a "labor dispute" within the meaning of the Norris-LaGuardia Act. P. 96.

2. It was not material in this regard that the attempt of the drivers' union to unionize the "vendors" was upon condition that, if admitted to that union, they would cease to handle milk as "vendors." P. 98.

3. The controversy did not cease to be a "labor dispute" when the plaintiff dairies' employees became organized. P. 99.

4. The requirements of the Norris-LaGuardia Act not having been met, the District Court had no jurisdiction to grant an injunction, notwithstanding that the suit was based upon alleged violation of the Sherman Act. P. 100.

108 F. 2d 436, reversed; District Court affirmed.

CERTIORARI, 309 U. S. 649, to review a decree which reversed a decree dismissing, for want of jurisdiction, a bill praying for an injunction.

Mr. Abraham W. Brussell, with whom *Mr. David A. Riskind* was on the brief, for petitioners.

Mr. Arthur R. Seelig for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

This proceeding presents two questions: First, Does there here exist a "labor dispute" within the meaning of the Norris-LaGuardia Act?[1] Second, If there is a "labor dispute," must the jurisdictional prerequisites of the Norris-LaGuardia Act[2] be complied with before injunc-

[1] 29 U. S. C. §§ 101–115, 47 Stat. 70. The Act defines a labor dispute as follows: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113 (c), 47 Stat. 73.

[2] "No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act . . ." 29 U. S. C. § 101, 47 Stat. 70.

tive process can be used against a labor union accused of violating the Sherman Anti-Trust Act? [3]

The District Court found that this was a case "involving or growing out of a labor dispute"; that plaintiffs (respondents here) had failed to satisfy the prerequisites of the Norris-LaGuardia Act; and that, accordingly, the court was without jurisdiction to grant either a temporary or a permanent injunction. The Circuit Court of Appeals reversed, one judge dissenting; [4] it was the opinion of that court that the case did not grow out of a labor dispute, and that even if it had, a federal court would have jurisdiction to enjoin if the Sherman Act had been violated.[5] Because of the importance of these questions, we granted certiorari.[6]

The Norris-LaGuardia Act applies to labor disputes between "persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests herein." [7] Here, all of the parties have "direct or indirect interests" in the production, processing, sale, and distribution of milk. Plaintiffs, who sought the injunction, were four: one was the Chicago local of a C. I. O. union, the Amalgamated Dairy Workers; two were Chicago dairies whose milk was processed and distributed by members of the C. I. O. union; [8] the fourth was a

[3] 15 U. S. C. §§ 1–7, 26 Stat. 209, as amended. Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

[4] 108 F. 2d 436.

[5] There is no diversity of citizenship, and federal jurisdiction, if present at all, exists because of violation of the Sherman Act. The contention that interstate commerce is involved stems from the fact that defendants, in Chicago, picketed retail stores selling milk produced in Wisconsin. In the view we take of the case, we find it unnecessary to pass on this question.

[6] 309 U. S. 649.

[7] 29 U. S. C. § 113 (a), 47 Stat. 73.

[8] As to one of these plaintiff dairies, the complaint was voluntarily dismissed.

Wisconsin coöperative association which supplied milk to the plaintiff dairies. Defendants were the Chicago local of the A. F. of L. Milk Wagon Drivers' Union, and its officials. The defendant union is a craft organization, limiting its membership to milk wagon drivers; the plaintiff union is organized along industrial lines, and its membership consists of all kinds of dairy workers, including inside help, office workers, wagon drivers, helpers, sweepers and janitors.

A brief statement as to the background of the controversy is necessary for a better understanding of the issues. The Chicago local of the A. F. of L. Milk Wagon Drivers' Union was organized in 1902. Since the organization, working conditions of the members have been materially improved; hours have been shortened, wages have been raised, and vacation periods with full pay have been secured. These better terms and conditions of employment have moved concurrently with a more or less steady increase in union membership and influence. At the time this litigation was begun the union had more than five thousand members.

With the approach and continuance of the depression of the early Thirties, the milk business, like other industries, was in acute distress. Loss of profits from decreased demand stimulated dairies to devise new and cheaper methods to obtain and serve customers. Under the long existing practice in Chicago, dairies had owned milk trucks and wagons, and had operated them with employee drivers—chiefly members of the A. F. of L. local. A major part of the business consisted of door-to-door deliveries to retail customers. Some of the A. F. of L. drivers also delivered milk to retail stores, those stores in turn selling to their customers. What appears to have been an insignificant part of the milk supply of pre-depression Chicago was delivered by retail milk "peddlers" who bought from the dairy at wholesale and sold at retail from their own trucks or wagons.

But with the depression this practice of sale by "peddlers" expanded, branched out into sales to retail stores, and developed into what is called the "vendor system"—around which revolves the present controversy. Retail peddling started the controversy; at the root of the conflict, however, is this later emerging "vendor system," under which "vendors" delivered milk at wholesale to retail stores. Under this system, plaintiff dairies make daily sales of milk to individuals owning their own trucks. These individuals, called "vendors," resell the milk to retail stores. Unsold milk is no loss to the "vendor," because the dairy takes it back at the full purchase price.

With the spread of this new competitive system, the business of the dairies employing union milk wagon drivers decreased. Many of the union drivers lost their jobs and were dependent upon their union's relief funds and upon public relief agencies for their support. How many of those who lost their jobs became unemployed as the result of the depression and how many were displaced by the growth of the "vendor system" cannot be determined; both causes undoubtedly contributed.

The stores buying milk from plaintiff dairies through these vendors made a practice of selling it below the standard prices charged for milk supplied by dairies employing A. F. of L. drivers. Defendant union and its members claimed that the reason the price could be cut was that the vendors worked long hours, under unfavorable working conditions, without vacations, and with very low earnings. On the other hand, the vendors and the dairies utilizing their services asserted that the reason for the lower prices was that the vendor system was more economical, that under it more milk could be delivered by wholesale to the cash and carry cut-rate stores, and that such distribution cost less even on the same wage level than did door-to-door distribution. As the vendor system made increasing inroads on the business of the union dairies, the opposition of the defendant union became

more active. Its members insisted that the vendor system constituted unfair competition, depressing labor standards. To combat it, they attempted—as the District Court found from the facts—to unionize the employees and vendors of the dairies utilizing this plan. Not succeeding in this attempt, in 1934 they began picketing the so-called cut-rate stores. The picketing was carried on almost continuously until this suit was filed. Pickets usually carried placards denouncing cut-rate stores as unfair to the A. F. of L. local. During the years in which this strife continued, store windows were broken, personal altercations occurred, charges and countercharges were frequent, arrests were made and court proceedings instituted. Finally, in March, 1938—about two months before the complaint was filed in this case—the vendors and the other employees of the plaintiff dairies organized the plaintiff union under a C. I. O. charter. Thereupon signs were placed inside the cut-rate store windows, announcing that the milk handled by the stores was processed and delivered by members of the plaintiff union. But this did not settle the long-standing controversy; the picketing continued, and this suit followed.

The petition for an injunction rests primarily upon the charge that the defendant union and its officials had entered into a conspiracy to interfere with and restrain interstate commerce in violation of the Sherman and Clayton Acts. It is contended by plaintiffs that the controversy is not a labor dispute within the meaning of the Norris-LaGuardia Act, but is an unlawful secondary boycott of which the purpose is not to unionize the vendors but to obtain for the defendants' employers a Chicago milk monopoly at a sustained high price level, contrary to the Sherman Act.

First. The complaint on its face is probably sufficient to show that a labor dispute existed.[9] We need not decide

[9] Among other things, the complaint revealed that the vendors were members of the C. I. O. union which had made a contract touching on

that point, however, for the case proceeded to final judgment. Defendants filed an answer, and the court referred plaintiffs' motion for a temporary injunction to a special master. The master conducted extensive hearings, and heard evidence offered by both sides. In his report, the master found, in the language of the Norris-LaGuardia Act, that the case arose out of and involved a labor "dispute between one or more employers or associations of employers and one or more employees or associations of employees," all of whom were engaged in the same industry, trade, craft or occupation, namely, the milk industry; that defendants had attempted for some time to unionize the employees of the plaintiff dairies and of other cut-rate dairies, and that the picketing was an effort on the part of the defendants to compel the vendors and wagon drivers of the dairies to join the defendant union for the purpose of improving working conditions and wages of vendors; that the working hours of the plaintiff dairies' employees were longer and the wage scales lower than the union standards.[10] The District Court adopted the findings of the master, and made further findings of its own.

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the terms and conditions of employment with the plaintiff dairies, that the vendors' right of organization and collective representation for the purpose of avoiding industrial strife with the defendant union should be protected, and that the plaintiff union and the defendant union were in actual competition in obtaining employment in connection with the sale and distribution of milk in the City of Chicago.

[10] Plaintiffs complain of the form in which this last finding was made. Undoubtedly, the Master failed to use apt language in expressing his conclusions. But the language used, read in its context and in conjunction with the entire record, reveals that the objections to the finding are without foundation. What the Master said in his report was: "The Master is of the opinion that the dispute involved in the instant case brings it within the provisions of the Norris-LaGuardia Act . . . The testimony of defendants' witnesses is to the effect that they have attempted for some time to unionize the employees of the Plaintiff Dairies and other cut-rate Dairies; that the picketing complained of herein is an effort to compel the vendors, and wagon drivers employed by the Plaintiff Dairies to join the defendant union

It is not material, as the Circuit Court of Appeals thought, that defendants' attempt to unionize the vendors was upon the condition that they would cease to handle milk as "vendors" if admitted to membership in the union. There are few instances of attempted unionization in which a change to union membership would not require some alteration in the conditions or terms of employment. Union membership contemplates change—change which it is believed will bring about better working conditions for the employees. Moreover, the evidence offered by the plaintiffs themselves shows that membership in defendant union would have involved no substantial change in the vendors' relationship to the dairies. Truck drivers employed by dairies were eligible for membership in the defendant union, and plaintiffs' evidence showed that the "vendors" were actually regarded as employees of the plaintiff dairies. The plaintiffs offered as a part of their evidence the articles of agreement between the plaintiff union and the plaintiff dairies; each of those contracts contains the following provision: "The term 'employee,' as used in this Agreement shall mean all wholesale and retail route salesmen or drivers and their helpers and assistants; all milk distributors commonly referred to as 'Vendors'; all persons employed in the sale and distribution of the Company's products; . . . " And each agreement provided for a closed shop and gave to plaintiff union the exclusive right to represent all the dairy's employees, including the vendors, for purposes of negotiating on "all questions of wages, hours, and conditions of employment that shall prevail in the Company's business." [11]

Whether rightly or wrongly, the defendant union believed that the "vendor system" was a scheme or device

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for the purpose of improving working conditions and wages of said vendors and employees of the Plaintiff Dairies, and that the working hours and wage scale of Plaintiff Dairy's employees is lower than the Union scale."

[11] On the subject of the actual status of the vendors, the president

utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no "labor dispute," is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife.

Nor does the controversy cease to be a labor dispute, as the Circuit Court of Appeals thought, because the plaintiff dairies' employees became organized.[12] This merely transformed the defendants' activities from an effort to organize non-union men to a conflict which included a controversy between two unions. A controversy "concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or

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of one of the plaintiff dairies testified as follows:

"The Witness [Sigfried Weiss, president of the Lake Valley dairy]: He wants to know if they are employed by the dairy?

"Mr. Riskind [attorney for defendants]. Yes, that is all I want to know.

"A. Now that is not so easy to say, if they are employed or not. We have contracts, and they are bound to our dairy. They are actually employed by our dairy, but we have the vendor system, where they own their own trucks and they pay their own expenses and they buy milk at a certain price at our dairy. In one way they are employees, and in another way, we don't pay wages. We have to pay whatever they can make over a certain price. We charge them a certain price."

[12] "Under these conditions we think it cannot be fairly said that there is a good faith labor issue involved between the defendant union and either the dairies' employees or the 'vendors' or the stores. Especially is this true when we consider the fact that the 'vendors' are organized as members of a well-recognized union, which with their consent is acting as their representative in matters dealing with their employers." 108 F. 2d at 442.

seeking to arrange terms or conditions of employment" is expressly included within the definition of a labor dispute in the Norris-LaGuardia Act.

The District Court not only found that a labor dispute existed, but also found that it was without jurisdiction to grant an injunction because the requirements of the Norris-LaGuardia Act had not been met. We do not understand that the Circuit Court of Appeals overturned this finding. That court said: "Again, if jurisdiction were conceded and there was a labor dispute involved, then it is quite doubtful if appellants could recover because they have not in every respect complied with the requirements of the Norris-LaGuardia Act." We agree with the District Court that this case grows out of a labor dispute. Since the requirements of the Norris-LaGuardia Act have not been met, the court did not have jurisdiction to grant an injunction unless by virtue of that phase of the bill which charged a violation of the Sherman Anti-Trust Act.

Second. The Court of Appeals concluded that the defendants' picketing activities constituted a secondary boycott in violation of the Sherman Anti-Trust Act, and that for this reason, regardless of the Norris-LaGuardia Act, the District Court had jurisdiction to grant an injunction even though the case arose out of or involved a labor dispute.[13] In this the court was in error.

No specific language of the Norris-LaGuardia Act is pointed to in support of the theory that the Act was to be inapplicable where injunctions are sought against labor unions charged with violating the Sherman Act in

[13] The court said: "Moreover, we think it is clear from the findings and from the undisputed evidence in this case that the appellees' picketing activities constitute a secondary boycott, which is an unlawful activity, of which appellees could not avail themselves even though a labor dispute were involved. See *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443; *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers' Union of Chicago, No. 753*, 371 Ill. 377; 21 N. E. 2d 308," 108 F. 2d at 442.

the course of labor disputes. On the contrary, § 1 of the Norris-LaGuardia Act provides that "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act." This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes. And this Court has said that "the legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act." [14]

The committee reports on the Norris-LaGuardia Act reveal that many of the injunctions which were considered most objectionable by the Congress were based upon complaints charging conspiracies to violate the Sherman Anti-Trust Act. To end the granting of injunctions of this type, § 5 of the Norris-LaGuardia Act deprived federal courts of jurisdiction to issue restraining orders or injunctions "upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated . . ." In reporting the bill, the House Judiciary Committee said: "This section is included principally because many of the objectionable injunctions have been issued under the provisions of the anti-trust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued." [15]

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[14] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 562.

[15] H. Rep. No. 669, 72nd Cong., 1st Sess., p. 8.

The Norris-LaGuardia Act, passed in 1932, is the culmination of a bitter political, social and economic controversy extending over half a century. Hostility to "government by injunction" had become the rallying slogan of many and varied groups. Indeed, as early as 1914 Congress had responded to a widespread public demand that the Sherman Act be amended, and had passed the Clayton Act, itself designed to limit the jurisdiction of federal courts to issue injunctions in cases involving labor disputes. But the proponents of the Norris-LaGuardia Act felt that the jurisdictional limitations of the Clayton Act had been largely nullified by judicial decision. Thus, the Senate Judiciary Committee, reporting the Norris-LaGuardia Act, said: "That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds. . . . For example, approximately 300 were issued in connection with the railway shopmen's strike of 1922, . . ." [16] And on the same subject the House Judiciary Committee said: "These are the same character of acts which Congress in section 20 of the Clayton Act of October 15, 1914, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect." [17] As an example of the judicial interpretation of the Clayton Act which the Committee said was "responsible in part for this agitation for further legislation," the Committee referred to the cases of *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, *American Steel Foundries* v. *Tri-City Central Trades Council,* 257

[16] S. Rep. No. 163, 72nd Cong., 1st Sess., p. 8.

[17] H. Rep. No. 669, *supra,* pp. 7, 8.

U. S. 184, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association,* 274 U. S. 37. In these cases, the jurisdiction of the courts to grant injunctions had been upheld upon allegations and findings that the Sherman Anti-Trust Act had been violated.

Whether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act. For us to hold, in the face of this legislation, that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress.[18] The Circuit Court of Appeals was in error; its judgment is reversed and the judgment of the District Court dismissing the bill for injunction is affirmed.

Reversed.

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[18] For example, one of the prerequisites to any injunction under the Act is "that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." Concerning this, the House Judiciary Committee said: "The last provision is considered desirable, because it often happens that complainants rush into a Federal court and obtain an injunction the enforcement of which requires the court to consider and punish acts which are and ought to be, under our system of government, cognizable in the local tribunals. Our Federal courts already are congested with cases ordinarly cognizable in the local police courts, . . ." H. Rep. No. 669, *supra,* p. 9.

WILSON & CO., INC. *v.* UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 23. Argued October 22, 23, 1940.—Decided November 18, 1940.

1. Claims to refunds by exporters of products upon which processing or floor stock taxes had been paid under the Agricultural Adjustment Act, *held* governed by § 601 (a) of the Revenue Act of 1936 (which reënacted § 17 (a) of the Agricultural Adjustment Act), where claimants disavow any attempt to proceed under Title VII of the Act. P. 105.
2. Where, in the case of a claim for refund governed by § 601 (a) of the Revenue Act of 1936, the record does not show the ground of denial by the Commissioner of Internal Revenue, the Court of Claims is without jurisdiction to review the Commissioner's determination. Revenue Act of 1936, § 601 (e). P. 106.

90 Ct. Cls. 131; 30 F. Supp. 672, affirmed.

CERTIORARI, 309 U. S. 651, to review the dismissal of petitions in three cases for refunds of processing and floor taxes paid under the Agricultural Adjustment Act upon products subsequently exported.

Mr. Dean G. Acheson, with whom *Messrs. J. Harry Covington, Paul E. Shorb,* and *H. Thomas Austern* were on the brief, for petitioners.

Mr. Warner W. Gardner, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioners are corporations engaged in the preparation, packing, and sale of meat products in foreign and domestic commerce. Between November 5, 1933 and

*Together with No. 24, *Wilson & Co., Inc., of Kansas* v. *United States,* and No. 25, *T. M. Sinclair & Co., Ltd.* v. *United States,* also on writs of certiorari, 309 U. S. 651, to the Court of Claims.

January 6, 1936 they exported to foreign countries large quantities of hog products with respect to which they paid processing taxes under § 9 (a) and floor stock taxes under § 16 (a) of the Agricultural Adjustment Act. 48 Stat. 31, 35, 40. Subsequent to exportation petitioners filed claims for refunds under § 17 (a). 48 Stat. 31, 40. The Commissioner of Internal Revenue denied all of the claims and suit in the Court of Claims followed. The United States thereupon moved to dismiss the petitions on the ground that the Court of Claims was without jurisdiction because of certain provisions of Title VII of the Revenue Act of 1936. 49 Stat. 1648, 1747–1755. The Court of Claims dismissed the actions for want of jurisdiction, on the ground, however, that § 601 (e) of Title IV of the Revenue Act of 1936, 49 Stat. 1648, 1740, prevented judicial review of the Commissioner's action. 30 F. Supp. 672. To resolve the conflict with *Cudahy Bros. Co.* v. *La Budde,* 92 F. 2d 937, and *Neuss, Hesslein & Co.* v. *United States,* 30 F. Supp. 595, we granted certiorari. 309 U. S. 651.

The single question presented is whether the Court of Claims was without jurisdiction of petitioners' suits. We hold that it was.

Title VII conditions payment of refunds upon proof that the claimant actually bore the burden of the tax sought to be refunded or that he unconditionally repaid it to his vendee who bore the burden. Since petitioners do not allege satisfaction of these conditions it is plain that they do not claim under Title VII. Indeed, they disown any attempt to bring their claims within its provisions.

Title IV provides for refunds to exporters of products upon which processing or floor stock taxes have been paid. It is true that § 17 (a) of the Agricultural Adjustment Act provided for these refunds before the Act was held unconstitutional in *United States* v. *Butler,* 297 U. S. 1.

Whether petitioners could still establish refund claims under that section if the act had never been invalidated is a question we need not consider. For whatever the effect of that decision on § 17 (a), Congress expressly made it a part of Title IV by reënacting it in § 601 (a). 49 Stat. 1648, 1739.[1] It follows that petitioners' claims, purportedly based on § 17 (a), must be governed by Title IV and the limitations it imposes.

Section 601 (e) of Title IV provides:

"The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination."

Petitioners contend that Congress intended to commit to the final determination of the Commissioner only "such matters as findings of fact, computations, and the like." Quite apart from the fact that in § 601 (d)[2] Congress uses virtually the quoted words in limiting review by administrative officers, we fail to see how the argument can aid petitioners here because the record does not show why their claims were denied. Since the record is silent on this point, such decisions as *United States* v. *Williams,* 278 U. S. 255, and *Silberschein* v. *United States,* 266 U. S. 221, are plainly distinguishable.

We hold that upon this record the determination of the Commissioner is final. Thus we see no occasion to narrow the effect of § 601 (e). The decision of the Court of Claims was correct and must be

Affirmed.

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[1] Sec. 601. (a) The provisions of sections . . . 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where . . . the exportation . . . took place prior to January 6, 1936.

[2] Sec. 601. (d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States.

WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO ET AL.*

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. Order entered November 25, 1940.

ORDER.

Upon consideration of the motion of the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan, New York, and Illinois, and in accordance with the following stipulation:

"Whereas, the State of Illinois contends that also during the period intervening between the effective date of the decree and since then substantial amounts of flocculent active sludge and sewage sludge have accumulated in the Brandon Road Pool and that the existence of such accumulation also adds to the menace of the health of the persons living adjacent thereto (which contention is denied by the respondent Great Lakes States) and,

Whereas, the Special Master in the above captioned causes, the Honorable Monte M. Lemann, before the close of the hearings, suggested that the Attorney General of the State of Illinois and the Attorneys General of the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York (hereinafter referred to as the opposing Great Lakes States) consider the mak-

*For the opinion and decree in these cases, see 281 U. S. 179, 696; see also, 309 U. S. 569, 636.

ing of an agreement to permit a temporary increase in diversion from 1500 cubic second feet plus domestic pumpage now authorized by the decree of the United States Supreme Court of April 21, 1930, to 10,000 cubic second feet plus domestic pumpage of water from Lake Michigan through the Chicago Sanitary Canal for one continuous period of ten days so as to scour out the Brandon Road Pool at Joliet, Illinois, and attempt to remove whatever flocculent active sludge and sewage sludge may have accumulated in said pool, and

Whereas, the Special Master suggested that any such agreement between the State of Illinois and the opposing Great Lakes States would be without prejudice to any of the parties to the above captioned causes, and would be solely for the purpose of trying by this means to remove whatever flocculent active sludge deposits and sewage sludge may have accumulated in the Brandon Road Pool by reason of the introduction of untreated sewage and sludge from treated sewage. Nothing in this stipulation shall be construed as an admission by the opposing Great Lakes States as in any manner or form whatsoever waiving, abandoning or prejudicing any of the positions of the opposing Great Lakes States hereinbefore stated or at any time taken in these causes or in the course of the present hearings; and said opposing Great Lakes States hereby affirm and again advance each and every contention and allegation set forth in the return of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York as respondents to rule to show cause issued on application of the State of Illinois, as Petitioner, for a temporary modification of Paragraph 3 of the Decree of April 21, 1930, filed in this Court on February 26, 1940; and said opposing Great Lakes States again deny each and every allegation contained in the Petition of

the State of Illinois herein, filed in this Court on January 15, 1940, and deny the positions taken during the course of the present hearings by Illinois, and,

Whereas, it is further understood that the State of Illinois does not by reason of this stipulation or motion or test in any manner or form waive, abandon or prejudice any of its positions at any time stated or taken in this proceeding, and the State of Illinois hereby affirms and again advances each and every contention and allegation set forth in its petition, and it is not to be construed as an admission by the State of Illinois that such temporary increase in diversion of water for a period of ten days will either remedy or ameliorate effectively the conditions in Brandon Pool which Illinois contends have constituted the alleged menace to health complained of, and,

Whereas, it is the position of the opposing Great Lakes States that any accumulation of sewage wastes and sludge in the Brandon Road Pool since the decree of the United States Supreme Court went into full operation on December 31, 1938, has not created any nuisance condition either from the standpoint of public health, navigation or in any other way, and that such temporary increase in diversion is in no wise necessary to protect the interests of public health or navigation, and

Whereas, the opposing Great Lakes States are nevertheless, in a spirit of conciliation and accommodation, willing to enter into the agreement suggested by the Special Master upon the express condition—(a) that such agreement shall not be construed as in any way waiving, abandoning or prejudicing any of the positions of the opposing Great Lakes States hereinbefore stated or at any time taken in these causes or in the course of the present hearing; (b) that nothing in this

stipulation nor the fact of the consent of the opposing Great Lakes States to such temporary expedient shall be construed as an admission or evidence of any claim of the State of Illinois or the Sanitary District of Chicago in the premises and shall not be used as a precedent for any future request for any additional temporary diversion over and above the amounts fixed by the decree of April 21, 1930.

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the parties to the above captioned causes, by their respective counsel, that a temporary increase in diversion from 1500 cubic second feet plus domestic pumpage now authorized by the United States Supreme Court decree of April 21, 1930, to 10,000 cubic second feet plus domestic pumpage of water from Lake Michigan through the Chicago Sanitary Canal may be authorized for one continuous period of ten days for the pupose of trying to remove whatever flocculent active sludge deposits and sewage sludge may have accumulated in the said Brandon Road Pool. It is understood that a record of said operation will be made and the results thereof incorporated in the record of the hearing.

IT IS FURTHER STIPULATED AND AGREED that any such agreement will be without prejudice to any party to the above captioned causes and that such agreement is not to be used as a precedent for any future request for additional temporary diversion in excess of the amounts fixed by the United States Supreme Court Decree of April 21, 1930.

IT IS FURTHER STIPULATED AND AGREED that a motion in accordance with this stipulation may be filed with the United States Supreme Court and that an order in accordance with the terms of this stipulation may

thereupon be entered by said Court without notice to any of said parties.

STATE OF ILLINOIS,
By JOHN E. CASSIDY,
Attorney General of the State of Illinois.
STATES OF WISCONSIN, MINNESOTA,
OHIO, PENNSYLVANIA, MICHIGAN,
AND NEW YORK,
By HERBERT H. NAUJOKS,
Special Assistant to Attorneys General.

Dated this 31st day of October, 1940."

It is ordered that the Sanitary District of Chicago be and it hereby is authorized to increase its diversion of water from the Great Lakes-St. Lawrence System or watershed through the Chicago Drainage Canal from 1,500 cubic feet per second in addition to domestic pumpage to 10,000 cubic feet per second in addition to domestic pumpage for one continuous period of ten days from an appropriate hour on December 2, 1940, to the same hour on December 12, 1940, after which period all the provisions of the decree entered April 21, 1930, 281 U. S. 696, shall be and remain in full force and effect until further order of this Court.

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

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

No. 27. Argued October 25, 1940.—Decided November 25, 1940.

1. Where, in 1934 and 1935, an owner of negotiable bonds, who reported income on the cash receipts basis, detached from the bonds negotiable interest coupons before their due date and delivered them as a gift to his son, who in the same year collected them at maturity, *held* that, under § 22 of the Revenue Act of 1934, and in the year that the interest payments were made, there was a realization of income, in the amount of such payments, taxable to the donor. P. 117.
2. The dominant purpose of the income tax laws is the taxation of income to those who earn or otherwise create the right to receive it and who enjoy the benefit of it when paid. P. 119.
3. The tax laid by the 1934 Revenue Act upon income "derived from . . . wages or compensation for personal service, of whatever kind and in whatever form paid . . .; also from interest . . ." can not fairly be interpreted as not applying to income derived from interest or compensation when he who is entitled to receive it makes use of his power to dispose of it in procuring satisfactions which he would otherwise procure only by the use of the money when received. P. 119.
4. This case distinguished from *Blair* v. *Commissioner,* 300 U. S. 5; and compared with *Lucas* v. *Earl,* 281 U. S. 111, and *Burnet* v. *Leininger,* 285 U. S. 136. Pp. 118–120.

107 F. 2d 906, reversed.

CERTIORARI, 309 U. S. 650, to review the reversal of an order of the Board of Tax Appeals, 39 B. T. A. 757, sustaining a determination of a deficiency in income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for petitioner.

Mr. Selden Bacon, with whom *Mr. Harry H. Wiggins* was on the brief, for respondent.

The coupons were independent negotiable instruments complete in themselves, and by the gift became the absolute property of the donee free from any control by the donor by reason of his retention of the bonds from which they had been detached. *Clark* v. *Iowa City,* 20 Wall. 583; *Hartman* v. *Greenhow,* 102 U. S. 672; *Koshkonong* v. *Burton,* 104 U. S. 668; *Clokey* v. *Evansville & T. H. R. Co.,* 16 App. Div. 304; *Pratt* v. *Higginson,* 230 Mass. 256.

The two cases on this point in the Circuit Courts of Appeals agree that coupons so given away before their maturity are not income of the donor, but of the donee. *Rosenwald* v. *Commissioner,* 33 F. 2d 423; *Horst* v. *Commissioner,* 107 F. 2d 906. See also, *Matchette* v. *Helvering,* 81 F. 2d 73; *Williston* v. *Commissioner,* 2 Mass. A. T. B. 663; Schoonmaker *v.* Commissioner, 39 B. T. A. 496.

The case at bar is not governed by *Helvering* v. *Clifford,* 309 U. S. 331, but by *Blair* v. *Commissioner,* 300 U. S. 5, 11–14. In the *Clifford* case there was no thing separated and completely transferred. What was transferred was net income from a trust fund over which Clifford retained absolute control. He might easily, under the extensive powers reserved to himself, invest it in such a way that there might be no net income therefrom during the specified period. That was left to his own absolute discretion. That is a very different thing from an absolute transfer of a specific coupon. Moreover, Clifford also retained control even over whatever net income there might be, under the striking provision that he was to pay over to his wife during the continuance of the trust, the whole or such part of the net income as he "in his absolute discretion" might determine. That

provision practically nullified any absolute right on her part to get the income. *Raymond* v. *Tiffany,* 59 Misc. 283. Any income paid her became a completed gift only when Clifford exercised his discretion in her favor, after the income had been collected by him.

MR. JUSTICE STONE delivered the opinion of the Court.

The sole question for decision is whether the gift, during the donor's taxable year, of interest coupons detached from the bonds, delivered to the donee and later in the year paid at maturity, is the realization of income taxable to the donor.

In 1934 and 1935 respondent, the owner of negotiable bonds, detached from them negotiable interest coupons shortly before their due date and delivered them as a gift to his son who in the same year collected them at maturity. The Commissioner ruled that under the applicable § 22 of the Revenue Act of 1934, 48 Stat. 680, 686, the interest payments were taxable, in the years when paid, to the respondent donor who reported his income on the cash receipts basis. The Circuit Court of Appeals reversed the order of the Board of Tax Appeals sustaining the tax. 107 F. 2d 906; 39 B. T. A. 757. We granted certiorari, 309 U. S. 650, because of the importance of the question in the administration of the revenue laws and because of an asserted conflict in principle of the decision below with that of *Lucas* v. *Earl,* 281 U. S. 111, and with that of decisions by other circuit courts of appeals. See *Bishop* v. *Commissioner,* 54 F. 2d 298; *Dickey* v. *Burnet,* 56 F. 2d 917, 921; *Van Meter* v. *Commissioner,* 61 F. 2d 817.

The court below thought that as the consideration for the coupons had passed to the obligor, the donor had, by the gift, parted with all control over them and their payment, and for that reason the case was distinguishable

from *Lucas* v. *Earl, supra,* and *Burnet* v. *Leininger,* 285 U. S. 136, where the assignment of compensation for services had preceded the rendition of the services, and where the income was held taxable to the donor.

The holder of a coupon bond is the owner of two independent and separable kinds of right. One is the right to demand and receive at maturity the principal amount of the bond representing capital investment. The other is the right to demand and receive interim payments of interest on the investment in the amounts and on the dates specified by the coupons. Together they are an obligation to pay principal and interest given in exchange for money or property which was presumably the consideration for the obligation of the bond. Here respondent, as owner of the bonds, had acquired the legal right to demand payment at maturity of the interest specified by the coupons and the power to command its payment to others, which constituted an economic gain to him.

Admittedly not all economic gain of the taxpayer is taxable income. From the beginning the revenue laws have been interpreted as defining "realization" of income as the taxable event, rather than the acquisition of the right to receive it. And "realization" is not deemed to occur until the income is paid. But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Corliss* v. *Bowers,* 281 U. S. 376, 378. Cf. *Burnet* v. *Wells,* 289 U. S. 670.

In the ordinary case the taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment

accrued. But the rule that income is not taxable until realized has never been taken to mean that the taxpayer, even on the cash receipts basis, who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor. The rule, founded on administrative convenience, is only one of postponement of the tax to the final event of enjoyment of the income, usually the receipt of it by the taxpayer, and not one of exemption from taxation where the enjoyment is consummated by some event other than the taxpayer's personal receipt of money or property. Cf. *Aluminum Castings Co.* v. *Routzahn,* 282 U. S. 92, 98. This may occur when he has made such use or disposition of his power to receive or control the income as to procure in its place other satisfactions which are of economic worth. The question here is, whether because one who in fact receives payment for services or interest payments is taxable only on his receipt of the payments, he can escape all tax by giving away his right to income in advance of payment. If the taxpayer procures payment directly to his creditors of the items of interest or earnings due him, see *Old Colony Trust Co.* v. *Commissioner, supra; Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170; *United States* v. *Kirby Lumber Co.,* 284 U. S. 1, or if he sets up a revocable trust with income payable to the objects of his bounty, §§ 166, 167, Revenue Act of 1934, *Corliss* v. *Bowers, supra;* cf. *Dickey* v. *Burnet,* 56 F. 2d 917, 921, he does not escape taxation because he did not actually receive the money. Cf. *Douglas* v. *Willcuts,* 296 U. S. 1; *Helvering* v. *Clifford,* 309 U. S. 331.

Underlying the reasoning in these cases is the thought that income is "realized" by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have

received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them. Cf. *Burnet* v. *Wells, supra.*

Although the donor here, by the transfer of the coupons, has precluded any possibility of his collecting them himself, he has nevertheless, by his act, procured payment of the interest as a valuable gift to a member of his family. Such a use of his economic gain, the right to receive income, to procure a satisfaction which can be obtained only by the expenditure of money or property, would seem to be the enjoyment of the income whether the satisfaction is the purchase of goods at the corner grocery, the payment of his debt there, or such non-material satisfactions as may result from the payment of a campaign or community chest contribution, or a gift to his favorite son. Even though he never receives the money, he derives money's worth from the disposition of the coupons which he has used as money or money's worth in the procuring of a satisfaction which is procurable only by the expenditure of money or money's worth. The enjoyment of the economic benefit accruing to him by virtue of his acquisition of the coupons is realized as completely as it would have been if he had collected the interest in dollars and expended them for any of the purposes named. *Burnet* v. *Wells, supra.*

In a real sense he has enjoyed compensation for money loaned or services rendered, and not any the less so because it is his only reward for them. To say that one who has made a gift thus derived from interest or earnings paid to his donee has never enjoyed or realized the fruits of his investment or labor, because he has assigned

them instead of collecting them himself and then paying them over to the donee, is to affront common understanding and to deny the facts of common experience. Common understanding and experience are the touchstones for the interpretation of the revenue laws.

The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it. We have had no difficulty in applying that proposition where the assignment preceded the rendition of the services, *Lucas* v. *Earl, supra; Burnet* v. *Leininger, supra,* for it was recognized in the *Leininger* case that in such a case the rendition of the service by the assignor was the means by which the income was controlled by the donor and of making his assignment effective. But it is the assignment by which the disposition of income is controlled when the service precedes the assignment, and in both cases it is the exercise of the power of disposition of the interest or compensation, with the resulting payment to the donee, which is the enjoyment by the donor of income derived from them.

This was emphasized in *Blair* v. *Commissioner,* 300 U. S. 5, on which respondent relies, where the distinction was taken between a gift of income derived from an obligation to pay compensation and a gift of income-producing property. In the circumstances of that case, the right to income from the trust property was thought to be so identified with the equitable ownership of the property, from which alone the beneficiary derived his right to receive the income and his power to command disposition of it, that a gift of the income by the beneficiary became effective only as a gift of his ownership of the property producing it. Since the gift was deemed to be a gift of the property, the income from it was held to be the income of the owner of the property,

who was the donee, not the donor—a refinement which was unnecessary if respondent's contention here is right, but one clearly inapplicable to gifts of interest or wages. Unlike income thus derived from an obligation to pay interest or compensation, the income of the trust was regarded as no more the income of the donor than would be the rent from a lease or a crop raised on a farm after the leasehold or the farm had been given away. *Blair* v. *Commissioner, supra,* 12, 13 and cases cited. See also *Reinecke* v. *Smith,* 289 U. S. 172, 177. We have held without deviation that where the donor retains control of the trust property the income is taxable to him although paid to the donee. *Corliss* v. *Bowers, supra.* Cf. *Helvering* v. *Clifford, supra.*

The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. See, *Corliss* v. *Bowers, supra,* 378; *Burnet* v. *Guggenheim,* 288 U. S. 280, 283. The tax laid by the 1934 Revenue Act upon income "derived from . . . wages, or compensation for personal service, of whatever kind and in whatever form paid, . . .; also from interest . . ." therefore cannot fairly be interpreted as not applying to income derived from interest or compensation when he who is entitled to receive it makes use of his power to dispose of it in procuring satisfactions which he would otherwise procure only by the use of the money when received.

It is the statute which taxes the income to the donor although paid to his donee. *Lucas* v. *Earl, supra; Burnet* v. *Leininger, supra.* True, in those cases the service which created the right to income followed the assignment, and it was arguable that in point of legal theory the right to the compensation vested instantaneously in the assignor when paid, although he never received it; while here the right of the assignor to receive the income

antedated the assignment which transferred the right and thus precluded such an instantaneous vesting. But the statute affords no basis for such "attenuated subtleties." The distinction was explicitly rejected as the basis of decision in *Lucas* v. *Earl*. It should be rejected here; for no more than in the *Earl* case can the purpose of the statute to tax the income to him who earns, or creates and enjoys it be escaped by "anticipatory arrangements however skilfully devised" to prevent the income from vesting even for a second in the donor.

Nor is it perceived that there is any adequate basis for distinguishing between the gift of interest coupons here and a gift of salary or commissions. The owner of a negotiable bond and of the investment which it represents, if not the lender, stands in the place of the lender. When, by the gift of the coupons, he has separated his right to interest payments from his investment and procured the payment of the interest to his donee, he has enjoyed the economic benefits of the income in the same manner and to the same extent as though the transfer were of earnings, and in both cases the import of the statute is that the fruit is not to be attributed to a different tree from that on which it grew. See *Lucas* v. *Earl, supra,* 115.

Reversed.

The separate opinion of Mr. Justice McReynolds.

The facts were stipulated. In the opinion of the court below the issues are thus adequately stated—

"The petitioner owned a number of coupon bonds. The coupons represented the interest on the bonds and were payable to bearer. In 1934 he detached unmatured coupons of face value of $25,182.50 and transferred them by manual delivery to his son as a gift. The coupons matured later on in the same year, and the son collected the face amount, $25,182.50, as his own property. There

was a similar transaction in 1935. The petitioner kept his books on a cash basis. He did not include any part of the moneys collected on the coupons in his income tax returns for these two years. The son included them in his returns. The Commissioner added the moneys collected on the coupons to the petitioner's taxable income and determined a tax deficiency for each year. The Board of Tax Appeals, three members dissenting, sustained the Commissioner, holding that the amounts collected on the coupons were taxable as income to the petitioner."

The decision of the Board of Tax Appeals was reversed and properly so, I think.

The unmatured coupons given to the son were independent negotiable instruments, complete in themselves. Through the gift they became at once the absolute property of the donee, free from the donor's control and in no way dependent upon ownership of the bonds. No question of actual fraud or purpose to defraud the revenue is presented.

Neither *Lucas* v. *Earl,* 281 U. S. 111, nor *Burnet* v. *Leininger,* 285 U. S. 136, support petitioner's view. *Blair* v. *Commissioner,* 300 U. S. 5, 11, 12, shows that neither involved an unrestricted completed transfer of property.

Helvering v. *Clifford,* 309 U. S. 331, 335, 336, decided after the opinion below, is much relied upon by petitioner, but involved facts very different from those now before us. There no separate thing was absolutely transferred and put beyond possible control by the transferror. The Court affirmed that Clifford, both conveyor and trustee, "retained the substance of full enjoyment of all the rights which previously he had in the property." "In substance his control over the corpus was in all essential respects the same after the trust was created, as before." "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."

The general principles approved in *Blair* v. *Commissioner,* 300 U. S. 5, are applicable and controlling. The challenged judgment should be affirmed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concur in this opinion.

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

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

No. 205. Argued October 25, 1940.—Decided November 25, 1940.

Renewal commissions paid in 1933 by insurance companies to the assignee of an agent, pursuant to assignments made by the agent, in 1924 and 1928, of such commissions as should become payable to him for services which had been rendered in writing policies of insurance under agency contracts, *held,* under § 22 of the Revenue Act of 1932, income taxable in 1933 to the assignor. Following *Helvering* v. *Horst, ante,* p. 112. P. 124.

110 F. 2d 737, reversed.

CERTIORARI, *post,* p. 630, to review the reversal of an order of the Board of Tax Appeals, 39 B. T. A. 583, sustaining a determination of a deficiency in income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Morton K. Rothschild* were on the brief, for petitioner.

Mr. Harry J. Rudick, with whom *Mr. John W. Drye, Jr.* was on the brief, for respondent.

The taxable status of assigned income depends upon ownership or control of the property which produces the

income. The respondent did not retain any such ownership or control, and is not taxable on the income.

The contract right to receive the renewal commissions, even though it may have resulted from services of the assignor, constituted a property right capable of assignment; and the disposition of that right did not correspond to an assignment of earnings. *Lucas* v. *Earl,* 281 U. S. 111, distinguished.

The commissions were not wholly the product of services personally rendered by the taxpayer. Assuming, however, that the commissions were entirely the result of respondent's individual efforts, *Lucas* v. *Earl* does not require that they be taxed to him. That case related to earnings *qua* earnings and not to a separately disposable contract right received as compensation for services.

The doctrine that earnings are always taxable to the earner produces absurd results. Suppose an agent owning a right to renewal commissions becomes bankrupt and the right to such commissions is sold by the trustee in bankruptcy to an outsider. Would the agent be taxable on the commissions paid to the purchaser because they were earned by the agent? Suppose the agent had sold his right to the future commissions, would he be subject to tax not only on the proceeds of sale, but on the larger amount of commissions as well because he had "earned" these commissions? Or suppose the agent had died owning the right to receive the renewal commissions. Application of the sweeping doctrine advocated by the Government would require him to be taxed after his death. This view was specifically rejected in *Seattle First National Bank* v. *Henricksen,* 24 F. Supp. 256, appeal dismissed, 100 F. 2d 1015.

A future commissions contract in the nature of a royalty contract, such as is here involved—the income from which is in no way dependent upon future services of the assignor, and the income from which has not yet

arisen, and will arise, if at all, by the happening of events over which the assignor has no control—may be assigned so as to relieve the assignor of the tax on the income therefrom in just the same way that the same sort of property arising from sources other than personal services may be assigned so as to relieve the assignor of tax.

The right to assign a contract of this character arising from personal services offers no more opportunity for tax avoidance than the right to assign a similar contract arising from any other source.

By leave of Court, *Mr. W. A. Sutherland* filed a brief, as *amicus curiae,* urging affirmance.

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to *Helvering* v. *Horst, ante,* p. 112, and presents issues not distinguishable from those in that case.

Respondent, a general life insurance agent, after the termination of his agency contracts and services as agent, made assignments in 1924 and 1928 respectively of renewal commissions to become payable to him for services which had been rendered in writing policies of insurance under two of his agency contracts. The Commissioner assessed the renewal commissions paid by the companies to the assignees in 1933 as income taxable to the assignor in that year under the provisions of the 1932 Revenue Act, 47 Stat. 169, § 22 of which does not differ in any respect now material from § 22 of the 1934 Revenue Act involved in the *Horst* case. The Court of Appeals for the Second Circuit reversed the order of the Board of Tax Appeals sustaining the assessment. 110 F. 2d 737; 39 B. T. A. 583. We granted certiorari October 14, 1940.

No purpose of the assignments appears other than to confer on the assignees the power to collect the commis-

sions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other.

For the reasons stated at length in the opinion in the *Horst* case, we hold that the commissions were taxable as income of the assignor in the year when paid. The judgment below is

Reversed.

The separate opinion of MR. JUSTICE McREYNOLDS.

The cause was decided upon stipulated facts. The following statement taken from the court's opinion discloses the issues.

"The question presented is whether renewal commissions payable to a general agent of a life insurance company after the termination of his agency and by him assigned prior to the taxable year, must be included in his income despite the assignment.

"During part of the year 1924 the petitioner was employed by the Canada Life Assurance Company as its branch manager for the state of Michigan. His compensation consisted of a salary plus certain commissions. His employment terminated on September 1, 1924. Under the terms of his contract he was entitled to renewal commissions on premiums thereafter collected by the company on policies written prior to the termination of his agency, without the obligation to perform any further services. In November 1924 he assigned his right, title, and interest in the contract as well as the renewal commissions to a corporate trustee. From September 1, 1924 to June 30, 1927, the petitioner and another, constituting the firm of Hart & Eubank, were general agents in New York City for the Aetna Life Assurance Com-

pany, and from July 1, 1927 to August 31, 1927, the petitioner individually was general agent for said Aetna Company. The Aetna contracts likewise contained terms entitling the agent to commissions on renewal premiums paid after termination of the agency, without the performance of any further services. On March 28, 1928, the petitioner assigned to the corporate trustee all commissions to become due him under the Aetna contracts. During the year 1933 the trustee collected by virtue of the assignments renewal commissions payable under the three agency contracts above mentioned, amounting to some $15,600. These commissions were taxed to the petitioner by the Commissioner, and the Board has sustained the deficiency resulting therefrom." 110 F. 2d 738.

The court below declared—

"In the case at bar the petitioner owned a right to receive money for past services; no further services were required. Such a right is assignable. At the time of assignment there was nothing contingent in the petitioner's right, although the amount collectible in future years was still uncertain and contingent. But this may be equally true where the assignment transfers a right to income from investments, as in *Blair* v. *Commissioner,* 300 U. S. 5, and *Horst* v. *Commissioner,* 107 F. 2d 906 (C. C. A. 2), or a right to patent royalties, as in *Nelson* v. *Ferguson,* 56 F. 2d 121 (C. C. A. 3), certiorari denied, 286 U. S. 565. By an assignment of future earnings a taxpayer may not escape taxation upon his compensation in the year when he earns it. But when a taxpayer who makes his income tax return on a cash basis assigns a right to money payable in the future for work already performed, we believe that he transfers a property right, and the money, when received by the assignee, is not income taxable to the assignor."

Accordingly, the Board of Tax Appeals was reversed; and this, I think, is in accord with the statute and our opinions.

The assignment in question denuded the assignor of all right to commissions thereafter to accrue under the contract with the insurance company. He could do nothing further in respect of them; they were entirely beyond his control. In no proper sense were they something either earned or received by him during the taxable year. The right to collect became the absolute property of the assignee without relation to future action by the assignor.

A mere right to collect future payments, for services already performed, is not presently taxable as "income derived" from such services. It is property which may be assigned. Whatever the assignor receives as consideration may be his income; but the statute does not undertake to impose liability upon him because of payments to another under a contract which he had transferred in good faith, under circumstances like those here disclosed.

As in *Helvering* v. *Horst,* just decided, the petitioner relies upon opinions here; but obviously they arose upon facts essentially different from those now presented. They do not support his contention. The general principles approved in *Blair* v. *Commissioner,* 300 U. S. 5, and applied in *Helvering* v. *Horst,* are controlling and call for affirmation of the judgment under review.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concur in this opinion.

SMITH *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 33. Argued November 14, 1940.—Decided November 25, 1940.

1. The conviction of a Negro upon an indictment returned by the grand jury of a county in which, at the time of such return and long prior thereto, Negroes were intentionally and systematically excluded from grand jury service, solely on account of their race and color, denies to him the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution. P. 132.
2. Upon review of a state court decision wherein a claim of a right under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. P. 130.
3. The evidence in this case sustains the claim of racial discrimination in the selection of the grand jury by which the Negro defendant was indicted; and, whether such discrimination was accomplished ingeniously or ingenuously, his conviction was void. Pp. 130–132.

136 S. W. 2d 842, reversed.

CERTIORARI, 309 U. S. 651, to review the affirmance of a judgment sentencing the petitioner upon his conviction of a crime. The trial court had overruled a motion to quash the indictment.

Mr. Sam W. Davis, with whom *Messrs. William A. Vinson* and *Harry W. Freeman* were on the brief, for petitioner.

Mr. George W. Barcus, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *Lloyd Davidson,* State Criminal Attorney, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In Harris County, Texas, where petitioner, a negro, was indicted and convicted of rape, negroes constitute

over 20% of the population, and almost 10% of the poll-tax payers; a minimum of from three to six thousand of them measure up to the qualifications prescribed by Texas statutes for grand jury service. The court clerk, called as a state witness and testifying from court records covering the years 1931 through 1938, showed that only 5 of the 384 grand jurors who served during that period were negroes; that of 512 persons summoned for grand jury duty, only 18 were negroes; that of these 18, the names of 13 appeared as the last name on the 16 man jury list, the custom being to select the 12 man grand jury in the order that the names appeared on the list; that of the 5 negroes summoned for grand jury service who were not given the number 16, 4 were given numbers between 13 and 16, and 1 was number 6; that the result of this numbering was that of the 18 negroes summoned, only 5 ever served, whereas 379 of the 494 white men summoned actually served; that of 32 grand juries empanelled, only 5 had negro members, while 27 had none; that of these 5, the same individual served 3 times, so that only 3 individual negroes served at all; that there had been no negroes on any of the grand juries in 1938, the year petitioner was indicted; that there had been none on any of the grand juries in 1937; that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none.

It is petitioner's contention that his conviction was based on an indictment obtained in violation of the provision of the Fourteenth Amendment that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." And the contention that equal protection was denied him rests on a charge that negroes were, in 1938 and long prior thereto, intentionally and systematically excluded from grand jury service solely on account of their race and color. That a conviction based upon an indictment returned by a jury so

selected is a denial of equal protection is well settled,[1] and is not challenged by the state. But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment.[2] But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.[3]

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it [4] but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial dis-

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[1] *Pierre* v. *Louisiana,* 306 U. S. 354; *Martin* v. *Texas,* 200 U. S. 316, 319; *Carter* v. *Texas,* 177 U. S. 442, 447.

[2] 136 S. W. 2d 842.

[3] *Chambers* v. *Florida,* 309 U. S. 227, 228; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Norris* v. *Alabama,* 294 U. S. 587, 590.

[4] "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . ." 18 Stat. 336, 8 U. S. C. § 44.

crimination whatsoever.[5] But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list.

The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted that they did not select any negroes, although the subject was discussed, but both categorically denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such. One said that their failure

[5] The statutory scheme is set out in the Texas Code of Criminal Procedure, Articles 333–350. At each term of court, three grand jury commissioners are appointed; at the time they are sworn in, the judge instructs them as to their duties; they are required to take an oath not knowingly to select a grand juror whom they believe unfit or unqualified; they must then retire to a room in the court house, taking the county assessment roll with them; while in that room they must select a grand jury of 16 men from different parts of the county; they must next seal in an envelope the list of the 16 names selected; thirty days before court meets the clerk is required to make a copy of the list and deliver it to the sheriff; thereupon the sheriff must summon the jurors.

to select negroes was because they did not know the names of any who were qualified and the other said that he was not personally acquainted with any member of the negro race. This is, at best, the testimony of two individuals who participated in drawing 1 out of the 32 jury panels discussed in the record. But even if their testimony were given the greatest possible effect, and their situation considered typical of that of the 94 commissioners who did not testify, we would still feel compelled to reverse the decision below. What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

Reversed.

FEDERAL COMMUNICATIONS COMMISSION *v.* COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.*

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

No. 39. Argued November 15, 1940.—Decided November 25, 1940.

1. Section 402 (b) of the Communications Act of 1934, as amended, does not authorize an appeal to the Court of Appeals for the District of Columbia from an order of the Federal Communications Commission denying an application under § 310 (b) for consent to the transfer of a radio station license. P. 134.

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* Together with No. 40, *Federal Communications Commission* v. *Associated Broadcasters, Inc.*, also on writ of certiorari, 310 U. S. 617, to the Court of Appeals for the District of Columbia.

2. Such an order is not one refusing an "application for a radio station license," within the meaning of § 402 (a) or § 402 (b) (1). P. 136.
3. Implied adoption of a judicial construction upon the re-enactment of a statute is merely one factor in the total effort to give fair meaning to statutory language. P. 137.

71 App. D. C. 206; 108 F. 2d 737, reversed.

CERTIORARI, 310 U. S. 617, to review the denial of motions in two cases to dismiss appeals from an order of the Federal Communications Commission refusing consent to the transfer of a radio station license. The proposed transferor and the proposed transferee had joined in an application to the Commission for such consent, and took separate appeals from the order denying it.

Mr. Telford Taylor, with whom *Solicitor General Biddle* and *Messrs. Joseph L. Rauh, Jr., Benedict P. Cottone,* and *Harry M. Plotkin* were on the brief, for petitioner.

Mr. Duke M. Patrick for respondent in No. 39. No appearance for respondent in No. 40.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought these two cases here, 310 U. S. 617, because they raise questions of importance touching the distribution of judicial authority under the Communications Act of 1934. (Act of June 19, 1934, 48 Stat. 1064, as amended by the Act of June 5, 1936, 49 Stat. 1475, and by the Act of May 20, 1937, 50 Stat. 189; 47 U. S. C. § 151 *et seq.*)

Insofar as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. Barring the exceptions immediately to be noted, § 402 (a) assimi-

lates "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act" to the scheme of the Act of October 22, 1913 (38 Stat. 219), pertaining to judicial review of orders of the Interstate Commerce Commission. Therefore as to the general class of orders dealt with by § 402 (a) jurisdiction rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court. Excepted from this scheme of jurisdiction is "any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license." These five types of orders, thus placed beyond the jurisdiction of the district courts, are then affirmatively dealt with by § 402 (b). As to them, that provision gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia," with ultimate resort to this Court only upon writ of certiorari.

Our problem, then, is to apply this scheme of jurisdiction to the situation before us. Acting under § 310 (b) of the Communications Act, the Commission refused consent to an assignment to the Columbia Broadcasting System of California of a radio station license held by the Associated Broadcasters. Columbia and Associated thereupon sought in the Court of Appeals for the District review of the Commission's denial of consent. The Commission moved to dismiss the appeals for want of jurisdiction. The court below, with one justice dissenting, denied the motions and entertained jurisdiction. 71 App. D. C. 206; 108 F. 2d 737.

The crux of the controversy is whether an order of the Commission, in the exercise of its authority under § 310 (b), denying consent to an assignment of a radio station license is an order "refusing an application . . . for

a radio station license," within the meaning of §§ 402 (a) and (b). If it is, the court below was seized of jurisdiction. If it is not, that court was without it. In the language quoted in the margin, Congress has made the choice and it is for us to ascertain it.[1]

Primarily, our task is to read what Congress has written. As a matter of common speech, the excepted types of orders which alone can come before the Court of Appeals for the District of Columbia do not include an order refusing the consent required by § 310 (b). Refusing "an application . . . for a radio station license" is hardly an apt way to characterize refusal to assent to the transfer of such a license from an existing holder. Nor is there anything to indicate that the peculiar idiom of the industry or of administrative practice has modified

[1] Sec. 402: "(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

"(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

If the assignee is covered § 402 (b) (1) the assignor would be within § 402 (b) (2).

the meaning that ordinary speech assigns to the language. Instead of assimilating the requirements for transfers to applications for new licenses or renewals, the Act as a whole sharply differentiates between them. Different considerations of policy may govern the granting or withholding of licenses from those which pertain to assent to transfers. And Congress saw fit to fashion different provisions for them. Compare §§ 307, 308, 309, and 319 with § 310 (b). There are also differences in the formulated administrative practice for disposing of applications for station licenses and requests for consents to transfer. Nor do some similarities in treatment make irrelevant the differences.

A sensible reading of the jurisdictional provisions in the context of the substantive provisions to which they relate gives no warrant for denying significance to the classification made by Congress between those orders for which review can only come before the local district courts, and those five types of orders, explicitly characterized, which alone can come before the Court of Appeals for the District. And an order denying consent to an application for a transfer is not one of those five, for it is not an application for "a radio station license" in any fair intendment of that category.

What thus appears clear from a reading of the Communications Act itself is not modified by the collateral materials which have been pressed upon us. That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached, in itself proves what dubious light they shed. What was said in Committee Reports, and some remarks by the proponent of the measure in the Senate, are sufficiently ambiguous insofar as this narrow issue is concerned, to invite mutually destructive dialectic, but not strong enough either to strengthen or weaken the force of what

Congress has enacted. See Sen. Rep. No. 781, 73d Cong., 2d Sess., pp. 9–10; House Rep. No. 1918, 73d Cong., 2d Sess., pp. 49–50; 78 Cong. Rec. 8825–26. This leaves for consideration only the bearing of an earlier decision by the Court of Appeals for the District on this very question, arising under the predecessor of the Communications Act, the Radio Act of 1927, 44 Stat. 1162, as amended, 46 Stat. 844. In that Act, § 16 covered, for present purposes, the provisions of § 402 (b) of the Communications Act. *Inter alia,* it provided for appeals to the court below by "any applicant for a station license." Construing that provision, the court below in *Pote* v. *Federal Radio Commission,* 67 F. 2d 509, held that it was without jurisdiction over an appeal by a transferee to whom consent to a transfer had been denied. The present § 402 was adopted after this decision and another decision by the same court within this field of jurisdiction (*Goss* v. *Federal Radio Commission,* 67 F. 2d 507) had been presumably brought to the attention of Congress. Hearings on S. 2910, 73d Cong., 2d Sess., pp. 44–45. On the one hand it is insisted that, in the light of these circumstances, the construction in the *Pote* decision was impliedly enacted by Congress, while respondents urge that differences in the provisions regarding the Commission's power over consent to transfers destroy the significance of the *Pote* case. But these changes in § 310 (b), which stiffened the control of the Commission over transfers, are wholly unrelated to the technical question of jurisdiction with which we are now concerned. We are not, however, willing to rest decision on any doctrine concerning the implied enactment of a judicial construction upon reënactment of a statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language. And so, at the lowest, the *Pote* case certainly

does not detract from, but if anything reënforces, the construction required by a clear-eyed reading of the statute.

Reversed.

AMERICAN UNITED MUTUAL LIFE INSURANCE CO. *v.* CITY OF AVON PARK, FLORIDA.

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

No. 31. Argued November 12, 1940.—Decided November 25, 1940.

1. A plan for the composition of the debts of a municipality under Chapter IX of the Bankruptcy Act comprised a refunding plan whereby the municipality's fiscal agent (a private corporation) would defray the expenses incident to the refunding and would be reimbursed therefor and compensated for its services by an assessment of participating bondholders. A stated charge was to be made for each $1000 bond, but the charge would be less if the bondholder should sell to the fiscal agent accrued interest coupons at a third of their face value. The fiscal agent solicited acceptances of the plan, and acceptances representing more than two-thirds of all claims affected were obtained. Exclusive of claims held by the fiscal agent as creditor and voted in favor of the plan, however, the two-thirds required for confirmation would have been lacking. The claims held by the fiscal agent were acquired by it at about fifty cents on the dollar, some before and others after it entered into the agency contract with the municipality. It did not appear from the record in the bankruptcy court whether the fiscal agent disclosed to creditors from whom it solicited acceptances: that it was a creditor as well as fiscal agent of the municipality; the extent, or the circumstances of the acquisition, of the claims held by it; or its intent to vote those claims in favor of the plan. No such disclosure was made in the plan. *Held* that an order of the bankruptcy court confirming the plan of composition must be set aside. Pp. 141, 143.
2. Whether the fiscal agent's compensation for services rendered would exceed the "reasonable compensation" authorized by § 83 (b) of the Act, requires evaluation of the aggregate of all benefits which might accrue to it under the plan, including its speculative interests. P. 144.

3. That the fiscal agent's position in the plan is speculative does not dispense with the necessity for the definitive finding demanded by the Act as to the reasonableness of compensation for services rendered. P. 144.
4. To the extent that the benefits accruing to the fiscal agent under the plan might exceed "reasonable compensation" for services rendered, the allowance was not authorized by § 83 (b). P. 144.
5. Also, if excess benefits should accrue to the fiscal agent, the plan would not then comply with § 83 (e) (1), for it would discriminate unfairly in favor of the fiscal agent as creditor. P. 144.
6. Since the fiscal agent in soliciting creditors' acceptances of the plan is not shown to have made full disclosure with respect to its dual capacity as fiscal agent and creditor, it can not be said that the assents were fairly obtained, nor that its acceptance of the plan was in "good faith" within the meaning of § 83 (e) (5). P. 144.
7. The control which the bankruptcy court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto, is to be exercised in accordance with principles of equity, so far as consistent with the Act. P. 145.
8. The duty of the court in cases such as this requires scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, the amount paid therefor, etc. Only after such investigation can the court exercise the "informed, independent judgment" essential to confirmation of a plan. P. 145.
9. It is the responsibility of the court before entering an order of confirmation to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle. P. 146.
10. The bankruptcy court, in permitting claims held by the fiscal agent as creditor to be included in computing the statutory percentage of assents, without protecting other creditors by requiring full disclosure and other appropriate safeguards, and in allowing compensation to the fiscal agent without scrutinizing the latter's speculative interests, did not in this case discharge its responsibilities under the Act. P. 146.
11. The provision of § 83 (b) for allowance of "reasonable compensation" for "services rendered" necessarily implies "loyal and disinterested service in the interest of the persons" for whom the claimant purported to act. P. 147.

12. Approval representing the required percentage of claims affected is not the exclusive test of whether a plan of composition satisfies the statutory standard; it is independent of, not a substitute for, the statutory standard. P. 148.
13. Claims are "controlled" by the municipality and required by § 83 (d) to be excluded in computing the statutory two-thirds required for confirmation of the plan not only when the holder of the claims is an agent of the municipality within the doctrine of *respondeat superior*, but also when there is such close identity of interests between the claimant and the municipality that the claimant's assent to the plan may fairly be said to be more the product of the municipality's influence and to reflect more the municipality's desires than an expression of an investor's independent business judgment. P. 148.
14. Should there be presented in this case another plan of composition involving a fiscal agency contract, the question of the legality of such contract under the state law would be a relevant inquiry for the District Court, as bearing on whether the municipality "is authorized by law to take all action necessary to be taken by it to carry out the plan," within the meaning of § 83 (e) (6). P. 149.

108 F. 2d 1010, reversed.

CERTIORARI, 309 U. S. 651, to review the affirmance of an order confirming a plan for the composition of the debts of a municipality under Chapter IX of the Bankruptcy Act.

Mr. Giles J. Patterson for petitioner.

Mr. Robert J. Pleus for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The District Court confirmed a plan for the composition of the debts of respondent under Ch. IX of the Bankruptcy Act (50 Stat. 653; 52 Stat. 939, 940).[1] The

[1] The Act of August 16, 1937 (50 Stat. 653) under which the petition was filed expired June 30, 1940, except in respect to proceedings initiated on or prior to that date. That Act, however, was amended by

Circuit Court of Appeals affirmed that order. 108 F. 2d 1010. Petitioner, a creditor of the city, having objected to the confirmation in the courts below, brought the case here on a petition for certiorari, which we granted in view of the importance of the problems in the administration of the composition and reorganization provisions of the Act.

The city's composition was a refunding plan worked out by it and its fiscal agent,[2] R. E. Crummer & Co. Pursuant to the fiscal agency contract both parties were to use their best efforts to induce the creditors to participate in the plan. The city was not to pay any of the costs of the refunding, as Crummer was to defray all expenses incident to assembling the bonds, printing the refunding bonds, representing the city in proceedings to validate the new bonds, obtaining a legal opinion approving the bonds, etc. The fiscal agency contract provided that Crummer was to be compensated for its services and reimbursed for its expenses by assessing charges against the participating bondholders. This charge was $40 for each $1000 bond; or in case the bondholders elected to sell Crummer the interest coupons, accrued to July 1, 1937, at one-third of their face amount [3] the charge was to be $20 per $1000 bond.

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the Act of June 28, 1940 (76th Cong. 3d Sess., c. 438, 54 Stat. 667), which, *inter alia*, extended for another two years the time for filing petitions.

[2] R. E. Crummer & Co. is a Delaware corporation organized primarily to represent clients of an affiliate (see *infra*, note 4) who had purchased bonds in Florida. Beginning in 1931, it had handled the debt problems of over 200 taxing units.

[3] Under the original plan all such accrued interest coupons were to be acquired by Crummer at 33⅓% of the face amount, which when refunded into new bonds, would be held by it subject to purchase by the City at not exceeding 50% of the face thereof for the first six months, 60% for the succeeding six months, 70% for the next six months, and 75% for the following six months. Due to fears of

Crummer solicited assents to the plan. Approximately 69% of the bondholders accepted. But for the claims held by the Crummer interests,[4] and voted in favor of the plan, the requisite two-thirds statutory vote, however, would not have been obtained. Some of these claims had been purchased prior to the fiscal agency contract, some later. The average price was apparently about 50¢ on the dollar. The inference seems clear that some of them were acquired in order to facilitate consummation of the composition by placing them in friendly hands. But the record does not show whether or not Crummer disclosed to the bondholders when their assents were solicited that it was a creditor as well as the city's fiscal agent, the extent of the claims held by it and its affiliate, the circumstances surrounding their acquisi-

illegality, the plan was modified. As modified it provided that compensation of the fiscal agent was to be 4% of the principal debt with the right of any creditor to sell to Crummer the interest accruals at 33⅓% of their face amount. In the latter event the charge against him was reduced to 2% and Crummer held the securities so obtained subject to the right of the city to acquire them at the rates above indicated. The fiscal agent estimated that it would get substantially the same amount of money out of the plan whichever option the bondholders elected.

Interest accruals were to be escrowed. Proceeds of the collection of delinquent taxes were to be remitted to the escrow agent who would reduce the amount owed by the city under the escrow by such amount as would result in the particular proceeds constituting a *pro tanto* payment and discharge at 50% of par during the first six months, 60% during the next six months, 70% during the next six months, and 75% during the following six months.

Thus in effect the interest accruals could be offset against delinquent taxes, the city being able to retire some of its debt at less than par if it could stimulate tax collections. The proceeds received by the escrow agent were to be held for the benefit of the depositors.

[4] R. E. Crummer & Co. and Brown-Crummer Investment Co. R. E. Crummer was president of both. A majority of the boards of both corporations was identical. The Crummer interests had acquired over a third of the claims.

tion, and its intent to vote those claims in favor of the plan. No such disclosure was made in the plan.

The District Court, however, found that the two-thirds of the aggregate amount of claims affected by the plan, required by § 83 (d), 11 U. S. C. § 403 (d), for confirmation, had assented. It also found that Crummer's compensation was fair and reasonable, that the plan and its acceptance were in good faith, and that the plan was fair, equitable and for the best interests of the creditors, and did not discriminate unfairly in favor of any creditor.

We disagree. The order of confirmation must be set aside. It cannot be said that the plan does not discriminate unfairly in favor of any creditor, that the acceptances were in good faith, that the requisite two-thirds vote of approval had been obtained.

Crummer had at least[5] three financial stakes in this composition: (1) the fee to be collected from the bondholders; (2) its speculative position in such of the interest accruals as it might acquire from the bondholders at a third of their face amount; (3) the profit which might accrue to it or its affiliate, as a result of the refunding, on bonds acquired at default prices.

The court found that the first of these items was reasonable. But it apparently deemed the others irrelevant to the inquiry.

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[5] There were other emoluments for Crummer. It was granted "exclusive authority" to act for and on behalf of the city for a period of three years "in all matters connected with, or relating to, the exchange." And in case any bonds or coupons were presented for payment or suit instituted thereon the city agreed to give Crummer notice before any terms of settlement were agreed upon. These provisions, the fact that the Crummer interests hold large blocks of claims acquired at default prices, the likely interest of Crummer in the accrued coupons and its strategic position all point towards future speculative possibilities which are not inconsiderable, whatever may be said of their unhealthy impact on the city and the public investors alike.

Clearly, however, no finding could be made under § 83 (b), 11 U. S. C. § 403 (b), that the compensation to be received by the fiscal agent was reasonable without passing on the worth of the aggregate of all the emoluments accruing to the Crummer interests as a result of consummation of the plan. Since that inquiry would necessitate an appraisal of the fiscal agent's speculative position in the plan, perhaps the definitive finding demanded by the Act could not be made. Yet that is a chance which the fiscal agent, not the bondholders, must take; for it is the agent who is seeking the aid of the court in obtaining one of the benefits of the Act. Moreover, to the extent that the aggregate benefits flowing to the Crummer interests exceeded reasonable compensation for services rendered, their reward would exceed what the court could authorize under § 83 (b), 11 U. S. C. § 403 (b). Furthermore, if any such excess benefits would accrue to them, then the plan would run afoul of § 83 (e) (1), 11 U. S. C. § 403 (e) (1). For in that event the plan would discriminate unfairly in favor of the Crummer interests as creditors.

Hence the lack of that essential finding would be fatal in any case. It is especially serious here in view of the fact that without the vote of the fiscal agent the requisite two-thirds acceptance would not have been obtained. Where it does not affirmatively appear that full and complete disclosure of the fiscal agent's interests was made to the bondholders when their assents were solicited, it cannot be said that those assents were fairly obtained. Cf. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 143. And where without such disclosure the fiscal agent's vote was cast for acceptance of the plan, it cannot be said that such acceptance was in "good faith" within the meaning of § 83 (e) (5), 11 U. S. C. § 403 (e) (5). Here the fiscal agent was acting in a dual capacity. While

it was representing the city, it likewise purported to represent the interests of bondholders. The very minimum requirement for fair dealing was the elementary obligation of full disclosure of all its interests. And the burden was on it to show at least that such disclosure was made. Equity and good conscience obviously will not permit a finding that an acceptance of a plan by a person acting in a representative capacity is in "good faith" where that person is obtaining an undisclosed benefit from the plan.

We have emphasized that full disclosure is the minimum requirement in order not to imply that it is the limit of the power and duty of the bankruptcy court in these situations. As this Court stated in *Securities and Exchange Commission* v. *United States Realty & Improvement Co.,* 310 U. S. 434, 455: "A bankruptcy court is a court of equity, § 2, 11 U. S. C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. . . . A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." And see *Pepper* v. *Litton,* 308 U. S. 295, 304, *et seq.* These principles are a part of the control which the court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto. As we said in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 114, "The court is not merely a ministerial register of the vote of the several classes of security holders." The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, the amount paid therefor, and the like. See *Continental Insurance Co.* v.

Louisiana Oil Refining Corp., 89 F. 2d 333. Only after such investigation can the court exercise the "informed, independent judgment" (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436; *Case* v. *Los Angeles Lumber Products Co., supra*, p. 115) which is an essential prerequisite for confirmation of a plan. And that is true whether the assents to the plan have been obtained prior to the filing of the petition or subsequently thereto. Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few, or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need. The requirement of full, unequivocal disclosure; the limitation of the vote to the amount paid for the securities (*In re McEwen's Laundry, Inc.*, 90 F. 2d 872); the separate classification of claimants (see *First National Bank* v. *Poland Union*, 109 F. 2d 54, 55); the complete subordination of some claims (*Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307; *Pepper* v. *Litton, supra*), indicate the range and type of the power which a court of bankruptcy may exercise in these proceedings. That power is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy. The necessity for its exercise (*Pepper* v. *Litton, supra*, p. 308) is based on the responsibility of the court before entering an order of confirmation to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle. Neglect of that duty is apparent here by inclusion of the vote of the claims held by the Crummer interests in computing the requisite statutory assents, without protection of the public investors through the

requirement of full disclosure and of other appropriate safeguards. By the same token allowance of compensation to Crummer without scrutiny of Crummer's speculation in the securities does not comport with the standards for surveillance required of courts of bankruptcy before confirming plans of composition or reorganization or before making such allowances. The scope of the power of the court embraces denial of compensation to those who have purchased or sold securities during or in contemplation of the proceedings. As in case of reorganizations under former § 77B, the provision in § 83 (b), 11 U. S. C. § 403 (b), for allowance of "reasonable compensation" for "services rendered" necessarily implies "loyal and disinterested service in the interest of the persons" for whom the claimant purported to act. *In re Paramount-Publix Corp.,* 12 F. Supp. 823, 828.

Beyond that is the question of unfair discrimination to which we have adverted. Compositions under Ch. IX, like compositions under the old § 12, envisage equality of treatment of creditors. Under that section and its antecedents, a composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another. *In re Sawyer,* Fed. Cas. No. 12,395; *In re Weintrob,* 240 F. 532; *In re M. & H. Gordon,* 245 F. 905. As stated by Judge Lowell in *In re Sawyer, supra,* "if a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an honest and unbiased vote." That rule of compositions is but part of the general rule of "equality between creditors" (*Clarke* v. *Rogers,* 228 U. S. 534, 548) applicable in all bankruptcy proceedings. That principle has been imbedded by Congress in Ch. IX by the express provision against unfair discrimination. That principle as applied

to this case necessitates a reversal. In absence of a finding that the aggregate emoluments receivable by the Crummer interests were reasonable, measured by the services rendered, it cannot be said that the consideration accruing to them, under or as a consequence of the adoption of the plan, likewise accrued to all other creditors of the same class. Accordingly, the imprimatur of the federal court should not have been placed on this plan. The fact that the vast majority of security holders may have approved a plan is not the test of whether that plan satisfies the statutory standard. The former is not a substitute for the latter. They are independent. See *Case* v. *Los Angeles Lumber Products Co., supra,* pp. 114–115.

Since the cause must be remanded, there are two other matters which should be mentioned. Section 83 (d), 11 U. S. C. § 403 (d), provides that in computing the statutory two-thirds vote necessary for confirmation of a plan all claims "owned, held, or controlled" by the city shall be excluded. So far as appears, the claims held by the Crummer interests were not owned by or held for the city. Yet it is by no means clear that they were not "controlled" by the city within the meaning of the Act. Claims held by a city's fiscal agent presumptively would seem to fall in that prohibited category. The abuse at which the Act is aimed is not confined to those cases where the holder of the claims is an agent of the city within the strict rules of *respondeat superior.* Rather, the test is whether or not there is such close identity of interests between the claimant and the city that the claimant's assent to the plan may fairly be said to be more the product of the city's influence and to reflect more the city's desires than an expression of an investor's independent, business judgment. Here there was such a close identity of interests between Crummer and the city

vis-à-vis the refunding as to raise grave doubts as to the propriety of allowing those claims to vote in any event. That, however, is a question for appropriate findings by the court should another plan be presented.

Petitioner also urges that the fiscal agency contract between Crummer and the city was illegal under the decisions of the Supreme Court of Florida in *Taylor* v. *Williams,* 142 Fla. 402, 562, 756; 195 So. 175, 181, 184; 196 So. 214, and *W. J. Howey Co.* v. *Williams,* 142 Fla. 415, 562, 756; 195 So. 181, 184; 196 So. 214. Under § 83 (e) (6), 11 U. S. C. § 403 (e) (6), the court must be satisfied that the city "is authorized by law to take all action necessary to be taken by it to carry out the plan" before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds or the levy of assessments therefor. The courts below did not pass on the applicability of these recent Florida decisions to this fiscal agency contract, since they were decided after the Circuit Court of Appeals affirmed the order of confirmation. Nor do we undertake to decide the question, in view of our disposition of the case. It is, however, a relevant inquiry to be made by the District Court as, if and when another plan of composition is presented, which directly or indirectly involves any such fiscal agency contract.

For the reasons stated we reverse the judgment below and remand the cause to the District Court for proceedings in conformity with this opinion.

Reversed.

BACARDI CORPORATION OF AMERICA *v.* DOMENECH, TREASURER OF PUERTO RICO, ET AL.

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

No. 21. Argued October 22, 1940.—Decided December 9, 1940.

1. The General Inter-American Convention for Trade-Mark and Commercial Protection signed at Washington on February 20, 1929, and ratified by the United States, by Cuba and by other American countries, is a part of our law; and no special legislation in the United States was necessary to make it effective there. P. 161.
2. The treaty binds the Territory of Puerto Rico, and can not be overridden by the Puerto Rican legislature. P. 162.
3. The treaty should be construed liberally to give effect to its purpose. Where a provision fairly admits of two constructions, one restricting, the other enlarging, rights claimed under it, the more liberal construction is to be preferred. P. 163.
4. When a foreign mark is entitled, by virtue of the treaty, to registration in a ratifying State, and is duly registered there, a substantive right to its protection in that State attaches. P. 163.
5. A ratifying State can not escape the obligation of protecting the owner in his use of a foreign trade-mark, duly registered under the treaty, by refusing that protection to its own nationals. P. 164.

   It is the plain purpose of the treaty to prevent a ratifying State from denying protection to the foreign mark because of its origin or previous registration in the foreign country. Protection against piracy necessarily presupposes the right to use the marks thus protected.
6. The treaty recognizes the right to transfer separately for each country the right to use and exploit trade-marks registered under it when the transfer is executed in accordance with the law of the place where it is made and is duly recorded. P. 165.
7. A statute of Puerto Rico prohibiting the use on distilled spirits manufactured in Puerto Rico of trade-marks which had previously been used anywhere outside of Puerto Rico, excepting any that had been used on spirits manufactured in Puerto Rico on or before a date specified or that had been used exclusively in continental United States prior to that date, *held* discriminatory, in violation

of the above-mentioned treaty, when applied to Cuban trade-marks on rum, duly registered but not within the statutory exceptions, and which a corporation, under license from the Cuban owner, sought to use in connection with the manufacture and sale of rum in Puerto Rico. Pp. 154, 167.

8. The fact that a corporation applied, under Puerto Rican laws, for a permit to engage in the business of rectifying distilled spirits in Puerto Rico, did not estop it from questioning the validity of later legislation discriminating against its foreign trade-marks in violation of the treaty. P. 166.
9. A regulation of the Puerto Rican legislature providing that distilled spirits (with certain exceptions not material here) may be shipped or exported from the Island only in containers holding not more than one gallon, is within the local police power and not inconsistent with the Federal Alcohol Administration Act. P. 167.

109 F. 2d 57, reversed in part; affirmed in part.

CERTIORARI, 309 U. S. 652, to review a decree which reversed a decree permanently enjoining the Treasurer of Puerto Rico from enforcing against the plaintiff corporation legislation regulating the use of trade-marks on distilled spirits and forbidding export of spirits in bulk.

Messrs. Edward S. Rogers and *Preston B. Kavanagh,* with whom *Messrs. Karl D. Loos* and *Jerome L. Isaacs* were on the brief, for petitioner.

Mr. William Cattron Rigby, with whom *Messrs. George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* were on the brief, for Manuel V. Domenech, Treasurer of Puerto Rico, respondent; and *Mr. David A. Buckley, Jr.* for Destileria Serralles, Inc., intervenor-respondent.

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

This case presents the question of the validity of legislation of Puerto Rico prohibiting the use of trade marks, brands, or trade names, on distilled spirits manufactured

in Puerto Rico if the marks, brands, or names had previously been used anywhere outside Puerto Rico, unless they had been used on spirits manufactured in Puerto Rico on or before February 1, 1936, or in the case of trade marks they had been used exclusively in continental United States prior to that date.

Petitioner, Bacardi Corporation of America, brought this suit in the District Court of the United States for Puerto Rico against the Treasurer of Puerto Rico to have this legislation declared invalid and its enforcement enjoined. The complaint charged invalidity under the Fifth Amendment and the commerce clause of the Constitution of the United States, the Organic Act of Puerto Rico, the Federal Alcohol Administration Act, and the General Inter-American Trade-Mark Convention of 1929. The Destileria Serralles, Inc., a Puerto Rican corporation, was permitted to intervene as a defendant.

The District Court held the legislation invalid and issued a permanent injunction. The Circuit Court of Appeals reversed the decree and directed the dismissal of the complaint. 109 F. 2d 57. In view of the importance of the questions, we granted certiorari. 309 U. S. 652.

The findings of the District Court, which were not disturbed by the rulings of the Circuit Court of Appeals, show the following:

Petitioner, Bacardi Corporation of America, is a Pennsylvania corporation authorized to manufacture distilled spirits. By agreement, petitioner became entitled to manufacture and sell rum in Puerto Rico under the trade marks and labels of Compania Ron Bacardi, S. A., a Cuban corporation. For more than twenty years, save for the period during national prohibition, the Cuban corporation and its predecessors had sold rum in Puerto Rico and throughout the United States under trade marks

which included the word "Bacardi," "Bacardi y Cia," the representation of a bat in a circular frame, and certain distinctive labels. These trade marks were duly registered in the United States Patent Office and in the Office of the Executive Secretary of Puerto Rico prior to the legislation here in question.

Bacardi rum has always been made according to definite secret processes, has been extensively advertised and enjoys an excellent reputation. Under petitioner's agreement with the Cuban corporation, all rum designated by the described trade marks and labels was to be manufactured under the supervision of representatives of the Cuban corporation and to be the same kind and quality as the rum that the latter manufactured and sold.

In March, 1936, petitioner arranged for the installation of a plant in Puerto Rico. Since March 31, 1936, petitioner has been duly licensed to do business in Puerto Rico under its laws relating to foreign corporations. Petitioner's basic permits from the Federal Alcohol Administration were amended so as to enable petitioner to operate in Puerto Rico and its labels were approved. Petitioner rented a building in Puerto Rico and spent large sums in installing its plant.

On May 15, 1936, the legislature of Puerto Rico passed Act No. 115 known as the "Alcoholic Beverage Law" which, after providing for permits, prohibited the holder of a permit from manufacturing any distilled spirits which were "locally or nationally known under a brand, trade name, or trade-mark previously used on similar products manufactured in a foreign country, or in any other place outside Puerto Rico," with a proviso excepting brands, trade names, or trade marks used on spirits "manufactured in Puerto Rico on February 1, 1936," and also "any new brand, trade name, or trade-mark which

may in the future be used in Puerto Rico." [1] This Act was declared to be of an experimental nature. It was repealed by Act No. 6 of June 30, 1936, which contained a similar provision and added a prohibition against exports in bulk.[2] That Act was to be in force until September 30, 1937. It was, however, converted into permanent legislation by the provisions of Act No. 149 of May 15, 1937, known as the "Spirits and Alcoholic Beverages Act." [3]

Declaring it to be the policy of the legislature "to protect the renascent liquor industry of Puerto Rico from all competition by foreign capital," [4] the Act of 1937 provided in §§ 44 and 44 (b) as follows:

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[1] These provisions were as follows (Laws of Puerto Rico, 1936, pp. 610, 644, 646):

"(g) No holder of a permit under this title shall manufacture, distill, rectify, or bottle, either for himself or for others, any distilled spirit locally or nationally known under a brand, trade name, or trade-mark previously used on similar products manufactured in a foreign country, or in any other place outside Puerto Rico; *Provided,* (1) That such limitation, aimed at protecting the industry already existing in Puerto Rico, shall not apply to any brand, trade name, or trade-mark used by a manufacturer, rectifier, distiller, or bottler of distilled spirits manufactured in Puerto Rico on February 1, 1936; and (2) such restriction shall not apply to any new brand, trade name, or trade-mark which may in the future be used in Puerto Rico."

"(h) If any kind, type, or brand of distilled spirits of a foreign origin becomes nationally or internationally known by reason of its bearing or showing as its brand, trade name, or trade-mark, the proper name of the manufacturer thereof, such name shall not, in any manner or form whatever, appear on the labels for any distilled spirit of said kind or type manufactured, distilled, rectified, or bottled in Puerto Rico."

[2] Laws of Puerto Rico, Third Special Session, 1936, p. 78.

[3] Laws of Puerto Rico, 1937, p. 392.

[4] This declaration is as follows:

"Section 1 (b). *Declaration of Policy.* It has been and is the intention and the policy of this Legislature to protect the renascent

"Section 44.—No holder of a permit granted in accordance with the provisions of this or of any other Act shall distill, rectify, manufacture, bottle, or can any distilled spirits, rectified spirits, or alcoholic beverages on which there appears, whether on the container, label, stopper, or elsewhere, any trade mark, brand, trade name, commercial name, corporation name or any other designation, if said trade mark, brand, trade name, commercial name, corporation name, or any other designation, design, or drawing has been used previously, in whole or in part, directly or indirectly, or in any other manner, anywhere outside the Island of Puerto Rico: *Provided,* That this limitation shall not apply to the designations used by a distiller, rectifier, manufacturer, bottler, or canner of distilled spirits manufactured in Puerto Rico on or before February 1, 1936."

"Section 44 (b).—Distilled spirits, with the exception of ethylic alcohol, 180° proof or more, industrial alcohol, alcohol denatured according to authorized formulas, and denatured rum for industrial purposes, may be shipped or exported from Puerto Rico to foreign countries, to the continental United States, or to any of its territories or possessions, or imported into Puerto Rico, only in containers holding not more than one gallon, and each container shall bear the corresponding label containing the information prescribed by law and by the regulations of the Treasurer; . . ." [5]

It is these sections which petitioner attacks.

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liquor industry of Puerto Rico from all competition by foreign capital so as to avoid the increase and growth of financial absenteeism and to favor said domestic industry so that it may receive adequate protection against any unfair competition in the Puerto Rican market, the continental American market, and in any other possible purchasing market."

[5] There followed in § 44 (b), after the provision quoted in the text, a proviso relating to the liquidation of a stock of rum where a rectifier wishes to withdraw from business.

Section 7 of the Act of 1937 amended the proviso of § 44 so as to make its limitation applicable, in regard to trade marks only, to such "as shall have been used exclusively in the continental United States" prior to February 1, 1936.[6] Petitioner asserts that in the absence of this last provision, there would have been two distillers whose trade marks would be subject to the prohibition of § 44, that is, petitioner and one other; and that § 7 protected the other manufacturer, leaving petitioner, whose marks had been used in foreign countries and not exclusively in continental United States, the only concern affected by the prohibition. The District Court said that the Act had the appearance of being framed so as to exclude only the plaintiff and that it was difficult to conceive of "a more glaring discrimination." In this relation petitioner cites the critical reference in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86, to a statute which "bristles with severities that touch the plaintiff alone." The Circuit Court of Appeals while recognizing the immediate bearing of the provision as thus challenged sustained it "as applying to all who might later engage in the business."

That construction, however, does not touch the essential character of the discrimination which the statute seeks to effect in the use of trade marks. The statute does not deal with the admission of corporations, foreign to Puerto Rico, for the purpose of transacting business in the Island. Petitioner received its local license. Nor

[6] Section 7 is as follows: "In regard to trade marks, the provisions of the *Proviso* of Section 44 of Act No. 6, approved June 30, 1936, and which is hereby amended, shall be applicable only to such trade marks as shall have been used exclusively in the continental United States by any distiller, rectifier, manufacturer, bottler, or canner of distilled spirits prior to February 1, 1936, provided such trade marks have not been used, in whole or in part, by a distiller, rectifier, manufacturer, bottler, or canner of distilled spirits outside of the continental United States, at any time prior to said date."

does the statute prohibit the manufacture of rum in Puerto Rico. That is allowed. Petitioner received permits from Puerto Rico for that manufacture as well as the basic permits from the Federal Alcohol Administration. The statutory restriction is not on doing business or manufacturing apart from the use of petitioner's trade marks and labels to designate its product. As to these trade marks and labels, the prohibition does not rest on lack of proper registration under the local law. Petitioner's trade marks have been duly registered in the United States and Puerto Rico. Nor does the prohibition of use proceed on the ground that the trade marks, as such, are invalid. The Cuban corporation which licensed petitioner to manufacture and sell Bacardi products and to use Bacardi trade marks had for many years sold its rum in Puerto Rico, although the rum was not manufactured there. There is no question of deception or unfair methods of competition. Petitioner is prohibited from the use of its trade marks, although valid and duly registered and although the product to which they are applied is otherwise lawfully made and the subject of lawful sale, solely because the marks had previously been used outside Puerto Rico and had not been used on spirits manufactured in Puerto Rico, or exclusively in continental United States, prior to February 1, 1936.

The first question thus presented is whether this discriminatory enactment conflicts with the General Inter-American Convention for Trade Mark and Commercial Protection signed at Washington on February 20, 1929.[7]

This treaty was the culmination of the efforts of many years to secure the coöperation of the American States in

[7] The Convention was ratified by the United States on February 11, 1931, and proclaimed February 27, 1931. 46 Stat. 2907. It was ratified by Cuba in 1930. *Id.*, p. 2976. It has also been ratified by Colombia, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru. Bulletin, U. S. Trade-Mark Association, 1936, p. 174.

uniform trade mark protection. As previous Conventions had not proved satisfactory,[8] the Sixth International Conference of American States, held at Havana in 1928, recommended to the Governing Board of the Pan American Union the calling of a special conference "for the purpose of studying in its amplest scope the problem of the Inter-American protection of trade marks." Delegates from the respective States were appointed accordingly and from their proceedings the Convention of 1929 resulted. There were obvious difficulties to be surmounted. These inhered in the differences between the principles of trade mark protection in the Latin American countries, where the civil law is followed, and the common law principles obtaining in the United States. The Convention states that the Contracting States were "animated by the desire to reconcile the different juridical systems which prevail in the several American Republics" and resolved to negotiate the Convention "for the protection of trade marks, trade names, and for the repression of unfair competition and false indications of geographical origin."

By Chapter I, entitled "Equality of Citizens and Aliens as to Trade Mark and Commercial Protection," the respective Contracting States bind themselves to grant to the nationals of the other Contracting States the same rights and remedies which their laws extend to their own nationals.

By Chapter II, entitled "Trade Mark Protection," provision is made for registration or deposit of trade marks in the proper offices of the Contracting States. Article 3 then specifically provides:

"Every mark duly registered or legally protected in one of the Contracting States shall be admitted to registra-

[8] Ladas, "The International Protection of Trade Marks by the American Republics," pp. 11 *et seq.*; Derenberg, "Trade-Mark Protection and Unfair Trading," pp. 779 *et seq.*

tion or deposit and legally protected in the other Contracting States, upon compliance with the formal provisions of the domestic law of such States."

The grounds upon which registration or deposit may be refused or canceled are then set forth, including those cases where the distinguishing elements of marks infringe rights already acquired by another person in the country where registration or deposit is claimed, or where they lack an appropriate distinctive character, or offend public morals, etc. (Art. 3). It is further provided that labels, industrial designs and slogans used to identify or to advertise goods shall receive the same protection accorded to trade marks in countries where they are considered as such, upon compliance with the requirements of the domestic trade mark law (Art. 5). The owner of a mark protected in one of the Contracting States is permitted to oppose registration or deposit of an interfering mark (Art. 7); and the owner of a mark refused registration because of an interfering mark has the right to apply for and obtain the cancellation of the interfering mark on meeting stated requirements. (Art. 8.)

There is another provision that "the use and exploitation of trade marks may be transferred separately for each country" and properly recorded. (Art. 11.)

Chapter III provides for the "Protection of Commercial Names," Chapter IV for the "Repression of Unfair Competition," and Chapter V for the "Repression of False Indications of Geographical Origin or Source." The remaining chapters relate to remedies and contain general provisions. Among the latter is one to the effect that the provisions of the Convention "shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs." An accompanying Protocol establishes an Inter-American Trade Mark Bureau where marks may be registered.

The text of the provisions above mentioned relating to the protection of trade marks is set forth in the margin.[9]

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[9] "Chapter I. Equality of Citizens and Aliens as to Trade Mark and Commercial Protection.

"Article 1. The Contracting States bind themselves to grant to the nationals of the other Contracting States and to domiciled foreigners who own a manufacturing or commercial establishment or an agricultural development in any of the States which have ratified or adhered to the present Convention the same rights and remedies which their laws extend to their own nationals or domiciled persons with respect to trade marks, trade names, and the repression of unfair competition and false indications of geographical origin or source."

"Chapter II. Trade Mark Protection.

"Article 2. The person who desires to obtain protection for his marks in a country other than his own, in which this Convention is in force, can obtain protection either by applying directly to the proper office of the State in which he desires to obtain protection, or through the Inter-American Trade Mark Bureau referred to in the Protocol on the Inter-American Registration of Trade Marks, if this Protocol has been accepted by his country and the country in which he seeks protection."

"Article 3. Every mark duly registered or legally protected in one of the Contracting States shall be admitted to registration or deposit and legally protected in the other Contracting States, upon compliance with the formal provisions of the domestic law of such States.

"Registration or deposit may be refused or canceled of marks:

"1. The distinguishing elements of which infringe rights already acquired by another person in the country where registration or deposit is claimed.

"2. Which lack any distinctive character or consist exclusively of words, symbols, or signs which serve in trade to designate the class, kind, quality, quantity, use, value, place of origin of the products, time of production, or which are or have become at the time registration or deposit is sought, generic or usual terms in current language or in the commercial usage of the country where registration or deposit is sought, when the owner of the marks seeks to appropriate them as a distinguishing element of his mark.

"In determining the distinctive character of a mark, all the circumstances existing should be taken into account, particularly the

This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective. *Head Money Cases,* 112 U. S. 580,

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duration of the use of the mark and if in fact it has acquired in the country where deposit, registration or protection is sought, a significance distinctive of the applicant's goods.

"3. Which offend public morals or which may be contrary to public order.

"4. Which tend to expose persons, institutions, beliefs, national symbols or those of associations of public interest, to ridicule or contempt.

"5. Which contain representations of racial types or scenes typical or characteristic of any of the Contracting States, other than that of the origin of the mark.

"6. Which have as a principal distinguishing element, phrases, names or slogans which constitute the trade name or an essential or characteristic part thereof, belonging to some person engaged in any of the other Contracting States in the manufacture, trade or production of articles or merchandise of the same class as that to which the mark applied." . . .

"Article 5. Labels, industrial designs, slogans, prints, catalogues or advertisements used to identify or to advertise goods, shall receive the same protection accorded to trade marks in countries where they are considered as such, upon complying with the requirements of the domestic trade mark law." . . .

"Article 7. Any owner of a mark protected in one of the Contracting States in accordance with its domestic law, who may know that some other person is using or applying to register or deposit an interfering mark in any other of the Contracting States, shall have the right to oppose such use, registration or deposit and shall have the right to employ all legal means, procedure or recourse provided in the country in which such interfering mark is being used or where its registration or deposit is being sought, and upon proof that the person who is using such mark or applying to register or deposit it, had knowledge of the existence and continuous use in any of the Contracting States of the mark on which opposition is based upon goods of the same class, the opposer may claim for himself the preferential right to use such mark in the country where the opposition is made or priority to register or deposit it in such country, upon compliance with the requirements

598, 599; *Asakura* v. *Seattle,* 265 U. S. 332, 341. The treaty bound Puerto Rico and could not be overriden by the Puerto Rican legislature. *Asakura* v. *Seattle, supra;*

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established by the domestic legislation in such country and by this Convention."

"Article 8. When the owner of a mark seeks the registration or deposit of the mark in a Contracting State other than that of origin of the mark and such registration or deposit is refused because of the previous registration or deposit of an interfering mark, he shall have the right to apply for and obtain the cancellation or annulment of the interfering mark upon proving, in accordance with the legal procedure of the country in which cancellation is sought, the stipulations in Paragraph (a) and those of either Paragraph (b) or (c) below:

"(a) That he enjoyed legal protection for his mark in another of the Contracting States prior to the date of the application for the registration or deposit which he seeks to cancel; and

"(b) that the claimant of the interfering mark, the cancellation of which is sought, had knowledge of the use, employment, registration or deposit in any of the Contracting States of the mark for the specific goods to which said interfering mark is applied, prior to adoption and use thereof or prior to the filing of the application or deposit of the mark which is sought to be cancelled; or

"(c) that the owner of the mark who seeks cancellation based on a prior right to the ownership and use of such mark, has traded or trades with or in the country in which cancellation is sought, and that goods designated by his mark have circulated and circulate in said country from a date prior to the filing of the application for registration or deposit for the mark, the cancellation which is claimed, or prior to the adoption and use of the same." . . .

"Article 11. The transfer of the ownership of a registered or deposited mark in the country of its original registration shall be effective and shall be recognized in the other Contracting States, provided that reliable proof be furnished that such transfer has been executed and registered in accordance with the internal law of the State in which such transfer took place. Such transfer shall be recorded in accordance with the legislation of the country in which it is to be effective.

"The use and exploitation of trade marks may be transferred separately for each country, and such transfer shall be recorded upon the production of reliable proof that such transfer has been

Nielsen v. *Johnson,* 279 U. S. 47, 52; *United States* v. *Belmont,* 301 U. S. 324, 331. According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Nielsen* v. *Johnson, supra; Factor* v. *Laubenheimer,* 290 U. S. 276, 293, 294.

Here, the clear purpose of the treaty is to protect the foreign trade marks which fall within the treaty's purview. The basic condition of that protection, as set forth in Article 3, is that the mark shall have been "duly registered or legally protected" in one of the Contracting States. This phrase shows the endeavor to reconcile the conflicting juridical principles of these States,—the words "or legally protected" being added to the words "duly registered" with the apparent intent to cover trade marks which were entitled under the common law to protection by reason of appropriation and use.[10] If duly registered or legally protected in one of the Contracting States, the mark is to be admitted to registration or deposit and is to be legally protected in the other Contracting States. The condition of that protection in the other States is compliance "with the formal provisions" of the domestic law. This clearly indicates that formalities or procedural requisites are envisaged and that, when these have been met, it is the intent of the treaty to confer a substantive right to the protection of the foreign mark. The intent to give this right of protection if the mark is entitled to registration under the treaty, is shown with

executed in accordance with the internal law of the State in which such transfer took place. Such transfer shall be recorded in accordance with the legislation of the country in which it is to be effective."

[10] Derenberg, *op cit.*, p. 788.

abundant clarity by the provisions of the same article setting forth the grounds, relating to infringement of previously acquired rights or lack of distinctive character, etc., upon which registration may be refused or canceled in the country where protection is sought. Also by the provisions as to the right of the owner of a mark protected in one of the Contracting States to oppose registration in another State of an interfering mark (Art. 7); and by the provisions as to the right of the owner of a mark, having its origin in one State and seeking registration in another, to obtain cancellation or annulment of an interfering mark which stands in the way of the registration sought, upon proving priority of right as stated. (Art. 8.) Then there is the additional recognition of the right to transfer the ownership of a registered mark and also to transfer separately for each country the use and exploitation of trade marks when the transfer is executed in accordance with the law of the place where it is made and is duly recorded. It will be observed that the right of protection of the foreign marks, on compliance with the prescribed formalities, is accorded in each of the ratifying States irrespective of citizenship or domicile.[11] When the foreign mark is entitled by virtue of the treaty to registration in a ratifying State, and is duly registered there, the substantive right to its protection in that State attaches.

In this view, the contention that a ratifying State, on due registration of a foreign mark in accordance with the treaty, is not bound to protect the owner in the use of that mark provided it refuses that protection to its own nationals necessarily fails. Undoubtedly the Contracting States are bound respectively to give to the nationals of the other Contracting States the same rights and remedies that are extended to their own nationals.

[11] See Bulletin, U. S. Trade Mark Association, 1931, p. 173; Derenberg, *op. cit.*, p. 788.

That is provided in Article 1. But that provision does not exhaust the rights given by the treaty. These rights under Article 3 extend to the legal protection of the foreign marks when duly registered. When protection is sought for such marks a ratifying State cannot escape the obligations of the treaty and deny protection by the simple device of embracing its own nationals in that denial. That would make a mockery of the treaty. It is its plain purpose to prevent a ratifying State from denying protection to the foreign mark because of its origin or previous registration in a foreign country. It is said that the object of the treaty is to prevent piracy. That is true, but the argument does not meet the issue. Protection against piracy necessarily presupposes the right to use the marks thus protected.

We are here concerned with the construction of the treaty only as it involves the determination of the validity of the statutory discrimination against the foreign marks which have been duly registered in the United States and Puerto Rico. The Bacardi marks are of Cuban origin. We must assume upon this record that they were duly registered and were valid in Cuba. Both the United States and Cuba have ratified the treaty.[12] The right of the Cuban corporation which owned the marks to make a separate transfer to petitioner of the right to use and exploit them in Puerto Rico is recognized by the treaty. Despite this, Puerto Rico has attempted to deny the right to use these marks on rum manufactured in Puerto Rico for the sole reason that the marks had been used outside Puerto Rico and had not been used on spirits made there, or exclusively in continental United States, before the given date. That is, the very fact of

[12] The Solicitor General has submitted to the Court a communication by the Cuban Embassy in Washington to the Secretary of State of the United States relating to the interest of Cuban nationals and the Cuban Government in the question here presented.

origin in Cuba, which makes the treaty applicable, is asserted as a ground for denying the right to use the trade marks, duly registered, on a product otherwise lawfully manufactured in Puerto Rico.

That Puerto Rico makes its rule applicable to its own citizens who may possess such foreign marks cannot avail to purge the discrimination of its hostility to the treaty. The same reasoning, if admitted to sustain this particular discrimination, would justify as against the treaty a local statute denying the right to use in Puerto Rico any foreign trade mark in any circumstances.

The exigencies of local trade and manufacture which prompted the enactment of the statute cannot save it, as the United States in exercising its treaty making power dominates local policy.

We are not impressed by the argument that petitioner is estopped by acts of acquiescence to challenge the validity of the Puerto Rican legislation. It is said that petitioner, having accepted the privilege to engage in the local business, is bound by the prescribed conditions. The basis of the contention fails. It does not appear that petitioner applied for a permit under the Act of 1937 which is the subject of attack. Petitioner did apply, on March 31, 1936, for a permit to engage in the business of rectifying distilled spirits. At that time the legislation of Puerto Rico did not discriminate against petitioner's trade marks, and the legislation of May 15, 1936, was of a temporary character. Apart from that, it is not the right to manufacture, aside from the use of trade marks, that is in dispute here but the right to use petitioner's trade marks upon its product. Nothing has been shown to warrant a finding of estoppel to assert the invalidity of the discrimination thus attempted in violation of the treaty. *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 468; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S.

494, 507; *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, 497; *Frost* v. *Corporation Commission,* 278 U. S. 515, 527, 528.

We conclude that, upon this ground of repugnance to the treaty, the decree of the District Court insofar as it enjoined the enforcement of § 44 of Act No. 6 of June 30, 1936, as amended by Act No. 149 of May 15, 1937, (including the amendment made by § 7 of that Act) with respect to petitioner's trade marks, was right, and that the reversal in that relation by the Circuit Court of Appeals was erroneous.

We have no occasion to consider the other grounds of objection to § 44 which have been urged under the Constitution and laws of the United States and the Organic Act of Puerto Rico.

A different situation is presented with respect to § 44 (b) of Act No. 149 of 1937, prohibiting bulk shipments of distilled spirits. This prohibition does not appear to offend any right conferred by the treaty and we think an adequate basis for it is found in the police power of Puerto Rico as applied to traffic in intoxicating liquors. We have recently said that "The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." *Puerto Rico* v. *Shell Company,* 302 U. S. 253, 261, 262. See, also, *Puerto Rico* v. *Rubert Hermanos,* 309 U. S. 543, 547. As the grant of legislative power in respect of local matters was "as broad and comprehensive as language could make it" (*Puerto Rico* v. *Shell Company, supra*), we think the legislature of Puerto Rico in the exercise of its police power had full authority to deal with the manufacture of, and traffic in, intoxicating liquors, so far as the Island was affected, in the absence of a treaty violation such as we have found in the prohibition of the use of

valid trade marks upon liquors which were otherwise permitted to be manufactured and sold. The legislature of Puerto Rico could thus have absolutely interdicted the manufacture or sale (*Mugler* v. *Kansas,* 123 U. S. 623), the importation into the Island (*State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59, 62; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401, 404) and the exportation from the Island. *Ziffrin* v. *Reeves,* 308 U. S. 132, 139. Having this power, the legislature of Puerto Rico could adopt measures reasonably appropriate to carry out its inhibitions. That broad power necessarily embraced the limited exercise which we find in § 44 (b) with respect to shipments in bulk. Nor do we find anything in the Federal Alcohol Administration Act which militates against that provision. The Circuit Court of Appeals did not err in its decision in this respect.

The decree of the Circuit Court of Appeals in relation to § 44 is reversed and the decree of the District Court is modified so as to eliminate the injunction against the enforcement of § 40 [13] and § 44 (b) of Act No. 149 of May 15, 1937, and as thus modified is affirmed.

It is so ordered.

[13] Section 40 was embraced in the decree of the District Court but is not the subject of attack in this Court.

FIDELITY UNION TRUST CO. ET AL., EXECUTORS, *v.* FIELD.

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

No. 32. Argued November 12, 13, 1940.—Decided December 9, 1940.

1. Where the applicable rule of decision is the state law, the duty of the federal court is to ascertain and apply that law even though it has not been expounded by the highest court of the State. P. 177.
2. An intermediate state court in declaring and applying the state law is acting as an organ of the State, and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. P. 177.
3. Certain statutes of New Jersey had been held by the state Court of Chancery, in two cases decided independently by two Vice-Chancellors, not to have changed the preëxisting law of the State with respect to the insufficiency of a mere savings bank deposit made by a decedent in his own name as "trustee" for another, but over which he exercised complete control during his life, to establish a gift *inter vivos* or to create a trust as against the decedent's legal representatives. So far as appeared, the Court of Appeals of New Jersey had not expressed any opinion on the construction or effect of these statutes, and the decisions of the Chancery court stood as the only exposition of the relevant state law. *Held,* in a case presenting the same question, that a federal court was bound to follow the decisions of the Chancery court, and was not at liberty to reject them merely because it did not agree with their reasoning. P. 178.
4. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule, simply because of diverse citizenship, for litigants in the federal courts. P. 180.

108 F. 2d 521, reversed; District Court affirmed.

CERTIORARI, 309 U. S. 652, to review the reversal of a decree of the District Court which declined to fasten a trust on a savings bank account. Jurisdiction was by diversity of citizenship.

Mr. Charles Danzig, with whom *Mr. Francis F. Welsh* was on the brief, for petitioners.

The New Jersey statute, as construed by the Court of Chancery of New Jersey, should have been applied. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202; *Rosenthal* v. *New York Life Ins. Co.,* 304 U. S. 263; *Kuhn* v. *Fairmont,* 215 U. S. 349, 372; *Brine* v. *Hartford Fire Ins. Co.,* 96 U. S. 627; *Masino* v. *West Jersey & S. S. R. Co.,* 41 F. 2d 646; *Murray* v. *Payne,* 273 F. 820; *Island Development Co.* v. *McGeorge,* 26 F. 2d 841; cert. den. 278 U. S. 642; cf., *Dorrance* v. *Martin,* 12 F. Supp. 746; aff'd 296 U. S. 393; and, following the Pennsylvania Superior Courts (not the highest court of Pennsylvania) *Taplinger* v. *Northwestern National Bank,* 101 F. 2d 274; *Berlet* v. *Lehigh Valley Silk Mills,* 287 F. 769; cf., *Steinbach* v. *Metzger,* 63 F. 2d 74.

See *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5, at p. 10; *New York Life Ins. Co.* v. *Ruhlin,* 25 F. Supp. 65, aff'd 106 F. 2d 65, 69; cert. den. 309 U. S. 655.

In many other cases, decisions of courts lower than the highest court of the State have been followed: *In re Gilligan,* 152 F. 605; cert. den., 206 U. S. 563; *American Optometric Assn.* v. *Ritholz,* 101 F. 2d 883; cert. den., 307 U. S. 647; *Delaware & Hudson R. Corp.* v. *Bonzih,* 105 F. 2d 541; *In re Wiegand,* 27 F. Supp. 725; *Gallagher* v. *Florida East Coast Ry.,* 196 F. 1000. Cf. *Tipton* v. *Atchison, T. & S. F. Ry. Co.,* 298 U. S. 141.

The Third Circuit has followed the Court of Chancery of New Jersey under the rule of the *Hilt* case in no less than three cases: *Greiman* v. *Metropolitan Life Ins. Co.,* 96 F. 2d 685; *Ex parte Zwillman,* 48 F. 78, appeal dismissed, 144 U. S. 310; *Radin* v. *Commissioner of Internal Revenue,* 33 F. 2d 39, 40.

The rulings of the Court of Chancery carry equal weight with those of the New Jersey Supreme Court in

the Court of Errors and Appeals. *Ramsey* v. *Hutchinson,* 117 N. J. L. 222.

Since it has been uniformly held that the courts of the United States are compelled to observe the decisions of the Supreme Court of New Jersey construing the statutes of that State, as being declaratory of the law of that State (*Erie R. Co.* v. *Hilt,* 247 U. S. 97, 100; *Erie R. Co.* v. *Duplak,* 286 U. S. 440, 443; and *North Philadelphia Trust Co.* v. *Smith,* 13 F. 2d 585, 586), it follows that the decision in the case under review, which, in effect, ignored the decisions of the Court of Chancery likewise construing a statute of that State, must be based on the view that the Court of Chancery is not of equal rank or importance with the State Supreme Court. Such reasoning is patently erroneous. *Pennsylvania R. Co.* v. *Nat. Docks Ry. Co.,* 54 N. J. Eq. 652; *In re appointment of Vice-Chancellors,* 105 N. J. Eq. 759; *Gregory* v. *Gregory,* 67 N. J. Eq. 7, 10–11; *Philadelphia & Camden Ferry Co.* v. *Johnson,* 97 N. J. Eq. 296, 297; *Ramsey* v. *Hutchinson,* 117 N. J. L. 222; *Cassatt* v. *First National Bank of West New York,* 9 N. J. Misc. 222.

The Justices of the Supreme Court and the Chancellor both sit on the Court of Errors and Appeals, but the Chancellor is the president of the Court of Errors and Appeals.

Although, as stated in *Ludlow* v. *Executors of Ludlow,* 4 N. J. L. 451, and in *Whitehead* v. *Gray,* 12 N. J. L. 36, the Supreme Court has the superintendence of all inferior courts both civil and criminal, nowhere is it given superintendence over the Court of Chancery, nor has it ever attempted to assert such superintendence.

Federal courts, charged with a duty to ascertain a state law, need not give greater weight to decisions of a local court than other courts in the same State but outside of its territorial jurisdiction would accord, and are free to make an independent determination of state law

in the same manner and subject to the same limitations as such other state courts. Cf. 53 Harv. Law Rev., No. 5, p. 880. But where the jurisdiction of an important state court, such as the Court of Chancery of New Jersey, is state-wide, its determination as to the prevailing state law should be followed by federal courts, particularly where its decisions have not been challenged for years by any other court in the State, and where the legislature has made no attempt to modify or amend the statute construed but has re-enacted it. See *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368.

Mr. Russell C. MacFall for respondent.

The New Jersey statute of 1932 validated tentative trusts with respect to savings bank deposits.

The Court of Chancery in *Thatcher* v. *Trenton Trust Co.,* 119 N. J. Eq. 408, and *Travers* v. *Reid,* 119 N. J. Eq. 416, and the trial court below, in refusing to apply the 1932 statute, disregarded fundamental rules of construction. No consideration was given to the presumption of the constitutionality of the Act; nor to the presumption that the legislature did not intend to adopt a superfluous law; nor to the rule that where an Act is unambiguous in its terms there is no room for judicial construction because the language is presumed to evince the legislative intent; nor to the rule that where an Act is susceptible of two constructions, that which will validate it must be adopted.

If such decisions carried the weight and authority claimed for them, it would be necessary to recognize that a situation exists whereby the will of the people of the State of New Jersey, as expressed through its legislature, may be set aside solely by the decision of a trial judge.

But that is not the fact. The effect and validity of the statute will ultimately be determined by the Court of Errors and Appeals of New Jersey. The decisions of the Court of Chancery do not settle the law of the State.

Dorman v. *West Jersey Title & Guaranty Co.*, 92 N. J. L. 487, 489; *Flagg* v. *Johansen*, 124 N. J. L. 456; *McGoldrick* v. *Grebenstein*, 108 N. J. L. 335; *Stabel* v. *Gertel*, 11 N. J. Misc. 247, affirmed, 111 N. J. L. 296; *Kicey* v. *Kicey*, 112 N. J. Eq. 459; *Gregory* v. *Gregory*, 67 N. J. Eq. 7. Cf. *Ramsey* v. *Hutchinson*, 117 N. J. L. 222.

Until the effect of the statute is finally determined by New Jersey's court of last resort, or at least by an authoritative appellate court of that State, the federal courts are free to determine whether or not the decisions of the Court of Chancery truly express the local law.

No advantage exists to the litigants because the federal jurisdiction has been invoked, nor should any disadvantage result, and if in an identical action in the state courts those courts are free to disagree with the decisions of the Court of Chancery, the federal courts likewise are free, and are charged with the duty of determining and applying the applicable local law.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, left untouched the well established rule, reiterated by this Court in *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey County*, 309 U. S. 270, that the federal courts are bound by the decisions of the highest court of the State in matters depending upon the construction of state statutes or constitution.

In *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, this Court found that the decision of the state appellate court was *res judicata*.

In *Russell* v. *Todd*, 309 U. S. 280, this Court followed the decision of the Appellate Division, an intermediate appellate court, not because it felt bound by that decision in the absence of a ruling upon the precise question by the court of last resort, but because the reasoning of the decision was persuasive.

The Circuit Court of Appeals correctly stated the rule: The federal courts should in all instances follow

the law of the State with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are *stare decisis*, and must be followed irrespective of the federal courts' opinion as to what the law ought to be. As to pronouncements of other state courts, however, the federal courts are not so bound, but may conclude that the decision does not truly express the state law.

Other decisions cited or discussed were: *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 532–536; *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627; *New York Life Ins. Co.* v. *Ruhlin*, 25 F. Supp. 65; *DeFeo* v. *Peoples Gas Co.*, 104 N. J. L. 156; *Irving National Bank* v. *Law*, 9 F. 2d 536.

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

In 1935, Edith M. Peck caused the title of a savings bank account standing in her name to be transferred on the records of the bank to "Edith M. Peck, in trust for Ethel Adelaide Field." Miss Peck retained exclusive control over the account, with sole right of withdrawal and right of revocation, and gave no further notice of the existence of a trust.

This suit was brought by Ethel Adelaide Field against the bank and the executors of Miss Peck to obtain a decree that the credit balance of the account belonged to the complainant. The executors denied the validity of the trust and claimed title. The District Court found in favor of the executors upon the ground that under the law of New Jersey there was no trust and no valid gift. The Circuit Court of Appeals reversed the judgment, holding that under a state statute the complainant was entitled to recover. In so ruling, the court declined

to follow contrary decisions of the Chancery Court of New Jersey. 108 F. 2d 521. In view of the importance of the question thus presented, we granted certiorari. 309 U. S. 652.

In 1932, the legislature of New Jersey passed four statutes, in similar terms and approved on the same date, dealing with trust deposits in banks. The text of one of these provisions is set forth in the margin.[1] Prior to these statutes, it had been the law of New Jersey that a mere savings bank deposit made by a decedent in his own name as trustee for another, over which the decedent exercised complete control during his life, was insufficient to establish a gift *inter vivos* or to create a trust as against the decedent's legal representatives. *Nicklas* v. *Parker,* 69 N. J. Eq. 743, affirmed, 71 N. J. Eq. 777; 61 A. 267; *Johnson* v. *Savings Investment & Trust Co.,* 107 N. J. Eq. 547; 153 A. 382, affirmed, 110 N. J. Eq. 466; 160 A. 371.

The statutes of 1932 came before the Chancery Court of New Jersey in 1936, in two cases decided independently by two Vice-Chancellors, *Thatcher* v. *Trenton Trust Co.,*

[1] Chapter 40, New Jersey Session Laws of 1932, § 1, is as follows:

"1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee." See Revised Statutes of New Jersey, 1937, 17: 9–4.

119 N. J. Eq. 408; 182 A. 912, and *Travers* v. *Reid,* 119 N. J. Eq. 416; 182 A. 908. In the *Thatcher* case it appeared that the decedent, at the time of her death in 1934, had two bank balances standing to her credit "in trust for Clifford Thatcher," the complainant. The bill was dismissed. The court found that there were no facts, beyond the mere opening of the account in that manner, "in any way tending to prove the declaration of a trust." The court examined the legislation of 1932, which it was argued had changed the law of the State, and after considering possible purposes of the legislature and analyzing the language employed, which was deemed to be "confused" and "difficult to comprehend," the court decided that the legislation was inoperative to change the law applicable to the facts before the court. In the *Travers* case, the decedent had changed his bank account to his name "in trust for Joseph Jennings," a minor. In a suit by the decedent's executrix to recover the money, a motion by the minor's guardian to strike the bill for want of equity and upon the ground that the fund was the property of the ward or held in trust for him, was denied. After stating the law as it stood before the statutes of 1932, the court concluded that they had not been effective to alter the previous legal requirements of a gift *inter vivos* or a valid trust. These cases were not reviewed by the Court of Errors and Appeals of New Jersey and, so far as appears, that court has not expressed an opinion upon the construction and effect of the statutory provisions.[2]

[2] In *Cutts* v. *Najdrowski,* 123 N. J. Eq. 481; 198 A. 885 (1938), the Court of Errors and Appeals held that the validity of a trust of choses in action created by a transaction *inter vivos* was determined by the law of the place where the transaction occurred, in that case New York. In *Trust Company of New Jersey* v. *Farawell,* 127 N. J. Eq. 45; 11 A. 2d 98 (1940), the Court of Errors and Appeals held that, where the decedent had made a deposit in her name in trust for her daughters, and the savings bank book was

The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound "by the pronouncements of other state courts" but might conclude that "the decision does not truly express the state law." The court held that the statute of 1932 was "clearly constitutional and unambiguous" and that "contrary decisions" of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals* v. *Hale,* 4 How. 37, 54; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78), but it is still the duty of the federal courts, where the state law supplies the rule of decision,[3] to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its deter-

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thereafter in the possession of the daughters and withdrawals were made upon the signatures of the mother and the daughters and were used for maintaining properties devised to the daughters by the mother shortly after the account was opened, there was sufficient evidence to show a presently effective trust. The court said that such a trust depends essentially upon the same principles "that activate a gift *inter vivos,* comprising donative intent, delivery of the subject-matter to the extent that delivery is possible or can be indicated, and the abdication by the donor of dominion over the subject-matter." *Id.,* p. 48. In these cases, the court did not refer to the statutes of 1932 or to the Chancery decisions cited in the above text.

[3] Judiciary Act of 1789, § 34; R. S. 721, 28 U. S. C. 725.

mination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West* v. *American Telephone & Telegraph Co., post,* p. 223. It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation. Equity decrees in New Jersey are entered by the Chancellor, who constitutes the Court of Chancery,[4] upon the advice of the Vice-Chancellors,[5] and these decrees, like the judgments of the Supreme Court of New Jersey, are subject to review only by the Court of Errors and Appeals.[6] We have held that the decision of the Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State's highest court (*Erie Railroad Co.* v.

[4] N. J. Constitution, Art. VI, § 4.

[5] See *Gregory* v. *Gregory,* 67 N. J. Eq. 7, 10, 11; 58 A. 287; *In re Appointment of Vice-Chancellors,* 105 N. J. Eq. 759; 148 A. 570.

[6] Revised Statutes of New Jersey, 2: 27–350, 2: 29–117.

Hilt, 247 U. S. 97, 100, 101; *Erie Railroad Co.* v. *Duplak,* 286 U. S. 440, 444), and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.

While, of course, the decisions of the Court of Chancery are not binding on the Court of Errors and Appeals, a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court "except for cogent and important reasons." *Ramsey* v. *Hutchinson,* 117 N. J. L. 222, 223; 187 A. 650. It appears that ordinarily the decisions of the Court of Chancery, if they have not been disapproved, are treated as binding in later cases in chancery (*Philadelphia & Camden Ferry Co.* v. *Johnson,* 94 N. J. Eq., 296, 297; 121 A. 900), but there is always, as respondent urges, the possibility that a particular decision of the Court of Chancery will not be followed by the Supreme Court (see *Flagg* v. *Johansen,* 124 N. J. L. 456, 461; 12 A. 2d 374) or even by the Court of Chancery itself. See *Kicey* v. *Kicey,* 112 N. J. Eq. 459, 461; 164 A. 684. It is the function of the court of last resort to resolve such conflicts as may be created by decisions of the lower courts, and except in rare instances that function is performed and the law is settled accordingly. Here, however, there is no conflict of decision. Whether there ever will be, or the Court of Errors and Appeals will disapprove the rulings in the *Thatcher* and *Travers* cases, is merely a matter of conjecture. See *West* v. *American Telephone & Telegraph Co., supra.* At the present time the *Thatcher* and *Travers* cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning.

The question has practical aspects of great importance in the proper administration of justice in the federal

courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals.

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

Reversed.

SIX COMPANIES OF CALIFORNIA ET AL. *v.* JOINT HIGHWAY DISTRICT NO. 13 OF CALIFORNIA.

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

No. 267. Argued November 13, 14, 1940.—Decided December 9, 1940.

1. An announcement of state law by an intermediate state appellate court, in the absence of a contrary ruling by the highest state court or of other convincing evidence that the state law is otherwise, should be followed by federal courts. P. 188.
2. An intermediate appellate court of California had ruled that, in that State, a stipulation in a construction contract for liquidated damages in case of delay in completion was inapplicable after abandonment of the work. This, apparently, had not been disapproved, and there was no convincing evidence that the law of the State was otherwise. *Held*, that the ruling should have been followed by the federal courts in a case involving the same questions, in California. P. 188.

110 F. 2d 620, reversed.

CERTIORARI, *post*, p. 631, to review the affirmance of a judgment for damages awarded on a cross-complaint, against a building contractor for delay in completing

a building. Jurisdiction was based on diversity of citizenship.

Mr. Paul S. Marrin, with whom *Messrs. Max Thelen, DeLancey C. Smith,* and *Jewel Alexander* were on the brief, for petitioners.

The Circuit Court of Appeals should have followed the decision of the District Court of Appeal of California in *Sinnott* v. *Schumacher,* 45 Cal. App. 46.

The question involved is: What is the law of California? Under the reasoning of the *Erie Railroad Co.* case, 304 U. S. 64, it makes little difference what state court has declared the law so long as it is the rule of decision in the State. In the *Erie* case this Court referred to the law of the State as declared by its highest court in a decision, but it did not say that the law of the State might not be established by the decision of an intermediate appellate court. And where the decision of such court does in fact announce a rule of law which other state courts are bound to follow, it establishes the law of the State even though another court of the State has the power to overrule its decision.

Had this case been tried in any superior (trial) court of California, such court would have been bound by *Sinnott* v. *Schumacher,* and the result would have been the opposite of that announced by the Circuit Court of Appeals. If, therefore, the state law is to be determined just as it would be in a case tried in the state courts, we can not escape the conclusion that the decisions of the California District Courts of Appeal are binding on the federal courts.

The power of the Supreme Court of California to overrule decisions of the District Courts of Appeal has little bearing on the solution of the problem. The Supreme Court has the power to overrule its own decisions, but its prior decisions, as well as prior decisions of the

District Courts of Appeal, are the law of the State unless and until overruled.

The decision of one District Court of Appeal in California binds the others, particularly when a petition for hearing by the Supreme Court of the earlier case has been denied. *Skaggs* v. *Taylor,* 77 Cal. App. 519; *Clover* v. *Jackson,* 81 Cal. App. 55; *Bridges* v. *Fisk,* 53 Cal. App. 117, 122; *People* v. *Whitaker,* 68 Cal. App. 7, 11; *Masonic Mines Assn.* v. *Superior Court,* 136 Cal. App. 298, 300. Distinguishing *People* v. *Brunwin,* 2 Cal. App. 2d 287.

Decisions of the District Courts of Appeal are of statewide scope and application. A rule of law announced in one district will be followed in all others and must be followed by all trial courts.

The decision below perpetuates the evils condemned in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. There are many propositions of state law in California which have never been decided by its Supreme Court, but which have been decided by a District Court of Appeal on which the Supreme Court has denied a hearing. These decisions of the District Courts of Appeal are accepted as the law throughout the State and the rules announced by them are applied in litigation in its courts. Many of the rules of law announced by the District Courts of Appeal of the State have never been decided by its Supreme Court and probably never will be, because, under the enlarged jurisdiction conferred upon the District Courts of Appeal by the 1928 amendment to Art. VI, § 4, of the California Constitution, most appeals are taken directly to these courts, and it is unlikely that the Supreme Court would order any case in which it believes the District Courts of Appeal have properly applied the law to be transferred to it for hearing. We earnestly contend that the decisions of these courts are the law of the State when there is no decision of the Supreme Court which conflicts with them. If the federal courts refuse to follow them we may have, for

long and indefinite periods of time, one rule in the federal courts and another in the state courts, a condition substantially the same as that brought about by the rule announced in *Swift* v. *Tyson,* 16 Pet. 1.

The jurisdiction of the District Courts of Appeal is state-wide. They have jurisdiction of appeals from any superior court in the State and their jurisdiction is not limited to hearing appeals from superior courts in their own districts.

The question of the power of the federal courts to disregard decisions of lower state courts was not involved in *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103.

Messrs. Archibald B. Tinning and *Theodore P. Wittschen* for respondent.

Denial by the State Supreme Court of a petition for hearing therein after decision by a District Court of Appeal does not mean approval of the opinion and decision of the lower court. *People* v. *Davis,* 147 Cal. 346, 350; *Bohn* v. *Bohn,* 164 Cal. 532, 537; *In re Stevens,* 197 Cal. 408, 423; *People* v. *Rabe,* 202 Cal. 409, 418; *Seney* v. *Pickwick Stages,* 206 Cal. 389, 391; *Shelton* v. *Los Angeles,* 206 Cal. 544, 550; *Western Lithograph Co.* v. *State Board of Equalization,* 11 Cal. 2d 156, 167.

The California District Courts of Appeal have held, and the California Supreme Court recognizes, that the decision of a District Court of Appeal in one district is not binding on another. *Danley* v. *Superior Court,* 64 Cal. App. 594, 599; *McMillan* v. *Greer,* 85 Cal. App. 558, 563; *Stone* v. *San Francisco,* 27 Cal. App. 2d 34; *Raynor* v. *City of Arcata,* 11 Cal. 2d 113, 120.

That being so, then clearly neither the Circuit Court of Appeals nor this Court is so bound.

The California District Courts of Appeal are courts of limited and not state-wide jurisdiction. But even if jurisdiction were state-wide, in view of the express limita-

tions which have been placed upon their decisions by the Supreme Court of the State, their decisions, even when the Supreme Court refuses a hearing, are not those of the highest court of the State, which the federal courts are required to follow.

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

Six Companies of California, a contractor, brought this suit against respondent, Joint Highway District No. 13, to recover the reasonable value of materials and labor furnished under a contract. The contractor had undertaken to rescind for alleged breach by respondent and had stopped work. Respondent answered, alleging wrongful abandonment of the contract and by cross-complaint sought damages against the contractor and its sureties.

There was a clause in the contract for liquidated damages in the amount of $500 a day in case of delay in completion.[1] The District Court found against the con-

[1] That clause provided:

"(d) Damages for Delay.—The Parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars ($500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

tractor and its sureties and on the cross-complaint awarded damages which included $142,000 as liquidated damages for delay. The Circuit Court of Appeals affirmed the judgment. 110 F. 2d 620.

Petitioners contended that under the law of California the clause providing for liquidated damages did not apply to delay which occurred after the abandonment of the work by the contractor. This contention was overruled. The Circuit Court of Appeals expressly recognized that its decision in that respect was contrary to the decision of the District Court of Appeal in California in the case of *Sinnott* v. *Schumacher,* 45 Cal. App. 46; 187 P. 105. But the Circuit Court of Appeals thought that decision wrong and refused to follow it. We granted certiorari limited to the question whether there was error in that ruling. October 14, 1940.

In *Sinnott* v. *Schumacher, supra,* the suit was brought to recover the value of labor and materials furnished under a building contract. After part performance the contractor gave notice of rescission and abandoned work because of failure to receive the first installment of the agreed payment. Defendants denied that the installment was due and filed a cross-complaint against the contractor and his surety asking damages because of the abandonment of the work. The trial court found against the plaintiff on his complaint and in favor of the defendants on their cross-complaint, and entered judgment for damages. The District Court of Appeal affirmed the judgment. The Supreme Court of the State denied a petition for hearing in that court.

On the appeal to the District Court of Appeal, the plaintiff-appellant contended that the trial court erred as to the amount of the damages awarded, basing his contention upon the clause in the contract which provided for liquidated damages in a stipulated amount per day

in case of delay in completion.[2] The District Court of Appeal held that the clause had no application to a case where the contract had been abandoned without sufficient cause. The court said:

"As to the appellants' contention that the court was in error in its finding and conclusion as to the amount of damages sustained by the defendants and cross-complainants by reason of the plaintiff's unjustified abandonment of work upon said building, and his failure, neglect, and refusal to complete the same, it may be stated that this contention is based upon the clause in the contract which relates to the matter of delay in the time of completion of said building and which purports to fix a penalty of

[2] The clause for liquidated damages in the contract in the *Sinnott* case was as follows:

"Should the Contractor fail to complete this contract and the work provided for within the time set for completion as aforesaid, due allowance being made for the contingencies provided for herein, he shall then become liable to the Owner for all loss and damages which the Owner may suffer on account thereof, in the sum of Ten Dollars per day, which the Contractor hereby agrees to deduct from his contract price, for each day that the work shall remain unfinished beyond such time for completion, and the Owner agrees to pay to the Contractor a bonus of Ten Dollars ($10) for each day that the work may be completed before the time aforesaid for the completion.

"The agreement in this paragraph made for damages is made as herein set forth for the reason that the actual damage which will be sustained by the Owner by reason of the Contractor's breach of the covenant to complete this contract within the time stated is from the nature of the case impractical and extremely difficult to fix; and one of the considerations moving the Owner to enter into this contract with the Contractor is the agreement of the Contractor to complete his said contract within the time herein stated and the liquidated damages herein above stated for his failure to do so."

The plaintiff's contention under this clause was that the delay in completion was not more than five days the damage for which under the contract would amount to $50.

fifty dollars per day for such delay; but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause, in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be affected or limited by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion." [3]

Respondent urges that what was said by the District Court of Appeal in the *Sinnott* case with respect to the liquidated damage clause was a mere dictum. We do not so regard it. This part of the opinion of the court was its answer to the appellants' insistence that the judgment on appeal was erroneous because the liquidated damage clause had been disregarded and damages had been awarded in excess of the amount for which the contract provided. What the court said as to this was a statement of the ground of its decision. It was a statement of the law of California as applied to the facts before the court. It is said that there is a difference between the two cases. That difference appears to be that in the instant case the owner is seeking to apply the liquidated damage clause in order to recover from the contractor, while in the *Sinnott* case the contractor was seeking to limit the damage recoverable against him to the amount agreed upon. But, so far as the question concerns the applicability of the liquidated damage clause, the difference would not seem to be material, as by the terms of the clause in each case it appears to be intended to bind both parties when applicable. The ruling as to the law of California as

[3] Compare *Bacigalupi* v. *Phoenix Building Co.*, 14 Cal. App. 632, 639; 112 P. 892. See Williston on Contracts, Rev. Ed., Vol. 3, § 785, pp. 2210, 2211.

applied by the state court was that the stipulation in the contract as to the amount of damages in case of delay in completion was not applicable to delay after the contractor had abandoned the work. As the Circuit Court of Appeals said, that decision "is adverse to ours."

The decision in the *Sinnott* case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise. We have fully discussed the principle involved in the cases of *West* v. *American Telephone & Telegraph Co., post,* p. 223, and *Fidelity Union Trust Co.* v. *Field, ante,* p. 169, and further amplification is unnecessary. See, also, *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 708; *Tipton* v. *Atchison, T. & S. F. Ry. Co.,* 298 U. S. 141, 151. The Circuit Court of Appeals should have followed the decision of the state court in *Sinnott* v. *Schumacher* with respect to the inapplicability of the liquidated damage clause in the event of the abandonment of work under the contract, and its judgment to the contrary is reversed. The cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Counsel for Parties.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JANNEY ET UX.*

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

No. 36. Argued November 18, 1940.—Decided December 9, 1940.

1. Under § 51 (b) of the Revenue Act of 1934, when a joint return is made by husband and wife, the tax is computed on their aggregate net income; and capital losses of one spouse may be deducted from capital gains of the other. P. 194.
2. Section 117 (d) of this Act did not purport to alter the rule as to the right of the spouses to deductions in their joint return, but merely limited the amount of capital losses which could be deducted. P. 194.
3. Treasury Regulations 86, Art. 117–5, in undertaking to provide that "the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets," is inconsistent with the Act and therefore ineffective. P. 194.

108 F. 2d 564, affirmed; 111 *id.* 144, reversed.

CERTIORARI, 310 U. S. 617, to review judgments of Circuit Courts of Appeals which dealt with rulings of the Board of Tax Appeals. In No. 36, a decision of the Board, 39 B. T. A. 240, sustaining a deficiency assessment was reversed by the court below, whose judgment is affirmed here. In No. 113, a like ruling of the Board was affirmed by a judgment of the Second Circuit which this Court reverses.

Mr. Thomas E. Harris, with whom *Attorney General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Miss Helen R.*

* Together with No. 113, *Gaines et ux.* v. *Helvering, Commissioner of Internal Revenue,* on writ of certiorari, *post,* p. 628, to the Circuit Court of Appeals for the Second Circuit.

Carloss were on the brief, for the Commissioner of Internal Revenue.

Mr. Bernhard Knollenberg, with whom *Mr. Harry J. Rudick* was on the brief, for respondents in No. 36. *Mr. Frederick Baum,* with whom *Mr. Frank E. Karelsen, Jr.* was on the brief, for petitioners in No. 113.

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

These cases present the same question, that is, whether under the Revenue Act of 1934, in the case of a joint return by husband and wife, the capital losses of one spouse may be deducted from the capital gains of the other.

In *Helvering* v. *Janney,* the wife realized net gains from the sale of capital assets during 1934, and the husband realized net losses from the sale of capital assets during the same year. They filed a joint income tax return reporting the capital gain, which represented the difference between the wife's adjusted capital gains and the husband's adjusted capital losses. The Commissioner ruled that the husband's losses could not be applied to reduce the gains realized by his wife and accordingly determined a deficiency. The Board of Tax Appeals sustained the Commissioner (39 B. T. A. 240) but the Circuit Court of Appeals for the Third Circuit reversed. 108 F. 2d 564.

In *Gaines* v. *Helvering,* the husband realized a net gain from the sale of capital assets during 1934, while his wife sustained a net loss from the sale of capital assets. They filed a joint return reporting a capital loss, which represented the difference between the husband's net capital gain and his wife's net capital loss. The Commissioner, as in the *Janney* case, decided against this adjustment and the Board of Tax Appeals affirmed. The Circuit

Court of Appeals for the Second Circuit affirmed the decision of the Board. 111 F. 2d 144.

In view of the conflict between these decisions, we granted certiorari. No. 36, 310 U. S. 617; No. 113, October 14, 1940.

Section 51 (b) of the Revenue Act of 1934 [1] with respect to the returns of husband and wife provided:

"(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

"(1) Each shall make such a return, or

"(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

The same provision in substance is found in the earlier Revenue Acts from that of 1921.[2]

The "aggregate income," to which paragraph 2 of § 51 (b) refers, is clearly the aggregate net income as it is the aggregate income on which "the tax is to be computed." In that view the deductions to which either spouse would be entitled would be taken in the case of a joint return, from the aggregate gross income.

That was the construction placed upon the provision for a joint return in the Revenue Act of 1918 by the Solicitor of Internal Revenue in an opinion rendered in

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[1] 48 Stat. 697.

[2] The Revenue Act of 1918, § 223, also provided for a joint return by husband and wife. 40 Stat. 1074.

Section 223 (b) of the Revenue Act of 1921 provided (42 Stat. 250):

"(b) If a husband and wife living together have an aggregate net income for the taxable year of $2,000 or over, or an aggregate gross income for such year of $5,000 or over—

"(1) Each shall make such a return, or

"(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

1921.[3] After considering the terms of the statute and the reasonable inference as to the intent of Congress, the Solicitor concluded:

"From the foregoing it follows that the proper construction of the Revenue Act of 1918 permits a husband and wife living together, at their option, to file separate returns or a single joint return. If a single joint return is filed it is treated as the return of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual. In cases, therefore, in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal and surtax."

The terms of the Revenue Act of 1921 made this view even clearer.[4] Treasury Regulations 62, Article 401, promulgated under the Revenue Act of 1921, apparently followed the same view. That article provided as to joint returns of husband and wife,—

"Where the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income." [5]

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[3] Sol. Op. 90, Cum. Bull. No. 4, p. 236 (1921).

[4] The Committee on Ways and Means of the House of Representatives reported with respect to the provision of the bill which became the Revenue Act of 1921 as follows:

"Section 231 of the bill proposes to amend section 223 of the present law in such a manner as to clear up the doubt now existing as to the right of husband and wife in all cases to make a joint return and have the tax computed on the combined income." House Rep. No. 350, 67th Cong., 1st Sess. See, also, Sen. Rep. No. 275, 67th Cong., 1st Sess.

[5] The same provision was continued in substance in succeeding regulations. Article 401 of Treasury Regulations 65 and 69 under the Revenue Acts of 1924 and 1926; Article 381 of Regulations 74 and 77 under the Revenue Acts of 1928 and 1932.

The question as to deductions for losses on sales or exchanges of securities arose under § 23 (r) (1) of the Revenue Act of 1932.[6] That provided that losses as there described should be allowed only to the extent of gains derived from such sales or exchanges. Nothing was said in this section which in any way affected the provision of the statute as to joint returns by husband and wife. The question in that relation, that is, as to deduction for losses on sales of securities, was submitted to the Commissioner of Internal Revenue and was answered by him on December 29, 1932, as follows:

"The specific question presented is whether the loss sustained by the husband may be applied to offset the same amount of gain realized by the wife in rendering joint income tax return for the year. In reply you are advised that, in the case of a husband and wife living together who file a joint income tax return, the tax liability is computed on the aggregate income as provided by section 51 (b) (2) of the Revenue Act of 1932, and such joint return is treated as if it was the return of a single individual. The aggregate income in such case would of course embrace the gains as well as the allowable deductions of each spouse. If it is correctly understood from your letter that the gains and losses in the illustration presented are from transactions falling within the same class within the meaning of the statute such as sales of securities not held for a period of more than two years, the loss sustained by the husband would offset the same amount of gain realized by the wife from such source." [7]

[6] 47 Stat. 183. Section 23 (r) (1) provided: "Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations)."

[7] 1933 Commerce Clearing House Federal Tax Service, Vol. III, par. 6037.

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This statement by the Commissioner applied the same principle which had previously been followed with respect to deductions in the joint returns of husband and wife, there having been no indication by Congress of any different purpose.

Treasury Regulations No. 77, promulgated under the Act of 1932, contained nothing to the contrary and the regulation theretofore obtaining as to such joint returns was left unchanged. Art. 381.

The Revenue Act of 1934 continued the prior statutory provisions as to joint returns of husband and wife, and § 117 (d) of that Act, as to capital losses, did not purport to alter the rule as to the right of the spouses to deductions in their joint return. Section 117 (d) merely limited the amount of losses which could be deducted, as follows:

"(d) *Limitation on Capital Losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges."

The conclusion of the Commissioner with respect to the Act of 1932, in the opinion above mentioned, was equally applicable to the new Act.

It was not until 1935 that the Treasury Department by Article 117–5 of Regulations 86 undertook to provide that "the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets." [8]

We are of the opinion that under the provision of the Act of 1934 as to joint returns of husband and wife, which embodied a policy set forth in substantially the same terms for many years, Congress intended to provide

[8] It was also in 1935 that the Bureau of Internal Revenue announced the same ruling under the Act of 1932. G. C. M. 15438, Cum. Bull. XIV–2, p. 156.

for a tax on the aggregate net income and that the losses of one spouse might be deducted from the gains of the other; and that this applied as well to deductions for capital losses as to other deductions. This, we think, was the meaning of the provision of the Revenue Act of 1934 when it was enacted, and it was subject to change only by Congress, and not by the Department.

In No. 36, the judgment of the Circuit Court of Appeals is affirmed.

In No. 113, the judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

No. 36, affirmed.
No. 113, reversed.

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

TAFT ET UX. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 183. Argued November 18, 1940.—Decided December 9, 1940.

1. A joint return by a husband and wife, under § 51 (b) of the Revenue Act of 1934, is to be treated as a return of a taxable unit and as though made by an individual. P. 197.
2. In computing the net income on a joint return of husband and wife, their combined charitable contributions are deductible from their aggregate gross income up to 15% of the aggregate net income, c. 277, 48 Stat. 690, § 23 (o). Pp. 197–198.

   Article 401, Treasury Regulations 62, under the Revenue Act of 1921 is consistent with this construction.
3. Article 23 (o), Treasury Regulations 86, which sought to require a husband and wife, whether they make "a joint return or separate returns," to base their deduction for charitable contributions

on the separate net income of the spouse making them, is inconsistent with the Act and therefore ineffective. P. 198.

111 F. 2d 145, reversed.

CERTIORARI, *post*, p. 628, to review a judgment which affirmed a ruling of the Board of Tax Appeals (40 B. T. A. 229) sustaining a deficiency assessment.

Mr. Clarence Castimore, with whom *Mr. Henry W. Taft* was on the brief, for petitioners.

Mr. Thomas E. Harris, with whom *Attorney General Jackson*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for respondent.

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

Petitioners, husband and wife, filed joint income-tax returns for the years 1934 and 1935. In computing their aggregate net income under § 51 (b) of the Revenue Act of 1934,[1] they made deductions of their combined charitable contributions.[2] The Commissioner ruled that the deductions on account of the wife's charitable contributions should be reduced to 15 per cent of her separate net income and deficiences were determined accordingly. The Board of Tax Appeals sustained the Commissioner (40 B. T. A. 229) and the Circuit Court of Appeals affirmed. 111 F. 2d 145.

Because the question is cognate to that presented in the cases of *Helvering* v. *Janney, ante*, p. 189, and *Gaines* v. *Helvering, ante*, p. 189, we granted certiorari. October 14, 1940.

The provision for joint returns in § 51 (b) of the Revenue Act of 1934 was in substantially the same form as the

[1] 48 Stat. 697.

[2] § 23 (o), 48 Stat. 690.

corresponding provision in the prior revenue acts from 1921. The import of that provision is that in making a joint return the husband and wife should report their aggregate gross income and could combine their deductions in reporting their aggregate net income upon which the tax was to be computed. That was the construction placed upon the original provision for joint returns, in the Revenue Act of 1918, by the Solicitor of Internal Revenue. He said in his ruling: "If a single joint return is filed it is treated as the return of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual. In cases, therefore, in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal and surtax." [3] We think that this was the intention of Congress in enacting the Act of 1921 [4] and the later acts containing the same provision for joint returns. We think that it was also the fair import of the Treasury Regulations under the Act of 1921 and of subsequent regulations prior to 1934.[5]

Respondent places emphasis on the phrasing of Article 401 of Regulations 62 under the Act of 1921, that "in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income." The argument stresses the words "to which either is entitled" and it is urged that each spouse is entitled only

[3] Sol. Op. 90, Cum. Bull. No. 4, p. 236 (1921). See *Helvering* v. *Janney, ante,* p. 189.

[4] House Rep. No. 350, 67th Cong., 1st Sess.; Sen. Rep. No. 275, 67th Cong., 1st Sess.

[5] Treasury Regulations Nos. 65 and 69, Art. 401; Regulations Nos. 74 and 77, Art. 381.

to deduct 15 per cent of his or her separate net income. But we think that this is an inadmissible construction of the statute and is not a necessary construction of the regulation. Such a construction is inconsistent with the premise of the Solicitor's opinion, above mentioned, that a joint return "is treated as the return of a taxable unit" and the tax is to be laid as though the return were that "of a single individual." The more specific language of the provision in the Act of 1921, which for the present purpose is the same as that in the Act of 1934, affords a stronger basis for this conclusion. It provides specifically for the inclusion of the income of each spouse "in a single joint return" and in that case that "the tax shall be computed on the aggregate income." The principle that the joint return is to be treated as the return of a "taxable unit" and as though it were made by a "single individual" would be violated if in making a joint return each spouse were compelled to calculate his or her charitable contributions as if he or she were making a separate return. The principle of a joint return permitted aggregation of income and deductions and thus overrode the limitations incident to separate returns. We find no indication in Article 401 of Regulations 62 under the Act of 1921 of any intention to depart from the Solicitor's view as to the purport of the statute.

In 1935, by Article 23 (o)–1 of Treasury Regulations 86, the Department sought to require a husband and wife, whether they make "a joint return or separate returns," to base their deduction for charitable contributions on the separate net income of the spouse making them. We are of the opinion that under the Revenue Act of 1934, taken with the meaning we think it had when enacted, petitioners were entitled to the combined deductions they claimed, and that the departmental regu-

lation to the contrary was ineffective to deprive them of that right.

The judgment of the Circuit Court of Appeals is

Reversed.

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

KLOEB, U. S. DISTRICT JUDGE, *v.* ARMOUR & COMPANY.

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

No. 65. Submitted November 18, 1940.—Decided December 9, 1940.

1. Sections 71 and 80, Title 28 U. S. C., were designed to prevent delay over orders remanding causes. They entrust determination to the informed judicial discretion of the District Court and cut off review. P. 204.
2. A state Supreme Court, basing its determination exclusively on the allegations of a petition to remove, and concluding therefrom that the cause involved a separable controversy between citizens of different States, directed removal. The federal District Court, basing its determination on the entire record, including new facts, found that there was no separable controversy and that the plaintiff was an alien, and remanded the cause. *Held:*

   (1) The District Court acted within its jurisdiction, pursuant to §§ 71 and 80, Title 28, U. S. C. P. 204.

   (2) The order of remand was not reviewable by the Circuit Court of Appeals. P. 205.

109 F. 2d 72, reversed.

CERTIORARI, 310 U. S. 621, to review orders of the court below, in mandamus proceedings, which directed the District Court to set aside remands in five separate actions.

Messrs. Percy R. Taylor and *Nolan Boggs* submitted for petitioner.

Messrs. Edward W. Kelsey, Jr., Fred A. Smith, and *Charles J. Faulkner, Jr.* submitted for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents, Armour & Company, a Kentucky corporation, by petition obtained from the Circuit Court of Appeals, Sixth Circuit, an order directing the U. S. District Judge, Northern District of Ohio, to set aside the remands of five separate actions. 109 F. 2d 72. The opinion of the court made the following statement concerning the basic issue.

"A number of persons, including George E. Kniess, brought suit against Armour and Company in the Court of Common Pleas of Lucas County for damages claimed to have been suffered in the consumption of food products, materials for which were prepared by Armour and Company, but which were processed by a retailer in Toledo by the name of Burmeister. In each of the five cases, and upon identical petitions, the plaintiffs joined Burmeister as a defendant on the theory that he and the Armour Company were joint tortfeasors. Armour and Company filed its petitions for removal with the Court of Common Pleas accompanied by proper removal bonds. Its petitions were contested by the plaintiffs and were denied. The Kniess case proceeded to trial while the other cases were held in abeyance and it eventually reached the Supreme Court of Ohio, *Kniess* v. *Armour & Co.,* 134 O. S. 432; 17 N. E. 2d 734; 119 A. L. R. 1348. That court disposed of the case upon the sole ground that the removal petition should have been allowed, because a separable controversy existed as between plaintiff

and Armour. It stated the law of Ohio to be that where the responsibility of two tortfeasors differs in degree and in nature, liability cannot be joint and the alleged torts are not concurrent. Holding that the defendant Armour and Company had adequately preserved its exceptions to the ruling of the lower court, the cause was reversed and remanded to the Court of Common Pleas with instructions to grant the removal petition, and the mandate directed the Court of Common Pleas to remove the cause to the District Court of the United States.

"When the case came before the respondent the plaintiff moved to remand and, notwithstanding the adjudication by the Ohio Supreme Court which had become final, the respondent proceeded to take evidence upon the question of a separable controversy, decided there was none, that the cause was not removable under the statute, entered an order to remand the case to the Court of Common Pleas of Lucas County, and denied petitions for rehearing."

The District Judge rendered no opinion to support his actions; but responding to the rule from the Circuit Court of Appeals to show cause, he cited *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, referred to affidavits filed in support of the motions and said that upon consideration of the entire record, he became satisfied that none of the five suits "really and substantially involved a dispute or separable controversy wholly between citizens of different states which could be fully determined as between them, and therefore none of said causes were within the jurisdiction of the District Court of the United States, and further that plaintiff Kniess is an alien."

Title 28, U. S. Code provides—

"Section 71—Whenever any cause shall be removed from any State court into any district court of the United

States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

"Section 80—If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Employers Reinsurance Corp. v. *Bryant,* 299 U. S. 374, 380, 381, says of these sections: "They are in *pari materia,* are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey* v. *Lockhart,* 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."

The court below concluded: "The District Court had no power to determine the issue of separable controversy entitling the petitioner to remove because that issue had already been adjudicated by the Supreme Court of Ohio, and the District Court, upon familiar principles, was bound by such adjudication."

And it said—"It would seem that in the use in Section 71 of the words 'the district court shall decide,' and in the employment in Section 80 of the phrase 'it shall appear to the satisfaction of the said district court,' it was within the contemplation of the Congress that the statute should apply to those cases in which there was some issue which, as a matter of primary decision, was submitted to the District Judge. It certainly could not have been intended to apply to decision of a question which was not properly at issue before the District Judge since it had already been adjudicated by the Supreme Court of Ohio in the same proceeding, between the same parties, and upon the plaintiff's petition. To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A., § 687, which provides: 'The records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' "

Also—"The decisions in *Employers Reinsurance Corporation* v. *Bryant, District Judge, supra,* and in *Re Pennsylvania Company, supra,* must not, in our judgment, be extended beyond the situations requiring the application of the rule there announced, that is to say, to cases where the issue of the petition to remand called for original and primary decision by the District Court unfettered by the doctrine of *res judicata* or the mandate of the 'full faith and credit' statute."

"That the decision of the Ohio Court was *res judicata* notwithstanding the issue was one involving the jurisdiction of a federal Court, is settled by *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298; *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, and the decision in *Evelyn Treinies, Petitioner,* v. *Sunshine*

Mining Co., et al., [308 U. S. 66] 60 S. Ct. 44, 84 L. Ed. —, announced as recently as November 6, 1939."

"While the precise question here involved is one of first impression, the Supreme Court in *Re Metropolitan Trust Company,* 218 U. S. 312, 31 S. Ct. 18, 54 L. Ed. 1051, has drawn the distinction between orders to remand erroneously issued and those issued by a District Judge in excess of his authority. The former may not be challenged by appeal or writ of mandamus—the latter are a nullity. We think it follows that under general supervisory powers they may be set aside."

We cannot accept the conclusion of the Circuit Court of Appeals. It derives from an inadequate appraisal of the record and of §§ 71 and 80 U. S. Code, *supra.*

These sections were designed to limit possible review of orders remanding causes and thus prevent delay. *In re Pennsylvania Company,* 137 U. S. 451, 454. They entrust determination concerning such matter to the informed judicial discretion of the district court and cut off review.

In this cause the district judge weighed the petitions and relevant affidavits and concluded that the controversy was not within the jurisdiction of that court. His clear duty was to proceed no further and to dismiss or remand the causes. The statute exempted his action from review.

The suggestion that the federal district court had no power to consider the entire record and pass upon the question of separability, because this point had been finally settled by the Supreme Court of Ohio, finds no adequate support in the cases cited by the opinion below: *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, *American Surety Co.* v. *Baldwin,* 287 U. S. 156 and *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66. None of these causes involved a situation comparable to the one here presented.

Section 72, Title 28, U. S. Code, provides the requisites for removing causes from state to federal courts and directs that when complied with, the state court shall proceed no further. The Supreme Court of Ohio declared: "In passing upon the question of removal, unfortunately we are limited solely to a consideration of the facts stated in the petition." It held that upon them the trial court should have relinquished jurisdiction.

The causes went to the federal district court and additional facts were there presented. As required by the statute, that court considered all the relevant facts, petitions and affidavits, exercised its discretion and ordered the remands. Jurisdiction to decide, we think, is clear; the Circuit Court of Appeals lacked power to review the remand.

The challenged order must be

Reversed.

UNITED STATES *v.* FALCONE ET AL.

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

No. 42. Argued November 18, 1940.—Decided December 9, 1940.

One who sells materials knowing that they are intended for use, or will be used, in the production of illicit distilled spirits, but not knowing of a conspiracy to commit the crime, is not chargeable as co-conspirator. P. 210.

109 F. 2d 579, affirmed.

CERTIORARI, 310 U. S. 620, to review a judgment reversing convictions of conspiracy.

Assistant Attorney General Rogge, with whom *Solicitor General Biddle* and *Messrs. Raoul Berger, Irwin L. Langbein, Herbert Wechsler, George F. Kneip,* and *W. Marvin Smith* were on the brief, for the United States.

Mr. Daniel H. Prior for Salvatore and Joseph Falcone, and *Mr. Roger O. Baldwin* for Henry Alberico, respondents, for whom also *Mr. Anthony S. Falcone* entered an appearance.

Mr. Justice Stone delivered the opinion of the Court.

The question presented by this record is whether one who sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws.

Respondents were indicted with sixty-three others in the northern district of New York for conspiring to violate the revenue laws by the operation of twenty-two illicit stills in the vicinity of Utica, New York. The case was submitted to the jury as to twenty-four defendants, of whom the five respondents and sixteen operators of stills were convicted. The Court of Appeals for the Second Circuit reversed the conviction of the five respondents on the ground that as there was no evidence that respondents were themselves conspirators, the sale by them of materials, knowing that they would be used by others in illicit distilling, was not sufficient to establish that respondents were guilty of the conspiracy charged. 109 F. 2d 579. We granted certiorari, 310 U. S. 620, to resolve an asserted conflict of the decision below with those of courts of appeals in other circuits. *Simpson* v. *United States,* 11 F. 2d 591; *Pattis* v. *United States,* 17 F. 2d 562; *Borgia* v. *United States,* 78 F. 2d 550; *Marino* v. *United States,* 91 F. 2d 691; see *Backun* v. *United States,* 112 F. 2d 635. Compare *Young* v. *United States,* 48 F. 2d 26.

All of respondents were jobbers or distributors who, during the period in question, sold sugar, yeast or cans,

some of which found their way into the possession and use of some of the distiller defendants. The indictment while charging generally that all the defendants were parties to the conspiracy did not allege specifically that any of respondents had knowledge of the conspiracy but it did allege that respondents Alberico and Nole brothers sold the materials mentioned knowing that they were to be used in illicit distilling. The court of appeals, reviewing the evidence thought, in the case of some of the respondents, that the jury might take it that they were knowingly supplying the distillers. As to Nicholas Nole, whose case it considered most doubtful, it thought that his equivocal conduct "was as likely to have come from a belief that it was a crime to sell the yeast and the cans to distillers as from being in fact any further involved in their business." But it assumed for purposes of decision that all furnished supplies which they knew ultimately reached and were used by some of the distillers. Upon this assumption it said, "In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime." And it concluded that merely because respondent did not forego a "normally lawful activity of the fruits of which he knew that others were making unlawful use" he is not guilty of a conspiracy.

The Government does not argue here the point which seems to be implicit in the question raised by its petition for certiorari, that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present

here. Cf. *Gebardi* v. *United States,* 287 U. S. 112, 121; *Di Bonaventura* v. *United States,* 15 F. 2d 494. But the Government does contend that one who with knowledge of a conspiracy to distill illicit spirits sells materials to a conspirator knowing that they will be used in the distilling, is himself guilty of the conspiracy. It is said that he is, either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy, or what is the same thing he is a principal in the conspiracy as an aider or abettor by virtue of § 332 of the Criminal Code, 18 U. S. C. § 550, which provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some.[1] In the case of Alberico,

[1] The two Falcones who were in business as sugar jobbers were shown to have sold sugar to three wholesale grocers who in turn were shown to have sold some of the sugar to distillers. To establish guilty knowledge the Government relies upon evidence showing that the volume of their sales was materially larger during the periods of activity of the illicit stills; that Joseph Falcone was shown on two occasions, at one of which Salvatore Falcone was present, to have been in conversation with one of the conspirators who was a distiller, and on one occasion with another distiller conspirator who was his brother-in-law; that Joseph Falcone had been seen at the Venezia

as in the case of Nicholas Nole, the jury could have found that he knew that one of their customers who is an unconvicted defendant was using the purchased mate-

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Restaurant which was patronized by some of the conspirators and knew its proprietor; and on two occasions Salvatore Falcone had visited the restaurant, on one to collect funds for the Red Cross and on another for a monument to Marconi.

Respondent Alberico was a member of a firm of wholesale grocers who dealt in sugar and five-gallon tin cans among other things. They sold sugar to wholesale grocers and jobbers. To establish Alberico's guilty knowledge the Government relies on evidence that his total purchases of sugar materially increased during the period when the illicit stills were shown to be in operation; that some of his sugar purchases from a local wholesaler were at higher prices than he was then paying others; that on the premises of one of the distillers there were found fifty-five cardboard cartons, each suitable for containing one dozen five-gallon cans, on one of which was stencilled the name of Alberico's firm; that on eight to ten occasions Alberico sold sugar and cans in unnamed amounts to Morreale, one of the defendant distillers who was not convicted, and on one occasion was overheard to say, in refusing credit to Morreale, "I could not trust you because your business is too risky."

Respondent Nicholas Nole was shown to be proprietor of Acme Yeast Company and also the Utica Freight Forwarding Company, to which one and one-half tons of K & M yeast was consigned by the seller. Wrappers bearing the distinctive marks of the Acme Yeast Company and K & M yeast, quantity not stated were found at one of the stills; and a K & M yeast container was found at another. To show guilty knowledge of Nicholas Nole the Government relies on the circumstance that he registered the Acme Yeast Company in the county clerk's office in the name of a cousin; that the order for the consignment of K & M yeast was placed in the name of an unidentified person; that Nole had been seen in conversation with some of the convicted distillers at a time when some of the illicit stills were in operation, and that on one occasion during that period he sold and delivered fifteen five-gallon cans of illicit alcohol from a source not stated.

Respondent John Nole was shown to be a distributor for the National Grain Yeast Company in Utica during the period in question. Yeast wrappers bearing the National labels were found at three of the stills. To show guilty knowledge of John Nole the Government

rial in illicit distilling. But it could not be inferred from that or from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.

The gist of the offense of conspiracy as defined by § 37 of the Criminal Code, 18 U. S. C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone* v. *United States,* 148 U. S. 197; *Marino* v. *United States, supra; Troutman* v. *United States,* 100 F. 2d 628; *Beland* v. *United States,* 100 F. 2d 289; cf. *Gebardi* v. *United States, supra.* Those having no knowledge of the conspiracy are not conspirators, *United States* v. *Hirsch,* 100 U. S. 33, 34; *Weniger* v. *United States,* 47 F. 2d 692, 693; and one who

relies on evidence that he had assisted his brother Nicholas in unloading yeast at the Utica Freight Forwarding Co.; that he was a patron of the Venezia Restaurant; that on one occasion he was seen talking with Morreale, the unconvicted distiller, in the vicinity of a store in Utica, whose store it does not appear. On three occasions Morreale and another convicted defendant procured yeast in cartons and some in kegs at the store and on one occasion John Nole told the person in charge of the store to let them have the yeast; that John Noles' information return required by the Government of all sales of yeast in excess of five pounds to one person did not show in February or March, 1938, any sale of yeast to Morreale or any sale of keg yeast.

without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. On this record we have no occasion to decide any other question.

Affirmed.

SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.*

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

No. 9. Argued October 24, 25, 1940.—Decided December 9, 1940.

1. The claims of a patent are interpreted in the light of the specifications, but with reference also to its file-wrapper history. P. 217.
2. It is a rule of patent construction that a claim in a patent must be read and interpreted with reference to claims that have been cancelled or rejected and the claims allowed can not by construction be read to cover what has thus been eliminated from the patent. P. 220.
3. While this rule is most frequently invoked when the original and cancelled claim is broader than that allowed, the rule and the reason for it are the same if the cancelled or rejected claim be narrower. P. 221.
4. The patentee may not, by resort to the doctrine of equivalents, give to an allowed claim a scope which it might have had but for amendments, the cancellation of which amounts to a disclaimer. P. 221.
5. The patent to Jardine, No. 1,763,523, (Claims 1, 8, and 11), relating to pistons for internal combustion engines, claims the combination of a piston-head, a divided skirt, and webs connecting

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* Together with No. 10, *Aberdeen Motor Supply Co.* v. *Cleveland Trust Co. et al.*, and No. 11, *F. E. Rowe Sales Co.* v. *Cleveland Trust Co. et al.*, also on writs of certiorari, 309 U. S. 648, to the Circuit Court of Appeals for the Sixth Circuit. The Chrysler Corporation was joined as a party plaintiff in the original suits and is a nominal respondent here.

the head and skirt portions and supporting two wrist-pin bosses. Assuming that, with the aid of the specification, these claims might be construed to claim flexible webs, devised to act in coöperation with the other elements to make the piston respond to physical compression and thermal expansion, as an element of the combination which they do not claim expressly, such construction is precluded because the patentee, by amendments while his application was pending, made additional claims like those mentioned but specifying flexible webs, and thereafter withdrew them, upon their being rejected in interference proceedings. Pp. 215, 222.

108 F. 2d 109, reversed.

CERTIORARI, 309 U. S. 648, to review a decree sustaining a patent in suits to restrain infringements.

Messrs. John H. Sutherland and *John H. Bruninga* for petitioners.

Messrs. Arthur C. Denison and *F. O. Richey,* with whom *Messrs. Wm. C. McCoy* and *Milton Tibbetts* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.*

Decision in these cases turns on the question whether, in the light of the patent office history of the Jardine patent on a piston for gas engines, the court below, in construing the specifications and claims, erroneously included one element, "flexible" or "yielding" webs, in the patented combination.

A related question was considered by this Court in connection with the Gulick and Maynard patents, also involved in this litigation, in *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47. Respondent, the Cleveland Trust Company, is the assignee in trust under a pooling agreement of some eighty patents relating to

* The opinion appears here as amended by an order of February 3, 1941, reported in 312 U. S.

pistons for gas engines. It brought suit in the district court for northern Ohio against petitioners, three piston dealers, customers of the Sterling Products Company, to restrain infringement of five of the patents, including the Gulick patent No. 1,815,733, applied for November 30, 1917 and allowed July 31, 1931, the Jardine patent No. 1,763,523, applied for March 11, 1920 and allowed June 10, 1930, and the Maynard patent No. 1,655,968, applied for January 3, 1921 and allowed June 10, 1928.

The cases were consolidated and tried before a special master who, upon the basis of elaborate special findings, concluded that the Gulick patent was invalid because of want of invention and because of the addition to the application by amendment in 1922 of a new element of the alleged invention; that the Maynard patent was invalid for want of invention and for failure to describe and claim the alleged invention, and that the Jardine patent was invalid as not showing invention over the prior art exhibited by Ricardo, Franquist and Long. He held the other patents invalid for reasons not now material.

The district court adopted the master's findings and gave its decree for petitioners. The court of appeals reversed as to two of the five patents, holding the Gulick and Maynard patents valid and infringed. 92 F. 2d 330. The elements of the combination as stated in claim 39, of the Gulick patent, are:

"A piston for an engine cylinder comprising a skirt, a head separated from the skirt wall around its entire periphery, said skirt being longitudinally split to render the skirt wall yieldable on every diameter in response to cylinder wall pressure, wrist pin bosses, and means rigidly connecting said bosses to the head and yieldingly connecting said bosses to the skirt whereby said skirt is yieldable in response to cylinder wall pressure."

Reference to a combination, including with other elements web connections "whereby said piston skirt is

rendered yieldable during operation in response to cylinder wall pressure" appears in number 18, one of the sustained claims.

The court of appeals found invention in both the Gulick and Maynard patents, in a combination of elements of which one was "webs laterally flexible," which was not specifically described or claimed in the Gulick patent before its amendment of 1922 and was never so described or claimed in the Maynard patent.

Conceding that other elements in the combinations were old in the piston art it said: "But to combine insulation of head from skirt, retraction of the bosses from the skirt periphery, connection of such bosses to the skirt with webs laterally flexible and yet so carried from the head as to support the load upon the wrist pin with sufficient strength and rigidity, and to utilize the mechanical force of the cylinder wall upon the skirt and the thermal expansion of the bosses so as to compensate evenly and fully for head expansion and to secure a balanced flexibility of the skirt with no bending concentration at any point therein, discloses, we think, a meritorious concept beyond the reach of those skilled in the art." 92 F. 2d at 334.

Upon an examination of the Gulick application before amendment and the Maynard patent we concluded, 305 U. S. 47, that neither described or claimed flexible or yieldable webs as an element in the patented inventions. For that reason alone we held that, if the flexible web constituted an essential element of the inventions, both patents failed to satisfy the requirement of the statute that the patentee describe his invention so that others may construct and use it after the expiration of the patent and that it "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not,"

Permutit Co. v. *Graver Corp.*, 284 U. S. 52, 60; that consequently the patent monopoly did not extend beyond the invention described and explained by the patent as the statute requires and could not be enlarged by amendment so as to embrace in the invention an element not described or claimed in the application as filed, at least when adverse rights of the public had intervened. See *Schriber-Schroth Co.* v. *Cleveland Trust Co., supra,* 57.

Upon the remand the court of appeals held in the present suit, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 108 F. 2d 109, that the elements of the combination described and claimed in the Gulick patent before amendment and in the Maynard patent without including the flexible web element which was added only by amendment to the Gulick patent, did not disclose invention over the prior art. But considering that the flexible web element which had not been included in the combination patented by Gulick and Maynard had been described and claimed in the Jardine patent, it recalled its mandate to the district court by which it had directed dismissal without prejudice of the suit brought on that patent. See *Schriber-Schroth Co.* v. *Cleveland Trust Co., supra,* 112, 113. Upon an examination of the Jardine specifications and claims it found there described and claimed the invention which it had previously found in Gulick and Maynard, but which this Court had found the patentees had failed to describe and claim in their applications.

The Jardine claims, 1, 8 and 11, which it sustained, recite the webs as an element but do not describe them as flexible or point to flexibility as an element in the invention claimed. But in the specifications of the patent, which so far as now material appeared in Jardine's application describing the invention, he makes specific reference to the webs constructed in such proportions as to enable them to "bend" in response to the reaction force of the cylinder wall on the outer faces of the guide

segments as the piston expands, and to the coöperation of the "bending" web with the thermal expansion of the guide part of the piston without a corresponding increase in its outer diameter.[1] He explained the principle of his device saying, "I have found that these difficulties can be overcome by constructing a piston with its skirt or guide portion supported and slotted or divided in a manner to permit deformation and deflection of parts thereof without interfering with the performance of the essential functions of the respective parts."

Reading specifications and claims together, the Court of Appeals interpreted the latter as incorporating the element of web flexibility in the combination claimed and concluded that Jardine had explained and claimed "the principle of operation of his machine and the flexibility of its webs." It said that "the knowledge that was not Gulick's or was by him concealed is clear to Jardine and by him proclaimed." It held the Jardine patent valid and infringed as it had found Gulick infringed in its earlier decision.

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[1] An excerpt from the Jardine Specifications reads:

"The webs 6 and guide segments preferably are so designed that this displacement of the segments 10, 10ª, is permitted by virtue of a bending of the webs 6 at points remote from the guide segments. To this end, as shown in Fig. 4, the thickness of the guide segments is increased toward the webs 6 and the webs 6 are decreased in thickness from the guide portions inward toward the bosses to points in line with the inner ends of the slots 11ª. This gives in effect a cantilever structure weakest at its support, . . . Thus the reaction force of the cylinder wall on the outer faces of the guide segments as the piston expands tends to cause bending of the webs 6 along said lines 13. Due to the bending of the web sections 6 and the forcing together of each pair of segments, the guide part of the piston may undergo a considerable thermal expansion without a corresponding increase in the outer diameter thereof and thus a small initial clearance can be used without danger of scoring or seizure of the piston."

We granted certiorari, 309 U. S. 648, on a petition which raised, among others, the question whether the court of appeals had misinterpreted or unduly limited this Court's earlier decision in this case and its decision in *Permutit Co.* v. *Graver Corp., supra,* by refusing to hold a patent invalid where a feature found to be an essential element of the patented combination was not mentioned in the claims of the patent and was in fact surrendered during the prosecution of the application and after adverse decisions in interferences.[2]

The claims of a patent are always to be read or interpreted in the light of its specifications, *Hogg* v. *Emerson,* 11 How. 587; *Carnegie Steel Co.* v. *Cambria Iron Co.,* 185 U. S. 403; *Smith* v. *Snow,* 294 U. S. 1; and we may assume that if in the present case the specifications and claims of the patent were to be interpreted without reference to its file wrapper history, the webs referred to in the claims are the webs described in the specifications as capable of bending in coöperation with the slotted piston guides or skirts so as to compensate for thermal expansion and so supply the element of webs laterally flexible which was wanting to Gulick and to Maynard. But the particular invention to which the patentee has made claim in conformity to the statute is not always to be

[2] A question raised by the petition for certiorari was whether respondent could prosecute its suit for injunction in the absence, as a party, of the licensee to whom respondent had granted the exclusive right to manufacture, under the patents in question, aluminum pistons, the only field in which concededly the patent has present practical utility. The special master found against petitioners on this point and no exceptions were taken to his finding, nor was the point argued when the case was first before the circuit court of appeals and this court. The court below thought that in view of these circumstances the right of respondents to an injunction was no longer an issue. We do not here pass on the question since we find that, in any case, for reasons appearing in the opinion, no injunction should issue.

ascertained from an inspection of the specifications and claims of the patent alone. Where the patentee in the course of his application in the patent office has, by amendment, cancelled or surrendered claims, those which are allowed are to be read in the light of those abandoned and an abandoned claim cannot be revived and restored to the patent by reading it by construction into the claims which are allowed. Hence, petitioners argue, the effect to be given to the omission from the Jardine claims of any reference to the flexible web feature, which the court below thought distinguished his alleged invention from that of the Gulick and Maynard patents, cannot rightly be determined without some examination of the claims pointing to flexible webs as a feature of his invention, which Jardine added to his application by amendment and later surrendered as a result of interference proceedings in the patent office.

The Jardine patent was described as of the slipper type of piston although not limited to that type, the skirt consisting of two separated parts circumferentially separated from the piston head, supported by the webs which connect the skirt or slippers with the piston head and support wrist pin bosses from which the skirt is retracted or cut away. The claims of the Jardine application as filed or later amended and ultimately allowed made no reference to the webs as flexible, yielding, or resilient, which the court of appeals found, when coöperating with other structural elements, to be a distinguishing feature of Jardine's invention. Claim 8 of the Jardine patent, which is typical of the three which the court below sustained, reads:

"In a piston for an internal combustion engine, the combination of a head having a cylindrical ring flange, oppositely disclosed webs integral with the flange and carrying diametrically opposite piston pin bosses, a skirt integral with said webs and cut away to expose the sides

of said webs and separated from the ring flange by circumferential slits and provided with a longitudinal slit disposed between the ends of the webs."

Claims 5 and 6 refer to the "skirt portion cut away from the head to expose the bosses."

While the application was pending Jardine amended his claims so as to supply this omission. In various forms he claimed the piston head, skirt and web combination with piston head separated at its flange or periphery from the skirt, the skirt slotted or separated into parts and connected with the head by the webs, variously described as "yielding ribs," "resilient arms," "skirt carriers . . . susceptible of being slightly flexed radially" or as "joining means being resiliently yieldable," or as "means for yieldingly connecting the said skirt section with said head." These claims, as a result of being thrown into interference with Hartog, No. 1,842,022, applied for February 16, 1920, allowed January 19, 1932, and in some instances with Gulick and with Long, No. 1,872,772, applied for March 7, 1919, allowed August 23, 1932, were rejected by the patent office. Jardine then withdrew all of these amendments. Of these amended and cancelled claims, claim 18 [19 E] is typical. It reads as follows:

"In a piston of the class described, a cup-like head comprising a pressure receiving end and a wall portion, a skirt circumferentially disconnected from the wall portion of the head and divided from end to end, and skirt carriers connecting said skirt to the pressure receiving end, said skirt carriers being disconnected from the wall portion of the head and susceptible of being slightly flexed radially."

Upon comparison of the withdrawn claim with claim 8 of the patent as allowed it will be observed that both are combination claims for a piston having a head, a divided or slotted skirt disconnected from the wall portion of the

head and connected with the head by ribs, webs or skirt carriers. The only material difference in view of what has been said to be the invention is the statement in the withdrawn claims that the skirt carriers (webs) are "susceptible of being slightly flexed radially" or the like. Whatever would have been the proper construction of the claims as allowed, read in the light of the specifications alone, there being no amendments, the question now presented is whether in view of the amendments and their withdrawal the patent can rightly be construed as including the flexible webs in the claim allowed.

In addition to the fact of the cancellation of the only claims specifying flexing webs or their equivalents as a feature of the invention, it is to be noted that at no time during the prosecution of the Jardine application did he urge that he was the inventor of a piston having flexible webs. Before the interferences and in distinguishing his invention from the Ricardo piston, Jardine urged as his only advance over Ricardo the addition of the slotted skirt which "changes the structure and the resistance to a disposal of the forces within and without the piston when the piston is in use," although in this litigation it is contended that the Ricardo patent did not disclose flexing webs. In submitting the final amendment cancelling the flexible web claims in interference and presenting the claims 8 and 11 of the Jardine patent held valid by the court below, there is no mention of flexing webs, the features stressed being in the case of claim 8 that the webs are integral with the ring flange and in the case of claim 11 that the webs are integral with the flange and extend "convergingly inwardly" therefrom.

It is a rule of patent construction consistently observed that a claim in a patent as allowed must be read and interpreted with reference to claims that have been cancelled or rejected, and the claims allowed cannot by construction be read to cover what was thus eliminated from

the patent. *Shepard* v. *Carrigan,* 116 U. S. 593; *Sutter* v. *Robinson,* 119 U. S. 530; *Roemer* v. *Peddie,* 132 U. S. 313; *Phoenix Caster Co.* v. *Spiegel,* 133 U. S. 360; *Hubbell* v. *United States,* 179 U. S. 77; *Weber Electric Co.* v. *E. H. Freeman Electric Co.,* 256 U. S. 668; *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 443. The patentee may not, by resort to the doctrine of equivalents, give to an allowed claim a scope which it might have had without the amendments, the cancellation of which amounts to a disclaimer. *Smith* v. *Magic City Club,* 282 U. S. 784, 790; *Weber Electric Co.* v. *E. H. Freeman Electric Co., supra,* 677, 678; *I. T. S. Rubber Co.* v. *Essex Rubber Co., supra,* 444. The injurious consequences to the public and to inventors and patent applicants if patentees were thus permitted to revive cancelled or rejected claims and restore them to their patents are manifest. See *Leggett* v. *Avery,* 101 U. S. 256, 259.

True, the rule is most frequently invoked when the original and cancelled claim is broader than that allowed, but the rule and the reason for it are the same if the cancelled or rejected claim be narrower. *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S. 425, 429; *Wm. B. Scaife & Sons Co.* v. *Falls City Woolen Mills,* 209 F. 210, 213; see *Computing Scale Co.* v. *Automatic Scale Co.,* 204 U. S. 609, 620, 621; cf. in case of disclaimer *Altoona Publix Theatres, Inc.* v. *Tri-Ergon Corp.,* 294 U. S. 477, 492, 493.

In view of the prior art which precluded, as the court below held, invention in Gulick and Maynard, absent the flexible webs, and in Jardine without the inclusion of the surrendered flexible web feature in the patented combination, it does not appear why the patent office allowed the broad claims after rejecting the narrower ones. But in any case the patentee, having acquiesced in their rejection, is no longer free to gain the supposed advantage of the rejected claims by a construction of the allowed

claims as equivalent to them. *Morgan Envelope Co.* v. *Albany Paper Co., supra.*

The application of that principle in the present case is not foreclosed as respondent suggests because the combination of elements surrendered differs from the combination which the court below found to be preserved in the allowed claims and in which it found invention. The combination which it found to be preserved in Jardine's claims was "a combination with balanced skirt flexibility due to co-operation of longitudinal and vertical slotting with flexing webs supporting retracted bosses and connected to a skirt thereby made responsive to physical compression and thermal expansion so as to permit of minute clearances between piston and cylinder, a concept perceived in Gulick as amended and minus amendment no longer perceived." 108 F. 2d 114.

But the amended and cancelled claims are to be read in the light of the specifications. So read, cancelled claim 18 [19 E], already quoted, claims a piston "of the class described" and embraces the combination in which the court below found invention, longitudinal and vertical slotting, flexing webs supporting "retracted bosses" and connected to a skirt thereby made responsive to physical compression and thermal expansion. True the amended and cancelled claim and allowed claims 1, 8 and 11 did not specifically mention retraction of the skirt from the bosses. Nor did either the amended claims or the allowed claims specify balanced skirt flexibility due to coöperation of the parts. For them recourse must be had to the specifications and drawings in which the court below found the elements of the invention which it described but in which, absent the flexible web element, it found no invention. In view of such want of invention and of the prior art, the only material difference between the amended and the allowed claims is the presence in the former of the flexible web element and, in consequence of the surrender of the former particularizing the flexible web feature of

the alleged invention, the latter cannot be construed as including that feature.

We have no occasion to determine whether, in view of the prior art, the Jardine patent disclosed invention if the flexible web feature had not been surrendered. Without it the court below concluded that Jardine, like Gulick and Maynard, disclosed no invention. It rejected the Schmiedeknecht patent, No. 1,256,265, one of those in suit, on like grounds, saying, "It discloses no web flexibility co-operating with other elements of resiliency to achieve the balanced flexibility perceived in Jardine on the basis of which alone the latter is thought to be valid . . ." We accept this conclusion as supported by the evidence of the prior art in the master's findings and the only one which could be reached consistently with the decision below with respect to the Gulick and Maynard patents which stand adjudged as invalid.

Reversed.

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

WEST ET AL. *v.* AMERICAN TELEPHONE AND TELEGRAPH CO.

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

Nos. 44 and 45. Argued November 13, 1940.—Decided December 9, 1940.

1. In a suit in a federal court for equitable relief in protection of legal rights growing out of an unlawful transfer of stock by a corporation, the state laws defining those rights are the rules of decision. P. 236.
2. A rule announced and applied by state courts as the law of the State, though not passed on by the highest state court, may not be rejected by a federal court because it thinks that the rule is unsound in principle or that another is preferable. P. 236.

3. In deciding local questions it is the duty of the federal court to ascertain from all available data what the state law is and apply it, however superior a different rule may appear from the viewpoint of general law and however much the state rule may have departed from prior decisions of the federal courts. P. 237.
4. Where an intermediate state appellate court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the State would decide otherwise. P. 237.

   This is the more so where, as in this case, the highest state court has refused to review the lower court's decision, rendered in one phase of the very litigation which is being prosecuted by the same parties before the federal court.
5. The Ohio County Court of Appeals, by a judgment which the Supreme Court of the State declined to review, decided that an action against a corporation for damages resulting from its issue of a certificate for shares of its stock in the name of one who was a life tenant of the stock, without disclosing on the face of the certificate that the stockholder was a life tenant or the interest of the remaindermen, followed by a wrongful transfer of the stock to a third person, was premature because no demand had been made on the corporation to reinstate the plaintiffs' rights in the stock and because the corporation had not refused this in advance of the suit. In a second suit brought in the federal court after a sufficient demand had been made, in which the same plaintiffs sought equitable relief and damages from the same corporation, the Circuit Court of Appeals, declining to follow the ruling of the state Court of Appeals, held that a demand was not essential—that the cause of action accrued when the stock was issued to the life tenant and, counting from that time, was barred by a statute of limitations, or laches. *Held:*

   (1) No reason appears for supposing that, if the second suit had been brought in a state court, the state Court of Appeals would depart from its previous ruling or that the Supreme Court of the State would grant the review which it withheld before. P. 238.

   (2) The law thus announced and applied by the state Court of Appeals is the law of the State, applicable to a case between the same parties in the federal court, and the federal court is not free to apply a different rule, however desirable it may believe it to be,

and even though it may think that the state Supreme Court may establish a different rule in some future litigation. P. 238.

(3) Since the cause of action under the Ohio law did not arise until demand, which was either when the suit was brought in the state court or when the formal demand was made, the statute of limitations did not begin to run until one or the other of those dates. P. 238.

(4) No special circumstances are shown effective under Ohio law to limit the time of demand or shorten the statutory period after demand; the findings of the District Court that the plaintiffs were not estopped or guilty of laches were supported by evidence and should not be disturbed. P. 239.

108 F. 2d 347, reversed.

CERTIORARI, 310 U. S. 618, to review a decree of the Circuit Court of Appeals which (upon separate appeals by the petitioners and respondent here, but on a single record) reversed a decree of the District Court requiring the respondent corporation to procure shares of its common stock to be held in a trust during the life of a decedent's widow and to be ultimately distributed to remaindermen, as directed by the will. Jurisdiction was by diversity of citizenship.

Mr. H. L. Deibel, with whom *Mr. Orlin F. Goudy* was on the brief, for petitioners.

The decision of the state court on the issue of demand is *res judicata* in state and federal courts. *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5; *De Sollar* v. *Hanscome,* 158 U. S. 216; Freeman on Judgments, 5th ed., §§ 745, 1465; *North Carolina R. Co.* v. *Story,* 268 U. S. 288; *Mitchell* v. *Bank,* 180 U. S. 471.

The decision of the state court creates a right which is protected by the Fifth Amendment.

The law of Ohio requires demand, and the federal courts are bound by the law of the State, statutory or common law, in diversity of citizenship cases. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life*

Ins. Co., 304 U. S. 202; *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263; *Lyon* v. *Mutual Benefit Assn.*, 305 U. S. 484, 489; *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208; *Martin* v. *Cobb*, 110 F. 2d 159, 163; *Erie R. Co.* v. *Hilt*, 247 U. S. 97; *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487.

Federal courts are bound to decide a case as they think the state courts would decide it, and not as they think the state courts should decide it.

It would be arbitrary to have regard only for the adjudications of the highest state court.

If it be the correct doctrine that the decisions of the highest court only are the state law, the judgment below is nevertheless erroneous, because the Supreme Court of Ohio has expressly held demand prerequisite in actions by shareholders of corporations for recognition of their rights and for mesne dividends. *Steverding* v. *Cleveland Co-operative Stove Co.*, 121 Ohio St. 250.

Whether the petitioners are regarded as remaindermen, or as absolute owners, they are seeking to restore their rights in the shares, and the principle of the *Steverding* case should be applied. Cf., *Cleveland & Mahoning R. Co.* v. *Robbins*, 35 Ohio St. 483.

Failure of the state Supreme Court to order certification is in some degree an approval of the decision of the state Court of Appeals, and lends it partial sanction, and to this extent is the Supreme Court's pronouncement of the law.

Only a fraction of the cases litigated in the Ohio *nisi prius* courts and reviewed in the Court of Appeals, reach the Supreme Court. The highest court has absolute and arbitrary discretion in ruling on motions to certify; it may certify in any case, and from its conclusions there is no appeal. The judgments of the Court of Appeals therefore are usually final. The constitution provides they "shall be final in all cases," with named exceptions.

Although the Ohio Court of Appeals can review only the cases that are tried in the lower courts of its district, as prescribed by constitutional provision, it has state-wide jurisdiction in some cases, e. g. in *quo warranto.*

The fact is that no court is bound by any decision in the State of Ohio, whether rendered by a low court or a high court. A *nisi* court may with entire impunity disregard and overrule the judgments of even the Supreme Court in other cases. And occasionally, on further examination, the Supreme Court concurs. *Stare decisis* does not bind a court to follow even its own prior decisions. There is no binding force in this doctrine except that the public interest requires certainty and uniformity. *Kearney* v. *Buttles,* 1 Ohio St. 362, 366; *State* v. *Yates,* 66 Ohio St. 546.

But the decisions of the Ohio Courts of Appeals are of importance in all the courts of the State, and declare the law of Ohio, in the absence of adverse pronouncements by the Supreme Court, and not merely the law of their districts.

The only sound rule in diversity of citizenship cases is, that the federal courts should decide as they think the state courts would decide in the same case. All the reasoning of all the state tribunals may be scrutinized. That is done in the state courts, and should be done in the federal courts.

Since demand was required, the action can not be barred by any statute of limitations. Even if demand were not necessary, the action would not be barred.

The appellants are not barred by laches.

The unauthorized sale of the stock by the life tenant terminated her life estate, and accelerated all rights in, and accruing from, the stock to the remaindermen as of the time of the sale. And the sale, having been made possible by the wrongful act of respondent, is to be laid

at respondent's door, as of the time it recognized the sale, cancelled the West certificate and issued a new certificate to a third person.

A corporation must respond to shareholders for losses resulting from unauthorized and wrongful transfers.

Equity will afford complete relief, including damages.

Mr. William B. Cockley for respondent.

The defendant was not negligent in transferring its stock without limitation. This action is barred by the statute of limitations, by laches, and by the final judgment of the Ohio Court of Appeals.

The opinion of the Ohio Court of Appeals is a misapplication of well-settled Ohio law.

The refusal of the Ohio Supreme Court to grant the plaintiffs' motion to certify did not imply approval of the opinion of the Ohio Court of Appeals.

The opinion of the Ohio Court of Appeals should not be considered binding on the federal courts. The rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78 and other decisions of this Court is that the law of a State must be established by its legislature or by its highest court. *Lyons* v. *Mutual Benefit Health & Accident Assn.,* 305 U. S. 484, 489–490; *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103, 107; *Russell* v. *Todd,* 309 U. S. 280, 293. These cases establish the rule of binding authority for the decisions of the highest court of a State and a persuasive authority only for the decisions of inferior state courts. This has been the interpretation of the decisions of this Court not only by the Sixth Circuit in the instant case but by other Circuits. *Six Companies* v. *Joint Highway District No. 13 of California,* 110 F. 2d 620; *Field* v. *Fidelity Union Trust Co.,* 108 F. 2d 521; *Hack* v. *American Surety Co.,* 96 F. 2d 939. Cf., *Erie R. Co.* v. *Hilt,* 247 U. S. 97, 99.

Graham v. *White-Phillips Co.*, 296 U. S. 27, clearly held that the decision of an intermediate appellate court in Illinois construing the Negotiable Instrument Law was not binding upon the federal court sitting in Illinois.

Even if the rule of *Erie R. Co.* v. *Tompkins* were to be extended it ought not to include decisions by the Court of Appeals of Ohio. There are nine Courts of Appeals in Ohio, each having jurisdiction in a particular district. The Eighth District has jurisdiction in only a single county, namely, Cuyahoga. It has no jurisdiction over suits brought in the other eighty-seven counties of the State. Its judgments are final except in cases involving questions under the state or federal constitution and "cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court." Ohio Const., Art. IV, § 6. In practice this means that the Supreme Court can, by granting a motion to certify, review practically any case decided by any Court of Appeals.

The decisions of the Court of Appeals of Cuyahoga County are not binding upon the courts of the other eighty-seven counties of Ohio but are of persuasive authority only. Common Pleas judges of the other 87 counties and the Courts of Appeals of the other eight districts are under no obligation to accord the opinion in *West* v. *American Telephone & Telegraph Co.* any greater weight than its reasoning compels. Nor does the fact that a motion to certify this decision was denied by the Ohio Supreme Court add to its authority. *Village of Brewster* v. *Hill,* 120 Ohio St. 343.

The only Ohio court, therefore, that is bound by the decision of the Court of Appeals of Cuyahoga County is the Common Pleas Court of that county. If the plaintiffs' claim in this case is recognized it will mean that

the decision of the Ohio Court of Appeals of Cuyahoga County can be ignored by the courts of eighty-seven of eighty-eight counties in Ohio, as it can by the Supreme Court of Ohio, but will be binding upon justices of the peace, municipal courts and the Common Pleas Court of Cuyahoga County and upon all the federal courts, including the highest.

Moreover, it means that a plain misinterpretation and misconstruction of the decisions of the Supreme Court of Ohio incorporated in the opinion in this case can be corrected in a later case in practically all the courts of Ohio but can not be corrected by any of the federal courts.

Finally, it means, as the Circuit Court of Appeals said, that a decision proceeding upon a misunderstanding of a former decision of the Sixth Circuit Court of Appeals can not be corrected by that court or by this Court.

There are other consequences of moment. If the rule sought by the plaintiffs were put in effect every cause of action supported by a doubtful decision of a Court of Appeals of Ohio would be brought in the federal court where diversity or other jurisdictional ground existed for the very purpose of preventing the Ohio courts from correcting the unsound rule.

We point out further that the District Court for the Eastern Division of the Northern District of Ohio has jurisdiction in some nineteen counties. These same nineteen counties include all or parts of the territorial jurisdiction of three Ohio Courts of Appeals. Under the rule advocated by the petitioners a single judge sitting in the Eastern Division of the Northern District of Ohio might conceivably have three different rules of law from which to choose as announced by the three Ohio Courts of Appeals in his district. And why stop here? If each Court of Appeals in Ohio can declare the law of the State binding on the federal court, theoretically there could be nine

such decisions from which the District Judge might choose.

The opinion of the Ohio Court of Appeals in this case can not be accepted by the federal courts without (a) denying full faith and credit to the judgment rendered in the same case, and (b) perpetuating a plain misconstruction of well-settled Ohio law.

Plaintiffs' claims as to the relief are wholly unwarranted.

MR. JUSTICE STONE delivered the opinion of the Court.

The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West* v. *American Telephone & Telegraph Co.*, 54 Ohio App. 369; 7 N. E. 2d 805; 7 Ohio Opinions 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of § 34 of the Judiciary Act of 1789 and of our decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

In 1926 an Ohio decedent, domiciled at death in Cuyahoga County, bequeathed his estate, including ninety-two shares of the common stock of respondent, to his widow for life, with remainder to petitioners, the sons of decedent's first wife, who was the sister of his widow. February 2, 1927, the widow tendered to respondent, for transfer, certificates for the ninety-two shares of stock standing in decedent's name, each endorsed with an assignment of the shares evidenced by the certificate, to the widow, signed in her name as executrix of decedent's estate. Accompanying the certificate were duly attested documents as follows: A copy of decedent's will, a cer-

tificate of the Cuyahoga County Probate Court of the qualification of the widow as executrix under the will; copy of an application of the executrix for the distribution in kind of the estate, consisting of specified corporate stocks including the ninety-two shares of respondent's stock, with the appended consent of petitioners to the distribution in kind, and a copy of the journal of the probate court showing that it had granted the application and ordered the distribution.

Thereupon respondent issued a new certificate for the ninety-two shares in the name of the widow which did not disclose her limited interest as life tenant or that of petitioners as remaindermen. October 31, 1929 the widow endorsed and delivered the certificate as collateral security for her brokerage account to a stock broker to whom respondent issued a new certificate in his name as stockholder on November 4, 1929. In March, 1934, petitioners first learned of this disposition of the shares by the widow and in June, 1934, brought suit against respondent in the Cuyahoga County Court of Common Pleas, seeking recovery of damages for the wrongful transfer of the shares. In addition to defenses on the merits respondent set up the Ohio four-year statute of limitations. After a trial on the merits the trial court gave judgment for petitioners, which the Cuyahoga County Court of Appeals reversed. The state Supreme Court denied petitioners' motion to require the court of appeals to certify its record to the Supreme Court for review because of "probable error" in the case, after which the Court of Common Pleas entered "final judgment against appellees [petitioners here] and in favor of appellant [respondent here]" upon the mandate of the Court of Appeals stating "the judgment of the Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appel-

lant, no error appearing in the record." The opinion of the appellate court was not filed but copies were furnished counsel and it appears of record.

The state court of appeals held that upon the tender for transfer of the certificates of stock by the executrix it was the duty of respondent to issue a new certificate showing on its face the respective interests of the life tenant and of the petitioners as remaindermen; that the transfer of the shares by respondent to the broker without the endorsement of the certificate by petitioners was unauthorized and wrongful; that the unlawful disposition of the stock by the life tenant did not terminate the life interest or accelerate the rights of the remaindermen, but that the refusal of respondent after demand by petitioner to recognize and reëstablish petitioners' rights in the stock, or other stock of equal par value, was a conversion of it entitling petitioners to damages to the extent of the value of their interest in the stock or to a decree of restitution directing respondent to issue a new certificate for the ninety-two shares in such manner as would protect the respective interests of all parties.

Construing the relevant provisions of the Ohio Uniform Stock Transfer Act (Ohio G. C., §§ 8673–1–22) the court held that as a prerequisite to recovery for conversion of petitioners' interest in the stock it was necessary that respondent repudiate petitioners' title and that the petitioners should allege and prove that respondent had refused to recognize petitioners' right in the stock and to issue an appropriate certificate for it. As petitioners had failed to allege or prove any demand on respondent or any refusal by it in advance of suit to recognize petitioners' rights or to issue an appropriate certificate, the court directed judgment for respondent in conformity to its mandate.

On June 18, 1937, following the denial of petitioners' motion by the state Supreme Court, in January, 1937,

petitioners made demand on respondent, the sufficiency of which is not questioned, to restore to petitioners their rights in the shares, and on July 14, 1937, petitioners brought the present suit in the federal district court for Northern Ohio. The bill of complaint, after alleging the facts already mentioned which the state court had found to establish the wrongful transfer of the stock by respondent and after reciting the course and results of the litigation in the state courts and the demand on respondent, set up petitioners' right to relief according to the decisions of the state courts and prayed judgment that respondent issue to petitioners a certificate for the ninety-two shares of stock and for back dividends with interest, and damages, and generally for other relief.

The trial court found that the cause of action did not accrue until the demand made upon respondent; that suit was not barred by the prior adjudication in the state court since that suit, in which no demand was alleged or proved, was on a different cause of action from that now asserted; that it was not barred by limitations or laches and that the remainder interests had not been accelerated by the wrongful disposition and transfer of the stock. It accordingly decreed that respondent procure by purchase or otherwise ninety-two shares of its common stock, issue a certificate for it to a trustee, which was directed to hold the stock during the lifetime of the widow for the benefit of respondent and upon her death to make distribution of it to the remaindermen as directed by the will.

The Court of Appeals for the Sixth Circuit dismissed the appeal of petitioners raising questions not now material and on the appeal of the respondent, reversed the decree of the district court, 108 F. 2d 347. It held contrary to the ruling of the state court that demand upon respondent was not prerequisite to the accrual of petitioners' cause of action and that petitioners' right of re-

covery was barred by limitations and laches. We granted certiorari, 310 U. S. 618, upon a petition which set up that the Court of Appeals had erroneously failed to apply the Ohio law with respect to the necessity for a demand as defined by the state court of appeals in the litigation between the present parties and that the court below had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts.

The court below thought that demand was not an essential part of the cause of action where the suit was brought by remaindermen not entitled to possession of the stock certificate, consequently that the district court had erred in following the ruling of the state court of appeals and that both had misconstrued and misapplied an earlier decision of the court below in *American Steel Foundries* v. *Hunt,* 79 F. 2d 558, where demand was held to be prerequisite to a suit brought by one who had acquired shares by purchase but had failed to present the endorsed certificate to the corporation for transfer before bringing suit. It cited decisions of similar purport by the Ohio Supreme Court but recognized that the only Ohio case passing upon the question whether demand is prerequisite to suit in the case of a remainderman is the decision of the state court of appeals in *West* v. *American Telephone & Telegraph Co., supra.* It held that it was not bound to follow the decision of an intermediate appellate court of the state and so was free to adopt and apply what it considered to be the better rule that demand is unnecessary and consequently is not a part of the petitioners' cause of action. From this it concluded that the cause of action which it thought had accrued in 1927 when the stock certificate was issued to the life tenant, was barred by the four-year statute of limitations applicable to causes of action "for an injury to the rights of the plaintiff not arising on contract . . ."

§ 11224 Ohio G. C., or by laches if demand were necessary.

Since the equitable relief sought in this suit is predicated upon petitioners' legal rights growing out of respondent's unlawful transfer of the stock to the assignee of the life tenant, the state "laws" which, by § 34 of the Judiciary Act of 1789, c. 20, 28 U. S. C., § 725, are made "the rules of decision in trials at common law" define the nature and extent of petitioners' right. See *Russell* v. *Todd,* 309 U. S. 280, 289. And the rules of decision established by judicial decisions of state courts are "laws" as well as those prescribed by statute. *Erie Railroad Co.* v. *Tompkins, supra,* 78. True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103, 107. But the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it

thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. See *Erie Railroad Co.* v. *Tompkins, supra,* 78; *Russell* v. *Todd, supra,* 203.

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Six Companies of California* v. *Joint Highway District, ante,* p. 180; *Fidelity Union Trust Co.* v. *Field, ante,* p. 169. Cf. *Graham* v. *White-Phillips Co.,* 296 U. S. 27; *Wichita Royalty Co.* v. *City National Bank, supra,* 107; *Russell* v. *Todd, supra.* This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner, may hold itself free to modify or reject the ruling thus announced. *Village of Brewster* v. *Hill,* 128 Ohio St. 343, 353; 190 N. E. 766.[1] Even though it is arguable

[1] Article IV, § 6 of the Ohio Constitution provides that: "Judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state . . . and cases of public or great general interest in which the supreme court may direct any court of appeals

that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.

Whether the state court of appeals in the first suit defined the cause of action as arising out of the failure of respondent to describe correctly the interests of the parties, in the certificate issued to the widow in 1927, or out of the wrongful transfer in 1929, is immaterial to the question of the period of limitation. In either case, since the cause of action under the Ohio law did not arise until demand, which was either on June 2, 1934, when the suit was brought in the state court, or June 18, 1937, when the formal demand was made, the statute of limitations did not begin to run until one or the other of those dates. See *Keithler* v. *Foster,* 22 Ohio St. 27.

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to certify its record to that court . . . and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

It is unnecessary to decide whether, as petitioners contend, the suit was on contract or statutory liability to which the six-year statute applies, § 11222, Ohio G. C., or "for the recovery of personal property or for taking or detaining it," in which case the cause of action is not deemed to accrue "until the wrongdoer is discovered . . ." § 11224, Ohio G. C., see *Cleveland & Mahoning R. Co.* v. *Robbins,* 35 Ohio St. 483, 502, or whether as the court below held the cause of action was "for injury to the rights of the plaintiff not arising on contract . . .," in which case the statute runs from the date of the injury when demand is not required. § 11224, Ohio G. C. For in any event since under Ohio law no cause of action arose until demand was made, the four-year period would run either from the date of the first suit, or from that of the formal demand, and had not expired on July 14, 1937, when the present suit was commenced in the district court.

The court below also held that if demand were to be deemed a prerequisite to suit petitioners were barred by their "unnecessary delay" in making it, citing *Keithler* v. *Foster, supra,* for the proposition that demand must be made within four years after the cause arose (1927 or 1929), the time limited by the statute for bringing an action if no demand were necessary. But the Supreme Court in that case thought it correct to apply the rule relied upon by the circuit court of appeals only when "no cause for delay can be shown." Cf. *Stearns* v. *Hibben Dry Goods Co.,* 11 Ohio C. C. (N.S.) 553; 31 Ohio C. C. 270; affirmed 84 Ohio St. 470; 95 N. E. 1157. Here no special circumstances are shown for limiting the time of demand or shortening the statutory period after demand.[2] Both the state court and the district court

[2] In *Keithler* v. *Foster,* 22 Ohio St. 27, the demand on a sheriff for moneys collected on an execution sale in 1855 was not made until 1867. The Supreme Court in holding that the suit brought

in this case have ruled that petitioners are not estopped by their consent to distribution, which both courts interpreted as a consent only to a lawful distribution by a lawful procedure. The district court also found that the evidence relied upon to show lack of diligence on the part of petitioners in prosecuting inquiries which would have disclosed the unlawful transfer failed of its purpose and was insufficient to establish either estoppel or laches. At most the evidence shows that in 1930 one of the petitioners became suspicious that the life tenant had suffered losses in the stock market and made inquiry of one corporation whose stock was included in the estate only to learn that the stock certificate had been properly issued to the widow as life tenant of the estate and that he made no further inquiries. The record is barren of any

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on the sheriff's bond in 1868 was not barred by the ten year statute of limitations said that where "the statute begins to run, in cases like this, from the time of demand, it would be but reasonable to hold, in the absence of other special circumstances, when no demand is shown to have been made within the statutory period for bringing the action, that, for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which time the statute will begin to run."

In *Douglas* v. *Corry,* 46 Ohio St. 349; 21 N. E. 440; *Townsend* v. *Eichelberger,* 51 Ohio St. 213; 38 N. E. 207, on which respondent relies, no suit was brought until after the expiration of the additional limitation period after the demand was made or presumed as in *Keithler* v. *Foster, supra.*

Here, even if demand were presumed at the end of a four year period, which began to run either in 1927 or 1929, the state court action was timely when begun on June 2, 1934. It was dismissed in February, 1937. The present action was begun in July, 1937. § 11233 of the Ohio G. C. provides: "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. . . ."

evidence to suggest that petitioners had any ground for suspicion that respondent had issued the certificate to the life tenant in any improper or unlawful form before March, 1934, when they discovered the misappropriation of the stock. They brought suit in the state court the following June. We think there was no want of diligence on the part of petitioners in presenting and prosecuting their demand and that the findings of the trial court are supported by the evidence and should not have been disturbed.

The judgment will be reversed, but as other points involving questions of state law argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE ROBERTS:

I concur in the opinion of the court in so far as it holds that the Circuit Court of Appeals should have treated the decision of the Cuyahoga County Court of Appeals, under the circumstances of this case, as expressing the law of Ohio with respect to the necessity of a demand prior to institution of suit. I do not, however, agree that the judgment should be reversed.

I am unable to say that the court below erred in holding that, under Ohio law, the four-year period of limitations applied to petitioners' cause of action, and that delay of demand for more than four years after the cause of action accrued barred the suit. Both holdings seem to me to be supported by decisions of the Ohio courts; *Keithler* v. *Foster,* 22 Ohio St. 27; *Douglas* v. *Corry,* 46 Ohio St. 349; 21 N. E. 440; *Townsend* v. *Eichelberger,* 51 Ohio St. 213; 38 N. E. 207; *Stearns* v. *Hibben Dry Goods Co.,* 11 Ohio C. C. (N. S.) 553, 31 Ohio C. C. 270; affirmed 84 Ohio St. 470; 95 N. E. 1157. There is here

no place for any presumption of demand, as in *Keithler* v. *Foster,* for here the suit in the state court was dismissed on the express ground that no demand had in fact been made; and in the present suit in the United States District Court the averment of the complaint is that demand was made June 18, 1937, at least eight years after the cause of action accrued. In such circumstances, as the other cited cases show, a demand made at a date beyond the period of limitations, does not toll the statute. In the *Douglas* case the averment was that demand was made nine years after the cause of action accrued and suit was brought within four years thereafter. In the *Stearns* case it was alleged demand was made four years and nine months after accrual of cause of action, and suit begun within four years thereafter. The statute of limitations was held a bar in both.

Though the action was in equity, an action at law might have been maintained (*Stearns* v. *Hibben Dry Goods Co., supra; Russell* v. *Todd,* 309 U. S. 280, 289), and the statute governing such an action is applicable.

Not only have petitioners failed to show "special circumstances" justifying their delay in making demand (*Keithler* v. *Foster, supra*), but the court below has held they were guilty of laches, an independent ground of decision, which, though the question be a close one, we ought not, under our settled practice, to reëxamine.

For these reasons I think that, despite the erroneous view of the Circuit Court of Appeals as to the law of Ohio on the point decided by the State Court of Appeals, the judgment should be affirmed.

MONTGOMERY WARD & CO. *v.* DUNCAN.

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

No. 30. Argued November 12, 1940.—Decided December 9, 1940.

1. A defendant who moved the District Court successfully for judgment *non obstante veredicto* and who thereupon urged that, because of the granting of the judgment his alternative motion (on other grounds) for a new trial had passed out of the case, did not thereby elect to stand upon his motion for judgment alone and abandon his right to have the motion for new trial decided by the District Court should his judgment be reversed on appeal. P. 249.
2. Under Rule 50 (b) of the Rules of Civil Procedure for the District Courts, the granting of a motion for judgment *non obstante veredicto* does not effect an automatic denial of an alternative motion for a new trial. Pp. 249–250.
3. The provision of the rule that "A motion for a new trial may be joined with this motion [for judgment *non obstante veredicto*], or a new trial may be prayed for in the alternative"—does not confine the trial judge to an initial choice of disposing of either motion to the exclusion of the other. P. 251.
4. Rule 50 (b) should be so administered as to accomplish all that is permissible under its terms in avoidance of delay in litigation. P. 253.
5. Under Rule 50 (b) where there is a motion for judgment *non obstante veredicto*, and in the alternative for a new trial because of trial errors and matters appealing to the judge's discretion, the judge should rule on the motion for judgment, and, whatever the ruling thereon, should also rule on the motion for new trial, indicating the grounds of his decision. If he grants judgment *non obstante veredicto* and denies a new trial, the party who obtained the verdict may appeal from that judgment, and the appellee may cross-assign error to rulings of law at the trial, so that if the appellate court reverses the order for judgment *non obstante veredicto*, it may pass on the errors of law which the appellee asserts nullify the judgment on the verdict. P. 253.
6. Where the District Court granted judgment *non obstante veredicto* to the defendant, but failed to pass upon defendant's motion in the alternative for a new trial, and the granting of the judgment

non obstante veredicto was adjudged erroneous and reversed on appeal, *held*, that in view of the novelty of the procedure under Rule 50 (b) and other circumstances, the cause should be remanded to the District Court with directions to hear and rule upon the motion for a new trial. P. 254.

108 F. 2d 848, modified.

CERTIORARI, 309 U. S. 650, to review a judgment of the court below which reversed a judgment of the District Court for the defendant entered *non obstante veredicto* and remanded the case with instructions to the District Court to enter judgment on the verdict in favor of the plaintiff.

Mr. John A. Barr argued the cause, and *Messrs. L. E. Oliphant* and *J. Merrick Moore* were on the brief, for petitioner.

Mr. Edward H. Coulter, with whom *Messrs. Kenneth W. Coulter* and *Boone T. Coulter* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we are called upon to determine the appropriate procedure under Rule 50 (b) of the Federal Rules of Civil Procedure.[1]

[1] 308 U. S. Appendix, p. 63; U. S. C., Tit. 28, § 723c addendum. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

To recover damages for personal injuries, respondent (hereinafter spoken of as plaintiff) brought action against petitioner (hereinafter spoken of as defendant), pursuant to an Arkansas statute declaring that corporations should be liable for injuries to an employe attributable to the negligence of a fellow employe. The complaint alleged that the plaintiff, while in the defendant's service, had been so injured. The answer denied the plaintiff was an employe of the defendant; denied he was injured in the manner described or by the negligence of his co-employe, and set up assumption of risk. At the close of the evidence upon the trial, the defendant moved for a directed verdict. The motion was denied and the jury returned a verdict for plaintiff on which judgment was entered. Within ten days the defendant filed its written motion in the following form:

"Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states . . ."

Thereunder, in heading A, it set out nine reasons in support of the motion for judgment, four of which were general, to the effect that the verdict was contrary to law, to the evidence, to the law and the evidence, and that the court erred in refusing to direct a verdict. Four challenged the sufficiency of the evidence as to negligence, as to the existence of the employment relation,

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If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

and as to assumption of risk, to support the verdict. One dealt with the preponderance of the evidence and was therefore inappropriate in support of the motion.

Under heading B, in support of the motion for a new trial, the same reasons as were assigned for the other motion were, with an immaterial exception, repeated; and additional reasons were added to the effect that the damages were excessive; that the court erred in ruling upon evidence, and in refusing to give requested instructions.

The motion concluded thus:

"Wherefore, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the Court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and judgment on behalf of the plaintiff and grant the defendant a new trial herein."

The District Court rendered an opinion [2] holding that there was no evidence of negligence on the part of the co-employe and that, therefore, judgment should be entered for the defendant.

The plaintiff filed a motion praying that, to limit the issues on appeal, the court's order and judgment specifically show the grounds on which relief was granted, and "in order that the judgment of the appellate court may be final," the motion for a new trial be overruled. The court, however, merely entered a judgment for the defendant notwithstanding the verdict.

[2] 27 F. Supp. 4.

The plaintiff filed a second motion reciting that, at a hearing upon his earlier motion, the defendant had resisted the contention that the court should rule on the motion for a new trial as that motion "passed out of existence and consideration on the granting of its motion for a judgment notwithstanding the verdict." The plaintiff further recited that the court did not pass upon the plaintiff's contentions but simply entered a judgment in favor of the defendant, and renewed his prayer that the court consider the motion, modify the judgment to specify the grounds upon which relief was granted, and dispose of all issues raised by both motions. This was denied.

The plaintiff appealed to the Circuit Court of Appeals, which decided that the District Court erred in holding the evidence insufficient to make a case for a jury. It reversed the judgment and remanded the cause with instructions to the District Court to enter judgment on the verdict in favor of the plaintiff.[3] It overruled the defendant's contention that the case should be remanded with leave to the trial court to dispose of the motion for a new trial.

The importance of a decision by this court, respecting the proper practice under Rule 50 (b), and a conflict of decisions,[4] moved us to grant certiorari.

The Circuit Court of Appeals said:

"Strictly speaking the motion did not pray for relief in the 'alternative,' giving the court a choice between

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[3] 108 F. 2d 848.

[4] *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co.*, 112 F. 2d 140; *Pessagno* v. *Euclid Investment Co.*, 112 F. 2d 577. Other cases cited seem not to have raised the precise question here presented. *Leader* v. *Apex Hosiery Co.*, 108 F. 2d 71; affirmed 310 U. S. 469; *Massachusetts Protective Assn.* v. *Mouber*, 110 F. 2d 203; *Lowden* v. *Denton*, 110 F. 2d 274; *Reliance Life Ins. Co.* v. *Burgess*, 112 F. 2d 234; *Ferro Concrete Construction Co.* v. *United States*, 112 F. 2d 488; *Williams* v. *New Jersey-New York Transit Co.*, 113 F. 2d 649; *Southern Ry. Co.* v. *Bell*, 114 F. 2d 341.

two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only 'in the event' he 'refuses to set aside the verdict . . . and judgment . . . and refuses to enter judgment herein in favor of the defendant. . . .' The court having granted the prayer of the motion as made did not err in not ruling on the motion for a new trial. The condition on which the court was asked to grant a new trial did not come into existence. The new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if when relief is asked on condition or in the alternative the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition. The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case upon the entry of the order."

The defendant contends that the rule continues the existing practice respecting granting of new trials, and also regulates the procedure for rendering judgment notwithstanding a verdict; that the provision for an alternative motion for a new trial would be meaningless and nugatory if the granting of the motion for judgment operated automatically to dismiss it, since the bases of the two motions are, or may be, different, and orderly procedure requires that the court first rule on the motion for judgment, the granting of which renders unnecessary a ruling upon the motion for a new trial, which should be reserved until final disposition of the former.

The plaintiff insists that the trial court is limited to a choice of action on one motion or the other, but cannot rule upon the motion for judgment and leave that for a new trial to be disposed of only if judgment notwithstand-

ing the verdict is denied. He further asserts, in support of the judgment below, that the uncontradicted allegations of his motion in the District Court disclose that defendant elected to stand upon its motion for judgment alone and that it cannot now repudiate the position thus taken.

We shall consider the plaintiff's contentions in inverse order.

1. While we took the case to review the Circuit Court's construction of the rule, it is true that if the defendant elected to stand on its motion for judgment and, in effect, withdrew its motion for a new trial, we do not reach the question involved in our grant of certiorari. We are, however, unable to spell out any such election or withdrawal. The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial whereas none of them could be considered in connection with the motion for judgment.

We think that when the defendant urged upon the District Court that it should not decide the motion for a new trial because it passed out of existence and consideration on the granting of the motion for judgment, all that defendant meant was that, having granted the motion for judgment, the court had no occasion to pass upon the reasons assigned in support of the motion for a new trial. That would obviously have been true if no appeal had been taken from the District Court's action or if that action had been affirmed upon appeal.

2. We come then to the substantial question which moved us to issue the writ, namely, whether under Rule

50 (b) the District Court's grant of the motion for judgment effected an automatic denial of the alternative motion for a new trial. We hold that it did not.

The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other.[5] Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict.[6] The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.[7]

Rule 50 (b) merely renders unnecessary a request for reservation of the question of law or a formal reservation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure.

A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for a new trial.[8] And the latter motion might be, and often was, presented after the former had been denied. The rule was not intended to alter the existing right to move for a new trial theretofore recognized and confirmed by statute.[9] It permits the filing of a motion for judgment

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[5] Compare *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 with *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654.

[6] *Baltimore & Carolina Line* v. *Redman, supra,* 659.

[7] *Ibid.*, 660.

[8] Thompson, Trials, (2d Ed.) § 2726; *Brannon* v. *May*, 42 Ind. 92; *Stone* v. *Hawkeye Ins. Co.*, 68 Iowa 737; *Tomberlin* v. *Chicago, St. P., M. & O. Ry. Co.*, 211 Wis. 144, 148; 246 N. W. 571; 248 N. W. 121.

[9] See Rule 59 (a), 28 U. S. C. 723c addendum, cf. Judicial Code § 269, as amended, 28 U. S. C. § 391.

in the absence of a motion for a new trial or the filing of both motions jointly or a motion for a new trial in the alternative.

Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

We are of opinion that the provision of the rule,—"A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative"—does not confine the trial judge to an initial choice of disposing of either motion, the exercise of which choice precludes consideration of the remaining motion. We hold that the phrase "in the alternative" means that the things to which it refers are to be taken not together but one in the place of the other.[10]

The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. If, however, as in the present instance, the trial court erred in granting the motion the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors

[10] The word "alternative" may be used properly in this sense. See Webster's International Dictionary, Second Edition.

and matters appealing to the discretion of the judge. In this case the reasons assigned in support of the motion for a new trial were in both categories. The grounds assigned for a new trial have not been considered by the court. In the circumstances here disclosed the uniform practice in state appellate courts has been to remand the case to the trial court with leave to pass upon the motion for new trial.[11]

The plaintiff urges that, whereas the rule was intended to expedite litigation, to prevent unnecessary trials, and to save the time of courts and litigants, the course urged by the defendant tends to extend the duration of litigation, to create unnecessary hardship, and to defeat the purpose of the rule.

We are of opinion that the position is untenable. This case well illustrates the efficacy of the procedure sanctioned by the rule. In view of the trial judge's conclusion that the plaintiff failed to make out a case for the jury he would, under the earlier practice, simply have

[11] *Bryan* v. *Inspiration Consol. Copper Co.*, 24 Ariz. 47; 206 P. 402; *Estate of Caldwell*, 216 Cal. 694; 16 P. 2d 139; *Hayden* v. *Johnson*, 59 Ga. 105; *Chicago & N. W. Ry. Co.* v. *Dimick*, 96 Ill. 42; *Daniels* v. *Butler*, 175 Iowa 439; 155 N. W. 1013; *Linker* v. *Union Pac. R. Co.*, 87 Kan. 186; 123 P. 745; *Cummins' Estate*, 271 Mich. 215; 259 N. W. 894; *Kies* v. *Searles*, 146 Minn. 359; 178 N. W. 811; *Central Metropolitan Bank* v. *Fidelity & Casualty Co.*, 159 Minn. 28; 198 N. W. 137; *Wegmann* v. *Minneapolis Street Ry. Co.*, 165 Minn. 41; 205 N. W. 433; *Trovatten* v. *Hanson*, 171 Minn. 130; 213 N. W. 536; *Fisk* v. *Henarie*, 15 Ore. 89; 13 P. 760; *Osche* v. *New York Life Ins. Co.*, 324 Pa. 1; 187 A. 396; *Altomari* v. *Kruger*, 325 Pa. 235; 188 A. 828; *Raske* v. *Northern Pacific Ry. Co.*, 74 Wash. 155; 132 P. 865; *McLain* v. *Easley*, 146 Wash. 377; 262 P. 975; 264 P. 714. Statutory provisions or rules render it possible in some states to bring the grounds for new trial or the action of the trial court on the motion for new trial before the appellate court. See *Peters* v. *Aetna Life Ins. Co.*, 282 Mich. 426; 276 N. W. 504; *Kauders* v. *Equitable Life Assurance Society*, 299 Ill. App. 152; 19 N. E. 630; *Dochtermann Van & Express Co.* v. *Fiss, Doerr & Carroll Horse Co.*, 155 App. Div. (N. Y.) 162; 140 N. Y. S. 72.

granted a new trial. Upon the new trial, the judge, if his view as to the law remained unchanged, would have directed a verdict for the defendant. The only recourse of the plaintiff would have been an appeal from this second judgment. If the appellate court had been of the view it here expressed, it would have reversed that judgment and remanded the cause for a third trial. Upon such third trial, if the trial court had ruled upon the evidence and given the instructions to which the defendant objects a judgment for the plaintiff would have been the subject of a third appeal and, if the defendant's position were sustained by the appellate court, the cause would be remanded for a fourth trial at which proper rulings would be rendered and proper instructions given.

Much of the delay formerly encountered may be avoided by pursuing the course for which the defendant contends. But the courts should so administer the rule as to accomplish all that is permissible under its terms. Is it necessary, if the trial judge's order for judgment be reversed on appeal, that only thereafter he deal with the alternative motion? If so, and he then refuses to set aside the original judgment, a second appeal will lie,—not from his order denying a new trial, for that order, save in most exceptional circumstances, is not appealable,[12] but from the judgment entered on the verdict, for errors of law committed on the trial. Can such a second appeal be avoided in the interest of speeding litigation? We think so.

If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment *n. o. v.* and also denies a new trial the judgment on the verdict stands, and the losing party may appeal

[12] See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481–485.

from the judgment entered upon it, assigning as error both the refusal of judgment *n. o. v.* and errors of law in the trial, as heretofore.[13] The appellate court may reverse the former action and itself enter judgment *n. o. v.* or it may reverse and remand for a new trial for errors of law. If the trial judge, as he did here, grants judgment *n. o. v.* and denies the motion for a new trial, the party who obtained the verdict may, as he did here, appeal from that judgment. Essentially, since his action is subject to review, the trial judge's order is an order *nisi*. The judgment on the verdict may still stand, because the appellate court may reverse the trial judge's action. This being so, we see no reason why the appellee may not, and should not, cross-assign error, in the appellant's appeal, to rulings of law at the trial, so that if the appellate court reverses the order for judgment *n. o. v.*, it may pass on the errors of law which the appellee asserts nullify the judgment on the verdict.[14]

Should the trial judge enter judgment *n. o. v.* and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable,[15] and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial.

We might reverse and direct that the cause be remanded to the District Court to pass on both motions.

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[13] *Hall* v. *Weare*, 92 U. S. 728, 732.

[14] This procedure is prescribed under a statute and a supplementary court rule in Michigan; *Peters* v. *Aetna Life Ins. Co.*, 282 Mich. 426; 276 N. W. 504, and perhaps is indicated in Wisconsin in the absence of statute or formal rule: *Tomberlin* v. *Chicago, St. P., M. & O. Ry. Co.*, 211 Wis. 144, 149; 246 N. W. 571; 248 N. W. 121.

[15] *United States* v. *Young*, 94 U. S. 258; *Young* v. *United States*, 95 U. S. 641; *Phillips* v. *Negley*, 117 U. S. 665, 671; *Hume* v. *Bowie*, 148 U. S. 245; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, *supra*.

But that course would, in the circumstances, be neither fair nor practical. As respects federal courts, the procedure permitted by the rule is novel. The provision which is involved in this case substantially follows the first state statute to authorize such procedure.[16] The Supreme Court of that State has construed the statute to permit the trial judge to pass on the motion for judgment, leaving the motion for a new trial for later disposition. In the event that his decision is reversed, the practice is to remand the cause with leave to the trial judge to pass upon the motion for a new trial.[17] It was therefore not unnatural for the defendant to advocate that course, or for the trial judge to follow it.

In the circumstances, we think the failure of the District Court to rule in the alternative on both matters can be cured without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion.

Modified.

C. E. STEVENS COMPANY ET AL. *v.* FOSTER & KLEISER CO. ET AL.

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

No. 41. Argued November 19, 20, 1940.—Decided December 9, 1940.

A complaint in a suit for triple damages under the Sherman Anti-trust Act, brought by a poster advertising company against others engaged in that business, adequately alleged a conspiracy by the defendants to monopolize the business of bill posting by restraining interstate commerce in the transportation of posters. The com-

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[16] 2 Mason's Minnesota Statutes (1927) § 9495.

[17] See the Minnesota cases cited in note 11.

plaint alleged also, as part of the general conspiracy, local acts of the defendants aimed at preventing the complainant from obtaining sites for posting and signs. Injury and damage to the complainant, including loss of business and profits, were alleged. *Held:*

1. The damage alleged could not be regarded as having been the consequence solely of the local acts of the defendants; and the allegations of damage, though general, were adequate. P. 260.

2. It was not necessary in order to state a cause of action that the complainant allege it was unable, as a result of defendants' activities, to obtain posters. P. 261.

109 F. 2d 764, reversed.

CERTIORARI, 310 U. S. 618, to review the affirmance of a judgment dismissing the complaint in a suit for triple damages under the Sherman Antitrust Act.

Mr. H. B. Jones, with whom *Mr. Wheeler Grey* was on the brief, for petitioners.

Mr. Herbert W. Clark, with whom *Messrs. J. Hart Clinton* and *Stephen V. Carey* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case the petitioners filed a complaint[1] in the District Court for Western Washington under § 7 of the

[1] The suit was brought by the C. E. Stevens Company and two subsidiaries. The complaint is in three counts, the first setting forth the claim of the parent company, and each of the others the claim of one of the subsidiaries, against the respondents. Save as to the locale of the plaintiffs' business, and the amount of damages demanded, the counts are substantially alike. We shall refer to the first count as the complaint. The District Court did not pass on the question of the propriety of the joinder of the several causes of action, which was raised by the demurrer, and we express no opinion upon it.

Sherman Act,[2] for triple damages for alleged violation by the respondents of §§ 1 and 2 of the Act.[3] The respondents demurred to the amended complaint for failure to state a cause of action. The District Court treated the demurrer as a motion to dismiss and dismissed the complaint. The Circuit Court of Appeals affirmed the judgment.[4]

The question presented is whether the complaint alleges damage to the petitioners consequent upon a conspiracy to create a monopoly in the business of bill posting in the Pacific Coast region and to accomplish that monopoly by restraining interstate commerce in the transportation of posters.

The relevant allegations of the complaint may be summarized.

The petitioner C. E. Stevens Company is engaged in the business of outdoor advertising, which is the business of procuring locations and erecting structures thereon for the posting of bills and the painting of signs. Its business is conducted in Washington and other states. More specifically, the petitioner's activities are the soliciting, entering into, and execution of contracts for poster service for the display of posters, painted bulletins, and wall displays. These contracts are secured from advertisers, their representatives, and advertising agencies located throughout the United States and constitute agreements whereby the parties are to ship posters, lithographs, designs, stencils, etc., interstate with the purpose that the posters or lithographs shall be placed upon billboards and the other material used for painting signs on locations controlled by the bill posting

[2] Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.

[3] Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209; 15 U. S. C. §§ 1 and 2.

[4] 109 F. 2d 764.

company. Foster & Kleiser Co., one of the respondents, is engaged in the same business in the Pacific Coast states and elsewhere. The other respondents are connected with and controlled by Foster & Kleiser Co. or its subsidiary, Restop Realty Co., the latter being in the business of owning, holding, and leasing property for outdoor advertising sites on the Pacific Coast.

The usual routine of the business is that the advertiser, directly or through an agency, contracts with a lithographer for making posters. The advertiser, either personally or through an agency, contracts with a bill posting company in the desired locality for the placing of the posters. The advertiser then forwards the posters to the bill poster or orders the lithographer to forward them. Foster & Kleiser Co. is operating under numerous contracts thus made.

Foster & Kleiser Co. formulated and entered into a plan, scheme, and conspiracy with others for the purpose of monopolizing all branches of the outdoor advertising business in the Pacific Coast area and preventing petitioner and other independents, so-called, from engaging in that business and securing and executing contracts therefor and from securing posters for use therein. The purpose of the conspirators was to prevent lithographers from supplying posters to independents, including petitioner, or to advertisers who were customers of petitioner and to prevent independents from securing adequate sites for the display of posters.

The bill asserts that there is an association of paint plant [5] operators and poster plant operators, known as "Outdoor Advertising Association of America, Inc.," of which the owners of separate plants located in separate cities are members. There is one membership for each

[5] A plant is a group of sign locations owned or controlled by one bill poster in one city or community.

municipality. Voting rights are according to the number of separate plants owned and operated by each voting member. Foster & Kleiser Co. has some six hundred plants with concomitant voting rights. By virtue of its voice in the management of the association, and pursuant to the conspiracy, it caused the association to threaten to refuse, and to refuse, to post lithographs if the manufacturers thereof sold or furnished them for posting by independent plants or furnished samples of posters to independent plants, with the aim and effect of coercing and intimidating the lithographers so as to prevent and hamper the petitioner and other competitors of the association's plants, and of the respondents, from securing samples or lithographs. Actual obstruction and hindrance of the independents, including the petitioner, resulted. Pursuant to the conspiracy, the association and the conspirators threatened to refuse, and have refused, to post posters and lithographs for advertisers if they patronized or made contracts with independent plants. In addition, the conspirators refused to execute any portion of national contracts for outdoor advertising if any part of the work had been executed, or was to be executed by an independent plant. The movement in interstate commerce of posters, lithographs, and designs for outdoor advertising was thus attempted to be monopolized, was monopolized, and was unreasonably restrained by the respondents.

Other allegations are made with respect to agreements brought about by the Foster & Kleiser Co. and other bill posting concerns to exclude the petitioner and other independents from participation in the national business of advertising. It is also alleged that the respondents resorted to various other illegal and unfair acts and means in the petitioner's locality in an effort to prevent petitioner from obtaining sites for posting lithographs

and displaying advertising signs, as part of the same general conspiracy and for the same ultimate purpose. We do not further set out these allegations because enough has been said to indicate the question on which the case turns.

The respondents conceded in the court below, and here, that the complaint charges a conspiracy in restraint of interstate commerce, within the purview of the Sherman Act, in view of the decision in *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501.

The court below, however, agreed with the respondents that the complaint fails to allege that the conspiracy, so far as it affected interstate commerce, was effective to injure petitioner, since there was no allegation that respondents' conduct prevented the petitioner from obtaining or receiving any posters. It thought the allegations of damage to petitioner's business were directed to the local acts of the respondents rather than to any restraint of interstate commerce in posters; and, as purely local activities were the gravamen of the complaint, no violation of the Sherman Act was sufficiently charged. This, upon the principle that local activities pursued without intent to hinder or restrain interstate commerce, although they indirectly affect it, cannot flow from or sustain a finding of conspiracy to interfere with or restrain such commerce.

The petitioner urges that the complaint charges a general conspiracy to monopolize the bill posting business on the Pacific Coast and, as one of the means of such monopoly, to restrain interstate commerce in posters contributing to the resulting injury of the petitioner. It insists that the court below was wrong in construing the complaint as charging a monopoly of local business not intended to affect interstate commerce.

We hold that the complaint alleges a conspiracy in violation of §§ 1 and 2 of the Sherman Act. The object

of it is to monopolize or to restrain trade in the bill posting business on the Pacific Coast, and in aid of that purpose, to restrain interstate commerce in posters; and the complaint sufficiently alleges that such monopoly and restraint inflicted damage upon the petitioner.

As we have said, the complaint alleges that the petitioner solicits contracts for poster advertising as does the respondent, Foster & Kleiser Co. The petitioner is thus in competition with Foster & Kleiser Co. in the effort to obtain contracts which call for the interstate shipment of posters for their execution. The complaint adequately charges a conspiracy to restrain the transportation of posters in interstate commerce, in aid of the attempted monopoly. It also charges other means and acts, local in character, with the same aim. The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented petitioner from establishing a business in San Francisco, "all to the great injury and damage of plaintiff." The pleading further alleges that the respondents' acts were injurious to the petitioner, excluded petitioner from fair competition, and charges that because of petitioner's inability to compete with respondents, petitioner "has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby."

While these allegations are general, we cannot say that they are inadequate nor are we able to agree with the court below that they are coupled with and treated solely as the consequence of local activities of the respondents.

We think that, in order to state a cause of action, the petitioner was not bound to aver that it had been wholly unable to obtain posters.

The judgment is reversed and the cause is remanded for further proceedings in conformity to this opinion.

Reversed.

BOWMAN *v.* LOPERENA ET AL.

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

No. 59. Submitted November 20, 1940.—Decided December 9, 1940.

1. A petition in the bankruptcy court for a rehearing, from the denial of which an appeal was taken to the Circuit Court of Appeals in this case, *held* a petition for rehearing of an order adjudging the debtor a bankrupt. P. 265.
2. Where a petition for rehearing of an order of the bankruptcy court adjudging the debtor a bankrupt is allowed to be filed out of time, and the court upon consideration of the merits denies the petition, the time for the taking of an appeal from the order of adjudication runs not from the date of such order but from the date of the denial of the petition for rehearing. P. 266.

110 F. 2d 348, reversed.

CERTIORARI, 310 U. S. 621, to review the dismissal of an appeal from an order of the bankruptcy court adjudicating the debtor a bankrupt.

Mr. Llewellyn A. Luce submitted for petitioner.

No appearance for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The sole question for decision is whether the Circuit Court of Appeals properly dismissed as untimely an appeal from an order made by a District Court sitting in bankruptcy.

The proceeding was initiated by the petitioner, hereinafter spoken of as the debtor, in the District Court, for

an extension under § 74 of the Bankruptcy Act as amended.[1] The petition, filed May 23, 1935, was referred to a referee, who denied it July 26, 1935. May 15, 1936, the court, on petition for review, re-referred the cause to a referee, who, on August 19, 1936, filed his certificate with the court in which he concluded: "I therefore recommend that the proposal or proposals of the debtor for an extension under § 74 of the Bankruptcy Act be not confirmed, and that the debtor be adjudicated a bankrupt."

August 21, 1936, the District Court, reciting the referee's recommendation, made an order adjudicating the debtor a bankrupt and again referring the cause to the referee for further proceedings in bankruptcy.

August 28, 1936, the debtor prayed a review and the referee certified the matter to the court. In the petition for review both the action of the referee in reporting his recommendations instead of granting or dismissing the petition for extension, and the action of the court on the referee's report adjudicating the debtor a bankrupt, were challenged. September 10, 1936, the debtor filed a petition for rehearing of the order of adjudication, praying that it be vacated and the cause reheard. October 14, 1936, motion was filed by the debtor, after due notice to the parties in interest, praying that the order of adjudication be vacated and the proceeding dismissed without prejudice.

October 16, 1936, a district judge heard the motion for rehearing and the motion to vacate the adjudication and entered an order that the entire matter of the debtor's petition for extension which was re-referred to the referee May 15, 1936, be again re-referred to him with direction to hear and consider the petition for extension and any supplemental petition, and to make an order or orders

[1] Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467; Act of June 7, 1934, c. 424, § 2, 48 Stat. 922, 923; 11 U. S. C. (1934) § 202.

thereon as provided by the Act and the General Orders, and continuing: "it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof." It will be observed that the court did not finally dispose of the petition and motion so far as they were directed to the adjudication of the debtor.

Proceedings on a supplemental proposal of extension were had before the referee from time to time and eventuated, on June 14, 1937, in an order denying the petition for extension. The debtor presented a petition for review to the referee July 15, 1937, and thereupon the latter made and forwarded to the court his certificate reciting the proceedings and certifying the evidence. The matter came on for hearing before the District Court and, on October 25, 1937, a judge of that court confirmed the order of the referee and ordered that the stay of proceedings under the order of adjudication of August 21, 1936, should be vacated and that the referee should proceed to perform his duties under the adjudication and order of reference.

November 15, 1937, the debtor filed a petition for rehearing in which he asked, *inter alia,* that the adjudication in bankruptcy be vacated and set aside. On the same day a judge of the District Court endorsed upon the petition:

"This petition having been 'seasonally presented' and 'entertained' by the above entitled court, permission to file same is hereby granted."

The petition for rehearing was heard by a judge of the District Court and, on February 17, 1938, he rendered his opinion and made an order thereon. 24 F. Supp. 381. In the opinion he said:

"This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate."

His order was: "The petition for review is denied."

March 18, 1938, an appeal to the Circuit Court of Appeals was allowed by the District Court. In his petition for appeal the debtor stated that he "does hereby appeal . . . from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, . . ." His first assignment of error was to the order of adjudication.

The court below dismissed the appeal [2] in the view that, while it was taken within thirty days of the order denying the petition for rehearing, it came too late because the adjudication was entered August 21, 1936, and the time for appeal therefrom expired thirty days thereafter unless the running of time for taking appeal was suspended by application for rehearing. The court construed the petition for rehearing of September 10, 1936, as directed rather to the action of the referee than to the order of adjudication, but that petition, as we have seen, recited the adjudication, alleged that it was erroneous, and prayed that it be vacated. This position was reiterated in the motion of October 14, 1936, and both the petition and the motion were heard together and were the basis of the order of October 16, 1936, re-referring the case and staying the effective date of the adjudication until the further order of the court.

As appears from the order of October 25, 1937, the District Judge understood that the question of the propriety of the adjudication was before him and dealt

[2] *In re Bowman,* 110 F. 2d 348.

with it in his denial of the petition. Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and the hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.

These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal.[3] But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.[4]

We hold that the court below should have entertained the appeal.

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

Reversed.

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[3] *Morse* v. *United States*, 270 U. S. 151, 153, 154; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137.

[4] *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, 137; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 499; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., supra*, 137, 138.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* OREGON MUTUAL LIFE INSURANCE CO.

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

No. 564. Argued November 19, 1940.—Decided December 9, 1940.

1. Section 203 (a) (2) of the Revenue Acts of 1932 and 1934, which permits a life insurance company—defined by the Acts as "an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance)"—in computing income tax to deduct from gross income an amount equal to a prescribed percentage of its "reserve funds required by law," authorizes such deduction in respect of reserves (required by law) based upon disability provisions of policies of combined life and disability insurance. P. 270.
2. The deduction may be taken in respect of such reserves whether the policyholders have then incurred disability or not. P. 271.

112 F. 2d 468, affirmed.

CERTIORARI, *post*, p. 640, to review the affirmance of a decision of the Board of Tax Appeals which reversed a determination of a deficiency in income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key* and *Edward H. Horton* were on the brief, for petitioner.

Mr. William Marshall Bullitt for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In computing its net taxable income for 1933 and 1934, respondent took a deduction of 3¾% of the reserves it had set aside with respect to its combined policies of life, health, and accident insurance. Section 203 (a) (2)

of the 1932 and 1934 Revenue Acts permits a life insurance company to deduct from its gross income "An amount equal to [3¾%] of the mean of the reserve funds required by law . . ."[1] That respondent was a life insurance company as defined by the Revenue Acts and that it was required by law to maintain reserves to protect both death and disability benefits were conceded. The Commissioner allowed a deduction for death reserves, but disallowed as to disability reserves, on the hypothesis that the words "reserve funds required by law" should be construed to apply only to reserves for death losses—thereby excluding disability reserves. The Board of Tax Appeals held the deductions allowable in both respects and reversed the Commissioner.[2] The Court of Appeals for the Ninth Circuit affirmed;[3] certiorari was granted because the Court of Claims had reached an opposite result on the same question.[4]

Legislative history discloses that a deduction similar to that allowed by § 203 (a) (2) first appeared in the Revenue Act of 1921,[5] and has reappeared in every revenue measure since, including that of 1939.[6] Prior to 1921, insurance companies had not been allowed such a deduction, but had been subject to the same tax plan as corporations generally; the 1921 Act, however, wholly exempted insurance companies from the general scheme

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[1] 47 Stat. 224; 48 Stat. 732.

[2] The opinion is not officially reported; the Board relied on its earlier decisions in Equitable Life Assurance Society *v.* Commissioner, 33 B. T. A. 708; Monarch Life Ins. Co. *v.* Commissioner, 38 B. T. A. 716; and Pan-American Life Ins. Co. *v.* Commissioner, 38 B. T. A. 1430.

[3] 112 F. 2d 468. Other circuits reached a like result: *Commissioner* v. *Pan-American Life Ins. Co.*, 111 F. 2d 366 (C. C. A. 5); *Commissioner* v. *Monarch Life Ins. Co.*, 114 F. 2d 314 (C. C. A. 1).

[4] *New World Life Ins. Co.* v. *United States*, 26 F. Supp. 444.

[5] 42 Stat. 261, § 245 (a) (2).

[6] 53 Stat. 72.

of corporate taxation and set up special systems applicable to them alone.[7] The new plan, as it related to life insurance companies, had as a major objective the elimination of premium receipts from the field of taxable income. It had long been pointed out to Congress that these receipts, except as to a very minor proportion of each premium, were not true income but were analogous to permanent capital investment.[8] In all the Revenue Acts from 1921 through 1939, the gross income of life insurance companies no longer included premium receipts, but was limited to income "from interest, dividends, and rents." [9] And, pursuant to the conceived analogy of reserves to capital investment, net income was to be determined by permitting, among other deductions from gross income, that same deduction here in dispute—a percentage of the "reserve funds required by law."

As entirely new and separate tax provisions relating only to life insurance companies were thus enacted, it became necessary specifically to define what constituted a "life insurance company" within the meaning of the Act. Therefore, it was declared in the 1921 Act and all its successors that "when used in this title the term 'life insurance company' means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds." [10]

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[7] The history of this legislation is set out in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 523–524.

[8] See, e. g., S. Rep. No. 617, part 1, page 9, 65th Cong., 3d Sess.

[9] E. g., § 244 (a), Act of 1921, 42 Stat. 261; § 202 (a), Act of 1939, 53 Stat. 71.

[10] E. g., § 242, Act of 1921, 42 Stat. 261; § 201, Act of 1939, 53 Stat. 71. The government contends that the determinative ratio under this section is death reserves to total reserves; the insurance companies contend that the ratio is all reserves on the enumerated

Under the Congressional plan, there is granted a deduction based on those "reserve funds required by law." Section 203 (a) (2) grants this deduction; § 201 defines life insurance companies. It seems clear that Congress intended to permit the deduction of reserves based on those policies that make a company a "life insurance company" under the Act, which, by definition, includes policies of "combined life, health, and accident insurance." The reserves here related to the disability provisions of such combined policies. The same underlying considerations that prompted the deduction for death reserves are applicable to the reserves for disability in these combined policies. And disability as well as death reserves fall literally within the language of the deduction provision. It is not disputed that administrative regulations promulgated under every Revenue Act from 1921 through 1932 recognized the right of life insurance companies to take deductions both for death and for disability reserves on policies such as those here involved.[11] Nor is it denied that the 1934 reënactment of § 203 (a) (2) followed thirteen years of administrative regulation and practice under which substantially identical provisions had been so construed and applied that life insurance companies could and did obtain these deductions. During that entire period, the Treasury found no ambiguity in § 203 (a) (2), and expressed no doubt as to a life insurance company's right to make such deductions. But on February 11, 1935, regulations were promulgated asserting disability reserves to be non-deductible under the 1934 Act; [12] and

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types of policies to total reserves. Since Oregon Mutual is admittedly a "life insurance company" regardless of which of these contentions is correct, this question is not before us.

[11] Article 681 of Regulations 62, 65, 69, and Article 971 of Regulations 74 and 77.

[12] Article 203 (a) (2) of Regulation 86.

on December 18, 1935, a Treasury Decision declared that this regulation applied retroactively to the 1932 and earlier Acts.[13] Petitioner now says that the former practice in permitting disability reserve deductions was erroneous,[14] and that the new regulation should be given full retroactive effect.

It is the Government's contention that the change in the regulations was particularly appropriate because induced by judicial decision.[15] And it is true that this Court has held that reserves set aside by life insurance companies to protect payment of policy investment purchases cannot be used as the basis for deductions.[16] But those decisions rested upon the conclusion that the investment fund features had no relation to the insurance risks. Here, in the combined life and health and accident policies, the health and accident reserves are based upon contingencies of the commencement and continuance of disability. They have a direct and inseparable relationship to the very insurance contracts which bring respondent under a special tax scheme.[17] Nor is there a distinction, as petitioner urges, between that part of the reserve set aside to protect policy holders not yet disabled and that part set aside to protect those already disabled. The liability to those who have incurred disability is not a fixed sum, but remains a contingency, still uncertain in

[13] T. D. 4615, XIV–2 Cum. Bull. 310.

[14] In support of the Commissioner's right to change the regulations under this supposed state of facts, the government cites *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134–135, and *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299.

[15] Cf. *Morrissey* v. *Commissioner,* 296 U. S. 344, 355. The judicial decisions relied on are those cited in the following footnote.

[16] *Helvering* v. *Inter-Mountain Life Ins. Co.,* 294 U. S. 686; *Helvering* v. *Illinois Life Ins. Co.,* 299 U. S. 88.

[17] Cf. *Rhine* v. *New York Life Ins. Co.,* 273 N. Y. 1; 6 N. E. 2d 74; *Rubin* v. *Metropolitan Life Ins. Co.,* 278 N. Y. 625; 16 N. E. 2d 293.

duration and amount. Reserves held for such a contingent liability are true reserves in the insurance sense.

We find it unnecessary to discuss the extent to which such a regulation might, under different circumstances, be given retroactive effect by virtue of the statutory power of the Commissioner.[18] Nor do we find it necessary to discuss the argument that the policy behind the special treatment afforded life insurance companies does not warrant allowing this deduction. For it is our conclusion that by § 203 (a) (2) of the 1932 and 1934 Acts, Congress has granted life insurance companies a deduction for disability reserves which only Congress can take away.[19]

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PAN-AMERICAN LIFE INSURANCE CO.

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

No. 264. Argued November 19, 1940.—Decided December 9, 1940.

Decided on the authority of *Helvering* v. *Oregon Mutual Life Ins Co.*, *ante*, p. 267.
111 F. 2d 366, affirmed.

CERTIORARI, *post*, p. 637, to review the affirmance of a decision of the Board of Tax Appeals, 38 B. T. A. 1430.

Mr. Arnold Raum, with whom *Solicitor General Biddle*, *Assistant Attorney General Clark*, and *Messrs.*

[18] For the Commissioner's power to promulgate retroactive regulations, petitioner relies on § 506 of the Revenue Act of 1934, which amended § 1108 (a) of the 1926 Act.

[19] *Biddle* v. *Commissioner*, 302 U. S. 573, 582; *Koshland* v. *Helvering*, 298 U. S. 441, 446–447.

Sewall Key and *Edward H. Horton* were on the brief, for petitioner.

Mr. Eugene J. McGivney for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves respondent's income tax for the tax year 1933. It is in all respects governed by our decision in *Helvering* v. *Oregon Mutual Life Ins. Co., ante,* p. 267, and on the authority of that case the decision below is

Affirmed.

WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL.

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

No. 51. Argued November 20, 22, 1940.—Decided December 9, 1940.

1. Under § 75 (s) (3) of the Bankruptcy Act, the debtor, upon his request, must be afforded an opportunity to redeem the property at its current value (as reappraised, or as fixed by the court after hearing, pursuant to provisions of the section), before the property may be ordered sold at public sale. P. 277.
2. The debtor's right, upon request, to redeem pursuant to the procedure prescribed in the first proviso of § 75 (s) (3) can not be defeated by the request of a secured creditor for a public sale under the second proviso. P. 279.
3. The power of the bankruptcy court under § 75 (s) (3) to appoint a trustee and order a sale or other disposition of the property if the debtor "at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years," may not be exercised so as to deprive the debtor of his right to redeem at the reappraised value or at the value fixed by the court. P. 280.

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4. Provisions of the Bankruptcy Act for the relief of farmer-debtors must be liberally construed to give the debtor the full measure of the relief afforded by Congress. P. 279.

5. Pursuant to § 75 (s) of the Bankruptcy Act, a farmer-debtor had been adjudged bankrupt and proceedings against him had been stayed. Subsequently, a mortgage creditor petitioned the bankruptcy court for an immediate sale of the property, alleging, *inter alia*, that the debtor's financial condition was beyond hope of rehabilitation and that he had failed to comply with provisions of § 75 (s) (3) and orders of the court pursuant thereto. The debtor answered and filed a cross-petition under § 75 (s) (3) requesting a reappraisal of the property or that its value be fixed by the court after hearing, and that he be allowed to redeem at the value so determined and free from any liability on account of any deficiency. Upon hearing, the court found the value of the property but ordered its sale without affording the debtor an opportunity to redeem at that value. *Held:*

(1) That the debtor's cross-petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been thus determined, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. P. 281.

Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale.

(2) As thus modified, the order of the court should stand, granting the mortgagee the privilege of purchasing the property at the sale and of crediting the indebtedness of the debtor against the purchase price; the debtor to have the privilege of redemption within ninety days, upon payment of the sales price and interest thereon, as provided by § 75 (s) (3) of the Act. P. 281.

108 F. 2d 361, modified.

CERTIORARI, 310 U. S. 618, to review the affirmance of an order of the bankruptcy court directing that the property of a debtor be sold.

Mr. Samuel E. Cook, with whom *Mr. William Lemke* was on the brief, for petitioner.

Mr. Arthur S. Lytton, with whom *Mr. Virgil D. Parish* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves the same debtor and the same 200 acre tract of land as were involved in *Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502. As revealed in that case, the debtor is a farmer who filed a petition under § 75 of the Bankruptcy Act and later amended it under § 75 (s), asking to be adjudged a bankrupt.[1] This Court held that the 200 acre tract was subject to the jurisdiction of the bankruptcy court and that § 75 (n) extending the period of redemption was constitutional. The present record does not disclose all that has transpired in this proceeding. For example, it does not appear whether the debtor asked for an appraisal under § 75 (s) which it is the duty of the court to make on such request and in which event the three-year stay provided for in § 75 (s) (2) may start to run only after such appraisal has been made. *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180; *Borchard* v. *California Bank,* 310 U. S. 311. But such problem is not sharply presented by the record before us. The narrow issue presented by this petition for certiorari and which moved us to grant it is whether under § 75 (s) (3) the debtor must be accorded

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of August 28, 1935, c. 792, 49 Stat. 942, 943. The petition was amended October 11, 1935, as authorized by § 75 (s) as enacted by the Act of August 28, 1935. Sec. 75 has been further amended by the Acts of March 4, 1938, and June 22, 1938, 52 Stat. 84, 85, 939, and by the Act of March 4, 1940, c. 39, 54 Stat. 40, but in respects not material here. Sec. 75, as now in force, appears in 11 U. S. C. § 203.

an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.

On July 22, 1938, respondent filed a petition praying that the proceeding be dismissed or, in the alternative, that an immediate sale be had, and alleging, *inter alia*, that the debtor's financial condition was beyond all reasonable hope of rehabilitation, that he had failed to comply with the order of the court requiring two-fifths of the crops to be delivered to the trustee, that he had made no offer of composition, and that he had failed to pay taxes and insurance and had made no payment on principal since 1925 and none on interest since 1930. The debtor's motion to dismiss the petition was denied. On October 5, 1938, the debtor filed both an answer to the petition, and a cross petition under § 75 (s) (3) to have the land appraised or a date set for hearing and after hearing evidence to have its value fixed, to be allowed to redeem at that value, and to be discharged from liability on account of any deficiency. Respondent answered alleging that the debtor was not entitled to redeem at such value and that by the terms of § 75 (s) (3) its request for a sale took precedence over any such right of the debtor. The court held a hearing at which evidence was adduced. It found, *inter alia,* that the amount owed by the debtor to respondent was $15,903.68, that the value of the property was $6,000, that there was no evidence upon which might be based a reasonable hope or expectation of the debtor's financial rehabilitation, that there was no evidence of his ability to effect a refinancing of the property at that value, and that he had failed and refused to obey orders of the court. Accordingly it ordered that the property be sold "at public sale to the highest bidder and for cash, without any relief whatever from valuation and appraisement laws"; that respondent be allowed to purchase at the sale

and to "utilize and be given credit for all or any part of the indebtedness of [the] debtor"; and that the debtor be barred from all equity of redemption in the property if it be not redeemed by him "within the time and in the manner allowed and provided" by § 75 (s) (3).[2] On appeal to the Circuit Court of Appeals that order was affirmed, 108 F. 2d 361, the court stating that the facts not only authorized the entry of the order but made such action imperative. We granted certiorari because of the importance of the problem to the orderly administration of the Act.

We think that the denial of an opportunity for the debtor to redeem at the value fixed by the court before ordering a public sale was error.

The provision in § 75 (s) (3) that at the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property, is followed by two *provisos*.[3] The first states that "upon request of

[2] Sec. 75 (s) (3) grants the debtor ninety days to redeem any property sold at a public sale, by paying the amount for which it was sold, together with 5% interest, into court.

[3] Sec. 75 (s) (3) reads as follows:

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided,* That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided,* That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any

any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, . . . and the debtor shall then pay the value so arrived at into court . . ." The second provides that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."

True, the granting of a request for a public sale is mandatory. But so is the granting of a request for a valuation at which the debtor may redeem. Yet a reconciliation of these seemingly inconsistent remedies is not difficult if the purpose and function of the Act are not obscured. This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central Life Ins. Co., supra; John Hancock Mutual Life Ins. Co.* v. *Bartels, supra; Kalb* v. *Feuerstein,* 308 U. S. 433. Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels, supra,* at pp. 186–187; *Borchard* v. *California Bank, supra,* at p. 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the

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property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels, supra; Kalb* v. *Feuerstein, supra*), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.

Equal protection to debtor and creditor alike can be afforded only by holding that the debtor's request for redemption pursuant to the procedure prescribed in the first *proviso* of § 75 (s) (3) cannot be defeated by a request of a secured creditor for a public sale under the second *proviso*. Certainly equal protection of debtor and creditor would not be obtained if the contrary view were followed. Then the debtor's rights under the first *proviso* would be either dependent on the outcome of his race of diligence with a creditor, for which customarily he would be poorly equipped (Cf. *Kalb* v. *Feuerstein, supra*); or they would be defeasible at the instance of a creditor. Under our construction, however, the debtor will be given the benefit of an express mandate of the Act. And the creditor will not be deprived of the assurance that the value of the property will be devoted to the payment of its claim. For, as indicated in *Wright* v. *Vinton Branch,* 300 U. S. 440, 468, if the debtor did redeem pursuant to that procedure, he would not get the property at less than its actual value. In that case this Court, in sustaining the constitutionality of § 75 (s), emphasized that the Act preserved the right of the mortgagee to realize upon the security by a judicial sale. By our construction the exercise of this right is merely deferred or postponed until the other conditions and requirements of the Act, prescribed for the protection of the debtor, have been met. It is eventually denied the creditor only in case he is paid the full amount of what he can constitutionally claim.

Respondent, however, places great reliance on that part of § 75 (s) (3) which provides that if the debtor "at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act." This provision is somewhat ambiguous. And no significant light is thrown on its meaning by the Committee Reports.[4] To be sure it was relied on by this Court in *Wright* v. *Vinton Branch, supra,* pp. 460–462, for the conclusion that the three-year stay provided for in § 75 (s) (2) is not an "absolute one" but that "the court may terminate the stay and order a sale earlier." (p. 461.) But there is nothing in that opinion or in the Act which says that that power of the court may be utilized so as to wipe out the clear and express right of the debtor under § 75 (s) (3) to redeem at the reappraised value or at the value fixed by the court. Nor can the existence of that power be fairly implied. The power of the court to "order the property sold or otherwise disposed of as provided for in this Act" cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive device of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem

[4] S. Rep. No. 985, 74th Cong., 1st Sess.; H. Rep. No. 1808, 74th Cong., 1st Sess.

at the reappraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression. *Wright* v. *Vinton Branch, supra,* p. 466. Such an important remedial right cannot be lost by mere implication. And to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate. This discretionary power of the court is exhausted when the court terminates the proceedings or accelerates their termination. Such termination can be effected only pursuant to the precise procedure which Congress has provided. And so we return to our reconciliation of the two apparently conflicting *provisos* of § 75 (s) (3).

We hold that the debtor's cross petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale.

Some question has been raised as to the propriety of certain provisions of the public sale order, particularly those which give the creditor the right to utilize all of its indebtedness in bidding for the property.

The majority of the Court is of opinion that except for the modification we have indicated the order for sale should stand with the privilege of the respondent mort-

gagee to purchase at the sale and to receive credit for the indebtedness of the debtor in satisfaction of the purchase price and with the privilege of the debtor to redeem within ninety days upon payment of the sales price and interest thereon, as provided by § 75 (s) (3) of the Act.

To the extent indicated, we modify the judgment; and we remand the cause to the District Court for further proceedings in conformity with this opinion.

Modified.

DECKERT ET AL. *v.* INDEPENDENCE SHARES CORP. ET AL.*

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

No. 17. Argued October 18, 1940.—Decided December 9, 1940.

1. A bill of complaint filed in the District Court by purchasers of securities under a financial plan which involved a trust, alleged in substance that the vendor sold the securities by means which rendered it liable to the purchasers under the Securities Act of 1933; that the vendor was insolvent, was threatened with many lawsuits, and its assets were in danger of dissipation or depletion; and that the trustee was in possession of assets consisting in part of payments made by the purchasers. The bill prayed the appointment of a receiver for the vendor, with power to liquidate assets and to pay claims of the complainants; an injunction restraining the trustee from transferring or disposing of assets of the trust; and general relief. *Held:*

(1) An appeal to the Circuit Court of Appeals from an interlocutory order granting an injunction was authorized by § 129 of the Judicial Code and was not premature. P. 286.

(2) Upon such appeal the Circuit Court of Appeals could properly determine the correctness of the District Court's denial of motions

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*Together with No. 18, *Deckert et al.* v. *Pennsylvania Company for Insurances on Lives and Granting Annuities*, also on writ of certiorari, 309 U. S. 648, to the Circuit Court of Appeals for the Third Circuit.

to dismiss the bill, although normally such denial would be appealable only after a final decree. P. 287.

(3) Motions to dismiss the bill because it failed to state a cause of action, and because the District Court lacked jurisdiction, were properly denied. P. 287.

(4) The District Court had jurisdiction of the suit under § 22 (a) of the Securities Act, irrespective of the amount in controversy or the citizenship of the parties. P. 289.

(5) The grant of a temporary injunction by the District Court—restraining the transfer of funds held by the trustee for the account of the vendor, upon security being given to protect the defendants—was proper to preserve the status quo pending final determination of the questions raised by the bill. P. 290.

The grant of a temporary injunction is within the discretion of the trial court and will not be disturbed on appeal unless it be contrary to equity or an abuse of discretion.

(6) The allegations of the bill sufficiently showed that the legal remedy against the vendor, without recourse to the fund in possession of the trustee, would be inadequate. P. 290.

(7) Orders of the District Court allowing the bringing in of two additional plaintiffs, and referring the issue of insolvency to a master, were interlocutory and not reviewable except upon appeal from a final decree. P. 290.

2. The relief of purchasers who have been sold securities by means which render the seller liable under the Securities Act of 1933, is not restricted to a money judgment. P. 287.
3. The jurisdiction conferred on the District Court by § 22 (a) of the Securities Act of suits "to enforce any liability or duty" created by the Act, implies the power to make effective the right of recovery afforded by the Act, and the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to a litigant in the exigencies of the particular case. P. 288.
4. A suit to rescind a contract induced by fraud, and to recover the consideration paid, is cognizable in equity, at least where the legal remedy is inadequate. P. 289.

108 F. 2d 51, reversed.

CERTIORARI, 309 U. S. 648, to review the reversal of interlocutory orders of the District Court, 27 F. Supp. 763, including the denial of motions to dismiss and the

grant of a temporary injunction, in a suit based upon the Securities Act of 1933.

Mr. Harry Shapiro for petitioners.

Mr. Robert F. Irwin, Jr., with whom *Mr. George M. Kelvin* was on the brief, for respondents in No. 17.

Mr. Walter Biddle Saul, with whom *Mr. Francis H. Bohlen, Jr.*, was on the brief, for respondent in No. 18.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Two important questions are presented by these petitions. The first is whether the Securities Act of 1933 (48 Stat. 74) authorizes purchasers of securities to maintain a suit in equity to rescind a fraudulent sale and secure restitution of the consideration paid, and to enforce the right to restitution against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor. The second question is whether such purchasers must show that the amount in controversy exceeds $3,000 exclusive of interest and costs as required by § 24 of the Judicial Code as amended (28 U. S. C. § 41).

Petitioners, with one exception residents of Pennsylvania, are owners and holders of Capital Savings Plan Contract Certificates purchased from Capital Savings Plan, Inc., since merged with and now Independence Shares Corporation, a Pennsylvania corporation. These certificates required the holders to make certain installment payments to The Pennsylvania Company for Insurances on Lives and Granting Annuities, also a Pennsylvania corporation.[1] Pennsylvania, after deducting

[1] For convenience the three corporations just named will be referred to as Capital, Independence, and Pennsylvania.

certain fixed charges, used the balance of these installment payments to purchase Independence Trust Shares for the benefit of the certificate holders. Independence Trust Shares, issued by Pennsylvania, represented interests in a trust of common stocks of 42 American corporations deposited by Independence with Pennsylvania. Pursuant to trust agreement and indenture between Pennsylvania and Independence, Pennsylvania collected dividends and profits from the stocks and administered the trust.

Petitioners brought this suit in the District Court for the Eastern District of Pennsylvania against Pennsylvania, Independence, two affiliated companies, and certain officers and directors of Independence whose residence does not appear. The action against the affiliated companies has been dismissed.

The bill alleges that Independence and its predecessor Capital were guilty of fraudulent misrepresentations and concealments in their sale and advertisement of contract certificates to petitioners and others similarly situated in violation of the Securities Act of 1933. It alleges that Independence is insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion. Petitioners therefore pray the appointment of a receiver for Independence with power to collect and take possession of the assets of Independence and the trust assets held by Pennsylvania, liquidate the assets, determine the claims of petitioners and other certificate holders and pay them, and wind up and dissolve the corporations. They also seek relief incidental to the above and an injunction restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust. There is the usual prayer for general relief.

None of the original petitioners' claims exceeds $3,000 and respondents contend that the aggregate of all of them will not exceed $3,000. It is conceded that the assets sought to be reached are greatly in excess of $3,000.

Respondents answered the bill and thereafter moved to dismiss it. The motions were heard with petitioners' motions for a temporary injunction and the addition of two plaintiffs. The trial judge denied the motions to dismiss, approved the addition of two plaintiffs, but reserved decision on the application for a receiver. He directed the appointment of a master to take testimony and file a report on the question of the insolvency of Independence, and enjoined Pennsylvania from transferring or otherwise disposing of the sum of $38,258.85 representing certain charges, income, and proceeds received in administration of the trust. 27 F. Supp. 763.

Pennsylvania, Independence, and the individual defendants appealed from these orders. The Circuit Court of Appeals did not expressly consider whether the appeals were premature. It thought that the Securities Act did not authorize a bill seeking equitable relief against a third party which has assets belonging to the vendor, and, therefore, that Pennsylvania was not a proper party to the suit since no cause of action under the Securities Act was stated against it. It reversed all of the orders appealed from and remanded the cause with directions to allow petitioners to amend their complaint to state a claim for a money judgment at law against Independence only. 108 F. 2d 51. We granted certiorari because of the importance of the questions presented. 309 U. S. 648.

We believe that the appeals from the order granting the temporary injunction were not premature. It is true that § 128 of the Judicial Code (28 U. S. C. § 225) authorizes circuit courts of appeals to review only final decisions. But § 129 of the Judicial Code (28 U. S. C. § 227)

expressly excepts from the general rule certain interlocutory orders and decrees. It provides in part: "Where, upon a hearing in a district court . . . an injunction is granted . . . by an interlocutory order or decree . . . an appeal may be taken from such interlocutory order or decree to the circuit court of appeals. . . ." Thus by the plain words of § 129 the Circuit Court of Appeals was authorized to consider the appeals from the temporary injunction. Compare *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449.

However, this power is not limited to mere consideration of, and action upon, the order appealed from. "If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141. See also *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. *Reed* v. *Lehman*, 91 F. 2d 919; *Miller* v. *Pyrites Co.*, 71 F. 2d 804. Compare *Gillespie* v. *Schram*, 108 F. 2d 39; *Rodriguez* v. *Arosemena*, 91 F. 2d 219; *Kneberg* v. *Green Co.*, 89 F. 2d 100; *Satterlee* v. *Harris*, 60 F. 2d 490.

Respondents' motions sought to dismiss the bill because it failed to state any cause of action and because the District Court lacked jurisdiction. We hold that these motions were correctly denied.

We think the Securities Act does not restrict purchasers seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may en-

force in designated courts by such legal or equitable actions or procedures as would normally be available to him. Undoubtedly any suit to establish the civil liability imposed by the Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the security. § 12 (2); 15 U. S. C. § 77 (l) (2). But § 12 (2) states the legal consequences of conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ.

Moreover, in § 22 (a) (15 U. S. C., § 77v) specified courts are given jurisdiction "of all suits in equity and actions at law brought *to enforce* any liability or duty created by this subchapter." [2] The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires. That it does not authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under § 12 (2).

We are of opinion that the bill states a cause for equitable relief. There are allegations that Independence is insolvent, that its business is practically halted, that it is threatened with many law suits, that its assets are endangered, and that preferences to creditors are probable. There are prayers for an accounting, appointment of a receiver, an injunction *pendente lite,* and for return of petitioners' payments. Other allegations show that

[2] Emphasis added.

although petitioners dealt with Independence their installments were paid to Pennsylvania and that the complicated arrangement between Pennsylvania and Independence might make it extremely difficult to obtain satisfaction of any claim established against Independence.

The principal objects of the suit are rescission of the Savings Plan contracts and restitution of the consideration paid, including recovery of the balance, held by Pennsylvania for account of Independence, which consisted in part of the payments alleged to have been procured by the fraud of Independence. That a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate, is well established. *Tyler* v. *Savage,* 143 U. S. 79; *Montgomery* v. *Bucyrus Machine Works,* 92 U. S. 257; *Boyce's Executors* v. *Grundy,* 3 Pet. 210. See Black, Rescission and Cancellation, 2d edition, § 643, *et seq.;* Williston, Contracts, 3d edition, § 1525, *et seq.;* Pomeroy, Equity Jurisprudence, 4th edition, §§ 881, 1092.[3]

It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. Whether or not they sufficiently allege or prove their right to all of the relief prayed in the bill we do not decide because the question is not before us. Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill.

We agree with the courts below that the Securities Act confers jurisdiction of the suit upon the District Court irrespective of the amount in controversy or the citizenship of the parties. Section 22 (a) provides in part:

[3] In *Falk* v. *Hoffman,* 233 N. Y. 199, 202; 135 N. E. 243, 244, Judge Cardozo said: "Equity will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer."

"The district courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." This is plainly a suit to enforce a liability or duty created by the Act. That the District Court therefore has jurisdiction is evident from the provision quoted. Accordingly, the only remaining question is whether the injunction was proper.

We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. "It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 50–51; *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141. As already stated, there were allegations that Independence was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate. The injunction was framed narrowly to restrain only the transfer of $38,258.85, and the trial judge required petitioners to furnish security for any losses respondents might suffer. In view of this we cannot say that the trial judge abused his discretion in granting the temporary injunction.

We conclude that the orders granting the temporary injunction and denying the motions to dismiss were correct and should have been sustained. The orders allowing the addition of two plaintiffs and referring the issue of insolvency to a master were interlocutory and

not appealable (28 U. S. C. § 225),[4] and should have been reversed only if petitioners were not entitled to any equitable relief. See *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136; *Smith* v. *Vulcan Iron Works,* 165 U. S. 518. The Circuit Court of Appeals properly did not consider them on the merits, and if ultimately there is an appeal from a final decree the correctness of these orders may be examined.

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

Reversed.

MR. JUSTICE DOUGLAS did not participate in the consideration or decision of this case.

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[4] An order allowing the addition of plaintiffs is interlocutory and not appealable: *Central California Canneries Co.* v. *Dunkley Co.,* 282 F. 406, 410. See *Oneida Navigation Corp.* v. *W. & S. Job & Co.,* 252 U. S. 521; Cyclopedia of Federal Procedure, Vol. 5, § 2608.

An order of reference to a master is generally interlocutory and not appealable, at least if not for a mere ministerial purpose: *George* v. *Victor Talking Machine Co.,* 293 U. S. 377. See *Latta* v. *Kilbourn,* 150 U. S. 524; *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536; *Hill* v. *Chicago & Evanston R. Co.,* 140 U. S. 52; *Beebe* v. *Russell,* 19 How. 283; *Craighead* v. *Wilson,* 18 How. 199; *Forgay* v. *Conrad,* 6 How. 201; Cyclopedia of Federal Procedure, Vol. 5, § 2618.

UNITED STATES *v.* HARRIS.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 52. Argued November 22, 1940.—Decided December 9, 1940.

1. An indictment charging the defendant with having falsely testified under oath before a federal grand jury—in answer to a question material to the investigation, and knowing the answer to be false—that he did not make certain statements to Government agents concerning earlier conversations with others regarding the operation of places of ill repute, sufficiently charges perjury in violation of § 125 of the Criminal Code. Pp. 293, 295.
2. The alleged perjury consists not in the accused having contradicted before the grand jury earlier statements made by him in conversation with others, but in his having sworn falsely that he had never told Government agents he had made such statements. P. 294.

Reversed.

APPEAL under the Criminal Appeals Act from an order of the District Court quashing an indictment for perjury.

Mr. Gordon B. Tweedy argued the causes, and *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph W. Burns,* and *Herbert Wechsler* were on the briefs, for the United States.

No appearance for appellees.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In a proceeding before a grand jury, appellees were asked whether, in 1937, they had made certain statements to government agents concerning earlier conver-

*Together with No. 53, *United States* v. *Kenny,* also on appeal from the District Court of the United States for the District of New Jersey.

sations with one Ray Born and others regarding the operation of places of ill repute. They denied having made the statements. The grand jury thereupon found the indictments [1] now before us which charge, in effect, that appellees' testimony was false, that it was material to the investigation of the grand jury, and that appellees therefore committed perjury in violation of § 125 of the Criminal Code (35 Stat. 1111, 18 U. S. C. § 231).[2]

Appellees promptly moved to quash the indictments on the ground that they failed "to charge an offense against the United States." After hearing on the motions, the trial judge entered orders in both cases quashing the indictments because they did not charge an offense under the statute. The cases are here on appeals from these rulings. 18 U. S. C. § 682, 28 U. S. C. § 345; see *United States* v. *Borden Co.*, 308 U. S. 188, 193.

The sole question presented by the two cases is whether the indictments charge an offense under the statute. The indictment against May Harris alleged that ". . . the said May Harris . . . at the times she made the statements aforesaid [before the grand jury], then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the

[1] Although appellees were indicted separately, the indictments in all material respects are identical, and the appeals present the same question. They are therefore treated in one opinion.

[2] Section 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

said Special Agents . . . that she had gone to Ray Born in 1932 and talked to him . . .; that she had spoken to Lou Kissel . . .; that she had paid money to said James McCullough. . . ." [3]

The trial judge apparently thought that the alleged perjury consisted of contradicting, before the grand jury, the earlier statements made by appellees in conversations with Born and others, for in the opinion accompanying the orders quashing the indictments he stated: ". . . I am satisfied . . . that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses." He cited several cases to show that mere proof of prior inconsistent or contradictory statements would not support a charge of perjury. See *Phair* v. *United States,* 60 F. 2d 953, 954; *Clayton* v. *United States,* 284 F. 537, 540.

It is evident, however, that the indictment charged perjury not in the mere making of contradictory and inconsistent statements concerning these conversations, but in swearing falsely before the grand jury that appellees had never told the government agents they had had such conversations. Moreover, proof that appellees had told government agents that they had conversed with Born and others would not be evidence of mere previous inconsistent or contradictory statements by appellees affecting only their credibility as witnesses, but would be direct evidence of the offense itself and hence would support the charge made in the indictment. The difference between the instant cases and such cases as *Phair*

[3] The charge in the indictment against Marie Kenny, *mutatis mutandis,* is identical with the one quoted.

v. *United States,* 60 F. 2d 953, therefore, is obvious and substantial. See *O'Brien* v. *United States,* 69 App. D. C. 135; 99 F. 2d 368.

Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law.

The facts stated in the indictment are clearly sufficient to charge a violation of the perjury statute. Accordingly, the orders quashing the indictments are reversed and the cause is remanded.

Reversed.

L. SINGER & SONS ET AL. *v.* UNION PACIFIC RAILROAD CO.*

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

No. 34. Argued November 14, 15, 1940.—Decided December 16, 1940.

1. In order that one may sue as a "party in interest" under paragraph 20, § 402 of the Transportation Act of 1920, to enjoin the construction of a railroad extension not authorized by the Interstate Commerce Commission, he must show that the extension will

*Together with No. 35, *Kansas City, Missouri,* v. *L. Singer & Sons et al.,* also on writ of certiorari, 309 U. S. 653, to the Circuit Court of Appeals for the Eighth Circuit.

bring about a change in the transportation system by which his own special and peculiar interest may be directly and materially affected. P. 303.

2. Numerous commission merchants who did business and owned property in and about an established city produce market alleged in their bill against a railroad company that the market adequately served the consuming public in its vicinity and dealt in produce shipped to and from other States; that the city was engaged in constructing new buildings for it at large cost and that the market had adequate transportation facilities; that an adjoining city was constructing a new market, at great expense, partly with funds to be procured by sale of its bonds to the railroad company; that the company proposed at large expense to furnish trackage to serve this new market, which would constitute an extension of its lines for which it had procured no certificate from the Interstate Commerce Commission; that the construction and operation of such extension would injure and destroy the business and property of the plaintiffs in and about the existing market, by creating an unnecessary rival market at an inconvenient place without increase of produce to be handled or customers to be served; that it would result in unnecessary duplication of railroad facilities, at large cost, without increasing the freight to be handled; would divert traffic from railroads now serving the existing market and cause destructive competition between them and the defendant, and needless and wasteful expenditure by the defendant; that the alleged extension would thus directly and adversely affect the property interests of the plaintiffs and the public by bringing about a material change in the transportation situation and would constitute an unnecessary burden upon interstate commerce, directly and adversely affecting the welfare of the plaintiffs and the public interest, *Held:*

(1) That the plaintiffs were without standing to maintain the suit as "parties in interest" under paragraph 20, § 402, Transportation Act of 1920. P. 300, *et seq.*

(2) That the city in which the existing market is located was properly denied leave to intervene as a party plaintiff. P. 305.

109 F. 2d 493, affirmed.

CERTIORARI, 309 U. S. 653, to review the affirmance of a decree dismissing a bill praying for an injunction against the construction and operation of an alleged extension of the lines of the defendant railroad company.

The decree also denied an application of the City of Kansas City, Missouri, to intervene as a plaintiff.

Mr. Ruby D. Garrett, with whom *Messrs. John M. Cleary* and *Fred Ruark* were on the brief, for petitioners in No. 34.

Mr. William E. Kemp, with whom *Mr. John M. Cleary* was on the brief, for petitioner in No. 35.

Mr. Henry N. Ess, in No. 34, and *Mr. Thomas W. Bockes,* in No. 35, with both of whom *Mr. A. C. Spencer* was on the briefs, for the Union Pacific Railroad Company, respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Undertaking to proceed under Paragraphs 18, 20 and 21, § 402, Transportation Act, 1920[1] (41 Stat. 456, 477, U. S. C. Title 49, § 1) petitioners, by bill filed December 30, 1938, in the United States District Court, Western District of Missouri, asked a decree enjoining respondent from constructing or operating an alleged extension. 26 F. Supp. 721.

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[1] Transportation Act, 1920, § 402:

"Paragraph '(18) . . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such . . . extended line . . .' Paragraph '(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, . . .' Paragraph '(20) . . . Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest. . . .'"

The bill describes them thus:—

"Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said business. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately $500,000.00. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

Answering, the respondent alleged that petitioners were not parties "in interest" within Paragraph 20, § 402, Transportation Act and had no right to sue. The District Court sustained this defense and dismissed the bill. 26 F. Supp. 721. Upon appeal its action was affirmed. 109 F. 2d 493. The matter is here by certiorari.

The Circuit Court of Appeals made the following summation of the bill—

"The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-estab-

lished market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at a cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a 'Food Terminal' or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be handled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expendi-

ture of money by the defendant; that 'for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest.' " 109 F. 2d 493.

It is not alleged that the respondent has ever served the produce market in Kansas City, Missouri, or that petitioners make or receive shipments over its lines or that the proposed extension will deprive them of any shipping facilities. Evidently the real purpose was to obstruct construction of a competitor and the theory upon which the proceeding rests would permit petitioners to sue if any railroad should extend its lines to any market competing with the market at Kansas City, Missouri.

Concerning the purport of the allegations of the bill, the Circuit Court of Appeals rightly said:

"It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the pro-

posed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business."

It declared that the question whether petitioners were "parties in interest" within Paragraph 20 must be determined upon consideration of *Western Pacific R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and concluded—

"The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. . . . We conclude that the statute is not to be so liberally construed as to enable

those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises."

A dissenting opinion by Judge Stone likewise relied upon *Western Pacific R. Co.* v. *Southern Pacific Co.*, but took the view that the challenged action might directly and substantially affect petitioners' welfare since their financial interests would suffer from the proposed rival market which could not come into existence without the proposed extension.

The purpose and effect of Paragraphs 18, 20 and 21 were much considered in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 and *Western Pacific R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47.

In the first of these causes a railroad sought to prevent another from building an extension. The meaning of the term "party in interest" was not discussed. But the opinion asserts that by the Transportation Act of 1920, "Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

Also "the prohibition of Paragraph 18 is absolute. If the proposed track is an extension and no certificate has

been obtained, the party in interest opposing construction is entitled as of right to an injunction."

In the second cause it was claimed that the Western Pacific was not "a party in interest" within the statute. The Circuit Court of Appeals accepted that view, 46 F. 2d 729; we concluded otherwise but did not undertake to announce an inclusive and exclusive definition of the term. The circumstances disclosed a special interest in that complainant with probability of direct loss from what the defendant—not another—proposed to do. The portion of the opinion, presently specially important, follows—

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon,* 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."

The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, § 402, provides that suit for an injunction may be instituted by the United States, the Commission (I. C. C.), any Commission or Regulative Body of the state or states affected, or any "party in interest." Such

a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 F. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

The right to sue under the statute is individual. Petitioners are not helped by uniting.

The Circuit Court of Appeals after reviewing all the facts reached the conclusion that the welfare of petitioners could only be indirectly and consequentially affected by the proposed extension; that their interest in the transportation situation "is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve." It held this was not enough. We agree. A mere extension to the plant of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interest which they have the right to prevent by suit.

The challenged judgment must be affirmed.

No. 35.

The City of Kansas City, Missouri, sought to intervene in No. 34. The District Court denied its motion. The Circuit Court of Appeals affirmed. In view of what we have decided in No. 34 this denial necessarily must be affirmed.

Affirmed.

MR. JUSTICE FRANKFURTER:

I quite agree with my Brother STONE that unfair loss may be cast upon a community by the unjustified extension of a railroad line, and that such loss is one consequence of the evils of unregulated railroad building which the Transportation Act was intended to check. But our immediate problem is to determine how a community can challenge such a proposed improper extension. Can a city, in other words, come into a Federal Court and urge its special relation to an alleged violation of § 1 (18–22), of the Transportation Act, 1920, 41 Stat. 456, 477, 49 U. S. C. § 1 (18–22)? The answer, of course, depends on the scheme of enforcement that Congress has devised for the Act. After making administrative provisions for securing a certificate from the Interstate Commerce Commission as a prerequisite to the construction of an "extension," the Act subjects any construction in violation of its licensing system to an injunction "at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest." § 1 (20).

A city deeming itself adversely affected by a proposed illegal extension would naturally turn to its state commission to assert its interests. If, for any reason, the state agency does not employ its power under § 1 (20) on behalf of the city's claims, the latter can invoke the law-enforcing authority of the Interstate Commerce Commission and also enlist the power of the Attorney General to initiate litigation. It is reading § 1 (20)

without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1 (18) by including a city as a "party in interest." To do so would disregard recognition of a state utility commission as the special repository of all the interests of a state in this particular field, and of the Interstate Commerce Commission as the national organ for enforcing the body of interstate commerce acts. Clearly, therefore, Kansas City can not be deemed a "party in interest" for the litigious purposes of that phrase in § 1 (20).

But it would indeed be strange to find that while the city was not given power to resort to a court, a private and more limited sufferer from the same economic threat may have such legal standing. Such a paradox exposes the appropriate scope of "party in interest" in § 1 (20). The guiding considerations in the application of that section are to be found in the reach of the functions of the Interstate Commerce Commission and of its state analogues. They are relied on for the enforcement of railroad legislation neither grudgingly nor with scepticism. In these agencies are lodged the resources for compounding the manifold ingredients of "the public interest." To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. If there be insufficient assurance that unlawful railroad construction will be resisted by a state commission representing all the interests of a state that are affected, the Interstate Commerce Commission may be moved to enjoin illegality.

Who then is a "party in interest"? As a part of the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a "party in interest" to effectuate the railroad policy intro-

duced by the licensing system of the Transportation Act. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277; *Western Pacific R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. Los Angeles Passenger Terminal Cases, 100 I. C. C. 421; 142 I. C. C. 489; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 393–94, may perhaps be deemed a "party in interest" in the further pursuit of claims before a court after adverse action by the Commission. Compare *Interstate Commerce Comm'n* v. *Oregon-Washington R. Co.*, 288 U. S. 14, and *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. But to allow any private interest to thresh out the complicated questions that arise out of § 1 (18–22)[1]—as, for instance, whether a proposed construction is an "extension" or a "spur," compare *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues.[2] It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of

[1] The fact that, in order to raise the bare legal question of petitioner's right to sue, the illegality of the proposed extension was conceded by the pleadings, does not touch the force of the argument.

[2] With reference to the present circumstances themselves, the Attorney General, at the request of the Interstate Commerce Commission, has chosen a different remedy to protect the public interest. See *United States* v. *Union Pacific R. Co.*, 32 F. Supp. 917.

federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission.

Therefore, the court below made proper dispositions of these cases.

MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY, having concurred in the Court's opinion, also join in these views.

MR. JUSTICE STONE:

I think that the complainants, petitioners in No. 34, are proper parties to maintain this suit, that the decree should be reversed and, on the remand, the petition of Kansas City for intervention should be considered in light of that conclusion and of §§ 212 and 213 of the Judicial Code, 28 U. S. C. § 45a and of Rule 24 of the Rules of Civil Procedure.

On the pleadings it stands conceded that the proposed extension of respondent's line is unauthorized and unlawful, and the sole question we have to decide is whether the interest of petitioners in maintaining this suit, as disclosed by their pleadings, satisfies the requirement of the statute which authorizes it to be brought by "any party in interest."

Section 1 (18) of the Transportation Act of 1920, 41 Stat. 474, 477, 49 U. S. C. § 1 (18), forbids the extension of its line by a railroad without a certificate of the Interstate Commerce Commission that "the present or future public convenience and necessity require or will require" the construction of the extension. Similarly it prohibits the abandonment of any portion of a line of railroad without a like certificate permitting the abandon-

ment. Section 1 (19) requires the Commission to give notice of application for a certificate to the governor of the state in which the proposed extension is to be constructed and to publish the notice in each county through which the line of railroad is constructed or operated. By § 1 (20) the Commission is authorized to attach to its certificate such "conditions as in its judgment the public convenience and necessity may require," and authorizes any court of competent jurisdiction to enjoin the prohibited construction or abandonment "at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; . . ." By § 1 (22) spur, industrial, side tracks and the like are excluded from the authority of the Commission and the railroad may build them without applying for a certificate.

The interest of petitioners in maintaining the suit as shown by the pleadings is derived from the injury to the public which, it is specifically alleged, will result from the proposed extension through the injury to the community in Kansas City, Missouri, and vicinity, of which community petitioners are a part and in which they are property owners, and the consequent injury alleged to affect them individually. The public injury, it is alleged, will be caused by (a) the loss or serious impairment in utility of the Kansas City public produce market and the destruction or serious diminution of values of property and business and of financial investments in and about the market, which will be brought about by the extension, through the creation of a rival market and the diversion of traffic to it at a point in Kansas City, Kansas, far removed from the center of population of Kansas City, Missouri, and to the inconvenience of the great majority of the citizens of both cities who are served by the existing market, which is adequate to the needs of the community; (b) by the

unnecessary duplication of railroad facilities in the Kansas City district at large cost, with wasteful and needless expenditures by respondent and no increase in freight to be handled; and (c) by the diversion of traffic to respondent railroad from other railroads and destructive competition between the railroads operating in the vicinity.

Special injury is shown to complainants (petitioners in No. 34) by the allegations that they are owners of business property and investments in the existing market area and vicinity, and that their property will be reduced in value in consequence of the diversion of traffic to the rival market. The petitioner, Kansas City, Missouri, in intervention, in No. 35, alleges the like injury to the public which it represents and sets up specifically the threatened loss in value and utility of a large public market structure which it is now building at great cost, and the threatened loss to it of taxes through diminution in property values in the city.

The statute does not define the "parties in interest" whom it permits to sue to restrain an unauthorized extension. It cannot be assumed that the phrase is meaningless or that the statute should be read as though the words were omitted. Obviously the parties intended must have, as do petitioners, an interest in the outcome of the litigation other than the "common concern for obedience to law." See *Massachusetts* v. *Mellon,* 262 U. S. 447, 488. And as the language of the statute plainly indicates, and as we have held, they may be, as are petitioners, others than the public bodies named in the statute as appropriate plaintiffs. *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission,* 283 U. S. 380, 393, 394. And they may maintain the suit although the injury which they allege is not strictly an actionable wrong independently of the paragraphs in question.

Western Pacific R. Co. v. *Southern Pacific Co.*, 284 U. S. 47.

The statute draws no distinction between direct and indirect injury as the test of plaintiff's interest. Nor is any reason advanced for saying that his interest is more significant because the injury which he suffers is labeled "direct" rather than "indirect." In any case, that suffered by petitioners does not seem to be any the less direct than that which an extension may inflict upon a competing railroad which admittedly may sue to enjoin it. *Western Pacific R. Co.* v. *Southern Pacific Co., supra;* cf. *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382. If the statute imposes any requirements other than those indicated by the phrase "party in interest," they must be implied from the purposes of the statute, its context, and from the reasons for permitting others than the public bodies named in it to bring the suit. Cf. *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 24. On the other hand if maintenance of the present suit by petitioners is consistent with those purposes and aids them and is in harmony with the reasons for allowing any party in interest to sue, the conclusion would seem inescapable that petitioners are proper plaintiffs.

It is not denied that the statutory language and the legislative history of the paragraphs in question require consideration by the Commission of the interests of cities, towns and communities which are adversely affected by a proposed extension of a line of railroad, in order to determine whether "public convenience and necessity" require the extension. The phrase "public convenience and necessity" has long been used to signify the final result of the balancing of the consequences which flow from the proposed action to all those matters of public concern which are affected by it. Cf. *Chesa-*

peake & Ohio Ry. Co. v. *United States,* 283 U. S. 35, 42; *United States* v. *Lowden,* 308 U. S. 225. And we have held that in the administration of the cognate provision relating to abandonment of railroad lines the Commission must consider as a part of the public convenience and necessity the interests of local communities affected by the proposed abandonment. *Colorado* v. *United States,* 271 U. S. 153, 168. A community may suffer injury through the loss of railroad service and diversion of traffic resulting from the construction and operation of a railroad extension without any compensating public advantage which is comparable in kind and amount with injury sustained by the abandonment of a line of railroad. One as well as the other should receive the consideration of the Commission in determining whether it should grant or withhold a certificate. Such appears to be its settled practice on applications for a certificate authorizing extension.[1]

[1] See Aroostook Valley R. Co., Construction, 105 I. C. C. 643; Minnesota Western R. Co., Construction, 111 I. C. C. 377; Northern Oklahoma Rys., Construction, 111 I. C. C. 765; Construction of Piedmont & Northern Ry. Co., 138 I. C. C. 363; Western Pacific California R. Co., 162 I. C. C. 5. And in balancing the public conveniences and necessities involved, that is to say the public interest in an adequate transportation system and the public interest in protecting local communities from undue injury from extensions of relatively small transportation importance, the Commission has sometimes found the injury to existing community interests persuasive ground for refusing the certificate. Construction by Aroostook Valley R. Co., *supra;* Construction by Minnesota Western R. Co., *supra.*

The broad scope of the Commission's inquiry is evidenced by the questionnaire which applicants for an extension must answer. Among the data required is the nature of the population, the territory, the industries involved, the names and character of towns near to but not served by the extension. See *In the matter of Applications under Paragraphs (18) and (21), Inclusive, Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad,*

It is plain that the purpose of the statute is the protection of the public interest and that in the administration of its provisions by the Commission public interest is of paramount concern. That interest is primarily that railroad extensions, as the statute provides, shall not be built or operated without receiving the approval of the Commission, and that the Commission shall grant its permission only if the public convenience and necessity so require.

In determining who may bring the suit to restrain the proposed construction as provided by § 1 (20), it is significant that the suit is brought to restrain an act which the statute declares unlawful, the construction of an extension without the certificate of the Commission, § 1 (18), and that the function of the court is not that of the Commission in granting or withholding a certificate. The only issue which can be litigated in such a suit, brought by a proper plaintiff, is whether in fact the proposed construction is of a spur or sidetrack, the only new trackage which a railroad may lawfully build without recourse to the Commission. It is an issue which is by paragraphs (18) and (22) of § 1 made a judicial, not an administrative question and involves no more complexities of litigation than many other cases which courts are called on daily to decide. In any case the issue is one which Congress directed to be litigated in a suit brought under § 1 (20), and its complexity is unaffected by the particular plaintiff who brings the suit.

If the proposed construction is an extension the injunction must issue as of right, but its only effect is to compel the railroad before proceeding further to apply to the Commission for a certificate of public convenience and necessity which is the public purpose of the Act.

January 22, 1924. III-A Sharfman, The Interstate Commerce Commission, 333–335, 351.

Texas & Pacific Ry. Co. v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273. The court is thus called on to decide no administrative issue which must be submitted to the Commission in advance of suit, and any decree which it may render involves no embarrassment to the Commission or otherwise in the administration of the Act. While the Commission itself may bring the suit, it is under no statutory duty to do so and its only other authority in the premises is to grant or withhold the certificate when applied for. One injured by an unauthorized extension and opposed to its construction, whether a state commission, a competing railroad or any other injured party, is not authorized to initiate any proceeding before the Commission and its only protection as of right from the consequences of the threatened public wrong is that afforded by suit authorized by § 1 (20). See *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co., supra,* 272–274.

In considering the scope of the application of the statute this Court has recognized that the public interest which the Commission is to protect includes the public interest in the maintenance of an adequate transportation system and that a railroad whose welfare, although not its legal right, is adversely affected by an unauthorized and therefore unlawful extension of the line of another is a "party in interest" entitled to maintain suit to enjoin the extension. *Western Pacific R. Co.* v. *Southern Pacific Co., supra;* cf. *Claiborne-Annapolis Ferry Co.* v. *United States, supra.* And it has held that one other than a carrier (a municipality), who has "a proper interest in the subject matter," may institute a proceeding before the Interstate Commerce Commission under § 1, paragraphs 18 to 22, to obtain a certificate of public convenience, so as to enable a railroad to build an extension to a new station which a state commission has ordered it to build. *Atchison, T. & S. F. Ry. Co.* v.

Railroad Commission, supra, 393, 394. Compare *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 F. 540.

But it has never held, unless it has done so now, that the public concern in protecting large communities from destruction of their business and financial interests by diversion of traffic to rival communities by railroad extensions, is not included in that public convenience and necessity which the Commission must consider in granting or withholding a certificate; or that one not a railroad who is a member of a community adversely affected and whose own business or property interests are so adversely affected is not a "party in interest" within the meaning of the statute.

If the statute permits some protection through commission action of the public interest in the preservation of communities adversely affected by the construction of railroad extensions, no plausible reason has been advanced for saying that an individual member of such a community whose property or financial interests are adversely affected by the proposed unauthorized extension, and who would be a proper party to the proceeding before the Commission on application for a certificate,[2]

[2] It is settled policy of the Interstate Commerce Act and related statutes to permit shippers, cities, commercial organizations and other interested parties to participate in proceedings before the Commission and in those before the courts where the application of the statute is involved. Section 9, 24 Stat. 382, 49 U. S. C. § 9, permits any person "claiming to be damaged" by a carrier to make complaint to the Commission or to bring suit in a district court. Communities, shippers and associations may make complaint to the Commission under § 13 (1), 49 U. S. C. § 13 (1), 24 Stat. 383 as amended, 36 Stat. 550. See, *United States* v. *Merchants & Manufacturers Traffic Assn.,* 242 U. S. 178. Section 42 provides that in actions to stop rebates and concessions "all persons interested in or affected by the rate or regulation or practice" may be made parties. Sections 212 and 213 of the Judicial Code, 28 U. S. C. § 45a, provide that "communities, associations, corporations, firms and individuals who are

is not a party in interest, entitled to bring suit quite as much as a competing railroad whose property interests are likewise affected. On the contrary, petitioners have a special and peculiar interest in preventing the unlawful extension and in securing, before the extension is built, such consideration of the community interest as the Commission gives, and which can be insured only by resort to the suit authorized by § 1 (20).

True, the statute is concerned with the protection of the public interest but in order that the public interest might not suffer, and that private injury might not be inflicted through a public wrong, the construction of an unlawful extension, Congress did not restrict the authority to bring suit to public agencies—the United States, the Commission or state commissions. Congress by providing that applications for certificates of convenience need not be made for local spur or side tracks, recognized that such constructions are too trivial to require a proceeding before the Commission. Instead it gave authority to bring the suit to private parties in interest, who because of the injury especially inflicted upon them through the adverse effect of the unlawful extension on the public, have a peculiar incentive to protect the public interest with which the statute is concerned, see *Federal Communications Comm'n* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 477, and who by restraining an unauthorized "extension" insure the expert consideration by the Commission in the situation in which Congress required it.

Just as Congress gave authority to a railroad to sue to enjoin an unauthorized extension by its competitor in order to effect the railroad policy of the Act, it gave like authority to complainants to effect its public policy with respect to a community injuriously affected by an

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interested in the controversy or question" before the Commission or in any suit which may be brought under the Act may intervene.

unlawful railroad extension. The statute gives no warrant for saying that the one may bring suit but that the other can only ask some public body to bring it; and neither interferes with the functions which the Commission is authorized to perform and which, as we have seen, are distinct from those assigned to the court by § 1 (20).

Maintenance of the suit by complainants is thus within the fair meaning of the words of the statute. It aids rather than obstructs the administration of the Act; it effectuates the public policy of the Act and is within the reason for permitting others than public agencies to bring the suit. They are "parties in interest" to which the statute refers.

Since the suit was properly brought the district court should entertain and decide the petition of Kansas City for intervention in the light of 28 U. S. C. § 45a and Rule 24 of the Rules of Civil Procedure.

The CHIEF JUSTICE and MR. JUSTICE REED concur in this opinion.

UNITED STATES *v.* NORTHERN PACIFIC RAILWAY CO. ET AL.; and NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

Nos. 3 and 4. Argued March 4, 5, 1940. No. 3, reargued October 15, 16, 1940.—Decided December 16, 1940.

1. In a suit under the Act of June 25, 1929, for an accounting, etc. between the United States and the Northern Pacific Railway Company, with respect to the land grants made by the United States to that company's predecessor, decision on the following propositions of the Government, each advanced as a defense to

any relief for the company, are reserved, eight Justices who heard the case being equally divided in opinion concerning them, viz.:

(a) That the obligations of the United States under the Act of July 2, 1864, were avoided by the alleged failure of the grantee to obtain *bona fide* subscriptions to its stock and payments thereon, as the Act required. P. 335.

(b) That the grantee failed to build its whole railroad as required by that Act, in as much as it did not locate or construct it between Wallula and Portland, a distance of 225 miles, but instead secured running rights over tracks of another company connecting those two places. P. 336.

(c) That the grantee, by diverting to the building and support of allegedly unjustified and unprofitable branch lines, funds which it should have used to complete its main line, broke its contract with the United States and thereby lost the right to make further lieu selections of land. P. 336.

(d) That the grantee broke its contract with the United States by refusing to open land granted it by the Resolution of 1870 to settlement and preëmption at $2.50 per acre, and is therefore not entitled to any relief in this case. P. 337.

(e) That, through unauthorized preliminary withdrawals of place and indemnity lands made by the Secretary of the Interior in the interest of the grants, the grantee and its successor received benefits, lands and values to which they were not entitled, precluding any award to the railroad company in this case. P. 339.

(f) That foreclosures and reorganizations affecting the railroad company and its property debarred the company from selecting more lieu lands. P. 340.

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2. Under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, granting land to the Northern Pacific Railroad Company, land in the indemnity limits was not subject to selection, in lieu of land lost in the place limits, until identified as odd-numbered sections by an official survey; nor could mineral land be selected. P. 342.
3. In determining the existence and extent of deficiencies in these grants on the dates of withdrawals by the Government of land in the indemnity limits for forestry and other purposes, tracts unsurveyed, or classified as mineral, are not to be counted as then available for selection by the railroad. P. 342.

4. The fact that by the terms of the granting Acts the land in the indemnity limits was, before survey, subject to be taken by preemptors and settlers, whereby ultimate satisfaction of the grants might be defeated, did not justify the Government in reserving such land to itself and thus rendering it impossible for the company to obtain it. *United States* v. *Northern Pacific Railway Co.*, 256 U. S. 51. P. 344.
5. The right of the railroad company, under the Act of June 25, 1929, to be indemnified for deficiencies in its grants caused by governmental reservations of land within the indemnity limits does not depend upon proof being made by the company that, but for the withdrawals, it would have selected tracts so reserved, and what tracts it would have selected. P. 346.

   The company's right of selection, to the extent of the deficiencies in the grants, remained available as to the withdrawn lands provided the lands selected were such as are defined in the grants. The Government's contention that no one can say how soon the lands would have been surveyed and selected if they had not been withdrawn and reserved, or what areas would have been taken up by settlers and preëmptors if there had been no withdrawals or surveys, does not avail to abrogate or qualify the company's right to exercise its privilege of selection notwithstanding the withdrawals. Moreover, the argument ignores the repeal of the preëmption laws by the Act of March 3, 1891. P. 347.
6. The Indian Treaties of September 17, 1851 (Fort Laramie), and October 17, 1855 (Blackfeet), which purport to "reserve" vast tracts of the Indian Country, did not create technical reservations but merely demarked the areas to be occupied by the respective tribes, the object being to promote peace among them and between them and the United States. The status of the land as "Indian Country," owned by the United States subject to the Indian right of occupancy, was not altered. P. 347.
7. Land along the definite location of the Northern Pacific where it traversed areas described in these treaties was not "reserved" within the meaning of § 3 of the Act of 1864; and the undertaking of the United States to extinguish the Indian title (§ 2 of that Act) applied not only to the right-of-way but also to the lands in the place and indemnity limits. P. 348.
8. The allegations of the Government bill do not support its contention that the railroad company should be charged in this case with a large amount of land alleged to have been obtained illegally,

as a result of the company's having adopted an unnecessarily circuitous route between certain points of its line in the Territory of Washington. P. 349.

9. The Railroad was entitled, under the Act of 1864 and the Resolution of 1870, to make selections of land in the second indemnity limits in Montana in lieu of place sections lost to it as a result of the creation, in 1868, out of country described in the Treaty of 1851, *supra*, of the Crow Reservation—a typical Indian Reservation. P. 352.

10. The addition of lands in the Railroad's indemnity limits to the Northern Cheyenne Indian Reservation in Montana, by Executive Order of March 19, 1900, confirmed by Act of Congress of June 3, 1926, was a withdrawal of such lands as a "Government reservation" and for "governmental purposes" within the intent of the Act of June 25, 1929; and within the meaning of that Act such lands were, on June 5, 1924, lands embraced within the exterior boundaries of a Government reservation, for which the Railroad is entitled to claim compensation. P. 353.

11. Lands in the Northern Pacific indemnity limits which, after being reserved by the Government for forestry and other purposes, were filed upon by homesteaders before June 5, 1924, and were patented to them after that date, are lands for which the Act of June 25, 1929 awards indemnity, as lands which on June 5, 1924, were embraced in a Government reservation, and which, in the event of a deficiency of the Railroad's grants on the date of withdrawal for governmental purposes, "would be, or were" available for selection. P. 354.

12. Under the Act of February 26, 1895, Government Commissioners undertook to examine and to classify as mineral or non-mineral all lands within the place and indemnity limits of the Northern Pacific Railroad in four land districts of Montana and Idaho, and made their reports, which were accepted and approved by the Secretary of the Interior. In lieu of place sections so classified as mineral, the Railroad obtained patents for much indemnity land and in this suit claims credit for more. The Government alleges and the Railroad denies that the Commissioners were persuaded by fraudulent practices of the Railroad to classify as mineral, lands of little value so that the Railroad could select more valuable tracts in lieu. *Held:*

(1) Under the Act of June 25, 1929, this issue of fraud should go to trial. P. 355.

(2) Although it was alleged, and found by the court below, that the Commissioners could not possibly examine and classify the lands within the time limited by the Act of 1895, their reports and the approval and acceptance of them by the Secretary of the Interior, create a *prima facie* showing in favor of the classification and of the Railroad's indemnity selections based thereon. P. 358.

(3) The burden of proving the fraud alleged is on the United States. P. 358.

(4) The United States is not barred by laches or estoppel from asserting and proving the alleged fraud, and from having the Railroad charged with any lands or values received as a result of it. P. 358.

13. The "agricultural" land which the Railroad was entitled to select under the Act of 1864 in lieu of mineral land is such land as, by Land Office practice and public land laws, would have been available to individuals for clearing and subsequent cultivation, or for grazing, or for any other purpose commonly classified by the Land Office as coming within the preëmption and homestead laws; but it does not include land valuable solely for timber. P. 358.

14. The United States is liable to account to the Railroad for lands in indemnity limits which the Railroad could have selected if and when surveyed, had they not been withdrawn by the Government. P. 364.

15. In as much as, under the Act of 1929, the Railroad's right to compensation depends upon the availability of lands on the dates of the withdrawals for governmental purposes, the claim of the Government that subsequent restorations of withdrawn lands to the public domain, sufficient in area to make up the deficiency created by the withdrawals, defeated the Railroad's claim to choose lands within the withdrawal areas, is not sustained, in the light of the facts. P. 365.

16. For any financial detriment to the United States or financial benefit to the company that the Government may prove to have resulted from the action of the Department of the Interior in prematurely withdrawing lands in the place and indemnity limits from settlement and preëmption, the company should be charged and the United States credited, under § 6 of the Act of June 25, 1929. P. 366.

17. The proviso of the Resolution of 1870, requiring that granted lands be opened by the company to settlement and preëmption

applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. P. 367.

18. The company was not a trustee of such lands for the United States either in its own right or in behalf of possible settlers. It results that the Government can not call upon the company to account as a trustee for the proceeds of sale of the lands. P. 368.

19. The proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to preëmption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; its failure so to do was a breach of its contract with the United States; and the Government is entitled to prove, if it can, any damage to it, or advantage to the company, which resulted from this breach of contract. P. 368.

20. The company's right to receive patents for indemnity lands outside of the reserves for which selections were filed with the Department of the Interior prior to June 5, 1924, can not be attacked in this suit upon the ground that the bases were fraudulently classified as mineral, for the reason, amongst others, that the bill prays no affirmative relief in respect of such alleged fraudulent classification. P. 369.

21. The Government objected to a part of the decree below directing that the company receive patents to certain indemnity lands selected prior to June 5, 1924, basing the objection on the ground that the company had not assigned bases for selections. *Held* that the point is not open for argument, it not having been preserved in the record. P. 370.

22. The Resolution of 1870, in authorizing location and construction of the Northern Pacific line from Portland to Tacoma "under the provisions and with the privileges, grants and duties provided for in its [the company's] act of incorporation," made a new grant with place and indemnity limits of the same width as those prescribed for the railroad built under the charter Act of 1864. P. 372.

23. The Land Office construed the Resolution of 1870 as requiring the laying down of second indemnity limits for the Portland-Tacoma line. P. 375.

24. Such grants are not quantity grants, but grants of lands "in place" or by description. P. 375.

25. The lands in place limits, granted to the Northern Pacific under the Act of 1864 in aid of its "Cascade Line," which are embraced

also in the place limits of the grant made to the same company by the Resolution of 1870 in aid of the later Portland-Tacoma line, are not lands "granted or disposed of by the United States" prior to the later grant for which the company was entitled by that Resolution, to make indemnity selections. P. 376.

Affirmed in part; reversed in part.

THESE were cross appeals under a special Act of May 22, 1936, from a decree of the District Court, in a suit brought by the Attorney General pursuant to an Act of June 25, 1929, to determine all controversies between the United States and the Northern Pacific Railway Company, and to obtain an accounting, etc., in respect of the land grants made to that company's predecessor in aid of the construction of the railroad. The Bill named as parties defendant, Northern Pacific Railway Company, Northern Pacific Railroad Company, "Northern Pacific Railroad Company, as reorganized in 1875," Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company, and City Bank Farmers Trust Company. The Guaranty Trust Company disclaimed.

Mr. Edward F. McClennen and *Assistant Attorney General Littell,* with whom *Solicitor General Biddle,* and *Messrs. Walter L. Pope, E. E. Danly,* and *Robert K. McConnaughey,* and *Miss Margaret A. Shea* were on the brief, for the United States on the original argument in Nos. 3 and 4. *Mr. Frederick Bernays Wiener,* with whom *Solicitor General Biddle, Assistant Attorneys General Shea* and *Littell,* and *Mr. E. E. Danly* and *Miss Margaret A. Shea* were on the brief, for the United States on the reargument in No. 3.

Messrs. John W. Davis and *Lorenzo B. daPonte,* with whom *Messrs. Grandin Tracy Vought, Alfred N. Heuston,* and *John B. Marsh* were on the briefs, for the Northern Pacific Railway Company et al. on the original argument in Nos. 3 and 4 and on the reargument in No. 3.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The cause brought here by these appeals involves the correlative rights of the United States and the Northern Pacific Railway Company arising out of the land grants in aid of the Northern Pacific Railroad Company.

By an Act of July 2, 1864,[1] designated persons were created a body corporate, Northern Pacific Railroad Company, which was authorized and empowered to lay out, locate, construct, and maintain a continuous railroad and telegraph line from a point on Lake Superior to Puget Sound, with a branch via the valley of the Columbia River, to a point at or near Portland, Oregon. (§ 1.)

The Act granted a right of way through the public lands, with additional lands for stations, etc., and the United States agreed that it would extinguish, as rapidly as consistent with public policy and the welfare of the Indians, the Indian title to all lands falling under the operation of the Act and "acquired in the donation to the [road]." (§ 2.)

In aid of construction, and to secure transportation of mail, troops, munitions, and public stores, every alternate section of public land, not mineral, was granted to the amount of twenty sections per mile on each side of the line through territories, and ten sections per mile through states. In case any of these sections had been granted, sold, occupied by homestead settlers, or otherwise disposed of at the time of definite location of the railroad opposite such sections, the company was to be entitled to select, in lieu thereof, alternate odd-numbered sections not more than ten miles beyond the limits of the grant. In lieu of mineral lands, the company might

[1] 13 Stat. 365.

select a like quantity of agricultural lands "nearest to the line of said road and within fifty miles thereof." (§ 3.)

Whenever twenty-five consecutive miles of any portion of the railroad and telegraph became ready for service, the President was to appoint three Commissioners to examine the same and, upon their favorable report, patents were to be issued to the company for the lands opposite the completed sections. This procedure was to be repeated as each section of twenty-five miles was completed. (§ 4.)

The grant was subject to the conditions that the company should commence work within two years and complete not less than fifty miles per year after the expiration of the second year, and complete and equip the whole road by July 4, 1876. (§ 8.) In the event of a breach of these conditions, not cured within one year, the United States might "do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." (§ 9.)

The capital stock was to be publicly offered to the people of the United States; no mortgage or construction bonds were to be issued, or any mortgage lien created, except with the consent of Congress. (§ 10.) The road was to be a post and military road, for the use of the United States, subject to regulations imposed by Congress restricting the charges for such use. (§ 11.)

The acceptance of the terms of the Act was to be signified in writing by the board of directors of the company within two years after the passage of the Act. (§ 12.)

Unless the company should obtain bona fide subscriptions to its stock in the amount of $2,000,000 with ten per cent. paid, within two years from the approval of the Act, the Act was to be null and void. (§ 19.)

Congress reserved power "at any time, having due regard for the rights of said Northern Pacific Railroad Company," to "add to, alter, amend, or repeal" the Act. (§ 20.)

The company claimed to have been duly organized and the incorporators filed the acceptance provided for in § 12 within two years.

The belief that the road could be financed by popular stock subscriptions proved unfounded. The time for commencing and completing the road was twice extended.[2] The date ultimately fixed for final completion was July 4, 1879. The tentative route adopted by the company showed a line reaching to Puget Sound via the Yakima River. Ultimately the line was so definitely located and constructed. In 1869 Congress gave consent to the issue of mortgage bonds,[3] and also authorized the company to extend a branch line from a point at or near Portland to a suitable point on Puget Sound and to connect the branch with the main line west of the Cascade Mountains but made no land grant except for the right of way.[4] The company did not avail itself of either of the privileges granted. May 31, 1870, Congress again authorized the company to issue bonds to aid in the construction and equipment of its road, to be secured by mortgage on all of its property, railroad, land grant, and franchise to be a corporation. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant. It also provided a second indemnity belt

[2] 14 Stat. 355; 15 Stat. 255.

[3] 15 Stat. 346.

[4] 16 Stat. 57.

extending ten miles beyond the first on either side of the right of way.[5]

Pursuant to this authority the company created bonds, secured by mortgage of the railroad and land grant. By December 30, 1871, the line was completed from Carlton, Minnesota, to the Red River at Moorhead; by the spring of 1873 it was completed to the Missouri River at Bismarck, a total distance of four hundred and twenty-four miles. During the same period the road from Portland to Puget Sound was constructed from Kalama, Washington, to Tacoma, a distance of one hundred and six miles. The land grant concomitant to this construction amounted to approximately ten million acres.

The panic of 1873 caused cessation of construction; the company was short of funds; a receiver was appointed and a reorganization effected whereby a bondholders' committee purchased at foreclosure sale, and, jointly with the receiver, reconveyed the property to the company.

Construction was resumed in 1879 and reached the Yellowstone River in Montana in 1880. In 1879 the company began building eastward at Ainsworth in Washington Territory. The road from Carlton, Minnesota, to Ashland on Lake Superior was completed in 1883. Eastward and westward extensions met at a point in Montana in August 1883. The Cascade Branch from Pasco to Tacoma was completed in 1887. The company, by contract with the Oregon Railroad and Navigation Company, obtained the right to use the line of the latter from Wallula to Portland where it connected with the line to Puget Sound. As sections of twenty-five miles were completed, Commissioners were appointed, examined the road, reported favorably, and the construction was accepted by the President.

[5] Joint Resolution of May 31, 1870, 16 Stat. 378.

The corporation chartered by Congress operated the road until receivers were appointed in 1893. Pursuant to foreclosure proceedings the Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants.

The grant of 1864 was of the ten nearest alternate odd-numbered sections of public land, not mineral, on each side of every mile of the line as definitely located, in a state, and of twenty such sections in a territory. This grant was *in praesenti*.[6] The lands thus granted are spoken of as "place lands." They were in two belts each twenty miles wide in states, and forty in territories, parallel to the right of way.

Excepted from the grant were lands reserved, granted, appropriated, pre-empted, or subject to other claims and rights at the date of definite location. These exempted lands are spoken of as "lands lost to the grant." In lieu of such lost lands the Act provided that other lands were to be selected by the company, under the direction of the Secretary of the Interior, from odd-numbered sections not more than ten miles beyond the place lands, on each side of the road. The two ten-mile strips thus defined are spoken of as "the first indemnity belts" or "the first indemnity limits."

The Resolution of May 31, 1870 granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized what are spoken of as "second indemnity" belts ten miles wide, on either side of the original indemnity limits, in any state or territory in which the company could not obtain the number of sections intended for it by its

[6] *St. Paul & Pacific R. Co.* v. *Northern Pacific R. Co.*, 139 U. S. 1, 5.

charter. This additional grant, however, was conditioned that lieu lands in the second indemnity limits might be chosen only in the same state or territory in which place lands were lost to the grant.

Mineral lands are excepted from both grants. In lieu of lands lost because of their mineral character the legislation permits selection of agricultural lands within fifty miles on either side of the right of way. These fifty mile strips are known as "the mineral indemnity belts." Their exterior limits coincide with the exterior limits of the first indemnity belt in territories and lie ten miles beyond the exterior limits of the second indemnity belts in states.

"The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits." [7]

Since the grant excluded mineral lands and gave agricultural lands in lieu thereof, but made no provision for the determination of the character of the lands, Congress passed an Act of February 26, 1895,[8] which directed that the mineral character of the lands should be ascertained by a classification by commissioners appointed by the President which, when approved by the Secretary of the Interior, should be final except in case of fraud. Such a classification was made, whereby approximately 3,782,377 acres of place lands and more than 1,000,000 acres of indemnity lands, were ascertained to be mineral.

Between March 1, 1898, and May 15, 1924, 1,103,424 acres in the first indemnity limits, under the 1864 grant,

[7] *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228, 236.

[8] 28 Stat. 683.

and 961,992 acres in second indemnity limits of the same grant, were withdrawn and placed in national forests and other Government reservations. During the same period 155,727 acres from the first indemnity limits of the grant of 1870, and 213,001 acres from the second indemnity limits laid down under that grant, were withdrawn for the same purposes. This action was taken, in the main, pursuant to an Act of March 3, 1891.[9]

The company sought to select indemnity lands within the reservations but the Secretary of the Interior would not accept or approve the selections and the company was unable, by litigation, to compel action favorable to it.[10] In 1905, however, the company filed a selection list for over five thousand acres of surveyed lands in a Government forest reserve in Montana. The list was approved and the Secretary of the Interior issued patents. Subsequently, upon discovering that these lands were within the forest reserve, the United States brought suit to cancel the patents. The case reached this court,[11] which held that the Act of 1864, and the Resolution of 1870, embodied an offer that, if the company would construct and operate the railroad, it should receive the granted lands; that this offer had ripened into a contract by the company's acceptance and performance; that the promise of indemnity for granted lands not available to the company was a vested right protected from destruction; that, though the lands in the indemnity belts were open to acquisition by settlers before survey, they were open to selection by the company only after survey; and, finally, that withdrawals of indemnity lands for governmental purposes were invalid unless, at the time of withdrawal, there remained nonmineral lands available for selection sufficient to satisfy prior losses to the company

[9] 26 Stat. 1095, 1103; 16 U. S. C. 471.

[10] *Northern Pacific Ry. Co.* v. *Lane,* 46 App. D. C. 434.

[11] *United States* v. *Northern Pacific Ry. Co.,* 256 U. S. 51.

from the grant. The measure of the grant was held to be the aggregate of the odd-numbered sections within the place limits, subject to certain deductions not here material. Although a stipulation had been filed as to the measure of the grant, the court held that, since the evidence did not disclose that certain necessary deductions from the grant had been made to ascertain the net amount of land to which the company was entitled, the case was not ripe for judgment. Accordingly the cause was remanded for a determination of the alleged deficiency in the grant and for further proceedings dependent upon such determination.

The Department of Agriculture, which was charged with the administration of the forest reserves, realized that if the company's claims as to the deficiency in the grant, with consequent right of selection of withdrawn lands as indemnity, were sustained, much of the land in the forest reserves would be diverted from the purpose intended by their reservation. The Forester of the United States called the situation to the attention of the Secretary of the Interior and suggested that the latter should investigate a number of questions affecting the company's claims. The Land Office, with the coöperation of the company, undertook an adjustment of the grant and a tentative adjustment was prepared. The Forester raised many objections. Ultimately the Secretary of Agriculture, and the Secretary of the Interior, called the situation to the attention of the President and he and they communicated with Congress. As a result, that body adopted a Joint Resolution on June 5, 1924,[12] directing the Secretary of the Interior to withhold approval of any adjustment of the company's land grants and to withhold the issue of further patents; and appointing a Joint Committee to make an investigation of the grants and to report its conclusions and recom-

[12] 43 Stat. 461.

mendations to Congress. This Committee held protracted hearings, at which the Government departments and the company were represented, and presented evidence amounting to over five thousand printed pages.

In April 1929 the Committee rendered its report [13] recommending passage of a bill authorizing the institution of proceedings by the Attorney General to procure "a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Co. to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected." The result was the Act of June 25, 1929.[14] The title indicates that the purpose of the Act was to alter and amend the Act of July 2, 1864, and the Resolution of May 31, 1870; "to declare forfeited to the United States certain claimed rights asserted" by the company; and "to direct the institution and prosecution of proceedings looking to the adjustment of the grant."

The Act retains for the United States, free of claim by the company, and removes from the grant, any lands within the indemnity limits which, on June 5, 1924, were within the boundaries of any national forest or other Government reservation and which, on the date of withdrawals for governmental purposes, would be, or were, available to the company, by indemnity selection or otherwise, in satisfaction of any deficiency; and directs that the company shall have from the United States such compensation, if any, as the courts hold due for the loss of such lands. (§ 1.)

It declares that all unsatisfied indemnity selection rights, if any exist, claimed by the company, are forfeited to the United States. (§ 2.) It reserves the right to amend and repeal the charter act and supplementary

[13] S. Rep. No. 5, 71st Cong., 1st Sess.

[14] 46 Stat. 41.

resolution and asserts the adherence of Congress to the original policy with respect to the company's disposition of granted lands. Right of way lands and those in good faith employed in the operation of the railroad are excluded from the declared forfeiture. (§§ 3, 4.)

It directs the Attorney General to bring suit to remove the cloud of the company's claims upon any lands of the United States; to determine all controversies between the United States and the company, and to obtain a full accounting of what the company may be entitled to recover, and what the United States may be entitled to recover; to find and determine the extent of the performance by the United States, and by the company, of the terms of the granting Acts and what lands, if any, have been patented or certified as a result of fraud, mistake of law or fact, or legislative or administrative misapprehension; and, finally, to determine all questions of law and fact germane to a complete adjudication of the respective rights under the granting act and resolution, and all other questions of law and fact presented to the Committee. (§ 5.)

It lays down, in general terms, the considerations which are to govern in the mutual account to be taken between the United States and the company and empowers the court to render such judgments and decrees as law and equity may require. (§ 6.)

It establishes the venue for the trial of the suit, and for appeal, and provides that a reasonable time shall be fixed by the court within which Congress may adopt appropriate legislation to meet the requirements of the judgment. (§ 7.)

It requires reports to Congress from time to time from the Attorney General as to the decisions rendered in the proceeding. (§ 8.)

It provides for the withholding of the approval of the adjustment of the land grants by the Secretary of the

Interior and for the withholding of patents until the determination of the litigation. (§ 9.)

Pursuant to the Act, the Attorney General caused a bill to be filed, on behalf of the United States, in the District Court for Eastern Washington. The company and the trustees under certain of its mortgages filed answers and motions to dismiss the whole bill and each paragraph. The court referred the motions to a special master. He reported that they should be sustained as to certain paragraphs of the bill. The court overruled exceptions to his report. The case was then again referred to the master before whom testimony was taken upon the issues raised by the answers to those portions of the bill which had not been dismissed. The master reported that the company should be awarded compensation for the loss of the right of indemnity selection in the withdrawn lands, and submitted his calculation of the acreage involved.

The court, after sustaining certain of the plaintiff's exceptions and dismissing almost all of the defendants', found the company entitled to patents for certain lands outside the reserves and to compensation for the loss of 1,453,061 acres of land within them. The court reserved for future decision the contentions of the mortgagees that they are purchasers for value whose rights cannot be affected by the Government's claim and also ascertainment of the amount to be awarded to the company.

At this stage of the litigation Congress adopted the Act of May 22, 1936,[15] authorizing a direct appeal from the decree of the District Court to this court. Pursuant to that statute the present appeals by the United States and the company were taken. As to many of the issues the parties have accepted the decision of the Dis-

[15] 49 Stat. 1369.

trict Court. Errors are, however, assigned to the decree below by both the Government and the company.

The Government concedes that the Act of 1929, *supra,* is not a declaration of forfeiture for breach of conditions imposed by the Act of 1864 and the Resolution of 1870, but a reference to the courts of all questions as to performance and breach of the contracts created by the Act and the Resolution, to the end that the respective rights and liabilities of the parties may be determined and enforced. The company asserts that the Act of 1929 is an exercise of the power of eminent domain whereby the company is deprived of further right to select indemnity lands, and is to be paid just compensation for the right so taken. But the company does not deny that, in ascertaining the amount due it, the Government may offset the amount of any claims it may now be entitled to assert by reason of the company's breaches of contract.

The Government urges that the breaches of covenant by the company have been so substantial that it cannot call for further performance by the United States and is, therefore, not entitled to further selection rights or to any money compensation for their abrogation. Reliance is placed upon the following alleged breaches.

1. *The alleged failure of the company to obtain bona fide subscriptions to its stock and payments thereof required by the Act of 1864.*

Section 19 of the Act of 1864 provides that, unless within two years of its approval the company shall obtain bona fide stock subscriptions to the amount of two million dollars, with ten per cent. paid, the Act shall be null and void.

Paragraph VI of the bill alleges that, although within the two years pretended subscriptions and payments were made, the pretended payments were sham and a

fraud upon the corporation and the United States; that the Act thus became void and the company is not entitled to any compensation in the present suit.

The master recommended that the motion to dismiss this paragraph should be granted, and the District Court so ordered.

2. *The alleged failure of the company to perform the condition of the grant that it complete the whole railroad.*

Section 8 of the Act of 1864 provides that "each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six." The time for the completion of the road was extended by Congress to July 4, 1879. It is undisputed that the company never definitely located or built that portion of its line embracing the two hundred and twenty-five miles between Wallula and Portland. Instead, it made a contract for running rights over the tracks of the Oregon Railway & Navigation Company.

In paragraphs XIV and XXVI of the bill the United States alleges that the road was never completed. The master recommended that the company's motion to dismiss these paragraphs be granted. The court so ordered.

3. *The claim that diversion of funds in the building of branch lines disentitles the company to select further lands.*

Paragraph XIV of the bill alleges that, through various described contracts and transactions, the funds of

the Northern Pacific Railroad Company were used in the building of branch lines which were unjustified and unprofitable and that further funds were, under contract, advanced to such branch lines to keep them in operation. It is alleged that these things were done at a time when the company had not completed its main line from Wallula to Portland. The bill charges that the illegal and fraudulent conduct it describes resulted in the branch lines receiving unconscionable and illegal profits at the cost of the Northern Pacific when the latter's funds should have been used to complete its main line, all in violation of the contract between the United States and the Northern Pacific created by the Act of 1864 and the Resolution of 1870. The master recommended that this paragraph be dismissed in the view that the transactions in question did not disentitle the company to exercise indemnity selection rights in connection with the grant so far as concerns the road actually constructed. The court dismissed the paragraph.

4. *The claim that the company failed to perform its contract by refusing to open lands granted it by the Resolution of 1870 to settlement and pre-emption at $2.50 per acre.*

Section 10 of the Act of 1864 provides that "no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor. The Resolution empowered the company to issue bonds in aid of construction and equipment, and to "secure the same by mortgage on its property and rights of prop-

erty of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation." The Resolution further provided "that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

Paragraph XIII of the bill refers to these provisions of the Joint Resolution and alleges that among the place lands granted there are many million acres the quantity and description of which are known only to the company, or its predecessor, which should have been opened to settlement and pre-emption whereas they were, subsequent to July 4, 1884, (five years from the date finally fixed for completion of the road), sold at such prices, and on such conditions, as to the company seemed best, and that this was a breach of the company's contract with the United States and defeated the policy of the United States. The master reached the conclusion that the motion to dismiss paragraph XIII should be sustained and the court so ruled.

The Government insists that the Resolution required the company to hold the lands open for settlement, at the price and in parcels as specified, after five years, whether mortgaged or not; that it failed to do so, and sold the lands at higher prices and in larger parcels than the Resolution required, and that its breach of covenant defeats its right to any award. The company contends that the intent of the Resolution was to permit it to mortgage all its property rights; that if, at the expiration of five years from the completion of the road, any of the granted lands were undisposed of, or were

not subject to mortgage, those lands were open to pre-emption; that, whether or not the existence of a mortgage prevented settlement of the lands, after five years, there was no duty on the company to dispose of them to settlers; and that the company has not broken any covenant in respect of the lands in question.

5. *The claim that unauthorized withdrawals of place and indemnity lands preclude any award to the company.*

Section 3 of the Act of 1864 grants place lands "on each side of said railroad line, as said company may adopt," and fixes the date of passage of title to the company as "the time the line of said road is definitely fixed." Section 6 provides that the President shall cause the place lands to be surveyed "after the general route shall be fixed."

Pursuant to preliminary surveys, the Railroad Company filed with the Secretary of the Interior a map showing the general route of the proposed line. Thereupon the Secretary caused place limits to be laid down on either side of the proposed general route and withdrew from sale or entry the odd-numbered sections within those limits. In 1903 this court held that title to the granted place lands did not vest in the company until the filing of a map of definite location and that, consequently, the withdrawal of the lands by the Secretary prior to that time and coterminous with the general route was unauthorized.[16]

After the company had filed its maps of definite location the Secretary mapped the indemnity limits specified by the Act of 1864 and withdrew the lands comprehended within those limits from sale or entry. In 1888 the then Secretary held that land within the indemnity limits was open to pre-emption under the homestead

[16] *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108, 116–117.

laws and that such pre-emption, even before actual survey of the lands, deprived the company of the right to select the lands pre-empted. This view was adopted by this court in 1901.[17]

Paragraph XXXII of the bill recites these facts and alleges that, by virtue of the withdrawals, the Railroad Company and the Railway Company have received benefits, lands, and values to which they were not entitled, to the injury of the United States. The master recommended that the motion to dismiss the paragraph be sustained and the court so decreed.

6. *The claim that the foreclosures and reorganizations of the railroad and its property disentitle the company to select further lands.*

The Resolution of 1870 authorized the railroad company to issue its bonds and secure the same by mortgage on its property of every kind and provided that if the mortgage authorized should at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands granted by the Resolution, or any of them, should be sold by the mortgage trustees, upon default, "such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder . . ."

The bill alleges that two reorganizations occurred,—one in 1875 and the other in 1896. As respects the first, it is charged that, pursuant to court order, the trustees of the mortgage conveyed the mortgaged railroad and property in a block to certain individuals who thereupon retransferred to the railroad company under an arrangement whereby mortgage bondholders received preferred stock in lieu of their bonds, such preferred stock to be

[17] *Hewitt* v. *Schultz,* 180 U. S. 139.

redeemed from the proceeds of the sale of the company's lands. With respect to the latter foreclosure it is alleged that the company, after reorganization, created a number of mortgages which were foreclosed and that, in the course of the foreclosure, sales of the mortgaged lands, while made in the respective states and territories where they lay, and although made section by section, were all, by prearrangement, purchased by, or in behalf of, a new company, whereas it was the intent of Congress that they should be so sold as to give individuals an opportunity to acquire them.

Paragraphs IX, X, XI, XII, XVI and XVIII describe the transactions in great detail and charge that what was done was in the teeth of the policy of the United States and to its injury. The master recommended dismissal of these paragraphs and the court adopted his recommendation. The United States insists that what was done constitutes a breach of the company's obligation under the Resolution of 1870 so substantial as to disentitle it to any further performance of the land grants. The company asserts that the reorganization of 1875 involved no sale of the mortgaged lands within the contemplation of the statute but a mere device for reinvesting the company with its lands, freed of the mortgage, and that the foreclosure sales made in the reorganization of 1896 were made in strict and exact accordance with the provisions of the Resolution of 1870.

The Government asserts that none of the paragraphs referred to above should have been dismissed. It says that each of the breaches charged was so substantial as to disentitle the company to further performance by the United States. But, in any event, it says that all of them, taken together, certainly require this conclusion.

The company, on the other hand, contends that, as to some of the matters charged, the allegations of the bill do not show any breach, and that, as to others, if a breach is sufficiently alleged it was not such as, in the light of the history of the grants and the performance received by the United States, would disentitle the company to all further performance.

If the Government's position is sound the decree below should be reversed and the cause remanded with instructions to enter a judgment against the company and in favor of the United States.

The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy.

The Government puts forward certain further claims which, if sustained, would preclude any recovery by the company.

7. *The claim that no compensation should have been awarded because unsurveyed public lands were available for selection, and the company failed to show that it would, or could, have selected and obtained all of the withdrawn lands.*

The District Court found that, at March 1, 1898, just prior to the first forest withdrawal, the company had unsatisfied losses of 5,946,664 acres under the 1864 grant and that the total lands available for selection at that date were 1,137,508 acres, leaving a deficiency in the grant of 4,809,156 acres; and the deficiency in the 1870 grant, excluding available land in second indemnity limits, at March 1, 1898, was 593,656 acres, and there has been, ever since, a deficiency in respect of that grant.

In these findings the court computed as lands available for selection only non-mineral, surveyed, vacant land. The company asserts that in this the court was right. The Government insists that vacant unsurveyed lands were "available" as indemnity to the company notwithstanding the concession that, as lands selected must be identified, the company cannot select them until they have been so identified by survey.[18] It says the company failed to show that there were not ample unsurveyed lands within the indemnity limits to set off losses in the place limits at the time of the withdrawals and adds that, inasmuch as homesteaders might, in the interim, obtain prior rights by actual settlement of these unsurveyed lands,[19] it is a matter of pure speculation whether the company would ultimately have obtained adequate indemnity even if unsurveyed lands had not been withdrawn for forest reserves. It further claims that if the court below had treated unsurveyed lands as available for indemnity selection, there would have been no deficiency at the dates of withdrawal.

These contentions cannot be sustained.

Decision turns on the inquiry as to what lands were available to the company for selection at the time of the respective governmental withdrawals.

It is, of course, evident that the company could not select mineral lands as indemnity. It follows that all lands classified as mineral were excluded from selection.

By § 3 of the Act of 1864 it is provided that whenever any of the place lands granted to the company

[18] Atlantic & Pacific R. Co., 17 L. D. 313; Northern Pacific R. Co., 20 L. D. 187; *Sawyer* v. *Gray,* 205 F. 160, 163; *Douglass* v. *Rhodes,* 280 F. 230, 231; *Cox* v. *Hart,* 260 U. S. 427, 436.

[19] *Hewitt* v. *Schultz,* 180 U. S. 139; *Southern Pacific R. Co.* v. *Bell,* 183 U. S. 675.

shall have been, prior to the time of definite location of the road, "granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall *be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, . . .*"

The fact that the lands in the indemnity limits are, before survey, subject to be taken by pre-emptors and settlers, and thus ultimate satisfaction of the railroad company may be defeated, does not justify the Government itself in reserving lands contained within those limits and thus rendering impossible the company's obtaining them. This was definitely held in the *Forest Reserve Case.*[20]

Much was said in argument as to the meaning of the phrase "lands available as indemnity" as used in that case. It seems clear that unsurveyed lands are not available to the company under the Act of 1864. It will be observed that the company must select indemnity lands under the direction of the Secretary of the Interior. That officer has invariably ruled that no selection can be made or approved until the lands in question are surveyed.[21]

This ruling was necessitated by the very terms of the Act of 1864, which requires selection of alternate sections designated by odd numbers. Obviously, until surveyed, no odd-numbered sections could exist. Unsurveyed lands are not public lands.[22]

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[20] 256 U. S. 51, 66, 67.

[21] Atlantic & Pacific R. Co., 17 L. D. 313; Northern Pacific R. Co., 20 L. D. 187, 190.

[22] *Hewitt* v. *Schultz,* 180 U. S. 139, 152; *United States* v. *Montana Lumber & Mfg. Co.,* 196 U. S. 573, 578; *United States* v. *Morrison,* 240 U. S. 192, 200; *Cox* v. *Hart,* 260 U. S. 427; *Sawyer* v. *Gray,* 205 F. 160, 163; *Douglass* v. *Rhodes,* 280 F. 230, 231; *Northern Pacific Ry. Co.* v. *Lane,* 46 App. D. C. 434.

The decision in the *Forest Reserve Case, supra,* did not suggest any different view. The allegation of deficiency in indemnity lands in that case, found in the stipulation of the parties, was that the lands were those odd-numbered sections which the defendant was entitled to select under the regulations of the Land Department. This could only mean, and the decision could only have gone upon the view that it meant, that the surveyed lands within the indemnity limits were deficient to meet the selection rights of the railroad company. The case is not an authority, as the Government contends, for the proposition that unsurveyed vacant lands within the indemnity limits are to be considered as available to the company in ascertaining whether the Government has reserved to itself lands as to which the company has selection rights. Under the doctrine of the *Forest Reserve Case* the challenged withdrawals for forest and other governmental purposes left the indemnity lands available to the company deficient to satisfy its rights of selection.

The holding was that the withdrawals were void and the company's rights remained as if the withdrawals had never been made. If and when any of the withdrawn lands were surveyed the company was entitled to select them, as it did in the *Forest Reserve Case.*

It would appear, however, that the Government's contention is moot as respects all but 23,364 acres of lands in Idaho second indemnity limits for which the company was awarded compensation by the District Court's decree. If unsurveyed vacant lands remaining within the indemnity limits after a government withdrawal are to be treated as available to the company for selection, then the grant was not deficient as respects second indemnity limits in Idaho and the company should not have been awarded compensation for the acreage mentioned.

As respects withdrawals from first indemnity limits of the 1864 grant, and withdrawals from the limits of the 1870 grant, it appears to be undisputed that, other contentions of the Government, such as that with respect to the noncompletion of the entire road, being laid to one side, the withdrawals left the grants deficient even though unsurveyed lands remaining within the limits after the withdrawals be counted as available to the company. And the same conclusion would seem to be required respecting lands within the second indemnity limits in Montana with the exception of 4004.38 acres withdrawn on July 14, 1899.

Thus the issue becomes, to a large extent, moot but, as respects approximately 30,000 acres above referred to, we think what has been said on the subject of the availability of unsurveyed lands sustains the decree of the District Court.

The Government, however, argues that even though the withdrawals for governmental purposes created such a deficiency of lands available for selection that, to satisfy the grant, the company would have been compelled to select lands within the withdrawn reserves, nevertheless, in order to obtain indemnity for the deficiency so created, the company is bound to prove that it would have selected lands within the reserves, and what lands it would have selected, before it can claim compensation from the Government for the deprivation of its right to select. A majority of the justices who heard the case think the position is untenable.

Under the ruling in the *Forest Reserve Case* it was the obligation of the Government to refrain from any action which would deprive the company of its right of selection in accordance with the terms of the grant. When the United States withdrew the lands for forest and other reserves it signified its purpose to retain them for its own use and not to allow the company or anyone

else to obtain them, any law or contract to the contrary notwithstanding. We think the company's right of selection, to the extent of the deficiency in the grant, remained available as to the withdrawn lands, provided the lands selected were such as are defined in the grant. The Government's contention that no one can say how soon the lands would have been surveyed and selected if they had not been withdrawn and reserved, or, if they had remained unsurveyed and not withdrawn, what areas would have been taken up by settlers and pre-emptors, does not avail to abrogate or qualify the company's right to exercise its privilege of selection notwithstanding the withdrawals. Moreover, the argument ignores the repeal of the pre-emption laws by the Act of March 3, 1891.[23]

8. *The claim that the company should be charged with 13,300,000 acres wrongfully received because lying within Indian reservations.*

Paragraph XXIX of the bill alleges that by treaties of September 17, 1851, and October 17, 1855,[24] the United States "reserved" certain lands for Indian tribes. The paragraph alleges that the place and indemnity belts established by the Act of 1864 crossed certain of the lands reserved by the treaties, and that, by mistake and without lawful authority, the company received from the United States lands comprised in the reservations amounting to about 12,000,000 acres in place and first indemnity limits and 1,300,000 acres in second indemnity limits; that for all of them it had obtained patents to which it was not entitled, as it should have known.

In accordance with the master's recommendation, the court below sustained the motion to dismiss paragraph XXIX on the ground that the lands in question were

[23] C. 561, § 4, 26 Stat. 1097.

[24] IV Kappler, 1065; 11 Stat. 657.

granted to the company by the Act of 1864 and the Resolution of 1870. We think the court was right.

By an Act of June 30, 1834,[25] all lands lying west of the Mississippi River, not within the States of Missouri and Louisiana or the Territory of Arkansas, were designated as Indian country. The fee of all this territory was in the United States, subject to the Indian right of occupancy. The treaties of 1851 and 1855 did not alter the status of the lands described in them. The purpose of those treaties was to establish peace and amity between warring Indian tribes *inter sese* and between the tribes and the United States. To this end the country or territory of each tribe was described and the tribes agreed to respect the boundaries named in the treaties. No alteration in the status of the lands had occurred up to the date of definite location of the Northern Pacific's line. About seven hundred miles of the railroad traversed the area embraced in the treaties.

By § 2 of the Act of 1864 it was provided that "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill." The Government now contends that this section is inapplicable to any but right-of-way lands lying within the areas described by the treaties. The contention was not made or considered below, and we think, if it were open here, the plain language of the section renders it untenable.

Section 3 limits the land grant to lands as to which the United States "have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, . . ." The Government contends that this section excludes lands embraced

[25] 4 Stat. 729.

within the treaty limits for the reason that the treaties "reserve" all the lands described in them for the signatory Indian tribes. We think the contention is unsound.

As we have noted, the treaties did not create technical reservations as have many other treaties and acts of Congress. They did not set aside a defined territory for the exclusive use of a tribe nor contain the usual provisions for an Indian Agent for schools, assistance in farming operations, etc. The country described in the Treaty of 1851 amounts to one hundred and sixty-three million acres, and that described in the Treaty of 1855 to thirty-seven million acres. In the case of one of the tribes, if the treaty were considered to create a technical reservation it would have allotted to each man, woman, and child in the tribe more than eighteen square miles.

The Department of the Interior, as is evidenced by the patents issued, has consistently treated the lands in question as included in the grant. This court has repeatedly passed upon the question; has held the lands were Indian country, subject only to the Indians' right of occupancy; were within the grant made by the Act of 1864, and that, by § 2 of the Act, the United States assumed the obligation of extinguishing the Indian title in favor of the company.[26]

We come now to the contentions of the Government which go to the quantum of the award.

9. *The claim that the company should be charged with approximately 1,000,000 acres received as the result of adoption of an unnecessarily circuitous route.*

Section 1 of the Act of 1864 empowered the company to locate and construct a continuous railroad line from

[26] *Beecher* v. *Wetherby,* 95 U. S. 517; *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55; *Bardon* v. *Northern Pacific R. Co.,* 145 U. S.

a point on Lake Superior "westerly by the most eligible railroad route, as shall be determined by said company, . . . to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, . . ." The Resolution of 1870 authorized the company to construct its main line to a point on Puget Sound via the valley of the Columbia River, with the right to locate its branch from a point on the main line, across the Cascade Mountains, to Puget Sound.

Paragraph XXVI alleged that the company was required to construct its railroad to the western terminus upon the most direct and practicable line without unnecessary deviations but that, instead of doing so, the company built the road from Lind, Washington, to Ellensburg, Washington, by an unnecessarily circuitous route southwestward to Pasco on the Columbia River and thence northwestward via the valley of the Yakima, whereas it could have constructed the line nearly due westward from Lind to Ellensburg and have saved about eighty-two miles; that, by reason of this unnecessary circuity, approximately one million, four hundred thousand acres were added to the lands within the limits described in the grant over and above the amount which would have been included had the more direct route been followed. The allegations of the paragraph are that, after filing general route maps, the company ultimately filed definite maps of location and thereupon the Department of the Interior surveyed and patented to it lands lying along the line; that this was an error as the Department should have refused to patent place lands or allow selection of indemnity lands coterminous with the circuitous route. The paragraph contains no averment that the route was selected by the company fraud-

535, 542; *Missouri, K. & T. Ry. Co.* v. *Roberts,* 152 U. S. 114, 117; *Clairmont* v. *United States,* 225 U. S. 551, 556.

ulently in order to obtain additional lands or that it was not in good faith thought to be the most eligible route. The paragraph refers to the fact that subsequently the Chicago, Milwaukee and St. Paul Railway located its line from Lind to Ellensburg by the more direct route. The master recommended that the motion to dismiss the paragraph be sustained and the court so ordered. We think there was no error in this disposition of the matter.

The Joint Resolution of 1870 called for the main line to run via the valley of the Columbia River to Puget Sound with a branch line from a convenient point on the main line across the Cascade Mountains to Puget Sound. In pursuance of this requirement the company filed a map of definite location and constructed its route between Spokane and Wallula on the Columbia River. At that point it was able to make a connection with the Oregon Railway & Navigation Company. In 1880 it, therefore, entered into a contract for running rights over the line of that railroad and has used its line for traffic into Portland. It was natural, in this situation, to lay out the authorized branch line over the Cascade Mountains from the main line at Pasco. Maps of the line from Pasco to Tacoma were approved by the Secretary of the Interior between June 1883 and December 1884. Inspection reports in 1879 and 1880, made to the Secretary of the Interior, show that the Department was familiar with the line the company was building.

On March 3, 1893, Congress ratified an agreement for the payment to the Yakima Indians for right of way through their reservation provided the company should, within sixty days, pay the necessary money therefor into the Treasury of the United States.[27] This action shows that Congress was fully informed of the adopted route and coöperated in making its construction feasible.

[27] Act of March 3, 1893, c. 209, 27 Stat. 612, 631.

The master and the court below judicially noticed that the route via the Yakima valley was a much more advantageous one in respect of the country traversed, and the probable available traffic, than the more direct route between Lind and Ellensburg. The total population along the latter is said to be less than a thousand persons and the traffic originating thereon practically nil. On the other hand, the Yakima valley is one of the most fertile and productive agricultural sections in the Northwest.

The circuity is not such as to be an obvious evasion of the terms of the grant, and in the absence of any charge of fraud, it must be taken that the directors of the company considered the line laid out the most eligible one. We think the allegations of the paragraph do not support the contention that the company illegally acquired place and indemnity lands contiguous to this portion of its line.

10. *The claim that the company should have been charged with 1,198,000 acres received as indemnity in the second indemnity belt in Montana and should not have been awarded compensation for 170,000 acres in the same belt.*

Under the Act of 1864 losses of land in the place limits could be supplied only in the first and the mineral indemnity limits. The Resolution of 1870 added a second indemnity belt in which selections could be made only for losses in the same state or territory occurring through reservation, pre-emption, or other disposition subsequent to the passage of the Act of 1864.

As has been stated under heading 8, *supra,* the Land Office properly treated the lands within the boundaries described by the treaty of 1851 [28] as available under the grant. By the Crow Treaty of 1868 [29] a distinct and

[28] *Supra,* p. 346.

[29] Treaty of May 7, 1868, 15 Stat. 649.

exclusive reservation for that tribe was carved out of the larger territory designated in the earlier days as the Crow country. The Land Office treated the lands thus specifically reserved as lost to the grant and permitted indemnity selections from the second indemnity belt in Montana, in which State the loss occurred.

It appears that, by virtue of withdrawals chiefly for forest reserves in Montana, the company has been deprived of the right to select about 170,000 acres of lieu lands, about 64,000 acres of which losses were due to the creation of the Crow Reservation. In its computation of the lands for which the company was entitled to indemnity and compensation in this suit the court below included this entire acreage.

The Government contends that the court should have charged the company with the indemnity lands received in second indemnity limits in Montana due to alleged losses from the creation of the Crow Reservation and that it should not have awarded any further compensation for the loss of selection rights in that belt resulting from the creation of the Crow Reservation, or otherwise, as the company had already received more than was proper. We think the position cannot be maintained.

As shown under heading 8, *supra,* no lands were removed from the operation of the grant by the Treaties of 1851 and 1855. On the other hand the creation of the Crow Reservation—a typical Indian reservation—in 1868, removed the lands in that reservation from the grant within the intent and meaning of the Act of 1864, as supplemented by the Joint Resolution of 1870, and conferred the right to indemnity selections from the second indemnity belt within the same state.

11. *The credit to the company for lands within the Northern Cheyenne Indian Reservation.*

The court below, in its award, treated the company as entitled to select indemnity lands in first and second

indemnity limits where these limits lay within the Northern Cheyenne Indian Reservation in Montana. The area in question was part of the Crow country recognized by the Treaty of September 17, 1851.[30] When, in 1868, the Crow Reservation was created, the Crow nation ceded all its right and title in other lands embraced within the treaty area to the United States. By an Executive Order of March 19, 1900, the lands in question became part of the Northern Cheyenne Reservation. This action was confirmed by Congress June 3, 1926,[31] which declared that the lands were the property of the Northern Cheyennes, authorized allotments, etc.

The Government contends that these lands were not, on June 5, 1924—the pivotal date mentioned in the Act of June 25, 1929—"embraced within the exterior boundaries of any national forest or other Government reservation."

We think that under the terms of the Act these lands had been withdrawn as a "Government reservation" and for "governmental purposes"; and the Act which authorized this suit contemplated that compensation should be awarded for lands so withdrawn, which, but for the withdrawal, would have been available to the company as indemnity.

12. *The award for land within the reservations on which homesteaders filed prior to June 5, 1924, and for which they received patents after June 5, 1924.*

After the withdrawals had been made homesteaders filed on certain of the lands within the forest reserves. These filings were prior to June 5, 1924. Subsequent to that date patents were issued under the forest homestead laws. The court below, we think, properly treated these

[30] *Supra*, Note 24.

[31] c. 459, 44 Stat. 690.

lands as having been available for indemnity selection by the company at the date of withdrawal and awarded the company compensation for the abrogation of its right to select them. The Government asserts that this was error, in the view that the Act of 1929 awarded compensation only for those lands which would be, or were, available for selection on June 5, 1924. The Act, however, does not so provide. It awards indemnity for lands which, on June 5, 1924, were embraced in any reservation, and "which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company *upon the dates of the withdrawals* of the said indemnity lands for governmental purposes, *would be, or were,*" available for selection.

13. *The claim that, as to more than a million acres, the award rests upon a fraudulent mineral classification which will not support indemnity selection rights.*

Section 3 of the Act of 1864, granting odd-numbered sections, excluded mineral lands from the grant. The section provides that iron or coal lands are not to be classed as mineral. In lieu of mineral lands the company is given the right to select a like quantity of "unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road and within fifty miles thereof, . . ."

One of the contentions strongly pressed by the Department of Agriculture before the Joint Committee acting under the Resolution of June 5, 1924, was that, due to the company's fraud, great quantities of place lands had been improperly classified as mineral, with the result that the company had been allowed to select, and had received patents for, over a million acres of land in lieu of those so classified. The company resisted this contention.

By the Act of June 25, 1929, this matter was remitted to the courts for adjudication. Section 5 directs that in the judicial proceedings contemplated there shall be presented, and the court shall consider, make findings relating to, and determine, to what extent the terms, conditions and covenants of the granting acts have been performed by the United States and the company, including the question what lands, if any, have been wrongfully or erroneously patented or certified as the result of fraud. Section 6 requires that, in fixing the amount of compensation to be received by the company on account of the retention by the United States of indemnity lands for national forests or Government reserves, the court shall determine what quantities in lands or values the company and its predecessors have received as a result of fraud and that such excess lands and values, if any, shall be charged against the company in the judgment of the court.

Paragraph XXVIII of the complaint refers to the Act of February 26, 1895,[32] providing for the examination and classification, as mineral or nonmineral, of place and indemnity lands within four land districts in Idaho and Montana; recites the appointment and functioning of the Commissions authorized by the Act; alleges that the Commissioners undertook to classify approximately eleven million five hundred thousand acres of land, and pretended to classify the same; filed their reports which, with minor exceptions, were approved by the Secretary of the Interior; asserts that 3,782,377 acres, more or less, were classified as mineral, and that the company, and its predecessor in interest, made mineral lieu selections totaling 1,330,762 acres, more or less, and received patents therefor; alleges that the company is claiming additional indemnity lands of approximately 2,451,615 acres

[32] *Supra,* Note 8.

in lieu of lands classified as mineral; and charges that the company, and its predecessor, were guilty of fraudulent and collusive practices whereby the Commissioners were persuaded to classify, as mineral, lands of little value, so that the railroad could select more valuable lands in lieu thereof, and that the lands so selected and patented to the company were of a value in excess of the entire 3,782,377 acres, more or less, of lands fraudulently classified as mineral.

The company moved to dismiss the paragraph and in its answer denied the allegations. The master recommended that the motion be sustained and the court so ordered. In this we think there was error.

The master, after considering the facts set out, and matters of which he took judicial notice, stated that he would have no difficulty in overruling the motion to dismiss had it not been for the position taken by the Government in argument. The master states that a goodly portion of the nearly four million acres classified as mineral consisted of lands within the forest reserves, which by the Act of June 25, 1929, the Government signified its intention to retain, that still other lands so classified had been patented to claimants as mineral claims, and that the Government had sold much valuable timber from still other of such lands. The master says that in the light of these facts he inquired of counsel whether the Government desired a reclassification by reason of the alleged fraud and that the reply was in the negative. He reports that counsel contended the Government's pleading was meant to meet and defeat the company's claim, on the theory that, as to the lands classified as mineral and the claims to lieu lands therefor, the company must be treated as a plaintiff, and, as Paragraph XXVIII disclosed that the company did not have clean hands, it could not maintain its claim. The master overruled this contention, holding that the com-

pany was, in this case, a defendant and that the doctrine of clean hands did not apply to a defendant in equity.

Whatever gloss Government counsel may have put upon the paragraph, we think the master and the court below were bound to give full effect to the pleading and that the master was right in his original view that the facts set up, and the issues made by the answer, required a trial; and, if the Government succeeds in maintaining the truth of its allegations, the company should be charged with lands or values obtained as mineral indemnity through the fraud of its agents and their collusion with the Commissioners.

Although it is alleged, and the master found, that it was impossible in the time allowed by Congress for the Commissioners to make such a survey and classification as the legislation contemplated, we think the reports and the Secretary's approval and acceptance thereof, create a prima facie showing in favor of the classification and the company's selection of indemnity lands.

The United States pleaded the fraud which it says renders the classification, and the actions consequent upon it, a nullity. We think it necessarily has the burden of proof to sustain its pleading. It is not barred by laches or estoppel from asserting and proving the alleged fraud, and from having the company charged with the lands or values received as a result of it.

The case must go back for a trial of the issues made by paragraph XXVIII of the complaint and the answer thereto. It may be that on the trial the Government's evidence will prove fraud on the part of the company of such a character and extent as would disentitle the latter to any award even though the fraud does not extend to an acreage equal in extent to that of the selection rights taken away by the Act of 1929.

14. *The meaning of the phrase "agricultural lands" in the provision for selection in lieu of excepted mineral lands.*

In computing the deficiency of lands available for indemnity selection the District Court included the nearly

two million acres of mineral losses as to which indemnity selection had not been made at the time of the withdrawals and treated the withdrawn lands as available for selection in respect of mineral losses. The Government insists that this was error because much of the withdrawn land is not agricultural and is not, therefore, available as indemnity for mineral losses. The company, on the other hand, asserts that in the granting Act the word "agricultural" is not used in its ordinary sense of tillable or cultivable but as meaning merely lands not mineral. It bases this contention largely upon the alleged administrative construction and practice of the Department of the Interior which, so it claims, has treated the word "agricultural" as a term of classification and not one of strict definition.[33] This was the view taken by the master and the District Court.

Section 3 of the Act of 1864, which contains the grant to the railroad, employs three descriptions of public lands. The place land granted is denominated "public land, not mineral"; the lieu lands which may be selected to make up losses in the place lands are referred to as "other lands"; the mineral lieu lands are designated as "unoccupied and unappropriated agricultural lands."

The Act seems to have served as a model for other railroad grants made shortly thereafter. Section 3 of an Act of July 27, 1866,[34] which incorporated and granted lands to the Atlantic and Pacific Railroad Company, is

[33] It is true that in administration of the grant the Land Office approved selections upon affidavit merely that the chosen lands were "non-mineral"; but apparently the question whether that phrase was synonymous with "agricultural" was not raised or considered. We think the administrative practice, therefore, does not strengthen the company's argument. Moreover, Congress has not approved the practice, but, on the contrary, has directed that errors in the administration of the grant shall be corrected by the court's decree.

[34] 14 Stat. 292, 294.

in the same words except that the mineral indemnity is limited to a distance of twenty miles from the line. Section 9 of an Act of March 3, 1871,[35] incorporating and granting lands to the Texas Pacific Railroad Company, employs the same phraseology.

The granting clause of the Act of 1864 differed from those theretofore commonly used. In earlier acts indemnity selections were required to be of lands nearest the line. By the Act of 1864 lands in lieu of place lands previously sold, or otherwise disposed of, might be selected from land anywhere within the indemnity belt. In the mineral indemnity provision, however, Congress reverted to the earlier practice of requiring that agricultural lands nearest to the line, but within an unusually wide belt of fifty miles on either side, should be selected. It seems obvious that this provision was inserted in the knowledge that the mountainous Western country would afford less opportunity to obtain good lands by indemnity selection than the more level farming country to the East.

It is also to be noted that the bill as it passed the House omitted a provision found in bills earlier introduced in aid of railroads in the far West, requiring that the lieu lands for mineral losses should not only be those nearest the line, but "nearest the line of the road through said mineral lands . . ." [36] In the Senate the grant of mineral indemnity was stricken out and mineral lands were defined to exclude coal and iron.[37] The bill passed the Senate in this form and was sent to a Conference Committee.[38] The measure came from the Conference Committee in the form in which it finally passed. The

[35] 16 Stat. 573, 576.

[36] Cf. S. 65, 35th Cong., 1st Sess.; H. R. 411, 35th Cong., 1st Sess.

[37] Cong. Globe, 38th Cong., 1st Sess. 3290.

[38] Cong. Globe, 38th Cong., 1st Sess. 3459.

Act thus permitted a selection of agricultural lieu lands not only in the territory adjacent to the mineral place lands but within fifty miles on either side of the right of way anywhere along the entire route of the road. It has consistently been so construed and the company has been allowed to select, as mineral indemnity, lands not more than fifty miles from its right of way opposite any part of the road and in any state traversed by the line.[39]

The Government contends that "agricultural" means "presently tillable" or "presently fit for the plough." We agree, however, with the master and the court below that the words "mineral" and "agricultural" as used in the Act are not to be read strictly as defined by the dictionary. Mineral lands, as the phrase has been applied in the administration of public lands, embrace not only those which the lexicon defines as mineral, but, in addition, such as are valuable for deposits of marble, slate, petroleum, asphaltum, and even guano. Likewise, in the administration of pre-emption and homestead legislation, the terms "agricultural" and "cultivation" have been given a liberal construction. It appears from the record, and from the evidence before the Joint Congressional Committee, that pre-emptors or homesteaders, under the acts requiring settlement and cultivation as a prerequisite to a patent, have been allowed to take up forests, grazing land, and, in fact, all types of land which, in good faith, were sought for a home, provided the lands could, by the settler's effort, be made habitable

[39] Op. A. G. 498, 41 L. D. 571; Sessey *v.* Northern Pacific Ry. Co., 43 L. D. 302. The practice of the Land Office has been uniform in permitting selection of mineral lieu lands in any state irrespective of the state of loss. The same principle has governed the right of selection of first indemnity lands for losses other than mineral. 19 Op. A. G. 88, 94; Northern Pacific R. Co., 20 L. D. 187; Northern Pacific R. Co. *v.* Shepherdson, 24 L. D. 417; Hagen *v.* Northern Pacific R. Co., 26 L. D. 312.

and used as a farm home. This has been true in spite of the fact that the applicable acts of Congress have required cultivation as a prerequisite to acquisition by the pre-emptor or homesteader.[40]

Under the administrative practice, although lands containing timber could be taken for homes in the public land states, a certain portion of the lands had to be cleared preliminary to cultivation. But, the pre-emptor or homesteader has not been permitted to take up lands valuable only for timber or for stone or for some other use, which could not be rendered cultivable or usable in a broad sense for farming, by clearing or other work done thereon. Pursuant to legislation enacted years after the grants to the company, lands unfit for a farm home could be acquired.[41]

It seems to us that inasmuch as the railroad company could not take other mineral lands in lieu of mineral place lands lost to the grant and, if it were confined to non-mineral lands, contiguous to the lost mineral lands, it would probably receive lands then considered of little or no value, Congress, by the use of the term "agricultural," and by granting the right to select the lieu lands anywhere along the line, intended to give the company the privilege of taking more valuable lands than those wild forest lands contiguous to the mineral place lands in the Western mountain regions.

The truth seems to be that, in extending this privilege to select more valuable lands, Congress did not have in mind a distinction between "non-mineral" and "agricul-

[40] Act of June 19, 1834, c. 54, 4 Stat. 678; Act of June 22, 1838, c. 119, 5 Stat. 251; Act of August 4, 1842, c. 122, 5 Stat. 502; Act of March 3, 1843, c. 86, 5 Stat. 619, 621; Act of May 20, 1862, c. 75, 12 Stat. 392; R. S. § 2291, 43 U. S. C. § 164.

[41] Timber and Stone Act, June 3, 1878, c. 151, 20 Stat. 89; Desert Land Act, March 3, 1877, c. 107, 19 Stat. 377. The latter Act excluded both mineral and forest lands from its operation.

tural" lands, in the sense that the company must select the more valuable agricultural lands and refrain from taking less valuable lands non-mineral but not susceptible of cultivation. As the master well says, at the time of the grant agricultural lands in states eastward of the Rocky Mountains were far more valuable than the rough mountain lands farther to the west. It is reasonable to suppose that, at that time, neither Congress nor the company contemplated the selection of unusable mountain lands rather than lands ultimately available for agriculture. Nevertheless, we are bound to attribute some meaning to the language Congress employed. It is obvious that, by the use of the word "agricultural," the company was precluded from selecting other mineral lands in lieu of mineral lands lost in the place limits. With mineral lands thus excluded, we think the word "agricultural" is to be interpreted in the light of existing legislation and conditions.

We are of the view that the word "agricultural" was not, therefore, used as synonymous with "non-mineral" but as synonymous with "land subject to be taken by pre-emptors or homesteaders under the public land laws." It is conceded that much of the land in the forest reserves which the company claims the right to select as mineral indemnity is not such as could have been acquired by individuals under the land laws in force at the time of the grant.

We have already noted that until the public lands were surveyed the company could not make selections and that, in the meantime, unsurveyed lands might be taken, under the pre-emption and homestead laws, to the company's loss or detriment. No doubt if the railroad had been more promptly built, and if the company had been more active in paying for and procuring surveys, good lands in various states within the mineral indemnity belt would have been available for selection.

These, however, were taken up and removed from the company's right of selection, with the result that the existing deficiency in the grant must be satisfied, if at all, by selections of lands now in the forest reserves. But, for whatever reason, the company has lost the right to select the better lands mentioned, and we cannot rewrite the statute to confer upon it the privilege of taking lands of a different character than those specified.

We conclude that, while the company had, at the time of withdrawal, the right of selection of any lands which, under the existing practice of the Land Office, a settler could have taken under the pre-emption or homestead laws, it may not take lands valuable solely for timber or for other uses which would not justify pre-emption or homestead settlement under the land laws as contemporaneously understood and administered. The company's right of selection in the forest reserves is limited to such land as would, under the practice of the Land Office, have been available to individuals under the public land laws either for clearing and subsequent cultivation, or for grazing, or for any other purpose commonly classified by the Land Office as coming within the pre-emption and homestead laws.

Since the court below has accorded the company a much broader right of selection, its decree must be reversed and the cause must be remanded for ascertainment of the company's selection rights as of the dates of the withdrawals, in accordance with the views herein expressed.

15. *The claim that the United States is liable to account to the Railway Company only for the ascertained deficiency at the time of withdrawal.*

In its brief upon reargument the Government takes the position that even if the withdrawals left the grant deficient in lands lying in the second indemnity limits, the United States is liable to account to the Railway

Company only for the amount of such deficiency. The District Court held that if a given withdrawal had the effect of leaving within the indemnity limits an insufficient acreage to satisfy the selection rights of the company the withdrawal was a breach of the Government's obligation because thereby the Government disenabled itself to carry out that obligation. The consequence which the District Court attached to such action on the part of the Government was that the lands withdrawn were, notwithstanding the withdrawal, still open to selection by the company if and when surveyed. The court below thought that, as the company was entitled, under the terms of the grant, to exercise its selection rights with respect to the withdrawn lands in these circumstances, the Act of 1929 contemplated that it should be compensated for the deprivation of that right.

We think that the District Court was right and that the Government's position that it is liable to account only for any deficiency in the vacant lands at the time of withdrawal is not in accord with the granting act of 1864. The *Forest Reserve Case, supra,* supports the decision below. It is clearly there held that if, by the Government's own act in withdrawing lands from the indemnity limits, it leaves insufficient vacant land available for selection the company thereby becomes entitled to select lands within the indemnity limits. That is exactly what was done by the company which brought about the litigation in the *Forest Reserve Case.* The decision is clear to the effect that, assuming the grant was deficient (which was the matter the court could not determine on the record then presented), the company was entitled to select lands within the reserve.

16. *The claim that subsequent restorations of withdrawn lands defeat the company's right of selection of lands within the Governmental withdrawals.*

What has just been said requires denial of the Government's contention that where withdrawn lands were

subsequently restored to the public domain, in an amount sufficient to make up the deficiency created by the original withdrawal, the company's claim to choose lands within the withdrawal areas was thereby defeated.

Under the Act of 1929 the company's right to compensation depends upon the availability of lands on the dates of withdrawals for governmental purposes. This provision of the Act of 1929 is, we think, in strict accordance with the purpose and intent of the granting act and resolution. If, by the withdrawals, the Government disenabled itself to comply with its obligations to the company, the withdrawals were unauthorized and the company's right attached to the withdrawn lands equally with the vacant lands remaining in the indemnity limits.

17. *The illegal withdrawals of place and indemnity lands.*

As has been noted under heading 5, *supra,* the action of the Department of the Interior in prematurely withdrawing lands in the place and indemnity limits from settlement and pre-emption is claimed to have the effect of denying the company any further rights under the grants.

The further argument is made that, in any event, the company is liable to the Government for damages consequent upon its receiving lands which, if it had not been for the improvident withdrawals, would have gone to settlers and pre-emptors. The claim is that the court below should have permitted the Government to prove any damages it might be able to show as a result of this incorrect administration of the grant. A majority of the Court is of the opinion that a good ground for a credit in favor of the United States against the company is set up by paragraph XXXII of the bill and that

this paragraph is not, in this aspect, subject to the motion to strike.

The paragraph sets up the disadvantages to the Government of the action of the Secretary of the Interior in withdrawing lands prematurely; that as a consequence the company and its predecessor secured benefits, lands and values to which they were not entitled, to the injury of the United States.

The majority of the Court thinks that section six of the Act of 1929 requires a charge against the company for sums received in lands or values in excess of that to which it was rightfully entitled through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise.

The proof of these alleged advantages gained or losses suffered may be difficult. This is for development at the hearing. The proof, however, must be of financial detriment to the United States or of financial benefit to the company.

18. *The company's failure to open lands granted by the Resolution of 1870 to settlement and pre-emption.*

The company's alleged breach in this aspect as a defense to the company's entire claim is mentioned in heading 4, *supra.*

The bill alleges, in paragraph XIII, the company's failure to open the granted lands to settlement and pre-emption was a breach of its contract and "in defeat of the policy of the United States with respect to the disposition of its public domain, . . ." In paragraph XLII the court is asked to determine the extent to which the company has failed to comply with the obligation imposed by the Joint Resolution pertaining to the disposition of the lands by settlement and pre-emption and to decree that the company now perform its cove-

nant to the extent this is possible and, where it is found impossible for the company to perform, the plaintiff have such relief as the court may deem proper; and further that the court decree that any and all moneys received by the company from or by reason of the granted lands after the breach of its covenant be declared to have been received by the company in trust for the use and benefit of the United States and that the plaintiff be awarded judgment for the amount of such moneys. The prayer is, therefore, in the alternative for damages or for an accounting, as upon a constructive trust.

We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and pre-emption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864.[42] We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers.[43] It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands.

A majority of the justices who heard this case are of opinion that the proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to pre-emption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government

[42] The legislative history is convincing: see Cong. Globe, 41st Cong., 2d Sess., pp. 2480–85; 2569–84.

[43] Compare *Oregon & California R. Co. v. United States*, 238 U. S. 393, 431–436.

is entitled, if it can, to prove any damage to it, or advantage to the company, which resulted from this breach of contract. In this view the court below should not have dismissed paragraph XIII of the bill and that paragraph should be reinstated for the purpose of permitting the Government to prove damages and proof should be submitted thereunder to that end.

19. *The claim that the decree below in directing patents to issue for 428,986.68 acres of land outside the reserves was erroneous to the extent of 44,838.60 acres of indemnity lands.*

In its brief upon reargument, the Government advances the claim that the decree of the District Court quieting the company's title to 428,986.68 acres of land lying outside the reserves, and directing that patents issue upon payment of any balance of fees due by the company, was erroneous as to 44,838.60 acres. It is asserted that 383,808.08 of the acres in question lie within the place limits of the grant but 45,178.60 acres lie within indemnity limits. Of these the Government concedes that, by a stipulation filed, 340 acres are to be patented to the company. As to the remaining acreage, the contention is that the company is not entitled to patents, although selections were filed with the Department of the Interior, prior to June 5, 1924.

It is said that, on grounds heretofore stated, the company's breaches disentitle it to further performance on the part of the Government. And, it is urged that, as to over 30,000 acres of the lands in question, the company assigned losses of mineral lands as base for indemnity selection and the alleged fraud in mineral classification vitiates the selection of this acreage as indemnity. The Government also asserts that some 13,000 acres of lands selected for patent prior to the bar date are Indian lands within the Crow reservation. The first contention

cannot prevail in view of the even division of opinion already stated; the second cannot, since the bill prays no affirmative relief in respect of the fraudulent classification it alleges; the third cannot, in the light of our decision stated under heading 10, *supra*.

Secondly, the Government urges, since the District Court has held that, in order to obtain compensation for the deprivation of rights to select lands lying within the withdrawn Government reserves, the company must assign base for the lands selected as to which compensation is claimed, the same principle must apply to selection rights exercised prior to the Resolution of June 5, 1924. It adds that the company has failed to show that in selecting lands within the indemnity limits prior to the date of that resolution it assigned base for such selections, to which the company replies that the Government is in error in asserting that it did not assign such base.

The argument with respect to the selected indemnity lands, which the District Court decreed should be patented to the company, first emerged in this court on reargument. In its original brief the Government said:

"The decree quiets title to the lands from the indemnity belts retained by the United States in the forest reserves and other reserves and directs the issuance of patents to the company for 428,986.68 acres, mostly in place limits of the grants. In these and several other respects the decree is not the subject of this appeal."

It is now said that, despite this concession, the point was preserved in the record below and is open here. We cannot agree.

By its exhibits Nos. 149 to 158, inclusive, the company listed the lands in place and indemnity limits which had been selected for patent amounting to over

455,000 acres. By stipulation of the parties certain of these were eliminated. Thereafter the Government, by its exhibits Nos. 103 (Revised) and 210 (Revised) listed the remaining lands as chargeable to the grant. With negligible exceptions the master found that they were so chargeable. In its findings the District Court adopted the master's ruling and stated definitely in its findings that the plaintiff took no exception to the master's report in connection with this matter. The court found, therefore, on the basis of the master's report, that the total of the lands both in place and indemnity limits so selected by the company should go to patent. The Government, while not controverting the fact found by the court that it had taken no exception to this portion of the master's report, points to an assignment of error filed on the appeal to this Court asserting that the District Court erred: "52. In holding that the railroad is now entitled to receive patent to any of the indemnity lands mentioned or referred to in subdivision XVIII of the court's findings." Subdivision XVIII is that subdivision of the findings in which the court dealt with the whole matter of patents to be issued for lands selected prior to the adoption of the resolution of 1924 and does not deal specifically or separately with indemnity lands as contrasted with place lands.

It is obvious that the decision of the court sustaining the Government's position that, in the claim for compensation for loss of indemnity selection rights to lands within the reserves the company must assign base for the lands it alleged it lost by their withdrawal, furnishes no justification for the claim that the master or the District Court was asked to annul and hold ineffectual selection rights exercised with respect to lands outside the reserves which, but for the interposition of Congress in the Resolution of 1924, would have gone to

patent. Moreover, it is not clear from the record whether the company did in fact assign base in the lists of selection rights filed, or failed to do so. The implication from the record seems to be that the company did assign such base. In any event, we think the point was not brought to the master's or the court's attention in any such manner as to justify its being made the basis of a claim of error in this court. This must have been the Government's view when the case was first argued. In the light of its sweeping concession above quoted, and the state of the record, we are unwilling to disturb the District Court's decree as respects lands to be patented to the company.

20. *The company's claim to indemnity resulting from the Tacoma overlap.*

In its appeal (No. 4) the company challenges the rejection of its claim for loss of selection rights in second indemnity limits appurtenant to the Portland-Tacoma line. It is urged that the Joint Resolution of 1870, which made a grant in aid of this line, authorized the creation of second indemnity limits, in the event that there was a deficiency of lands in first indemnity limits, to supply loss of place lands lying along the route. The company insists that when, in 1898, 1902 and 1906, 213,000 acres of land were withdrawn and placed in national forests, these withdrawals deprived the company of selection of odd-numbered sections in second indemnity limits, as the 1870 grant was deficient in 1882, the date of the definite location of the last segment of the Portland-Tacoma line, and so remained.

For an understanding of the contention certain facts must be borne in mind. By the Act of 1864 the line authorized was to run from a point on Lake Superior to some point on Puget Sound, with a branch via the Columbia River to a point at or near Portland. By the Joint Resolution of 1870 the company was authorized to

construct its main line to a point on Puget Sound via the valley of the Columbia River with the right to construct its branch from a point on its main line, across the Cascade Mountains to Puget Sound. Thus the resolution altered what had been the proposed main line across the Cascade Mountains into a branch line, and the former branch line to Portland into a section of the main line running down the Columbia River to Portland and thence turning north to Puget Sound. Although by an Act of 1869 the company had been authorized to construct a line between Portland and Tacoma, and a right of way had been granted therefor, no grant of lands in aid of such construction was made until the adoption of the Resolution of 1870. That resolution in authorizing the location and construction of this portion of the company's road, did so in these words: "Under the provisions and with the privileges, grants, and duties provided for in its act of incorporation." Obviously the land grant was the same as that in the charter act, namely, place lands in a strip extending twenty miles on each side of the road in states and forty miles on each side in territories, with an indemnity belt ten miles in width on either side of the exterior limits of the place grant.

The legislative history of the resolution shows that Congress was informed the company could not obtain, in connection with its original grant, all that Congress intended it should have, for the reason that, prior to selection of indemnity lands for losses in place lands, much territory had been removed from the operation of the Act by pre-emption and settlement under the land laws. In order to compensate the company for such losses there was inserted in the Joint Resolution the following: "and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said

company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company . . . to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The Resolution made a new grant in aid of the Portland-Tacoma line.[44] The portion of the Cascade branch (designated as main line in the Act of 1864) entering Tacoma from the east was definitely located in 1884. This location defined the place lands granted by the Act of 1864. The line authorized by the Joint Resolution entering Tacoma from the south was definitely located in 1874, thus earning the grant made by the Resolution. The place limits forty miles wide to the south of the Cascade line, and of equal width to the east of the Portland-Tacoma line, overlap. The area of the overlap, approximately forty miles square, contains alternate sections totaling 637,580 acres. The company says that, under the 1864 grant pursuant to which the Cascade line was built, title to the place lands vested in the company on the date of definite location, as of the date of the original grant; that these lands were thus lost to the grant of 1870 appurtenant to the Portland-Tacoma line;

[44] *United States* v. *Northern Pacific R. Co.*, 152 U. S. 284; *Northern Pacific R. Co.* v. *DeLacey*, 174 U. S. 622; *United States* v. *Northern Pacific R. Co.*, 193 U. S. 1.

and that, the company was entitled to indemnity for them. If this is the right view, 637,580 acres must be added to the other losses for which indemnity was needed at the date of the forest withdrawals and thus the deficiency in the grant required a large quantity of lands in second indemnity limits through the withdrawn lands, if any such limits were created in connection with the 1870 grant. The Land Office construed the Resolution of 1870 as requiring the laying down of second indemnity limits for the Portland-Tacoma line, and laid them down in 1906. The master and the court below concluded that no place lands were lost to the 1870 grant by the overlap. We are of opinion that they were right.

Several decisions respecting overlaps of railroad land grants are cited but none is precisely in point. It seems to be conceded that if the Cascade branch and the Portland-Tacoma line had been authorized by the same Act there would have been but a single grant of odd-numbered sections in the overlap and the company could not have claimed indemnity as for a grant of double aid in the area.[45] And it is settled that such a grant as that under consideration is a grant not of lands by quantity but of lands in place or by description.[46] Whether Congress intended, in connection with its later grant of 1870, to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question. We conclude that Congress did not so intend.

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[45] See *United States* v. *Oregon & California R. Co.*, 164 U. S. 526, 537.

[46] *Winona & St. Peter R. Co.* v. *Barney*, 113 U. S. 618, 627; *Barney* v. *Winona & St. Peter R. Co.*, 117 U. S. 228, 231–2; cf. *Wisconsin Central R. Co.* v. *Forsythe*, 159 U. S. 46, 59–60.

It is true that the grant of 1870 was upon the same terms as that of 1864. Unquestionably the company, in respect of the line built under the later grant, was entitled to indemnity for lands granted or disposed of by the United States to others prior to the grant. Indeed, it would be entitled to indemnity for loss due to an earlier overlapping grant to another railroad.[47] The grant of 1864, carried title to the lands within the overlap to the company and, therefore, Congress could not and did not make a second grant of the same lands in 1870. Did Congress intend to grant the company indemnity for a preceding grant, not to a stranger, but to the company itself? In answering the question we must bear in mind that if the grants had been contemporaneous no intent to make a double grant, or a grant of indemnity, would be inferred, and that the two grants here in question really dealt with but a single railroad system. We think it clear that Congress did not intend to confer a right to indemnity upon the company which would give it lands double in quantity at the point of intersection of two of its lines. As, in this view, the alternate sections in the overlap granted to aid the Cascade line by the Act of 1864, were not a loss to the grant to the Portland-Tacoma line made by the Resolution of 1870, the latter grant was not deficient and no right to select lands in second indemnity limits was infringed by Government withdrawals.

The appeal in No. 4 is without merit, but, upon the appeal in No. 3, the judgment is reversed and the cause is remanded for further proceedings as indicated in this opinion.

No. 4, dismissed.
No. 3, reversed.

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

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[47] *United States* v. *Oregon & California R. Co.*, 176 U. S. 28, 50.

Syllabus.

UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO.

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

No. 12. Argued October 14, 15, 1940.—Decided December 16, 1940.

1. Upon review of a case involving the scope of the federal commerce power in relation to licensing by the Federal Power Commission of a hydroelectric dam, this Court may determine for itself whether a particular waterway is a navigable water of the United States, and it is not precluded by the rule that factual findings concurred in by two courts below will be accepted here unless clear error is shown. P. 403.
2. The ultimate conclusion as to whether a particular waterway is a navigable water of the United States, and the judicial standards to be applied in making the determination, involve questions of law inseparable from the particular facts to which they are applied. P. 404.
3. A waterway which by reasonable improvement can be made available for navigation in interstate commerce is a navigable water of the United States, provided there be a balance between cost and need at a time when the improvement would be useful. P. 407.
4. In such case, it is not necessary that the improvement shall have been already undertaken or completed nor even that it shall have been authorized. P. 408.
5. A navigable water of the United States does not lose that character because its use for navigation in interstate commerce has lessened or ceased. Pp. 408, 409.
6. A waterway may be a navigable water of the United States for a part only of its course. P. 410.
7. Lack of commercial traffic does not preclude the classification of a waterway as a navigable water of the United States where personal or private use by boats demonstrates its availability for the simpler types of commercial navigation. P. 416.
8. Upon the facts of this case, *held* that the New River, from Allisonia, Virginia, to Hinton, West Virginia, is a navigable water of the United States. Pp. 410, 418–419.
9. It is within the constitutional power of Congress to require that a federal license be obtained for the erection or maintenance of a

structure in a navigable water of the United States, even though the sole purpose of the structure be the generation of electric power. Pp. 424, 426.

10. The authority of Congress over navigable waters of the United States is not limited to control for the purposes of navigation only, but is as broad as the needs of commerce. P. 426.

11. In the exercise of its power over a navigable water of the United States, Congress may forbid the placing of an obstruction therein, or may grant the privilege on such terms as it chooses; and it is no objection that its exercise of power in this respect is attended by the same incidents which attend the exercise of the police power of the States. P. 427.

12. The Federal Power Act provides that licenses issued by the Federal Power Commission, for projects required by the Act to be licensed, shall contain certain conditions. Section 10 (a) requires that the project be best adapted to a comprehensive plan for improving or developing the waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; § 10 (c) requires that the licensee maintain the project adequately for navigation and for efficient power operation, maintain depreciation reserves adequate for renewals and replacements, and conform to the Commission's regulations for the protection of life, health and property; § 10 (d) requires that out of surplus earned after the first 20 years above a specified reasonable rate of return, the licensee maintain amortization reserves to be applied in reduction of net investment; § 10 (e) requires the licensee to pay to the United States reasonable annual charges for administering the Act, and authorizes the United States during the first 20 years to expropriate excessive profits unless or until the State prevents such profits; § 14 gives the United States the right, upon expiration of a license, to take over and operate the project by paying the licensee's "net investment," not to exceed the fair value of the property taken. *Held* that respondent, a power company which, under license from the State, had undertaken the construction of a hydroelectric dam in New River, could be compelled, in a suit brought by the United States, to obtain from the Commission a license containing conditions authorized by §§ 10 (a), (c), (d), (e) and 14; or, in the alternative, to remove its works from the river.

(1) The validity of other provisions of the license, challenged only generally as unrelated to navigation, not decided. P. 420.

(2) The fact that the provisions of § 14 for acquisition by the United States at the expiration of the license period vitally affect the establishment and financing of respondent's project, requires that the question of the validity of the section and of the license provisions based upon it be determined now, and that the determination be not deferred until the right matures and the United States proceeds to exercise it. P. 421.

(3) Assuming, without deciding, that by compulsion of the method of acquisition provided by § 14 and the required license, riparian rights of the respondent may ultimately pass to the United States for less than their value, this must be regarded as the price which the respondent must pay for the privilege to maintain the dam, and does not involve a violation of the Fifth Amendment. P. 427.

(4) The license conditions here considered have an obvious relationship to the exercise of the commerce power. P. 427.

(5) The provisions for future acquisition of the project by the United States is not an invasion of the sovereignty of the State. P. 428.

13. A valid exercise by Congress of the power delegated to it by the commerce clause can not constitute an encroachment on state sovereignty in violation of the Tenth Amendment. P. 428.

14. The Court confines its decision in this case to the concrete legal issues presented, and does not undertake to determine abstract questions as to the relative rights of the States and the United States in respect to the development and control of water power. P. 423.

107 F. 2d 769, reversed.

CERTIORARI, 309 U. S. 646, to review the affirmance of a decree dismissing a bill brought by the United States against the power company to enjoin the construction of a dam in the New River. Opinion of District Court, 23 F. Supp. 83.

Solicitor General Biddle, with whom *Messrs. John W. Aiken, Warner W. Gardner, Melvin H. Siegel, William S. Youngman, Jr., David W. Robinson, Jr., Gregory Hankin,* and *Willard W. Gatchell* were on the brief, for the United States.

The ultimate finding of navigability is a question for this Court, and not a simple physical or historical fact.

Concurrent findings do not preclude an independent reëxamination. *Leovy* v. *United States,* 177 U. S. 621, 628; *The Montello,* 20 Wall. 430, 442; cf., *Arizona* v. *California,* 283 U. S. 423, 452.

The foundation of the federal jurisdiction is that the stream be "used or suitable for use for the transportation of persons or property in interstate or foreign commerce." Federal Power Act, § 3 (8). If the stream has in fact been used for navigation of a consequential character, it follows without more that the river is navigable; and, if the navigation was the transportation of persons or property in interstate or foreign commerce, that the river is navigable water of the United States.

If the question is whether the stream is suitable for navigation, § 3 (8) in terms puts aside a number of considerations which might otherwise be urged to defeat a finding of navigability. Streams which otherwise might not be navigable are navigable if they "have been authorized by Congress for improvement after investigation under its authority." See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 328, 329–330.

Congress has power to define the character of the streams which require federal control, and thus to implement its constitutional grant of power by appropriate definition. *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; cf. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264. Even if the definition went somewhat beyond interstate commerce, it could hardly be denied that the waters described in § 3 (8) have an existing or potential effect upon interstate commerce; their regulation therefore may be sustained as a control of matters which otherwise would offer a substantial threat to interstate commerce. *Shreveport Rate Cases,* 234 U. S. 342; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 37–38.

The Radford-Wiley's Shoals stretch of New River is plainly navigable; it has borne a varied and extensive navigation.

It is unimportant that actual navigation has been abandoned. The DesPlaines River had been out of use for a century, "but a hundred years is a brief space in the life of a nation," and if federal control of navigable waters is to be abandoned "it is for Congress, not the courts, so to declare." *Economy Light Co.* v. *United States,* 256 U. S. 113, 124; *Arizona* v. *California,* 283 U. S. 423, 453–454.

Nor is it material that the navigation was accomplished with difficulty or danger. Navigation on the high seas is often difficult and dangerous, yet it cannot be said that the seas are not navigable.

The irregularity of commercial trips, or the absence of an established trade route, is irrelevant. Trips which occur only when there is a sufficient commercial demand prove navigability as completely as those which move on regular schedule. *United States* v. *Utah,* 283 U. S. 64.

The view that the commerce over the relevant stretch must be an appreciable part of the river's total commerce is unsound.

The size or character of the vessels used is immaterial. *Economy Light Co.* v. *United States,* 256 U. S. 113, 117; *Water Power Co.* v. *Water Commissioners,* 168 U. S. 349, 359; *The Montello,* 20 Wall. 430, 441–442.

The section is navigable also because it is susceptible of, or suitable to, navigation. The conceded traffic on this stretch is proof of its suitability for commercial navigation. A few trips between Allisonia and Hinton would not show an appreciable commercial navigation, but would demonstrate suitability for navigation.

The conclusion that the Radford-Wiley's Shoals stretch is navigable is required whether actual navigation or physical characteristics be considered. The Allisonia-Radford and Wiley's Shoals-Hinton stretches also being navigable, it follows that the New River is navigable from Allisonia, Virginia, to Hinton, West Virginia. Since this 111-mile stretch is interstate, it results that the site of respondent's project is in navigable waters of the United States.

Respondent's project is in navigable waters of the United States also because the Allisonia-Radford stretch, in which it is located, was the avenue of an interstate commerce which moved by boat to Radford and was there transshipped in interstate commerce by railroad. The protection which Congress is authorized to extend over navigable waters must be the same whether they are channels of interstate commerce wholly by water or by water and rail. Congress regulates interstate waterways and interstate railroads. Nothing in the Constitution prevents regulation of an interstate route which is part water and part rail.

As an interstate public utility, respondent may not complain of any prohibition against unlicensed construction of its project. Its project will send the bulk of its electric energy into interstate commerce and will be part of an extensive interstate electric system, interconnected with other systems. Therefore, it is subject to the commerce powers of Congress, without regard to the federal control of tributary streams. *Public Utilities Commission* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 86; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 182; *Electric Bond Co.* v. *Commission*, 303 U. S. 419, 432–433. And, since Congress is authorized to regulate the interstate transmission of electricity, it has full power to license its generation for purposes of interstate sale.

Another reason for federal control of respondent's project, whatever the navigability of New River at its site, is that the waters of New River are in interstate movement and concern West Virginia and Ohio as fully as Virginia. The federal commerce power extends to the interstate movement of waters, since it applies to the interstate movement of stolen automobiles, *Brooks* v. *United States,* 267 U. S. 432; impure foods, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; kidnapped persons, *Gooch* v. *United States,* 297 U. S. 124; convict-made goods, *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334; and women transported for immoral purposes, *Caminetti* v. *United States,* 242 U. S. 470.

The license provisions, designed to implement the recapture clause, are valid. Whether respondent's project is located in navigable or in non-navigable waters, the United States has power to forbid its construction, and it therefore has full power to condition its permission with regulatory provisions designed to serve public ends, whether or not the conditions are directly related to navigation as such. See *Green Bay Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, 80.

The Federal Power Act is a valid exercise of the powers granted to Congress to regulate interstate commerce, and it therefore does not violate the Tenth Amendment.

The development and control of the water resources of the country has long been recognized as a national problem. Rivers flow past or along state boundaries; their navigability in one State often depends upon upstream conditions in another State. If floods in Pennsylvania and Ohio are to be reduced, the tributaries in West Virginia and Virginia must be controlled. If downstream lands in arid regions are to be irrigated, the

water appropriations in upstream states must be controlled. If the development of hydroelectric energy is to be accomplished without injury to these interstate concerns, the State or States in which the dam chances to be built cannot have the sole voice in its control.

The Government's power to build the project or to take it by eminent domain is conceded. There is no invasion of the rights of the States if it elects instead to secure an option to take over the project 50 years hence.

It is unnecessary now to consider the validity of the recapture provision. Respondent will have an adequate remedy if its constitutional rights should ever in fact be invaded.

Nevertheless, the recapture provision is a valid condition to the license. Since there is power to prohibit construction or operation, there is power to grant a franchise or a license for a limited period. *Gibbons* v. *Ogden,* 9 Wheat. 1. At the end of the license period, the structure can no longer be maintained or operated. It then can have no more than a junk value. Cf. *Roberts* v. *New York City,* 295 U. S. 264, 284–285. The net investment contemplated by the Act is far in excess of the junk value of the plant. And there can be no claim for reimbursement for water power rights, the development of which the United States can and has forbidden. Cf. *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53.

There is no confiscation. The recapture provisions are simply the price which respondent must pay to obtain a privilege otherwise denied it. If the contract is harsh, respondent has the simple expedient of not constructing the project. The power of municipalities to condition the terms of their franchises is analogous. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539,

542; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267, 273; *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 438–439; *Public Service Co.* v. *St. Cloud,* 265 U. S. 352, 355–356; *Fox River Co.* v. *Railroad Commission,* 274 U. S. 651, 657.

Even if Congress were without power to forbid construction of the dam or operation of the hydroelectric plant, it may nevertheless forbid the interstate movement of electric energy from respondent's generators. To obtain this privilege, respondent as an interstate public utility must accept a license from the Federal Power Commission, just as an interstate railroad, motor carrier, or vessel must obtain a license or a certificate of public convenience and necessity from the appropriate federal authority. The recapture provision is an appropriate contractual price to pay for receipt of that privilege.

Respondent cannot challenge the amortization reserve requirement if it is built up out of the excess of its income over a reasonable rate of return. *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456. Its attack, then, must be directed at the requirement that the reasonable rate of return be referred to the net investment value. The Government has urged that the equivalent "prudent investment" basis of valuation is constitutional. Here Congress has specifically provided for this method of valuation, and the arguments have augmented strength from that congressional determination.

The recapture provision does not deny just compensation because it does not provide payment for any increase in property values during the period of the license. If one of the obligations of a public utility is to devote its property to the public use for a fair return upon its net investment, then it is subject to public expropriation upon the same basis. If there is no confiscation

from year to year, there can be none when the project is taken over at the end of the license period. Certainly this is the result when respondent, with knowledge of the provisions of § 14, undertakes the construction of its project.

Mr. Raymond T. Jackson, with whom *Messrs. A. Henry Mosle, Creswell M. Micou, Fraser M. Horn, Wendell W. Forbes, M. W. Belcher, Jr.,* and *John L. Abbot* were on the brief, for respondent.

Findings of fact which are concurred in by two lower courts will be accepted here if supported by substantial evidence. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477. The rule applies to a finding that a stream is not navigable in fact in interstate commerce. *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77. And there is no distinction between findings of basic or evidentiary facts and findings of ultimate facts. *United States* v. *O'Donnell,* 303 U. S. 501; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548; *Pick Mfg. Co.* v. *General Motors Co.,* 299 U. S. 3, 4; *United States* v. *Commercial Credit Co.,* 286 U. S. 63; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Baker* v. *Schofield,* 243 U. S. 114.

The argument that petitioner merely "differs" with the lower courts on the "legal question" of the "weight and relevance" of the evidence is disingenuous. No question of the admission or rejection of evidence (as a matter of relevancy or otherwise) is presented by petitioner; and disagreement with the "weight" accorded various selected items of evidence by the courts below presents no issue of law for this Court.

Navigability in the federal sense is a question of constitutional fact. *Crowell* v. *Benson,* 285 U. S. 22, 55; *Arizona* v. *California,* 283 U. S. 423, 452. Neither Congressional appropriations for improvements, nor other

federal legislation or acts of federal officers or agencies can establish navigability of a river in interstate commerce. The question is always one of fact to be determined by the courts. *Oklahoma* v. *Texas,* 258 U. S. 574, 585, 590–591. Indeed, abandonment of a federal attempt to make a stream navigable creates a presumption of nonnavigability. *Oklahoma* v. *Texas, supra,* 590.

Navigable waters of the United States are waters which are navigable in fact and which, by themselves or by uniting with other waters (navigable in fact), form a continuous highway over which commerce is or may be conducted among the States or with foreign countries in the customary modes in which commerce is conducted by water. *The Daniel Ball,* 10 Wall. 557; *The Montello,* 20 Wall. 430; *United States* v. *Oregon,* 295 U. S. 1, 23.

Navigability in fact must exist under "natural and ordinary conditions." *United States* v. *Oregon, supra,* 23; *United States* v. *Cress,* 243 U. S. 316, 321, 325, 326; *United States* v. *Holt State Bank,* 270 U. S. 56. Exceptional use, or susceptibility of use, in times of temporary high water or under other abnormal conditions, is insufficient. *Oklahoma* v. *Texas, supra,* 587; *United States* v. *Rio Grande D. & I. Co.,* 174 U. S. 690, 699. To be navigable in fact, a water must have a "capacity for general and common usefulness for purposes of trade and commerce." *United States* v. *Oregon, supra,* 23. *The Montello,* 20 Wall. 430, 442–3; *Donnelly* v. *United States,* 228 U. S. 243, 262. It must be used or susceptible of use for "commerce of a substantial and permanent character." *Leovy* v. *United States,* 177 U. S. 621, 632; *United States* v. *Doughton,* 62 F. 2d 936, 938. "A theoretical or potential navigability or one that is temporary, precarious and unprofitable, is not sufficient." *Harrison* v. *Fite,* 148 F. 781, 784; *United States* v. *Doughton, supra,* 939. Where "a stream has never been impressed with the character of navigability by past use in com-

merce, . . . commerce actually *in esse* or at least . . . *in posse* is essential to navigability," *Gulf & I. Ry. Co.* v. *Davis,* 26 F. 2d 930, 933, aff'd 31 F. 2d 109, cited with approval in *United States* v. *Doughton, supra.* Whether practical capacity for carrying useful, substantial and permanent commerce exists is a question of fact. *United States* v. *Utah,* 283 U. S. 64, 87; *Crowell* v. *Benson,* 285 U. S. 22, 55.

The physical characteristics alone establish that New River in its natural and ordinary condition was not navigable in interstate commerce anywhere in its course.

Aside from the complete absence of early use, petitioner failed to establish practical use, or susceptibility for practical use, in interstate commerce. The limited federal work did not change its non-navigable character.

The water power resources of streams, either navigable or non-navigable, are not the "heritage" of the Federal Government, but are the property of the several States, except so far as granted to their citizens. The United States has no title or property right in navigable streams, their waters, their water power or the lands over which they flow; and the property rights of riparian owners, on both navigable and non-navigable streams, are created by and flow exclusively from state sovereignty. *Port of Seattle* v. *Oregon & W. R. Co.,* 255 U. S. 56, 63; *United States* v. *Cress,* 243 U. S. 316; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10; *Shively* v. *Bowlby,* 152 U. S. 1.

The right or authority of the United States in relation to navigable waters is limited to control for the purposes of navigation. *Port of Seattle* v. *Oregon & W. R. Co., supra,* 63; *United States* v. *Oregon,* 295 U. S. 1, 14; *Kansas* v. *Colorado,* 206 U. S. 46. Any legislation ostensibly for the control of navigable waters which has no real or substantial relation to their control for purposes of navigation is unconstitutional and void. *United*

States v. *River Rouge Co.*, 269 U. S. 411, 419; *Wisconsin* v. *Illinois*, 278 U. S. 367, 415.

So long as the States do not substantially impair navigable capacity of federal navigable waters, the States may authorize or command such alteration in natural flow of their streams as they deem in their best interests. *Kansas* v. *Colorado*, 206 U. S. 46, 94; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; *Head* v. *Amoskeag Co.*, 113 U. S. 9; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140, 152; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670; *California Power Co.* v. *Cement Co.*, 295 U. S. 142, 163–4.

The United States has no authority under the commerce clause or otherwise to construct or acquire a power project or to develop the waterpower resources of either navigable or non-navigable streams; and it may not constitutionally create water power other than that which is incidentally and necessarily produced by works constructed for some constitutional purpose, and those works must be reasonably appropriate for, and have a real and substantial relation to, the performance of the constitutional function which in the premises is limited to the creation or improvement of navigability. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254, 273; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 613; *Missouri* v. *Union E. L. & P. Co.*, 42 F. 2d 692, 695. This limitation upon petitioner's constitutional authority is unaffected by considerations of "economic feasibility" and can not be escaped by designating a statutory scheme as a "multiple purpose project." Petitioner may not develop water power merely for profit, or as a primary purpose, or as a separate and independent objective, merely because it concurrently authorizes some con-

stitutional structure which does not necessarily or incidentally create the water power.

The servitude in favor of navigation, to which riparian lands on navigable streams are subject, is a natural servitude implicit in the location of the property and limited to the stream in its natural state. *United States* v. *Cress,* 243 U. S. 316, 321, 325; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *United States* v. *Lynah,* 188 U. S. 445; *Packer* v. *Bird,* 137 U. S. 661, 667; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 698; *Leovy* v. *United States,* 177 U. S. 621, 631. Whenever that servitude is exceeded by any action of the Federal Government in the improvement of a navigable water or the creation of an artificial federal waterway, it takes property for which it must make compensation. *United States* v. *Cress, supra,* 326; *United States* v. *Lynah, supra; Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *River Rouge Co.,* 269 U. S. 411, 419; *Wisconsin* v. *Illinois,* 278 U. S. 367, 415, 418.

The implied authority over interstate navigable streams arises solely from the fact that they are natural highways of interstate commerce. It does not derive from the fact that they are water but from the fact that they are natural instrumentalities of interstate commerce. The result is that the Federal Government may regulate, and therefore require a license for, the placing of structures in such highways so long as such regulation has a real and substantial relation to the protection of navigation or navigable capacity and so long as it does not attempt to make the exercise of the licensing power the vehicle of extending federal authority into a field closed to the Federal Government by the Constitution. *United States* v. *Butler,* 297 U. S. 1; *Linder* v. *United States,* 268 U. S. 5, 17; *Employers' Liability Cases,* 207 U. S. 463, 502; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583. Within those limitations, it may

make the erection or maintenance of a structure in a navigable stream without a federal license *ipso facto* unlawful. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251.

Neither construction nor operation of respondent's project is interstate commerce. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 179–182; *South Carolina Power Co.* v. *Tax Commission,* 52 F. 2d 515, 524; aff'd 286 U. S. 525.

Construction of respondent's project without a federal license may not be forbidden merely because some part of the electricity which it generates will move in interstate commerce. *Utah Power Co.* v. *Pfost, supra; Kidd* v. *Pearson,* 128 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Schechter Corp.* v. *United States,* 295 U. S. 495. In Part II of the Power Act, Congress expressly disclaimed any intention to assert such authority.

Petitioner asserts that it may prohibit construction of respondent's project because the natural flow of all waters from the spring houses to the sea is interstate commerce. This theory would destroy the constitutional distinction between navigable and non-navigable waters and between federal and state waters, and would transfer to the Federal Government control over, and virtual ownership of, practically all of the waters of the States.

None of the conditions of the tendered license has any relation to the protection of navigable capacity. Some of them require a licensee to devote its property to public use without compensation, and they further attempt to transfer to petitioner the full police power of the State.

The "capture clause" invades the reserved right of the States and their people, and takes private property without due process of law.

Petitioner has no constitutional authority to take over and operate respondent's project. The taking of a citizen's property for a purpose for which there is no constitutional authority to condemn, is a gross invasion of his

rights, no matter what compensation is paid. Thus also may be destroyed the authority of the States to regulate the development of their own resources and the rights of their people to utilize such resources under state law in conformity with state policy.

The "capture" clause is confiscatory. It requires a licensee to agree that petitioner may "take over" the project upon payment to the licensee of its "net investment" in the project, or its fair value at the time of taking, whichever is the less. Both the "net investment" and the "fair value" prescribed by the Act not only exclude "going value," but also any value for water rights or lands in excess of "the actual reasonable cost thereof at the time of acquisition" (no matter when acquired, which may have been years before the issuance of the license) so that petitioner will "take" any increase in the value of lands or water rights and the licensee will bear the loss of any decrease in their value.

If severe inflation should come, petitioner might "take over" respondent's property upon paying merely the number of dollars (greatly reduced in purchasing power) which had not been eliminated from the original investment by the statutory definitions of "net investment" and "fair value," and thereby might acquire such property for an insignificant fraction of its reproduction value, of its real worth or of the original investment.

The development of water resources is no more a "national problem" than the development of all other economic resources of the States. The Constitution grants no authority to regulate "national problems." *Kansas* v. *Colorado,* 206 U. S. 46; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 291–292; *United States* v. *Butler,* 297 U. S. 1. *Helvering* v. *Davis,* 301 U. S. 619, dealing with the power to spend (but not to regulate) for the general welfare, is inapposite.

The fact that any tract of land in the State might be acquired for some constitutional federal purpose and thereby be removed from the state tax roll, does not sustain the conclusion that petitioner might compel any or all land owners in the State to turn over their property for federal use in commercial ventures not within petitioner's constitutional authority, and that this would not be an invasion of the rights of the State or of her people.

Even on a navigable stream, the right to develop water power is in the riparian owner. Petitioner may regulate the right only in so far as necessary to protect navigation or navigable capacity. *Port of Seattle* v. *Oregon & W. R. Co.*, 255 U. S. 56; *Pike Rapids Power Co.* v. *Railroad*, 99 F. 2d 902, 908, cert. den., 305 U. S. 660.

Petitioner may not convert the project to its own use without compensation on the theory that it could have elected to abate it as a public nuisance. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

Municipal franchises are not analogous. No one is compelled to accept a municipal franchise to use its streets on penalty of being barred from use of his own property. Moreover, municipalities in such cases exercise full proprietary rights in their streets, police power and the authority to engage in business.

Fox River Co. v. *Commission*, 274 U. S. 651, is inapposite. A State, unlike the Federal Government, has the authority to engage in the electric power business, and it may establish such law of property, riparian and other, as it chooses, so long as it does not confiscate vested rights.

Petitioner asserts that the right to engage in interstate commerce is a privilege which petitioner may grant, deny or barter upon such terms as it may choose—includ-

ing the "taking over" of the property of a citizen as a condition of the grant. This is totalitarianism run riot.

"Net investment" under the Power Act would be confiscatory even if "prudent investment" were regarded as a constitutional basis for rate making or for compensation in condemnation. But that basis has been consistently rejected by this Court. *Smyth* v. *Ames,* 169 U. S. 466; *Driscoll* v. *Edison Co.,* 307 U. S. 104. Moreover, even on petitioner's erroneous hypothesis, it would hardly follow that a utility's property could be taken for less than fair value. The decisions of this Court are to the contrary.

By special leave of Court, *Mr. Abram P. Staples,* Attorney General, filed a brief and participated in the oral argument (see 309 U. S. 636) on behalf of the State of Virginia, as *amicus curiae.*

Virginia and the United States each enjoys in this court an equal status, and there is no presumption that the exercise by either of a power claimed by the other is constitutional or proper.

Even if New River were navigable in interstate commerce a half century or more ago, such fact alone would not confer perpetual jurisdiction on the Federal Government to regulate interstate navigation in the stream. There is no such navigation now, and no reasonable possibility that there ever will be any, to regulate. Distinguishing *Economy Light & Power Co.* v. *United States,* 256 U. S. 113.

The federal power to protect navigable waters in interstate navigable streams is itself implied from the power to regulate interstate commerce, and it cannot be made the basis of inferring additional regulatory power which has no relation to regulation of interstate commerce.

Regulation of the manufacture of electric energy in the manner provided for by the Act is not a regulation

of interstate commerce, and the exercise of any such power by the Federal Government, over the protest of the State in which the plant is located, would destroy our dual system of government.

Federal jurisdiction to control and regulate, not only the construction of a waterpower project affecting interstate navigation in so far as it affects stream flow (which Virginia concedes), but all other details of the project, even though having no possible relation to navigation, cannot be predicated on the circumstance that every plant which sends its products into interstate commerce is a business "affecting interstate commerce." There is no limit to the federal commerce power if it extends to every act affecting interstate commerce.

The power to prevent the construction does not imply the further power to embrace in a license or permit any and every regulatory provision which the Federal Government may desire, even though without relation to stream flow or to the protection of navigation or navigable waters. The Federal Government's jurisdiction and powers over navigable waters are restricted to the regulation of navigation and the protection of such waters from harmful obstructions; and, while the stream is subject to a servitude in favor of navigation and interstate commerce, the States themselves possess all other governmental jurisdiction. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140.

The Federal Government possesses no power to prohibit in navigable waters of the United States structures which are not hurtful or harmful to the navigable capacity of such waters, or to navigation therein. The only power that it has over such harmless structures is that of deciding whether they are in fact harmless. And it would be an obvious abuse of the power to decide this question, to exact, as a condition to a favorable decision,

the additional power to regulate matters in no way related to navigation or the protection of such waters.

The property rights and governmental control over streams, except in so far as such control relates to navigation and the protection of navigable waters, reside in the States, and these property rights can be converted into so-called "national resources" only by grant by the States or by constitutional amendment.

The Power Act contains nothing about flood control, and the regulatory powers conferred on the Commission, except in so far as they relate to the control of stream flow for the protection of navigation, have no more relation to flood control than they do to navigation.

Although the Federal Government could itself construct a project in aid of navigation and flood control, it would have to acquire the property rights involved and erect the structure at its own expense. This is essentially different from undertaking to dedicate, and in effect to confiscate, the properties of the States, without their consent, for such a purpose.

The provisions of the Power Act which authorize the Federal Government to take over the property of Virginia, consisting of the bed of the river and the usufruct of the stream flow, without compensation to the State, violate Art. 4, § 3, Cl. 2, as well as the fifth amendment, of the Constitution.

Even if the Federal Government had the power to regulate the manufacture of electrical energy, the regulation of the construction and operation of hydroelectric generating plants, where there is no such regulation of plants operated by steam, is arbitrary and would result in needlessly confusing the efforts of Virginia to regulate the industry as a whole.

Virginia is entitled to a decision now on the constitutionality of the capture clause, as well as the other license provisions of the Act, so as to enable her to

proceed with the development of her many valuable streams.

By leave of Court, briefs of *amici curiae* were filed on behalf of the States of Kentucky, by *Hubert Meredith,* Attorney General, and *M. B. Holifield,* Assistant Attorney General; West Virginia, by *Clarence W. Meadows,* Attorney General; Wisconsin, by *John E. Martin,* Attorney General, *Newell S. Boardman,* Assistant Attorney General, and *Mr. Adolph Kanneberg.*

A joint brief was filed: for Alabama, by *Thomas S. Lawson,* Attorney General; Arizona, by *Joe Conway,* Attorney General; California, by *Earl Warren,* Attorney General; Colorado, by *Byron G. Rogers,* Attorney General; Connecticut, by *Francis A. Pallotti,* Attorney General; Delaware, by *James R. Morford,* Attorney General; Florida, by *George Couper Gibbs,* Attorney General; Idaho, by *J. W. Taylor,* Attorney General; Illinois, by *John E. Cassidy,* Attorney General; Iowa, by *John M. Rankin,* Attorney General; Kansas, by *Jay S. Parker,* Attorney General; Kentucky, by *Hubert Meredith,* Attorney General, and *M. B. Holifield,* Assistant Attorney General; Louisiana, by *Eugene Stanley,* Attorney General; Maine, by *Franz E. Burkett,* Attorney General; Maryland, by *William C. Walsh,* Attorney General; Massachusetts, by *Paul A. Dever,* Attorney General; Michigan, by *Thomas Read,* Attorney General; Minnesota, by *J. A. A. Burnquist,* Attorney General; Mississippi, by *Greek L. Rice,* Attorney General; Missouri, by *Roy McKittrick,* Attorney General; Nebraska, by *Walter R. Johnson,* Attorney General; Nevada, by *Gray Mashburn,* Attorney General; New Hampshire, by *Thomas P. Cheney,* Attorney General; New Jersey, by *David T. Wilentz,* Attorney General; New Mexico, by *Filo M. Sedillo,* Attorney General; New York, by *John J. Bennett, Jr.,* Attorney General, and *Henry Epstein,* Solicitor General; North Carolina, by *Harry McMullan,* Attorney General; North Dakota,

by *Alvin C. Strutz,* Attorney General; Ohio, by *Thomas J. Herbert,* Attorney General; Oregon, by *I. H. Van Winkle,* Attorney General; Pennsylvania, by *Claude T. Reno,* Attorney General; Rhode Island, by *Louis V. Jackvony,* Attorney General; South Dakota, by *Leo A. Temmey;* Attorney General; Tennessee, by *Roy H. Beeler,* Attorney General; Utah, by *Joseph Chez,* Attorney General; Vermont, by *Lawrence C. Jones,* Attorney General; Virginia, by *Abram P. Staples,* Attorney General; Washington, by *Smith Troy,* Attorney General; and Wyoming, by *Ewing T. Kerr,* Attorney General—setting forth the position of the States in regard to the relative powers of the States and the United States over navigable and non-navigable waters.

Mr. Justice Reed delivered the opinion of the Court.

This case involves the scope of the federal commerce power in relation to conditions in licenses, required by the Federal Power Commission, for the construction of hydroelectric dams in navigable rivers of the United States. To reach this issue requires, preliminarily, a decision as to the navigability of the New River, a watercourse flowing through Virginia and West Virginia. The district court and the circuit court of appeals have both held that the New River is not navigable, and that the United States cannot enjoin the respondent from constructing and putting into operation a hydroelectric dam situated in the river just above Radford, Virginia.

Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without the consent of Congress.[1] By the Federal Water Power Act of 1920,[2]

[1] 30 Stat. 1151, 33 U. S. C. §§ 401, 403.

[2] 41 Stat. 1063. The Act was amended by 49 Stat. 838 (1935), U. S. C. Supp. V, Title 16, § 791a *et seq.*, by which it became known as the Federal Power Act.

however, Congress created a Federal Power Commission with authority to license the construction of such dams upon specified conditions. Section 23 of that Act provided that persons intending to construct a dam in a nonnavigable stream may file a declaration of intention with the Commission. If after investigation the Commission finds that the interests of interstate or foreign commerce will not be affected, permission shall be granted for the construction. Otherwise construction cannot go forward without a license.

The Radford Dam project was initiated by respondent's predecessor, the New River Development Company, which filed its declaration of intention with the Federal Power Commission on June 25, 1925. The Commission requested a report from General Harry Taylor, then Chief of Engineers of the War Department. He first reported that the river was navigable, and also that while the water flow from the dam, if not properly regulated, could have an adverse effect on navigation during low water stages in the Kanawha River (of which the New was one of the principal tributaries), such possible adverse effect would not warrant refusing a license to construct the dam if control were maintained by the United States. On review at the Commission's request, however, General Taylor rendered a second report, concluding that the New River in its present condition was not navigable and that navigation on the Kanawha would not be adversely affected by the proposed power development. On March 2, 1926, the Commission held a hearing on the declaration; the only evidence then submitted was General Taylor's second report.

Respondent, the Appalachian Electric Power Company, took an assignment of the declaration of intention on August 30, 1926, and several days later filed an application for a license on the Commission's suggestion that this would expedite matters and could be withdrawn if it later developed that no federal license was required.

In October, the district engineer of the War Department held a public hearing at Radford. On June 1, 1927, the Commission made a finding that the New River was not "navigable waters" within the definition in § 3 of the Federal Water Power Act of 1920 but that (under § 23 of the Act) the project would affect the interests of interstate and foreign commerce. On July 1, 1927, the Commission tendered to respondent a standard form license, which the respondent refused, in April, 1928, principally on the ground that the conditions—especially those concerning rates, accounts and eventual acquisition—were unrelated to navigation. In February, 1930, respondent reiterated that its project was not within the Commission's jurisdiction, but nevertheless offered to accept a "minor-part" license [3] containing only such conditions as would protect the interests of the United States in navigation. In September, 1930, Attorney General Mitchell advised the Commission that it could properly issue such a minor-part license; [4] the question submitted by the Commission had stated that the New River was neither navigated nor navigable in fact. On November 25, the Commission "declined to take action on the application favorable or adverse," on the ground that a court adjudication was desirable. After the establishment of the Commission as an independent agency,[5] it held another hearing in February, 1931; in April it denied the application for a minor-part license, directed that the respondent be tendered a standard form license under the Act, and ordered it not to proceed without such a license. A minority of the Commission then

[3] § 10 (i).

[4] 36 Op. A. G. 355.

[5] Originally it consisted of three cabinet officers, ex officio: the Secretaries of War, Interior, and Agriculture. By 46 Stat. 797 it was reorganized into an independent Commission with five members. The new Commission began to function on December 22, 1930.

favored a finding that the New River was navigable; the majority, however, thought that question was for the courts and that the Commission's jurisdiction was properly based upon § 23 of the Federal Water Power Act.

On June 8, 1931, the respondent brought an action against the Commission to remove a cloud on its title and to restrain interference with the use of its property. This case was dismissed for jurisdictional reasons.[6] While it was pending, on October 12, 1932, the Commission without notice adopted a resolution that the New River, from the mouth of Wilson Creek, Virginia, north, was navigable.

The respondent began construction work on the dam about June 1, 1934. On May 6, 1935, the United States filed this bill for an injunction against the construction or maintenance of the proposed dam otherwise than under a license from the Federal Power Commission, and in the alternative a mandatory order of removal. It alleged that the New River is navigable; that the dam would constitute an obstruction to navigation and would impair the navigable capacity of the navigable waters of the United States on the New, Kanawha and Ohio Rivers; that the Commission had found the dam would affect the interests of interstate or foreign commerce; and that its construction therefore violated both the Rivers and Harbors Act and the Federal Water Power Act. Respondent denied these allegations, and also set forth a number of separate defenses based on the assumption that the New River was nonnavigable. The fortieth and forty-first paragraphs of the answer, however, set forth defenses relied on by the respondent even if the river were held navigable. The substance of these was (1) that the conditions of any federal license must

[6] *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451, cert. denied, 291 U. S. 674.

be strictly limited to the protection of the navigable capacity of the waters of the United States; and (2) that the Commission's refusal to grant the minor-part license containing only such conditions was unlawful, and that any relief should be conditioned upon the Commission's granting respondent such a license. By these defenses respondent put in question—in the event of an adverse holding on navigability—the validity of the conditions of the Act carried over into the standard form license which relate to accounts, control of operation and eventual acquisition of the project at the expiration of the license.

After trial, in an opinion reinforced by formal findings of fact and law, the district court decided that the New River is not a navigable water of the United States; that respondent's dam would not obstruct the navigable capacity of the Kanawha or any other navigable river, and would not affect the interests of interstate commerce; that the Power Commission's findings on these matters were not final but subject to the determination of the courts; [7] that the Federal Water Power Act did not vest in the Commission authority to require a license in a nonnavigable river; that even if the Commission had authority to require some license for a dam in nonnavigable waters, it could not impose conditions having no relation to the protection of the navigable capacity of waters of the United States; and that its effort to impose upon respondent a license containing unlawful conditions barred the United States from relief. The district judge therefore dismissed the bill, but left it open

[7] In both courts below the Government unsuccessfully urged that the findings of the Commission, if supported by substantial evidence, were conclusive. Although it still regards this contention as correct, the Government does not seek to have this Court pass on it in this case.

to the Government to assert its rights if future operation of the project interfered with the navigable capacity of the waters of the United States. The circuit court of appeals, with one judge dissenting, affirmed. We granted certiorari.[8]

Concurrent Findings. The district court's finding that the New River was not navigable was concurred in by the circuit court of appeals after a careful appraisal of the evidence in the record.[9] Both courts stated in detail the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. There is no real disagreement between the parties here concerning these physical and historical evidentiary facts. But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the ultimate conclusion upon navigability to be drawn from this uncontroverted evidence.

The respondent relies upon this Court's statement that "each determination as to navigability must stand on its own facts," [10] and upon the conventional rule that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown.[11]

In cases involving the navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by two courts to determine for

[8] 309 U. S. 646.

[9] 107 F. 2d 769, 780, 787.

[10] *United States* v. *Utah,* 283 U. S. 64, 87.

[11] *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86; e. g., *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477; *Pick Mfg. Co.* v. *General Motors Corp.,* 299 U. S. 3; *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, 558; *United States* v. *O'Donnell,* 303 U. S. 501, 508.

itself whether the courts have correctly applied to the facts found the proper legal tests.[12] When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem, to the particular circumstances presented by the New River. To these circumstances certain judicial standards are to be applied for determining whether the complex of the conditions in respect to its capacity for use in interstate commerce render it a navigable stream within the Constitutional requirements. Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.

Navigability. The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. "The Congress shall have Power . . . To regulate Commerce . . . among the several States." It was held early in our history that the power to regulate commerce necessarily included power over navigation.[13] To make its control effective the Congress may keep the "navi-

[12] *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 699; *Leovy* v. *United States*, 177 U. S. 621; *Economy Light Co.* v. *United States*, 256 U. S. 113, 117; *United States* v. *Holt Bank*, 270 U. S. 49, 55.

[13] *Gibbons* v. *Ogden*, 9 Wheat. 1, 189; *Leovy* v. *United States*, 177 U. S. 621, 632.

gable waters of the United States" open and free and provide by sanctions against any interference with the country's water assets.[14] It may legislate to forbid or license dams in the waters; [15] its power over improvements for navigation in rivers is "absolute." [16]

The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers." [17] It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

The navigability of the New River is, of course, a factual question [18] but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; [19] that the density of traffic varies equally widely from the busy

[14] *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–25; *United States* v. *Coombs,* 12 Pet. 72, 78.

[15] *Willson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245, 250; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 703.

[16] *United States* v. *River Rouge Co.,* 269 U. S. 411, 419.

[17] *St. Anthony Falls Water Power Co.* v. *Water Commissioners,* 168 U. S. 349, 366; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 702.

[18] *Arizona* v. *California,* 283 U. S. 423, 452.

[19] *The Montello,* 20 Wall. 430, 441.

harbors of the seacoast to the sparsely settled regions of the Western mountains.[20] The tests as to navigability must take these variations into consideration.

Both lower courts based their investigation primarily upon the generally accepted definition of *The Daniel Ball*.[21] In so doing they were in accord with the rulings of this Court on the basic concept of navigability.[22] Each application of this test, however, is apt to uncover variations and refinements which require further elaboration.

In the lower courts and here, the Government urges that the phrase "susceptible of being used, in their ordinary condition," in the *Daniel Ball* definition, should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements. The district court thought the argument inapplicable.[23]

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[20] *United States* v. *Utah*, 283 U. S. 64, 83.

[21] 10 Wall. 557, 563:

". . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

United States v. *Appalachian Electric Power Co.*, 23 F. Supp. 83, 98; same, 107 F. 2d 769, 780.

[22] *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 698; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 86; *United States* v. *Holt Bank*, 270 U. S. 49, 56; *United States* v. *Utah*, 283 U. S. 64, 76; *United States* v. *Oregon*, 295 U. S. 1, 15.

[23] 23 F. Supp. at 99–100.

The circuit court of appeals said:
"If this stretch of the river was not navigable in fact in its unimproved condition, it is not to be considered navigable merely because it might have been made navigable by improvements which were not in fact made. Of course if the improvements had been made the question of fact might have been different." [24]

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condition" [25] refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining "navigable waters" as those "which either in their natural or improved condition" are used or suitable for use. The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree.[26] There must be a balance between cost and need at a time when

[24] 107 F. 2d at 786.

[25] *United States* v. *Oregon*, 295 U. S. 1, 15.

[26] Thus in the *Rio Grande* case, the record contained reports of army engineers that improvements necessary to make the river navigable would be financially, if not physically, impracticable because of the many millions of dollars that would be required. The supreme court of the Territory of New Mexico observed that "the navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions" (9 N. M. 292, 299; 51 P. 674, 676). This Court agreed that too much improvement was necessary for the New Mexico stretch of the river to be considered navigable. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 699.

the improvement would be useful. When once found to be navigable, a waterway remains so.[27] This is no more indefinite than a rule of navigability in fact as adopted below based upon "useful interstate commerce" or "general and common usefulness for purposes of trade and commerce" if these are interpreted as barring improvements.[28] Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.

Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed [29] or riparian rights [30] is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise.[31] An analogy is found in admiralty jurisdiction,[32] which may be extended over places formerly nonnavigable.[33] There

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[27] *Economy Light Co.* v. *United States,* 256 U. S. 113.

[28] See 107 F. 2d at 780.

[29] *Shively* v. *Bowlby,* 152 U. S. 1, 18 and 26; *United States* v. *Utah,* 283 U. S. 64, 75.

[30] *Oklahoma* v. *Texas,* 258 U. S. 574, 591, 594; *United States* v. *Oregon,* 295 U. S. 1, 14.

[31] Cf. *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 699.

[32] Art. III, § 2, cl. 1. Cf. *Genesee Chief* v. *Fitzhugh,* 12 How. 443.

[33] *The Robert W. Parsons,* 191 U. S. 17, 28; *Ex parte Boyer,* 109 U. S. 629; *Marine Transit Co.* v. *Dreyfus,* 284 U. S. 263, 271–72.

has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents.[34] The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.[35] In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.[36]

Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use.[37] Small traffic compared to the available commerce of the region is sufficient.[38] Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability

[34] *The Montello,* 20 Wall. 430, 442–43; *Economy Light Co.* v. *United States,* 256 U. S. 113, 122; *United States* v. *Utah,* 283 U. S. 64, 86. See also Mr. Justice McLean in *Spooner* v. *McConnell,* 22 Fed. Cas. No. 13,245, at p. 944 (C. C. D. Ohio 1838).

[35] Illustrative of this natural growth is *United States* v. *Cress,* 243 U. S. 316, involving riparian proprietors' rights where improvements raise the river level so that uplands are newly and permanently subjected to the servitude of public use for navigation. Compensation was decreed for the taking with a declaration that the waterways in question, as artificially improved, remained navigable waters of the United States (pp. 325 and 326). Cf. *Arizona* v. *California,* 283 U. S. 423, 454.

[36] Cf. *Barnes* v. *United States,* 46 Ct. Cl. 7, 28.

[37] *United States* v. *Utah,* 283 U. S. 64; *Arizona* v. *California,* 283 U. S. 423, 452–54.

[38] *United States* v. *Utah,* 283 U. S. 64, 82.

of rivers in the constitutional sense.[39] It is well recognized too that the navigability may be of a substantial part only of the waterway in question.[40] Of course, these evidences of nonnavigability in whole or in part are to be appraised in totality to determine the effect of all. With these legal tests in mind we proceed to examine the facts to see whether the 111-mile reach of this river from Allisonia to Hinton, across the Virginia-West Virginia state line, has "capability of use by the public for the purposes of transportation and commerce." [41]

Physical Characteristics. New River may be said to assume its character as such at the mouth of Wilson Creek near the North Carolina-Virginia line. From that point it flows first in a northeast and then in a northwest direction something over 250 miles to Kanawha Falls, West Virginia. It passes through Allisonia and Radford, Virginia, and then Hinton, West Virginia. It is joined by many tributaries, the largest of which is the Gauley. At Kanawha Falls it changes its name to the Kanawha, a navigable river of commercial importance which joins the Ohio 97 miles below. The whole territory traversed by the New is broken and mountainous. Between Hinton and Kanawha Falls, the river is swift and the gorge precipitous. Above Hinton the river flows more slowly, through a broader valley and between less rugged mountains. The same may be said of the area above Radford. Throughout the river there is an abundance of water, and the respondent hardly denies that the flowage suffices if other conditions make the New available for navigation.[42]

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[39] *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 329.

[40] *Economy Light Co.* v. *United States,* 256 U. S. 113, 124; *Arizona* v. *California,* 283 U. S. 423, 453.

[41] Cf. *The Montello,* 20 Wall. 430, 441.

[42] See 23 F. Supp. at 91.

It will conserve discussion to appraise the navigability of the 111-mile stretch between Allisonia and Hinton in three sections which together form the whole reach between these points: the 28 miles from Allisonia to Radford, which the United States improved between 1876 and 1883; the 59-mile stretch from Radford to Wiley's Falls, Virginia, never improved except at Wiley's Falls itself; and the 24 miles from Wiley's Falls across the state line to Hinton, West Virginia, which, like the upper section, the Government improved during 1876–1883. We shall examine chiefly the disputed middle section, for as to the others the evidence of navigability is much stronger and that of obstructions much weaker. For instance, the report of the Chief of Engineers for 1873 refers to certain keelboats operating on the river, and his report for 1883 shows that 17 keelboats operated above Hinton. Keelboats were flat-bottomed bateaux, 50 to 70 feet long, with a draft of two feet and a carrying capacity varying up to 10 or 12 tons. They were used commercially to transport lumber, tobacco and other products of the region. The evidence is clear that these bateaux plied from Hinton up to near Glen Lyn with fair regularity through the first decade of this century and well into the second; timber and lumber in large quantities apparently were boated and rafted down to Hinton from various up-river points below Glen Lyn until about the beginning of the World War.[43] Around and above Radford the Chief of Engineers reported two keelboats operating in 1881, eight in 1882, and eight together with a small steamboat in 1883. The corroborating testimony of many witnesses shows that in the 80s

[43] This is shown by the testimony of Weiss, Peters, Starbuck, Lane, E. M. Smith, Farley, Kenley, Lucas, E. W. Lilly, W. L. Burks, Z. V. Burks, Johnson, Wauhop, Stover, R. Calloway, J. C. Martin, Tomkies, and B. C. Lilly.

these boats carried iron ore and pig iron, as well as produce and merchandise, between Allisonia and New River Bridge, which is a little above Radford.[44] At the Hinton and New River Bridge railroad stations, freight brought in by the keelboats or other river craft was transshipped, and freight arriving by rail was forwarded by river.

We come then to a consideration of the crucial stretch from Radford to below Wiley's Falls where junction is made with the interstate reach from Wiley's Falls to Hinton. In the report of the Secretary of War for 1872 appears Hutton's useful mile-by-mile survey of the river from above Allisonia to the mouth of the Greenbrier, which is nearly down to Hinton. It was made as a basis for plans to improve the New by federal appropriation.[45] This survey designates the Radford-Wiley's Falls stretch as "mile 46" to "mile 104" inclusive. Eighteen of these miles have grades falling, gradually or abruptly, more than four feet in the mile. Several of these where there are rapids or falls show drops of eight, nine and in one instance 11½ feet. The higher footage represents, of course, miles in which small falls are found. Between these more precipitous sections are many miles of what is called "good water," with a gradual fall of 4 feet or less. Even in miles where the declivity is rapid, the fall is apparently largely in sections containing obstructions.

[44] E. g., the testimony of R. L. Howard, Graham, J. Breeding, Owen, Z. Farmer, H. B. Allison, J. H. Howard, Peterson, Moore, Likens, Roop, and Ingles.

In 1885 the assistant engineer reported that "from inquiries it is thought that the channel-way made in former years [on the improved sections] still keeps open, and bateaux are in constant use on them, iron having been shipped to New River bridge up to the time of the suspension of the furnaces by the prevailing hard times" (Report of the Chief of Engineers for 1886).

[45] 17 Stat. 376.

For instance, the 51st mile reads "Rapid, over bowlders and gravel, 1,500 feet long; fall, 8½ feet," and the 100th mile "Neilley's Falls and rapids; whole fall, 11 feet, 6 of it nearly vertical. A sluice 500 feet long, along left bank, will pass them, with 50 feet of rock excavation and 450 feet of bowlders and gravel." Quite frequently where the fall is moderate, other obstructions appear, as the 78th mile "Rapids, 500 feet long, over bowlders and gravel; fall, 2 feet." Large isolated rocks are scattered abundantly throughout the stretch. A geologist testifying for the respondent tells strikingly how the faulting and folding of the surface at this stretch has resulted in the tilting of the rock strata to a steep degree. "In its flow, the water of New River moves along and up the slopes of successive rock strata or ledges . . . this results in a river with numerous ledges of rock strata, some partly submerged, some exposed, which are substantially vertical or standing on end, and which extend across the stream at right angles to the line of flow . . . The slope of the strata is downward in an upstream direction rather than in a downstream direction," contrary to the usual condition. No other data point to material variations from these descriptions.

Use of the River from Radford to Wiley's Falls. Navigation on the Radford-Wiley's Falls stretch was not large. Undoubtedly the difficulties restricted it and with the coming of the Norfolk & Western and the Chesapeake & Ohio railroads in the 80s, such use as there had been practically ceased, except for small public ferries going from one bank to the other.[46] Well authenticated instances of boating along this stretch, however, exist. In 1819 a survey was made by Moore and Briggs, whom the

[46] At different times before 1935 ferries crossed the river at no less than ten points along the Radford-Wiley's Falls stretch. In 1935 there were five such public ferries.

General Assembly of Virginia had sent to report on the availability of the New for improvement. Beginning at the mouth of the Greenbrier they boated up to the mouth of Sinking Creek, some 55 miles, noting the characteristics of the river as they went. They reported that they ascended all falls with their boat, "though, in two or three instances, with considerable difficulty, after taking out our baggage, stores, &c." [47] Sinking Creek is about half way up this stretch of river we are considering.

In 1861 the Virginia General Assembly appropriated $30,000 to improve the New River to accommodate transportation of military stores by bateaux from Central depot [Radford] to the mouth of the Greenbrier.[48] While there is no direct proof that this particular appropriation was spent, reports of the War Department engineers make it clear that the Confederate government effected some improvements on the river.[49] These facts buttress the testimony of several witnesses, one a Confederate veteran, that during the Civil War keelbottom boats brought supplies from Radford to a commissary at

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[47] Report of Moore and Briggs. Fourth and Fifth Annual Reports of the Board of Public Works to the General Assembly of Virginia (1819). Report of the Principal Engineer of the Board of Public Works.

While Marshall was Chief Justice he was head of a Virginia commission which had surveyed part of the New River by boat in 1812, but only going downstream from the mouth of the Greenbrier. Report of the Commissioners, printed 1816.

[48] 48 Virginia Acts of 1861–62, c. 50.

[49] "But little has been done in the way of improving the river since the time of Moore and Briggs, though an effort is said to have been made in that direction by the confederate government in the late war" (Report of Chief of Engineers for 1873). "Experience, as developed by the universal fate of the work of the late Confederate States on this river (though this seems to have been injudiciously located and poorly built), is adverse to anything like rigid structures . . ." (Report of Chief of Engineers for 1879).

the Narrows (about 7 miles above Glen Lyn), and then continued further downstream.[50] This testimony the circuit court of appeals accepted as true.[51]

From the end of the Civil War to the coming of the railroads, the evidence of elderly residents familiar with events along the banks of the river between Radford and Wiley's Falls leaves no doubt that at least sporadic transportation took place in and throughout this stretch. By this it is not meant that the keelboats above Radford and above Hinton, which operated frequently in the improved sections, made regular through trips from Allisonia past Radford to Hinton. Through navigation, however, did occur, as is shown by the testimony of a number of witnesses and recognized by the lower courts.[52] There are also numerous references to isolated bits of boating along parts of the Radford-Wiley's Falls reach.[53] And when the Government stopped improvement in 1883, it ordered the boats it was using in the lead mines' division above Allisonia, and at various places downstream, to be brought down the full stretch of the river to Hinton for sale. Under the supervision of the assistant engineer, a derrick boat, four bateaux, and numerous flat boats, skiffs and canoes—more than twenty vessels in all—were taken down to Hinton, a number of them from points above Radford. This was accomplished, as the Chief of Engineers' report shows, despite difficulties

[50] Testimony of Snyder, Snidow, Skeen.

[51] 107 F. 2d at 783.

[52] See 23 F. Supp. at 93; 107 F. 2d at 786.

Testimony of bateaux going from Radford, or above, to Hinton, is given by Flannagan, Linkous, Collins, Webb, Snyder.

A boat, 50 feet by 8, with a gasoline motor, went from Radford to Hinton in 1901, though after the river had been materially raised by a rain.

[53] E. g., testimony of Coleman, Howard, Webb, Snyder, Price, Martin, Anderson.

occasioned by "weather, low water, and scarcity of labor." [54]

In addition to the testimony of use in the days before railways and good roads, there was a demonstration of the possibility of navigation by a government survey boat with an outboard motor, 16 feet long, five feet wide, drawing 2½ to 3 feet, loaded with a crew of five and its survey equipment. This boat made a round trip from the Narrows, just above Wiley's Falls, to Allisonia, a distance of 72 miles one way, in July, 1936, when the river stage was normal summer low water. While the crew was out of the boat and used poles a number of times, there were no carries or portages. Going upstream it was not necessary to pull or push the boat more than a mile and a quarter and not more than a few hundred feet on the return trip.

Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. Fourteen authenticated instances of use in a century and a half by explorers and trappers, coupled with general historical references to the river as a water route for the early fur traders and their supplies in pirogues and Durham or flat-bottomed craft similar to the keelboats of the New, sufficed upon that phase in the case of the DesPlaines.[55] Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.[56]

The evidence of actual use of the Radford-Wiley's Falls section for commerce and for private convenience,

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[54] Report of the Chief of Engineers for 1883. See also testimony of Owen, Crowell, Dickinson.

[55] *Economy Light Co.* v. *United States,* 256 F. 792, 797–98; affirmed 256 U. S. 113.

[56] *United States* v. *Utah,* 283 U. S. 64, 82.

when taken in connection with its physical condition, makes it quite plain that by reasonable improvement the reach would be navigable for the type of boats employed on the less obstructed sections. Indeed the evidence detailed above is strikingly similar to that relied upon by this Court in *United States* v. *Utah*[57] to establish the navigability of the Colorado from Cataract Canyon to the Utah-Arizona boundary line. There had been seventeen through trips over a period of sixty years from the original exploration; and these together with sporadic trips on parts of the stretch, and considerable use—in connection with gold placer mining—of other parts from 1888 to 1915, sufficed to sustain navigability.[58]

Effect of Improvability. Respondent denied the practicability of artificial means to bring about the navigability of the New River and the effectiveness of any improvement to make the river a navigable water of the United States. The Government supported its allegation of improvability by pointing out that the use of the section for through navigation and local boating on favorable stretches of the Radford-Wiley's Falls reach showed the feasibility of such use and that little was needed in the way of improvements to make the section a thoroughfare for the typical, light commercial traffic of the area. Keelboats, eight feet wide, drawing two feet, were the usual equipment. In the 1872 report of the Chief of Engineers, Major Craighill in charge of New River reports that to get "good sluice navigation of 2 feet at all times" for 54 miles up from the mouth of the Greenbrier River, near Hinton, would cost $30,000 and for 128 miles, Greenbrier to the lead mines (above Allisonia), would cost $100,000. The depth over the shoals could be increased to 2 feet without "too much increase

[57] 283 U. S. 64, 81.

[58] See the Report of the Master, p. 127 *et seq.*

of velocity of the current." This recommendation was based on Hutton's mile-by-mile survey and includes all of the Radford-Wiley's Falls section.

The improvements were undertaken beginning in 1877. As the region was becoming better developed, a higher type of improvement became desirable, wider sluice ways and a deeper channel, usable by small steamboats. Work went forward above Hinton and above Radford to meet the pressing demands of the communities. Annual reports of the Chief of Engineers assumed or reaffirmed the navigability of the entire river above Hinton and the practicality of the improvements.[59] By 1891, $109,733.21 had been spent. It was in that year estimated $159,000 more would be required to complete the project the full length from Wilson Creek to Hinton.[60] Useful navigation moved regularly between Hinton and near Glen Lyn and between Radford and Allisonia. About half the reach between Hinton and Allisonia was improved. The Radford-Wiley's Falls section was never improved. It was reported that conditions had changed and the project should not be completed.[61] The provisions for improvements were repealed in 1902.[62] By 1912 the region's need for use of the river had so diminished that the army engineers advised against undertaking improvements again, and even referred to the cost as "prohibitive." [63] From the use of the Radford-Wiley's Falls stretch and the evidence as to its ready improvability at a low cost for easier keelboat use, we conclude that this section of the New River is navigable. It follows from this, together with the undisputed commercial

[59] Report for 1878, pp. 69, 495–99; 1879, pp. 79, 530–45; 1880, pp. 107–08, 676–81; 1881, pp. 144–45, 904–11; 1882, pp. 140–42, 913–19; 1883, pp. 144–45, 699–705; 1886, pp. 281–82, 1599–1602.

[60] Report of the Chief of Engineers for 1891, p. 303.

[61] *Id.*, at 302–303.

[62] 32 Stat. 374.

[63] House Doc. No. 1410, 62nd Cong., 3d Sess., p. 3.

use of the two stretches above Radford and Hinton, that the New River from Allisonia, Virginia, to Hinton, West Virginia, is a navigable water of the United States.

License Provisions. The determination that the New River is navigable eliminates from this case issues which may arise only where the river involved is nonnavigable.[64] But even accepting the navigability of the New River, the respondent urges that certain provisions of the license, which seek to control affairs of the licensee, are unconnected with navigation and are beyond the power of the Commission, indeed beyond the constitutional power of Congress to authorize.

The issue arises because of the prayer of the bill that the respondent be compelled to accept the license as required by law or remove the dam as an obstruction and the answer of the respondent that the license required by law and tendered to it by the Commission contains provisions, unrelated to navigation or the protection of navigable capacity, which are beyond the constitutional authority of Congress to require on account of the Fifth and Tenth Amendments. There is no contention that the provisions of the license are not authorized by the statute. In the note below[65] the chief

[64] Cf. *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769, 793 *et seq.*

[65] Section 4 (a) of the Act allows the Commission to regulate the licensee's accounts.

Section 6 limits licenses to 50 years.

Section 8 requires Commission approval for voluntary transfers of licenses or rights granted thereunder.

Section 10 (a), as amended in 1935, requires that the project be best adapted to a comprehensive plan for improving or developing the waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. Under § 10 (c) the licensee must maintain the project adequately for navigation and for efficient power operation, must maintain depreciation reserves adequate for renewals and replacements, and must

statutory conditions for a license are epitomized. The license offered the respondent on May 5, 1931, embodied these statutory requirements and we assume it to be in conformity with the existing administration of the Power Act. We shall pass upon the validity of only those provisions of the license called to our attention by the respondent as being unrelated to the purposes of navigation. These are the conditions derived from §§ 10a, 10c, 10d, 10e and 14. We do not consider that the validity of other clauses has been raised by the respondent's general challenge to the constitutionality of any provision "other than those relating solely to the protection" of navigable waters.[66] It should also be noted that no complaint is made of any conditions of the license dependent upon the authorization of § 10g, the omnibus

conform to the Commission's regulations for the protection of life, health and property; (d) out of surplus earned after the first 20 years above a specified reasonable rate of return, the licensee must maintain amortization reserves to be applied in reduction of net investment; (e) the licensee must pay the United States reasonable annual charges for administering the Act, and during the first 20 years the United States is to expropriate excessive profits until the state prevents such profits; (f) the licensee may be ordered to reimburse those by whose construction work it is benefited.

By § 11, for projects in navigable waters of the United States the Commission may require the licensee to construct locks, etc., and to furnish the United States free of cost (a) lands and rights-of-way to improve navigation facilities, and (b) power for operating such facilities.

Section 14 gives the United States the right, upon expiration of a license, to take over and operate the project by paying the licensee's "net investment" as defined, not to exceed fair value of the property taken. However, the right of the United States or any state or municipality to condemn the project at any time is expressly reserved.

Section 19 allows state regulation of service and rates; if none exists, the Commission may exercise such jurisdiction.

[66] *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 484; *Pacific States Co.* v. *White,* 296 U. S. 176, 184.

clause requiring compliance with such other conditions as the Commission may require.

The petitioner suggests that consideration of the validity of § 14, the acquisition clause, and the license conditions based upon its language are properly to be deferred until the United States undertakes to claim the right to purchase the project on the license terms fifty years after its issuance.[67] Assuming that the mere acceptance of a license would not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license,[68] we conclude that here the requirements of § 14 so vitally affect the establishment and financing of respondent's project as to require a determination of their validity before finally adjudging the issue of injunction.

The respondent's objections to the statutory and license provisions, as applied to navigable streams, are based on the contentions (1) that the United States' control of the waters is limited to control for purposes of navigation, (2) that certain license provisions take its property without due process, and (3) that the claimed right to acquire this project and to regulate its financing, records and affairs, is an invasion of the rights of the states, contrary to the Tenth Amendment.

Forty-one states join as *amici* in support of the respondent's arguments. While conceding, as of course, that Congress may prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation, the Attorneys General speaking for the states insist that this power of prohibition does not comprehend a power to exact conditions, which are un-

[67] Cf. *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n,* 303 U. S. 419, 435; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 468; *New Jersey* v. *Sargent,* 269 U. S. 328, 339.

[68] § 6.

related to navigation, for the permission to erect such structures. To permit, the argument continues, the imposition of licenses involving conditions such as this acquisition clause, enabling the Federal Government to take over a natural resource such as water-power, allows logically similar acquisition of mines, oil or farmlands as consideration for the privilege of doing an interstate business. The states thus lose control of their resources and property is withdrawn from taxation in violation of the Tenth Amendment.

Further, the point is made that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions. The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation. "While the supremacy of the Federal Government in its own proper sphere, as delineated in the Constitution, is cheerfully conceded, yet just as earnestly does Virginia insist upon the supremacy of her own government in its proper field as established by that instrument." Virginia has a Water Power Act.[69] It, too, offers a fifty-year license, with the right to use the natural resources of the state, the stream flow and the beds of the water courses for the period of the license or its extensions subject to state condemnation at any time on Virginia's terms for ascertainment of value. Operation is likewise regulated by state law.[70] The Commonwealth objects that the development of its water power resources is subjected to Federal Power Act requirements such as are detailed above in stating the respondent's objection, even to the point that Virginia itself may not build and operate a dam in

[69] Michie's 1936 Code, §§ 3581 (1)–(16).

[70] Michie's 1936 Code, §§ 4065a, 4066.

navigable water without authorization and regulation by the Federal Government.

The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.[71] The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. We deem the pictured extremes irrelevant save as possibilities for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision.[72]

The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce.[73] The power flows from the grant to regulate, i. e., to "prescribe the rule by which commerce is to be governed." [74] This in-

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[71] *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 75; *United States* v. *West Virginia,* 295 U. S. 463, 474; *New Jersey* v. *Sargent,* 269 U. S. 328; cf. *McGuinn* v. *High Point,* 217 N. C. 449, 458; 8 S. E. 2d 462.

[72] *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 339.

[73] *New Jersey* v. *Sargent,* 269 U. S. 328, 337; *United States* v. *River Rouge Co.,* 269 U. S. 411, 419; *United States* v. *Cress,* 243 U. S. 316, 320; *Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62; *Gibson* v. *United States,* 166 U. S. 269, 271.

[74] *Gibbons* v. *Ogden,* 9 Wheat. 1, 196.

cludes the protection of navigable waters in capacity as well as use.[75] This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character.[76] The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.[77]

Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license.[78] This power is exercised through § 9 of the Rivers and Harbors Act of 1899 prohibiting construction without Congressional consent and through § 4 (e) of the present Power Act.

It is quite true that the criticized provisions summarized above are not essential to or even concerned with navigation as such. Respondent asserts that the rights of the United States to the use of the waters is limited to navigation. It is pointed out that the federal sovereignty over waters was so described in *Port of Seattle* v. *Oregon & Washington R. Co.*.[79] *United States* v. *Ore-*

[75] *Gilman* v. *Philadelphia,* 3 Wall. 713, 725.

[76] *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 64, 65; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400; cf. *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 18 How. 421.

[77] *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 66, 69, 76; cf. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330.

[78] *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 268; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 707.

[79] 255 U. S. 56, 63.

gon,[80] *Kansas* v. *Colorado,*[81] *United States* v. *River Rouge Company,*[82] and *Wisconsin* v. *Illinois.*[83] The first two of these cases centered around the issue of title to land under navigable water. Nothing further was involved as to the use of the water than its navigability. In *Kansas* v. *Colorado* the point was the Government's advocacy of the doctrine of sovereign and inherent power to justify the United States taking charge of the waters of the Arkansas to control the reclamation of arid lands (pp. 85–89). There was found no constitutional authority for irrigation in the commerce clause or the clause relating to property of the United States.[84] It cannot be said, however, that the case is authority for limiting federal power over navigable waters to navigation,[85] especially since the stretch of the Arkansas River involved in the dispute was asserted by the Government to be nonnavigable (p. 86). In the *River Rouge* controversy, this Court spoke of the limitation "to the control thereof for the purposes of navigation." But there, too, it was a question of the riparian owner's use of his property for access to the channel, a use fixed by state law. The conclusion that the United States could not interfere, except for navigation, with his right of access to navigable water, required no appraisal of other rights. *Wisconsin* v. *Illinois* is a part of the Chicago Drainage Canal litigation. In so far as pertinent here, it merely decided that under a certain federal statute [86] there was no authority for diversion of the waters of Lake Michigan for sanitary purposes (p. 418). There is no consideration

[80] 295 U. S. 1, 14.

[81] 206 U. S. 46, 85–86.

[82] 269 U. S. 411, 419.

[83] 278 U. S. 367, 415.

[84] Art. IV, § 3, cl. 2.

[85] Cf. *United States* v. *Hanson,* 167 F. 881, 884; *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 322.

[86] Cf. *Sanitary District* v. *United States,* 266 U. S. 405, 428.

of the constitutional power to use water for other than navigable purposes, though it is plain that other advantages occur (pp. 415, 419).

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.[87] As respondent soundly argues, the United States cannot by calling a project of its own "a multiple purpose dam" give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the

[87] Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states." [88] The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

The respondent urges that as riparian owner with state approval of its plans, it is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra,* that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined,[89] for the fast land; nothing for the water power.[90] We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In our view this "is the price which [respondents] must pay to secure the right to maintain

[88] *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147. Cf. *Mulford* v. *Smith,* 307 U. S. 38, 48.

[89] *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327.

[90] *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 66, 76.

their dam." The quoted words are the conclusion of the opinion in *Fox River Co.* v. *Railroad Commission.*[91] The case is decisive on the issue of confiscation. It relates to an acquisition clause in a Wisconsin license by which a dam in navigable water of the state might be taken over at such a price as would, this Court assumed, amount to violation of the due process clause of the Fourteenth Amendment if it were not for the license provision. Title to the bank and bed were in the objector, just as, by virtue of the state's license and the riparian ownership, all rights here belong to respondent. There, as here, the rights were subject to governmental "control of navigable waters." [92] The fact that the *Fox River* case involved a state and that this case involves the United States is immaterial from the due process standpoint. Since the United States might erect a structure in these waters itself, even one equipped for electrical generation,[93] it may constitutionally acquire one already built.

Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. At the formation of the Union, the states delegated to the Federal Government authority to regulate commerce among the states. So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state. It is the non-delegated power which under the Tenth Amendment remains in the state or the people. The water power statutes of the United States and of Virginia recognize the difficulties of our dual system of

[91] 274 U. S. 651.

[92] *Id.*, 656.

[93] *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Arizona* v. *California*, 283 U. S. 423.

government by providing, each in its own enactments, for the exercise of rights of the other.[94]

Reversed and remanded to the District Court with instructions to enter an order enjoining the construction, maintenance or operation of the Radford project otherwise than under a license, accepted by the respondent within a reasonable time, substantially in the form tendered respondent by the Federal Power Commission on or about May 5, 1931, or in the alternative, as prayed in the bill.

Reversed.

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

MR. JUSTICE ROBERTS, dissenting:

The judgment of reversal rests on the conclusion that New River is navigable,—a conclusion resting on findings of fact, made here *de novo,* and in contradiction of the concurrent findings of the two courts below. I am of opinion that the judgment of the Circuit Court of Appeals should be affirmed, first, because this court ought to respect and give effect to such concurrent findings which have substantial support in the evidence; secondly, because the evidence will not support contrary findings if the navigability of New River be tested by criteria long established.

1. A river is navigable in law if it is navigable in fact.[1] Indeed the issue of navigability *vel non* is so peculiarly one of fact that a determination as to one stream can have little relevancy in determining the status of another.

[94] §§ 10e, 14 and 19 of the Federal Power Act; Michie's 1936 Virginia Code, § 3581 (9).

[1] *Oklahoma* v. *Texas,* 258 U. S. 574, 585, 590–1; *Arizona* v. *California,* 283 U. S. 423, 452; *Crowell* v. *Benson,* 285 U. S. 22, 55.

As this court has said, "each determination as to navigability must stand on its own facts." [2]

The evidence supports,—indeed I think it requires,—a finding that, applying accepted criteria, New River is not, and never has been, in fact navigable. On this record the rule of decision, many times announced by this court, that the concurrent findings of fact of two lower courts, if supported by substantial evidence, will be accepted here, requires affirmance of the judgment. The rule applies not only to evidentiary facts but to conclusions of fact based thereon. Moreover, it has been the basis of this court's decision in a suit involving the question of navigability. Invoking the rule, this court, in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 86, declined to review a judgment based on a concurrent finding of two lower courts that a stream "was not, and had never been, navigable within the adjudged meaning of that term."

The cases cited for the proposition that where navigability was an issue this court has reconsidered the facts found by the courts below to determine whether they have correctly applied the proper legal tests do not, when the questions involved are understood, lend support to the action of the court in this case.[3]

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[2] *United States* v. *Utah,* 283 U. S. 64, 87.

[3] The cases cited are *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 699, where this court said with respect to the findings: "We are not, therefore, disposed to question the conclusion reached," by the courts below; *Leovy* v. *United States,* 177 U. S. 621, where a judgment on a jury's verdict was reversed for error in the judge's instructions as to the criteria of navigability; *Economy Light Co.* v. *United States,* 256 U. S. 113, 117, where the court did not reëxamine the facts but affirmed the judgment of the Circuit Court of Appeals, as that court had correctly applied the test laid down in *The Daniel Ball;* and *United States* v. *Holt Bank,* 270 U. S. 49, 55, where the courts below treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota, and

The petitioner, in effect, asks this court to convict the courts below of error in determining the credibility, weight and relevance of the evidence. But that determination is peculiarly within their province, as this court has often said. The doctrine applies in this case with especial force. The respondent says, without contradiction, that the Government in its brief in the Circuit Court stated: "It cannot be said that the New River presents a 'clear case' of navigability or non-navigability . . . " Yet this court is asked to ignore concurrent findings on the subject.

If the evidence may fairly support these findings the courts below can be convicted of error only in applying an erroneous rule of law to the facts found.

Examination of the opinions below shows that the courts faithfully followed the decisions of this court in applying the law to the facts. They adopted the definition [4] and applied the criteria this court has announced in appraising the effect of the facts found.

As shown by the cases cited in the margin,[5] a stream to be navigable in fact must have "a capacity for general and common usefulness for purposes of trade and commerce." Exceptional use or capability of use at high water or under other abnormal conditions will not suf-

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this court, though holding that they applied the wrong standard, as the question was one of federal law, affirmed the findings, instead of remanding the case, since the record disclosed that according to the right standard the water was navigable.

[4] Cf. *The Daniel Ball,* 10 Wall. 557; *The Montello,* 11 Wall. 411, 415; *United States* v. *Oregon,* 295 U. S. 1, 23.

[5] *The Montello,* 20 Wall. 430; *United States* v. *Rio Grande Co.,* 174 U. S. 690; *Leovy* v. *United States,* 177 U. S. 621; *Donnelly* v. *United States,* 228 U. S. 243; *United States* v. *Cress,* 243 U. S. 316; *Oklahoma* v. *Texas,* 258 U. S. 574; *United States* v. *Holt State Bank,* 270 U. S. 49; *United States* v. *Oregon,* 295 U. S. 1; *Harrison* v. *Fite,* 148 F. 781; *Gulf & I. Ry. Co.* v. *Davis,* 26 F. 2d 930, 31 F. 2d 109; *United States* v. *Doughton,* 62 F. 2d 936.

fice. Moreover, the stream must be used, or available to use, "for commerce of a substantial and permanent character." Where the stream "has never been impressed with the character of navigability by past use in commerce, . . . commerce actually *in esse* or at least *in posse* is essential to navigability" and "a theoretical or potential navigability or one that is temporary, precarious and unprofitable is not sufficient." The most important criterion by which to ascertain the navigability of a stream is that navigability in fact must exist under "natural and ordinary conditions." Application of these tests by the court below to the evidence in the case led to but one conclusion,—that New River has not been, and is not now, a navigable water of the United States. If the findings below had been the other way, the Government would be here strenuously contending that they could not be set aside, as it successfully did in *Brewer-Elliott Oil & Gas Co.* v. *United States, supra.*

2. The petitioner contends that the application of the accepted tests to the facts disclosed amounts to a ruling of law, and asserts that error in their application is reviewable. As I read the court's opinion, the argument is not found persuasive. While apparently endorsing it in the abstract the court, instead of relying on it, adopts two additional tests in the teeth of the uniform current of authority. If anything has been settled by our decisions it is that, in order for a water to be found navigable, navigability in fact must exist under "natural and ordinary conditions." This means all conditions, including a multiplicity of obstacles, falls and rapids which make navigation a practical impossibility. The court now, however, announces that "natural and ordinary conditions" refers only to volume of water gradients, and regularity of flow. No authority is cited and I believe none can be found for thus limiting the

connotation of the phrase. But further the court holds, contrary to all that has heretofore been said on the subject, that the natural and ordinary condition of the stream, however impassable it may be without improvement, means that if, by "reasonable" improvement, the stream may be rendered navigable then it is navigable without such improvement; that "there must be a balance between cost and need at a time when the improvement would be useful." No authority is cited and I think none can be cited which countenances any such test. It is of course true that if a stream in its natural and ordinary condition is navigable it does not cease to be so because improvements have bettered the conditions of navigation.[6] But the converse is not true,—that where a stream in its natural and ordinary condition is non-navigable, a project to build a canal along its entire course, or dams and locks every few miles, at enormous expense, would render it a navigable water of the United States. Who is to determine what is a reasonable or an unreasonable improvement in the circumstances; or what is a proper balance between cost and need? If these questions must be answered it is for Congress, certainly not for this court, to answer them. If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or channelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable because, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream.

If this criterion be the correct one, it is not seen how any stream can be found not to be navigable nor is it

[6] *Economy Light Co.* v. *United States*, 256 U. S. 113.

seen why this court and other federal courts have been at pains for many years to apply the other tests mentioned when the simple solution of the problem in each case would have been to speculate as to whether, at "reasonable" cost, the United States could render a most difficult and forbidding mountain torrent suitable for the least pretentious form of water traffic. In the light of the court's opinion, if this test be applied to the New River it must, of course, be admitted that by blasting out channels through reefs and shoals, by digging canals around falls and rapids, and possibly by dams and locks, the New River could be rendered fit for some sort of commercial use. What the expense would be no one knows. Obviously it would be enormous. Congress in the past has undertaken to render the river navigable and decades ago gave up the attempt. Still we are told that, at "reasonable" cost, the thing can be done, and so the stream is navigable.

In the light of the grounds upon which the decision of the court is based it hardly seems necessary to comment on the evidence, for it is in the main addressed to issues no longer in the case. The two courts below have analyzed it and examined it in detail and reference to their carefully considered opinions suffices.[7] I think the conclusion reached by the courts below must stand unless the two novel doctrines now announced be thrown into the scale to overcome it.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

[7] 23 F. Supp. 83; 107 F. 2d 769.

WISCONSIN ET AL. *v.* J. C. PENNEY CO.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 46. Argued November 20, 1940.—Decided December 16, 1940.

1. With respect to domestic and foreign corporations, Wisconsin imposes a tax "for the privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the State, equal to a specified percentage of such dividends, the payor corporation being required to deduct the tax from the dividends, payable to residents or non-residents, and to report and pay it over to the State. *Held:*

   (1) That the practical operation is to impose a tax on corporate earnings within Wisconsin, in addition to the general tax on corporate income, but to postpone liability for the tax until such earnings are paid out in dividends. P. 441.

   (2) The tax is constitutional—consistent with the due process clause of the Fourteenth Amendment—as applied to a Delaware corporation having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. P. 442.
2. The constitutionality of a state tax depends upon its operating incidence and not upon the name or description assigned to it by the state Supreme Court. P. 443.
3. The privilege granted by a State to a foreign corporation of carrying on local business supports a tax by that State on the income derived from that business. P. 444.
4. The fact that such a tax is by the state law imposing it made contingent upon the happening of events outside of the taxing State—as in this case, upon the declaration and payment of dividends from the local earnings—does not destroy the nexus between the tax and the local transactions for which it is an exaction. P. 445.
5. *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, distinguished. P. 445.

233 Wis. 286; 289 N. W. 677, reversed.

CERTIORARI, 310 U. S. 618, to review the reversal of a judgment which confirmed an order of the Wisconsin Tax Commission assessing a tax.

Messrs. Harold H. Persons, Assistant Attorney General of Wisconsin, and *James Ward Rector,* Deputy Attorney General, with whom *Mr. John E. Martin,* Attorney General, was on the brief, for petitioners.

Mr. W. H. Dannat Pell, with whom *Messrs. Roswell Dean Pine, Jr.* and *G. Burgess Ela* were on the brief, for respondent.

The State had no jurisdiction to tax the corporate surplus at the time the dividends were paid, notwithstanding that such surplus may have included funds derived in part from earnings in Wisconsin; nor to tax the part made up of such earnings. *Newark Fire Insurance Co.* v. *State Board,* 307 U. S. 313.

The concept of business situs is susceptible of more or less exact definition, and the facts upon which an alleged business situs is based must be shown with particularity if the presumption favoring domiciliary taxation is to be rebutted.

The record discloses that funds consisting of the proceeds of sales of merchandise in Wisconsin (and in other States), not needed to meet local payrolls, rents, advertising and other local expenses, are deposited to the general credit of the respondent in New York banks. The funds so deposited are used to pay salaries, general overhead of the New York office, accounts payable for merchandise purchased, and taxes. Dividends are also paid from these New York bank accounts. After leaving Wisconsin the funds completely lose their identity as far as having been derived from any particular source, and there is no one in Wisconsin who has anything to do with them.

It is possible that funds so deposited and used gained a business situs in New York, since the activities of the company might conceivably be said to be sufficient to

give it a commercial domicile there under the rule laid down in *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193. There is nothing in the facts of this case, however, except the fact of partial derivation from Wisconsin, upon which to base an alleged business situs, in that State, of the New York bank accounts used to pay the dividends.

We know of no case which indicates that derivation of earnings alone is or might be sufficient to give bank accounts containing them a tax situs in the State of derivation. Many affirmatively indicate that it is not. *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143; *Provident Savings Assn.* v. *Kentucky,* 239 U. S. 103; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69.

The tax can not be sustained as amounting to an income tax upon foreign corporations doing business within the State. It is not an income tax but an excise upon "the payment and receipt of dividends." The subject of an income tax is income earned within the State. *Hope Gas Co.* v. *Hall,* 274 U. S. 284; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 313; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341.

In the case of a foreign corporation the basis of jurisdiction to levy an income tax is that the income accrued in the State. As the income is earned, liability to pay the tax is incurred. As income may be said to represent a continuous flow, the calculation of the tax is simply deferred until a given date for convenience in measurement. The fact that the income may have been withdrawn from the State before this calculation date arrived is immaterial. This does not mean, however, that the tax may be regarded as being imposed upon a proportionate part of the corporate surplus as of the return day.

It simply means that the corporation earning the income must pay the state's "meterage" charge or render its property within the State subject to execution.

Although subsection (4) of the statute contains a presumption that dividends of corporations doing business both inside and outside of the State are paid from earnings attributable to Wisconsin for the preceding year, the tax is not limited to cases in which this presumption is not rebutted. Under the law, it would appear that, even though a corporate surplus had been accumulated for twenty years and no Wisconsin earnings realized during that period, the State Tax Commission would still be obliged to determine what part of a dividend paid by such corporation consisted of funds attributable to Wisconsin earnings, and assess a tax thereon.

The contention that the tax should be treated as a corporate income tax, notwithstanding the decision of the State Supreme Court to the contrary, ignores the principle that this Court is bound by the construction given the law by the State Supreme Court. *Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509. Petitioners are foreclosed from asserting it here.

The incidence of the tax is upon the declaration and receipt of dividends and not upon the earning of income. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Hope Gas Co.* v. *Hall,* 274 U. S. 284.

It is most likely that a very large proportion of income realized in one State by a corporation doing business in several will never be paid out in dividends.

There is no such close connection between the earning of income in Wisconsin by a foreign corporation, which does business both within and without the State, and its payment of dividends as to render a tax upon the one a tax upon the other. *Colorado National Bank* v. *Bedford,* 310

U. S. 41, 52. Cf., *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60.

Petitioners have advanced no contention that the tax should be sustained as an income tax upon stockholders, and it would appear to be too clear to admit of serious controversy that the State of Wisconsin may not impose an income tax upon respondent's nonresident stockholders. See *Domenech* v. *United Porto Rican Sugar Co.*, 62 F. 2d 562; cert. den. 289 U. S. 739. An effort to do this would amount to a disregard of respondent's corporate entity, and this may not be done. *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69; *Klein* v. *Board of Supervisors*, 282 U. S. 19; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *Ellinger* v. *Wisconsin State Tax Comm'n*, 229 Wis. 71.

The assessment is further void because the tax was calculated pursuant to the statutory presumption that the dividends were paid from the previous year's income and contained an exactly proportionate part of the Wisconsin earnings for such year. Such presumption is plainly not in accord with the facts and is, therefore, either rebutted or is void as arbitrary and unreasonable. If its effect is to establish a rule of substantive law requiring foreign corporations to declare their dividends from any particular source, such a presumption is an unconstitutional attempt to regulate the activities of foreign corporations outside of the State.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Whether the tax imposed by § 3 of Chapter 505 of the Wisconsin Laws of 1935 may apply to a foreign corporation licensed to do business in Wisconsin without offending the Fourteenth Amendment of the Constitution is the question before us. The statute is quoted in

the margin.[1] When this question originally came before the Supreme Court of Wisconsin it found no constitu-

[1] Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

"(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

"(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the

tional infirmity in such an exaction. *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission,* 221 Wis. 225; 265 N. W. 672; 267 N. W. 52. But deeming itself constrained by its reading of this Court's decision in *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, the Wisconsin Supreme Court in the present case found that the statute ran afoul the Due Process Clause insofar as it covered locally licensed foreign corporations. 233 Wis. 286; 289 N. W. 677. Inasmuch as important issues affecting the exertion of the taxing power of the states are involved, we brought this and its companion cases here. 310 U. S. 618, 619.

For many years, corporations chartered by other states but permitted to carry on business in Wisconsin have been subject to a general corporate income tax act on earnings attributable to their Wisconsin activities. The state has, of course, power to impose such a tax. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113. "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in" Wisconsin, an exaction "equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)" is the additional tax now before us. In the enforcement of this measure against foreign corporations, the amount of in-

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extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

"(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

"(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

"(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

come attributable to Wisconsin is calculated according to the same formula as that employed in assessing the general corporate income tax paid by such foreign corporations. The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.

As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system. The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. Wisconsin relied heavily upon taxation of incomes and largely looked to this source to meet the increasing demands of the depression years. But a special Wisconsin feature was exemption of dividends from personal taxation. See *Welch* v. *Henry,* 305 U. S. 134, 142–43. This exemption persisted while regular and surtax rates against personal incomes were raised. Attempts at relief from the unfairness charged against this exemption of dividends, particularly advantageous to the higher brackets, were steadily pressed before the Wisconsin Legislature. To relieve local earnings of foreign corporations from a dividend tax would have had a depressive effect on wholly local enterprises. The Privilege Dividend Tax was devised to reduce at least in part the state's revenue losses due to dividend exemptions, and also to equalize the burdens on all Wisconsin earnings, regardless of the formal home of the corporation.

Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, ex-

plicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, but postponed liability for the tax until such earnings were to be paid out in dividends, the power of Wisconsin to do so would hardly be questioned. Compare *Continental Assurance Co.* v. *Tennessee, ante,* p. 5. But because the legislative language ran "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state" the court below raised the barrier of the Fourteenth Amendment. Respondent is a Delaware corporation having its principal offices in New York; its meetings are held in the latter state where the dividends are voted and the dividend checks are drawn on New York bank accounts. Since the process for declaring dividends and the details attending their distribution among the stockholders transpired outside Wisconsin, although the exaction was apportioned to the earnings derived from Wisconsin, the state court concluded that the tax was an attempt by Wisconsin to levy an exaction on transactions beyond Wisconsin's borders.

The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax.

A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Henderson* v. *Mayor of New York,* 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding for-

mulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 280.

The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on

business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assurance Co.* v. *Tennessee, supra.* See also *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Compañia de Tabacos* v. *Collector,* 275 U. S. 87, 98; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308; *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412; *Atlantic Refining Co.* v. *Virginia,* 302 U. S. 22; *Curry* v. *McCanless,* 307 U. S. 357.

This analysis is merely a reformulation of the classic approach of this Court to the taxing power of the states. *Lawrence* v. *State Tax Commission, supra,* p. 280. Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.

Nor does *Connecticut General Co.* v. *Johnson, supra,* present a barrier against what Wisconsin has done. Its

presuppositions recognize the scope of the state taxing power we have outlined. 303 U. S. 77, 80, 82. In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions. Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. See, for instance, his dissent in *Compañia de Tabacos* v. *Collector, supra,* p. 100.

Because the Wisconsin Supreme Court found the statute to be invalid as to foreign corporations in the position of the respondent it had no occasion to pass on certain claims relating to the application of the statute to the specific dividends here involved. We therefore remand the case for the determination of such questions as are open in the light of this opinion.

Reversed.

MR. JUSTICE ROBERTS.

I assume that the principle still holds good that a state, a member of the sisterhood of states in the Republic, cannot extend her sovereignty by legislation so as to prohibit, to regulate, or to tax property or transactions of citizens of other sovereign states lying outside her boundaries and regulated by the law of the state of domicile or residence. I assume also that, where a state has, by law, fixed the conditions upon which a corporate citizen of another state may enter to transact business, she may not thereafter extend her sovereignty to matters not within her competence, in the guise of annexing other and further conditions or burdens upon the transaction

of the corporation's business within her borders. Those activities which have a real and substantial relation to the business transacted by the citizen of another state within her confines are, of course, subject to regulation and to taxation. It would be mere affectation to cite the adjudications of this court which are founded upon these propositions. I have thought that these principles were of the very warp and woof of the constitutional system which binds the states together in a federal union. Attempted transgressions of these limits of state sovereignty have time and again run afoul of the Fourteenth Amendment.

The respondent admittedly receives income in Wisconsin. No one questions the power of Wisconsin to lay a tax upon the receipt of that income. It has done so. It is said that the challenged exaction is merely an additional income tax,—this, notwithstanding that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege,—in the view that in testing the constitutionality of an exaction this court examines for itself the nature and incidence of the tax and disregards mere names and descriptive epithets. With that principle I have no quarrel, but I think the opinion of the court demonstrates that the tax here in question is, and can be, sustained only by a disregard of it. Let me illustrate my meaning. Assuming that, by statute, an ad valorem tax on property is prohibited and an income tax permitted. The terms used in the statute necessarily have a conventional connotation. One cannot intelligently discuss things or actions except by using the names commonly employed to describe them. Concepts of ad valorem taxation on property and taxation of income are clear and easily discriminable. What would be

said of a decision construing such a statutory provision so as to hold a tax of so many cents on the dollar upon property an income tax because, forsooth, all the property assessed has been received as the fruits of labor, of industry, or of capital, upon the theory that, as the property had come into existence at some remote date as income, the tax was an income tax? I think that is precisely what has been done in this case.

The facts are not in dispute. The respondent receives income in many states. That income is forwarded to its home office after bearing whatever tax is laid upon its receipt in the state of receipt. Thereupon the funds so forwarded become a portion of the general mass of the respondent's property, held and administered at its general office. The funds may be employed in the extension of its business; they may be held as insurance against future business losses or they may be distributed to its stockholders in dividends. Their management and their disbursement have no relation to the original receipt of income save only the fact that, like most property, they are built up as the fruits of income. Their use and their disbursement does not depend on any law of Wisconsin and cannot be controlled by any such law. The act of disbursing them, whether in payment of corporate obligations or as dividends, is one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition. That distribution cannot be the subject of an excise tax by the State of Wisconsin. So much the state admits.

Under the challenged statute, a presumption is created which is shown in the case of the assessment against the respondent for the years in question to be contrary to the fact,—namely, that an arbitrarily assumed proportion of the dividend is paid out of the respondent's earnings in Wisconsin for the year immediately preceding the payment of such dividend. By the very terms of the Act,

the tax is laid not on the corporation but on the stockholder receiving the dividend and, by confession, thousands of such stockholders are not residents of Wisconsin. The corporation is the mere collector of the tax and the penalty for failure to collect it is that the corporation must pay it. If the exaction is an income tax in any sense it is such upon the stockholder and is obviously bad. It cannot, except by a perversion of the term and the affixing of an arbitrary label, be denominated a tax upon the income of the respondent.

The explanation of the reason and purpose for imposing the tax, disclosed in the opinion of the court, serves to condemn it. If Wisconsin found that dividend income of stockholders of domestic corporations escaped taxation, and should bear it, an effective way to reach the dividend receipts of the stockholders of such corporations was to place a tax upon the receipt of dividends by them. But such a levy upon the stockholders of a foreign corporation, not resident within Wisconsin, obviously was impossible although that is exactly what was attempted by the statute in question. We are now told that this is not a fair exposition of the law but that, on the contrary, and in the teeth of the known facts, what Wisconsin did was to lay a supplementary income tax upon foreign corporations. This is simply to take the name of a well understood concept and assign that name as a label to something which in ordinary understanding never fell within such concept. By this process any exaction can be tortured into something else and then justified under an assumed name.

The respondent owns property in various states of the Union. It is reasonable to suppose that much of that property has been purchased out of corporate surplus, that is, out of past earnings. An ad valorem tax by Wisconsin on property so acquired could be quite as easily justified under the label of an income tax because

the property represented income once received, as the present tax, on the declaration and receipt of dividends out of earned surplus.

Upon the facts, the tax is levied on what lies outside the sovereignty of Wisconsin. Its attempted collection is a violation of the Due Process Clause of the Fourteenth Amendment and should be stricken down.

The Supreme Court of Wisconsin could not have decided otherwise in the light of a recent expression of this court on the subject. In reaching its decision it professedly followed and applied *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U. S. 77. There a Connecticut life insurance company did business in California under license from that state. It entered into contracts with other insurance companies, also licensed to do business in California, reinsuring them against loss on policies written by them in California on the lives of California residents. The contracts were made in Connecticut, premiums were paid there, and the losses, if any, were there payable. California imposed a tax upon the privilege of the company to do business within California. The tax was measured by the gross premiums received. California officials attempted to collect the tax on the premiums received by the Connecticut corporation under the reinsurance contracts in question. The Supreme Court of California sustained the tax. In that case, as in this, the highest state court described and defined the tax. There the tax was denominated "a franchise tax enacted for the privilege of doing business in the state." Here, the Supreme Court of Wisconsin has denominated the exaction as a privilege or excise tax imposed upon the transfer of property. By the very process the court now professes to employ of disregarding the name given to the tax by the state court, this court, in the *Connecticut General Life Insurance Co.*

case, reached the conclusion that the State of California could not impose the tax on the activities of the Connecticut company which were not within its jurisdiction. Citing many decisions of this court, it was there said:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

The very argument now invoked in support of the present decision was repudiated by the court in the *Connecticut* case in these words:

"It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transactions are so related to business carried on by appellant in California as to be a part of it and properly included in the measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions."

In describing the incidence of the void tax this court said, as it might with equal accuracy be said of the instant tax:

"Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."

And finally the court concluded:

"All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

I think that the judgment below should be affirmed.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE REED concur in this opinion.

WISCONSIN ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 48. Argued November 20, 1940.—Decided December 16, 1940.

1. Decided, in part, upon the authority of *Wisconsin et al.* v. *J. C. Penney Co., ante,* p. 435. P. 453.
2. A state tax on earnings of a foreign corporation attributable to activities in the taxing State, *held,* consistent with the commerce clause, although the liability to pay it was made contingent upon happenings outside of the State. P. 453.

233 Wis. 306; 289 N. W. 686, reversed.

CERTIORARI, 310 U. S. 619, to review the reversal of a judgment which confirmed an order of the Wisconsin Tax Commission assessing a tax.

Messrs. Harold H. Persons, Assistant Attorney General of Wisconsin, and *James Ward Rector,* Deputy Attorney General, with whom *Mr. John E. Martin,* Attorney General, was on the brief, for petitioners.

Mr. John L. Connolly, with whom *Messrs. Frederick J. Miller* and *G. Burgess Ela* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case, involving another application of the Wisconsin Privilege Dividend Tax considered in *Wisconsin* v. *J. C. Penney Co., ante,* p. 435, is governed by that decision except for a contention made by this respondent but not pressed here in *Penney's* case.

The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state, *Matson Navigation Co.* v. *State Board,* 297 U. S. 441. That liability for such a tax is made contingent upon later happenings, as in the circumstances of the present case, makes no difference.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE ROBERTS, and MR. JUSTICE REED dissent for the reasons stated in the dissenting opinion in *Wisconsin* v. *J. C. Penney Co., ante,* p. 446.

BEST & COMPANY, INC. *v.* MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 61. Argued November 22, 1940.—Decided December 23, 1940.

1. A state statute which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the State, who displays samples in any hotel room or house rented or occupied temporarily for the purpose of securing retail orders, *held* invalid under the Federal Constitution as a discrimination against interstate commerce. P. 456.

   So held as applied to a nonresident merchant who took orders in the State and shipped interstate directly to customers; and where the only corresponding fixed-sum license tax exacted of "regular retail merchants" was $1 per annum for the privilege of doing business.
2. The freedom of commerce which allows the merchants of each State a regional or national market for their goods may not be fettered by legislation the actual effect of which is to discriminate in favor of intrastate businesses. P. 457.

216 N. C. 114; 3 S. E. 2d 292, reversed.

APPEAL from a judgment reversing a judgment for the plaintiff in a suit for refund of a license tax. See also 217 N. C. 134; 6 S. E. 2d 893.

Mr. Lorenz Reich, Jr., with whom *Mr. M. James Spitzer* was on the brief, for appellant.

Mr. I. M. Bailey, with whom *Messrs. Harry McMullan*, Attorney General of North Carolina, *T. W. Bruton*, Assistant Attorney General, and *W. C. Lassiter* were on the brief, for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

Appellant, a New York retail merchandise establishment, rented a display room in a North Carolina hotel for several days during February, 1938, and took orders

for goods corresponding to samples; it filled the orders by shipping direct to the customers from New York City. Before using the room appellant paid under protest the tax required by chapter 127, § 121 (e), of the North Carolina Laws of 1937, which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders.[1] Appellant not being a regular retail merchant of North Carolina admittedly comes within the statute. Asserting, however, that the tax was unconstitutional, especially in view of the commerce clause, it brought this suit for a refund and succeeded in the trial court. The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand.[2] The prevailing opinion characterized the tax as one on the commercial use of temporary quarters, which in its operation did not discriminate against interstate commerce and therefore did not come into conflict with the commerce clause.

The commerce clause forbids discrimination, whether forthright or ingenious.[3] In each case it is our duty to

[1] "(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State."

[2] 216 N. C. 114; 3 S. E. 2d 292; 217 N. C. 134; 6 S. E. 2d 893.

[3] *Welton* v. *Missouri*, 91 U. S. 275, 282–283; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Hale* v. *Bimco Trading Co.*, 306 U. S. 375. In *McGoldrick* v. *Berwind-White Co.*,

determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as "regular retail merchants in the State of North Carolina." The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business.[4] Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A $250 investment in advance, required of out-of-state retailers but not of

309 U. S. 33, we pointed out that the line of decisions following *Robbins* v. *Shelby County,* 120 U. S. 489, read in their proper historical setting, rested on the actual and potential discrimination inherent in certain fixed-sum license taxes (pp. 55–57). There is no occasion now to reëxamine the particular tax statutes involved in those cases.

[4] North Carolina Laws of 1937, c. 127, § 405.

their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.[5]

Reversed.

MILLIKEN ET AL. *v.* MEYER, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 66. Argued December 13, 1940.—Decided December 23, 1940.

1. Where its judgment is challenged in another State, the jurisdiction of a state court over the parties or the subject matter is open to inquiry. P. 462.
2. If the judgment on its face appears to be a record of a court of general jurisdiction, then jurisdiction over the parties and the subject matter will be presumed, unless disproved by extrinsic evidence or by the record itself. P. 462.
3. Where a judgment of a state court having jurisdiction of the parties and the subject matter is challenged in another State, the full faith and credit clause of the Federal Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. P. 462.
4. A judgment *in personam* rendered in the State of his domicile against a defendant who, pursuant to a statute of that State providing for

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[5] Cf. *Bacardi Corporation* v. *Domenech, ante,* pp. 150, 156–157.

the service of process on absent defendants, was personally served in another State, *held* valid and entitled to full faith and credit under the Federal Constitution. P. 463.

A court of another State can not refuse to give full faith and credit to such judgment on the ground of an inconsistency between the judgment and the findings.

5. An incident of domicile is amenability to suit within the State even during sojourns without the State, where the State has provided a reasonable method for apprising the absent party of the proceedings against him. P. 464.

105 Colo. 532; 100 P. 2d 151, reversed.

CERTIORARI, 310 U. S. 622, to review the affirmance of a judgment which denied full faith and credit to a foreign judgment.

Mr. Jean S. Breitenstein, with whom *Messrs. Harold H. Healy* and *Edward M. Freeman* were on the brief, for petitioners.

Mr. Fred S. Caldwell submitted for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Colorado Supreme Court held null and void a judgment of the Wyoming court against the claim of Milliken that that judgment was entitled to full faith and credit under the federal constitution. 101 Colo. 564; 76 P. 2d 420; 105 Colo. 532; 100 P. 2d 151. The case is here on a petition for certiorari which we granted because of the substantial character of the federal question which is raised.

The controversy is over a 1/64th interest in profits from operation of certain Colorado oil properties. Transcontinental [1] on August 31, 1922, contracted to pay Meyer

[1] Transcontinental Oil Co. In June, 1923, Transcontinental had disposed of a one-half interest in the properties in question to Texas Production Co. In April, 1931, Ohio Oil Co. acquired the remaining interest of Transcontinental in the properties.

4/64ths of those profits. Milliken asserted a claim to a two-thirds interest in that 4/64ths share. As a settlement of that dispute Transcontinental on May 3, 1924, contracted to pay Milliken a 2/64ths interest and Milliken assigned [2] to Transcontinental all his claims against Meyer pertaining to the lands in question and to Meyer's 4/64ths interest in the profits.

Later Milliken instituted suit in the Wyoming court alleging a joint adventure with Transcontinental and Meyer and charging a conspiracy on their part to defraud him of his rights. He sought a cancellation of the contracts of May 3, 1924, and an accounting from Transcontinental and Meyer. Meyer, who was asserted to be a resident of Wyoming, was personally served with process in Colorado pursuant to the Wyoming statutes; [3] but he made no appearance in the Wyoming cause.[4] Transcontinental appeared and answered. The court found that there was a joint venture between Milliken and

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[2] Milliken's son, Carl S. Milliken, had an interest in the Milliken claim which he likewise assigned to Transcontinental.

[3] Wyo. Comp. Stat. 1920, § 5636 provided: "Service by publication may be had in either of the following cases: . . . 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."

Sec. 5641 provided:

"Personal service out of state. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

[4] His deposition, however, was taken on oral interrogatories concerning his legal residence in Wyoming.

Transcontinental; that the contracts of May 3, 1924, were valid; and that the action against Transcontinental should be dismissed with prejudice. It found, however, that there was a joint venture between Milliken and Meyer; that they were entitled to share equally in 6/64ths of the net profits; and that, while Meyer had regularly received 4/64ths, he had refused to account to Milliken for his 1/64th part. The court did not purport to decree the 1/64th interest to Milliken or anyone else but entered an *in personam* judgment against Meyer for the profits which Meyer had withheld from Milliken, together with interest thereon; and enjoined Transcontinental from paying, and Meyer from receiving, more than 3/64ths of the net profits. This was on July 11, 1931. Thereafter the 1/64th share was withheld from Meyer and paid over to Milliken.[5] In 1935 respondent instituted this suit [6] in the Colorado court praying, *inter alia,* for a judgment against Milliken for the sums withheld under the Wyoming judgment and paid to Milliken, for an injunction against Milliken attempting to enforce the Wyoming judgment, and for a decree that the Wyoming judgment was a nullity for want of jurisdiction over Meyer or his property. The bill alleged, *inter alia,* that Meyer at the time of service in the Wyoming court had long ceased to be a resident of Wyoming and was a resident of Colorado; that the service obtained on him did

[5] By the Ohio Oil Co. one of the vendees of Transcontinental. These payments were to Margaret M. Milliken to whom Milliken's interests had been assigned.

[6] Texas Production Co. and Ohio Oil Co. were joined as defendants. They filed separate answers and cross-complaints which are not material here. It should be noted, however, that the Ohio Oil Co. in its answer set up the contract between Milliken and Transcontinental whereby Milliken assigned all of his rights against Meyer in the lands and the 4/64ths interest in question to Transcontinental and alleged that Milliken was estopped thereby to make any claims against it for the disputed 1/64th interest.

not give the Wyoming court jurisdiction of his person or property; and that such judgment was violative of the due process clause of the Fourteenth Amendment. Milliken's answer alleged, *inter alia,* that Meyer was a resident of Wyoming at the time of the Wyoming action and that the Wyoming judgment was entitled to full faith and credit in Colorado under the federal constitution. The Colorado court, on issues joined, found that Meyer was domiciled in Wyoming when the Wyoming suit was commenced, that the Wyoming statutes for substituted service were constitutional, that the affidavit for constructive service [7] on Meyer was filed in good faith, substantially conformed to the Wyoming statute and stated the truth, that Wyoming had jurisdiction over the person of Meyer, that the Wyoming decree [8] was not void, and that the bill should be dismissed.

That judgment was reversed by the Supreme Court of Colorado. It did not pass on the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter. It held that the Wyoming decree was void on its face because of an irreconcilable contradiction between the findings and the decree. In its view the finding of the Wyoming court that Milliken's assignment of May 3, 1924, to Transcontinental of his claims against Meyer was valid, deprived the court of any ground upon which it could predicate a judgment against Meyer, since

[7] While the affidavit for constructive service stated in accordance with § 5636 of the Wyoming Comp. Stat., *supra,* note 3, that Meyer concealed himself in order to avoid service of summons, the present record does not show whether or not the Wyoming court so found.

[8] The Wyoming judgment does not seem to have been proved by respondents in accordance with the provisions of R. S. § 905, 28 U. S. C. § 687 in their suit in Colorado to set it aside. Nor was that judgment so proved by the answers. But since the Colorado trial court gave the Wyoming judgment full faith and credit despite lack of such proof, respondents cannot here claim that that was error.

the only basis for an action by Milliken against Meyer rested upon the claim before its assignment.

Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry. *Grover & Baker Sewing Machine Co.* v. *Radcliffe,* 137 U. S. 287; *Adam* v. *Saenger,* 303 U. S. 59. But if the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself." *Adam* v. *Saenger, supra,* at p. 62. In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy* v. *Lum,* 210 U. S. 230; *Roche* v. *McDonald,* 275 U. S. 449; *Titus* v. *Wallick,* 306 U. S. 282. Whatever mistakes of law may underlie the judgment (*Cooper* v. *Reynolds,* 10 Wall. 308) it is "conclusive as to all the *media concludendi.*" *Fauntleroy* v. *Lum, supra,* at p. 237.

Accordingly, if the Wyoming court had jurisdiction over Meyer, the holding by the Colorado Supreme Court that the Wyoming judgment was void because of an inconsistency between the findings and the decree was not warranted.

On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction over Meyer in the 1931 suit. Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state (*Huntley* v. *Baker,* 33 Hun 578; *Hurlbut* v. *Thomas,* 55 Conn. 181;

10 A. 556; *Harryman* v. *Roberts,* 52 Md. 64) as well as where he was personally served without the state. *In re Hendrickson,* 40 S. D. 211; 167 N. W. 172. That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court in *McDonald* v. *Mabee,* 243 U. S. 90, despite earlier intimations to the contrary. See *Pennoyer* v. *Neff,* 95 U. S. 714, 733; Burdick, Service as a Requirement of Due Process in Actions In Personam, 20 Mich. L. Rev. 422. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (*McDonald* v. *Mabee, supra*) implicit in due process are satisfied. Here there can be no question on that score. Meyer did not merely receive actual notice of the Wyoming proceedings. While outside the state, he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service. As in case of the authority of the United States over its absent citizens (*Blackmer* v. *United States,* 284 U. S. 421), the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. See *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. The responsibilities

of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. See Restatement, Conflict of Laws, §§ 47, 79; Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427. Here such a reasonable method was so provided and so employed.

Reversed.

STONER *v.* NEW YORK LIFE INSURANCE CO.

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

No. 74. Argued November 13, 1940.—Decided December 23, 1940.

In suits against an insurer upon policies providing for payment of benefits and waiver of premiums in the event of the insured's "total disability," an intermediate appellate court of Missouri had held that the evidence for the insured was sufficient to go to the jury. Subsequently, the insurer sued the insured in a federal court in that State, for a declaratory judgment that it was no longer obliged to pay disability benefits or to waive payment of premiums. In this suit, the parties were the same as in the earlier suits in the state courts, the issues were identical, and the evidence consisted of a transcript of the evidence in one of the state court suits, supplemented only by additional items introduced by, and favorable to, the insured. The suit was tried without a jury and judgment was for the insured. *Held:*

1. Reversal by the Circuit Court of Appeals, with direction to enter a declaratory judgment for the insurer, was erroneous. P. 467.

2. The decision of the Circuit Court of Appeals, determining in effect that the evidence on the issue of total disability required a find-

ing for the insurer, was inconsistent with the state law as announced by the intermediate appellate court of the State; and the Circuit Court of Appeals was bound to follow the state law as thus announced, since there is no indication that it would not be followed in like case by the intermediate appellate court of the State or by the state supreme court. P. 468.

3. That in the earlier suits the burden was on the insured to prove disability, while here the courts below assumed that the burden was on the insurer to show that disability no longer existed, is immaterial. P. 469.

4. The requisite jurisdictional amount was involved, for it was exceeded by the sum of the benefit payments and the premiums in controversy. P. 469.

109 F. 2d 874, reversed.

CERTIORARI, *post,* p. 628, to review the reversal of a judgment against the insurance company in a suit involving the question of its liability upon disability provisions of contracts of life insurance.

Mr. Kendall B. Randolph submitted for petitioner.

Mr. William H. Becker, with whom *Messrs. Paul M. Peterson* and *Louis H. Cooke* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Respondent insurance company brought this suit in the federal district court for a declaratory judgment that it was no longer obligated to make disability payments to petitioner or to waive payment of premiums under the total disability clauses of insurance policies issued to petitioner prior to 1931. The question is whether the Circuit Court of Appeals should have followed two decisions of the Kansas City Court of Appeals in earlier suits between the same parties.

In June, 1931, petitioner fell and seriously injured his left ankle. The injury is permanent. For about two

years after the injury, respondent paid petitioner the total disability benefits and waived premiums. In October, 1933, it notified him that it intended to cease benefit payments and waiver of premiums because it no longer considered him totally disabled.

In April, 1934, petitioner brought suit in a Missouri state court for the disability payments allegedly due and unpaid at that time. From a verdict and judgment for respondent he appealed to the Kansas City Court of Appeals, an intermediate state appellate court. That court held that petitioner's evidence was sufficient to take the case to the jury and that the trial judge erred in giving certain instructions. It reversed and remanded the case for a new trial. 90 S. W. 2d 784. Respondent thereupon sought a writ of certiorari from the Missouri Supreme Court but was unsuccessful. In consequence, the action is still pending but has not yet been retried.

In June, 1936, after remand of the first case, petitioner instituted two more actions, also in Missouri state courts, to recover disability benefits which allegedly had accrued since commencement of the first suit. One action was tried and this time petitioner secured verdict and judgment from which respondent appealed. The Kansas City Court of Appeals again reversed because of error in the instructions, although it held that petitioner's evidence presented a case for the jury. It remanded the action for a new trial. 232 Mo. App. 1048. 114 S. W. 2d 167. Both of these actions also are pending trial.

At this juncture respondent, a New York corporation, started the present suit against petitioner, a resident of Missouri, in the District Court for the Western District of Missouri. It sought a declaratory judgment that petitioner was not totally disabled within the meaning of the disability clause, and hence, that respondent was not liable for disability payments or waiver of premiums from June, 1936, until the date of suit. To prove its case re-

spondent introduced the transcript of testimony taken in the second of the earlier suits. Petitioner supplemented the transcript by a statement of respondent against interest, a personal deposition, and the testimony of another doctor. The trial, without a jury, resulted in a judgment for petitioner, the district judge finding that petitioner was totally disabled within the meaning of the policies. The Circuit Court of Appeals reversed, however, holding that the evidence established that petitioner was not totally disabled. It remanded with directions to enter a declaratory judgment as prayed by respondent. 109 F. 2d 874. We granted certiorari on October 14, 1940.

We are of opinion that the Circuit Court of Appeals erred in failing to follow the two decisions of the Kansas City Court of Appeals in earlier suits between the same parties involving the same issues of law and fact.

We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West* v. *American Telephone & Telegraph Co., ante,* p. 223; *Fidelity Union Trust Co.* v. *Field, ante,* p. 169; *Six Companies of California* v. *Joint Highway District, ante,* p. 180. In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review. *West* v. *American Telephone & Telegraph Co., supra.*

Twice the Kansas City Court of Appeals has had before it appeals involving the same parties, insurance contracts, and facts as are involved here. *Stoner* v. *New York Life Ins. Co.,* 90 S. W. 2d 784; *Stoner* v. *New York Life Ins. Co.,* 232 Mo. App. 1048; 114 S. W. 2d 167. Each time respondent argued that petitioner's evidence failed to

present a submissible case. 90 S. W. 2d 784, 790; 232 Mo. App. 1048; 114 S. W. 2d 167, 168. Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury. 90 S. W. 2d 784, 794, 797; 232 Mo. App. 1048; 114 S. W. 2d 167, 169. Moreover, in approving or disapproving certain instructions it marked out the limits of the test the jury was to employ in determining the existence or non-existence of total disability within the meaning of the policies.

It is apparent, then, that the question of total disability, on the evidence before the court in those two cases, is a question for the jury under instructions embodying the test the Kansas City Court of Appeals approved. Under the rule of the *West, Six Companies,* and *Field* cases, *supra,* it was error for the Circuit Court of Appeals to hold, in effect, that the evidence would not support the finding of the trial judge that there was total disability, unless convincing evidence indicated that the Missouri Supreme Court would decide differently.

The present case is not different merely because there are now in the record a statement against interest, a deposition of petitioner, and the testimony of a doctor which were not in the record in the earlier cases. The three items of evidence were introduced by petitioner and, if anything, weaken respondent's case. Moreover, apart from these three items, the evidence in the present case consists of the transcript the Kansas City Court of Appeals had before it when it wrote the opinion in the second appeal (232 Mo. App. 1048; 114 S. W. 2d 167).

Nor is there any indication that either the Kansas City Court of Appeals or the Missouri Supreme Court would decide this case differently. Certainly there is nothing to suggest that the Kansas City Court of Appeals now would conclude that the evidence is insufficient after it has held that the same evidence presented a question for the jury. And while the concept of total disability is

inseparable from the facts to which it is applied, *Heald* v. *Aetna Life Insurance Co.*, 340 Mo. 1143, 104 S. W. 2d 379, indicates that the Missouri Supreme Court likewise would conclude that a finding of total disability here is supported by the evidence. See also *Foglesong* v. *Modern Brotherhood,* 121 Mo. App. 548; 97 S. W. 240; *James* v. *U. S. Casualty Co.,* 113 Mo. App. 622; 88 S. W. 125; *Bellows* v. *Travelers' Insurance Co.,* 203 S. W. 978, which were approved in the *Heald* case.

Furthermore, the test for determining total disability approved in the *Heald* case was employed in the first and followed in the second of the appeals to which we have referred. 90 S. W. 2d 784, 793, 795; 232 Mo. App. 1048; 114 S. W. 2d 167, 171, 172. It has been employed consistently since the *Heald* case was decided. *Eden* v. *Metropolitan Life Ins. Co.,* 138 S. W. 2d 745; *Comfort* v. *Travelers' Insurance Co.,* 131 S. W. 2d 734; *Rogers* v. *Metropolitan Life Ins. Co.,* 122 S. W. 2d 5; *Wright* v. *Metropolitan Life Ins. Co.,* 115 S. W. 2d 102. The same test was used by the district judge in the present suit. He applied it to the evidence which the Kansas City Court of Appeals twice has said presented a question for the jury; and, since the case was tried to the court, he determined that the evidence established total disability. We think it is immaterial that in the earlier suits the burden was on petitioner to prove total disability while here the courts below assumed the burden is on respondent to show that total disability no longer exists.

We conclude that it was error to direct the entry of a declaratory judgment for respondent. It was proper, however, to deny petitioner's motion to dismiss for want of the necessary amount in controversy since a judgment in favor of respondent would determine petitioner's claim to both benefit payments and waiver of premiums. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

Z. & F. ASSETS REALIZATION CORP. *v.* HULL, SECRETARY OF STATE, ET AL.*

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

No. 381. Argued December 9, 10, 1940.—Decided January 6, 1941.

Holders of awards by the Mixed Claims Commission, United States and Germany, which were certified by the Secretary of State under the Settlement of War Claims Act of 1928 and were payable by the Secretary of the Treasury from the special fund established by that Act, sued to restrain the Secretary of State from certifying and the Secretary of the Treasury from paying later awards to other claimants, alleging that because the German Commissioner had withdrawn, and for other reasons relative to the power and procedure of the Commission, the later awards were null and void, and that if allowed to participate in the fund they would so deplete it that the awards of the plaintiffs could not be satisfied. After the filing of the bill, and before service, the awards complained of were certified by the Secretary of State. *Held*:

1. That the petitioners were entitled to sue to protect such interest as they might have under the Act; but as their standing rested solely upon the provisions of the Act they could not escape its terms or avoid payments for which the Act is found to provide. P. 485.

2. The certification by the Secretary of State which the Act requires as a condition to payment of an award is not a ministerial act meaning merely that the award certified is a genuine document, but is assurance by the Secretary that the proceedings leading to the award were such as duly to qualify it for payment from the special fund. P. 486.

Congress had constitutional power to lodge with the Secretary of State the authority to consider and pass upon the regularity and validity of the awards made by the Mixed Claims Commission for the statutory purpose of qualifying them for payment out of the account in the Treasury; and in view of the functions

*Together with No. 382, *American-Hawaiian Steamship Co.* v. *Hull, Secretary of State, et al.*, also on writ of certiorari, *post*, p. 632, to the Court of Appeals for the District of Columbia.

of the Secretary of State, the nature of the claims and the contentions to which they might give rise between the two governments concerned, Congress naturally required his views, with respect to the propriety of paying awards from that fund.

3. There is no basis in this case for concluding that the Secretary of State in certifying the questioned awards acted without due deliberation or failed to express his considerate judgment, as the statute contemplated. P. 488.

4. For the purpose of payment under the statute the certification of the Secretary of State is conclusive. P. 489.

It is unnecessary to consider in this case whether Congress could commit to the judiciary the determination of the validity of the challenged claims.

5. In view of the statutory provisions governing the case, there is no occasion to consider the circumstances in which an international agreement or action thereunder may be deemed to vest rights in private persons or the scope of such rights in particular cases. P. 489.

114 F. 2d 464, affirmed.

CERTIORARI, *post,* p. 632, to review the affirmance of a decree dismissing the bills in suits to restrain action by the Secretaries of State and of the Treasury.

Mr. Joseph M. Proskauer, with whom *Messrs. Frank Roberson, John F. Condon, Jr.,* and *John Bassett Moore* were on the brief, for Z. & F. Assets Realization Corp., petitioner in No. 381.

The conflict between the old award holders and the sabotage claimants as to their respective rights to payment from the special deposit fund is not a political controversy beyond the jurisdiction of the courts to determine.

Where a conflict of property rights under statutes and treaties is presented, the determination of those rights by the Executive Department is subject to review by the courts. *Banco de España* v. *Federal Reserve Bank,* 114 F. 2d 438, 442. The doctrine relied on by the Court of Appeals in this case has no application where, as here, the decision of property rights could not in any truly

factual sense be deemed an interference with the conduct of our foreign relations by the Executive, nor a matter for the Executive exclusively to determine. Willoughby, Const. L., 2d ed., § 855, p. 1336; Jaffe, Judicial Aspects of Foreign Relations, p. 233; *The Florence H.*, 248 F. 1012; *United States* v. *Watts*, 8 Sawyer 370; *United States* v. *Rauscher*, 119 U. S. 407; *Tartar Chemical Co.* v. *United States*, 116 F. 726. See also, *Head Money Cases*, 112 U. S. 580, 598, 599; *Deutsche Bank* v. *Cummings*, 83 F. 2d 554; 300 U. S. 115; *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Coleman* v. *Miller*, 307 U. S. 433, 460.

The certificate of the Secretary of State is a ministerial act and not conclusive of the validity of an award. Petitioners have a property right in the Special Deposit Fund and are entitled to bring the action. Cf., *Williams* v. *Heard*, 140 U. S. 529; *Comegys* v. *Vasse*, 1 Pet. 193. Cf., *Houston* v. *Ormes*, 252 U. S. 469; *Parish* v. *MacVeagh*, 214 U. S. 124.

This Fund consists of 20% of the German property seized during the war, unallocated interest thereon, the specific appropriation by Congress of more than $86,000,000 and the moneys received under the Paris agreement of January 14, 1925 and under the German-American debt agreement of June 23, 1930. Report of Secretary of Treasury, June 30, 1939, p. 76. Consequently, this action comes squarely within the cases holding that, where Congress has made an appropriation for certain persons, those persons may resort to the courts for the enforcement of their right of payment. It is immaterial that these were moneys of the United States. As soon as an appropriation is made, until that appropriation is withdrawn, the direct beneficiaries of such appropriation have rights which may be protected in the courts from improper attack. *American-Mexican Claims Bureau* v. *Morgenthau*, 26 F. Supp. 904, 906.

The real question is between two classes of American nationals, one of which seeks to take from the other the moneys that had been awarded to it, held in the Treasury of the United States. *Matter of Westbrook,* 228 App. Div. 549, 550.

In view of petitioners' property right, the District Court had jurisdiction to grant a declaratory judgment protecting them from payment of awards that were mere nullities. Moore, Digest, Vol. VII, § 1072, p. 30; *Comegys* v. *Vasse,* 1 Pet. 193; *Standard Marine Ins. Co.* v. *Westchester Ins. Co.,* 19 F. Supp. 334; aff'd 93 F. 2d 286; cert. den., 303 U. S. 661; *Frevall* v. *Bache,* 14 Pet. 95.

The Secretary of State neither reads the evidence nor hears the arguments of counsel upon it. In no sense, therefore, can his act preclude subsequent inquiry as to the validity of the award, either nationally or internationally.

The Secretary of State in this case acted within a few hours, so had no time to make any judicial inquiry, which he must have assumed was not called for.

Whenever the executive determination has been held conclusive in the absence of a statutory provision for a hearing and determination, the statute has either expressly provided for finality (*United States* v. *Babcock,* 250 U. S. 328, 331), or the character of the executive determination was such as to admit of no doubt that discretion had necessarily been conferred. *Williamsport Co.* v. *United States,* 277 U. S. 551, 559; cf., *Newport News Co.* v. *Schauffler,* 303 U. S. 54, 57; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50; *Adams* v. *Nagle,* 303 U. S. 532.

Certification was no more than a vehicle of notification to the Secretary of the Treasury that the Commission had signed, sealed and entered its alleged decision. True, the Secretary of State might choose to take further

diplomatic action if the action of the Commission were unsatisfactory to him (either on moral grounds or for palpable excess of power); but such action would in no sense spring from the Act of Congress, and hence could not enlarge the ministerial quality of his function under the statute. *Orinoco* v. *Orinoco Iron Co.*, 296 F. 965; *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121; *Perkins* v. *Elg*, 307 U. S. 325.

That the Secretary of State in certifying was performing a purely ministerial function, is demonstrated by the fact that he is frequently called upon to certify to the Treasury Department international awards. *American-Mexican Claims Bureau* v. *Morgenthau*, 26 F. Supp. 904.

A fortiori is such a certificate not controlling when made with knowledge of contemplated resort to the courts and after actual filing of the bill.

If their suit is meritorious, the petitioners are entitled to have the *status quo* restored as of the time of the commencement of the action. *Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 479.

An action is commenced by the filing of the complaint. Federal Rules of Civil Procedure, Rule 3. Therefore, the statement that the service of process was "too late" is completely unjustified.

The Commission made no awards in favor of the sabotage claimants, because, after the retirement of the German Commissioner, the Commission no longer existed.

The Commission made no awards in favor of the sabotage claimants, because the Commission was *functus officio* and not empowered to grant a rehearing.

The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission had no jurisdiction to grant it any award.

Since issues of fact are involved, respondent-intervener's application for summary judgment should in any event be denied.

Mr. Fred K. Nielsen for American-Hawaiian Steamship Company, petitioner in No. 382.

The court below does not deal specifically with the fundamental contentions which have been advanced by the petitioners. They have not contended that there can be any proceeding in the nature of a judicial review of acts of an international commission. They have found no fault with any act of the Commissioners or the Umpire performed conformably with the terms of the agreement of August 10, 1922. They have not undertaken to bring about any judicial interference with the conduct of foreign affairs by executive authorities.

This suit was brought to protect property rights of the petitioner in funds on deposit in the Treasury. Those rights and the rights which the intervener-petitioner undertook to protect are substantially identical. The rights have their foundation in (1) treaty stipulations concluded by the United States and Germany; (2) provisions of an agreement between the two countries to give effect to those treaty stipulations; and (3) statutory provisions enacted by Congress to give effect to both the treaty stipulations and the provisions of the supplemental agreement.

The petitioners have taken the position that the courts have the power to determine whether statutory provisions found in the Settlement of War Claims Act of 1928 would be properly or improperly executed, if action should be taken conformably to the prayers in the motion of the intervener-respondent for summary judgment presented to the District Court and in the motion of the defendants to dismiss the complaint and the bill of intervention. The law of 1928, of course, contemplates the

payment of valid awards only, that is, awards made in accordance with the terms of the agreement of August 10, 1922. The petitioners have contended that, in passing on questions with regard to the execution of the law of 1928, the courts have the power to construe the pertinent international covenants, to determine whether or not valid awards were rendered through the acts of a single Commissioner and the Umpire. The agreement of August 10, 1922, was incorporated by reference into the Settlement of War Claims Act of 1928. In construing and applying the statute, it is necessary and proper for the Court to construe the agreement. The petitioners have invoked judicial action with the purpose of protecting important property rights.

The awards said to have been made in favor of the Lehigh Valley Railroad Company and others were not valid awards made by the Commissioners nor by the Umpire. The so-called awards are not awards within the meaning of the provisions of the agreement of 1922, because they are not awards rendered conformably to the terms and requirements of the agreement. They are simply individual acts of one Commissioner and the Umpire. Therefore, the payment of these so-called awards is not authorized by the Settlement of War Claims Act of 1928. Payment would be a misapplication of funds which are on deposit in the Treasury Department by virtue of the Settlement of War Claims Act.

Contentions now made by the petitioners with respect to pertinent stipulations of the agreement of August 10, 1922, are in harmony with the sound construction put on them by counsel for the United States in the course of proceedings before the Claims Commission to have set aside the decision of the Commission dismissing in 1930 the claims of the Lehigh Valley Railroad Company and others. That construction counsel for the respond-

ents, the two cabinet officers, do not now undertake to discard, but they argue the case involves political questions.

A determination of the issues in the present case would not result in an interference by the Judiciary in political affairs arising in the conduct of foreign relations. Those issues involve justiciable questions and not so-called political questions, such as were controlling in numerous cases cited in the opinion of the Court of Appeals.

Some diplomatic exchanges referred to by the Court of Appeals have no bearing on questions pertaining to the power of courts of the United States to construe federal statutory provisions and international covenants for the purpose of protecting private property rights or the interest of the Government, its material interests and its interest in the observance of international covenants.

This diplomatic correspondence does reveal facts to the effect that one party to the pertinent covenants has challenged the validity of acts which the petitioners contend are void. It also reveals that the Secretary of State declined to enter into a diplomatic discussion of rules and principles of law determinative of questions as to the propriety of these acts which the petitioners contend can not legally have the effect of disposing of the large funds on deposit in the Treasury.

The petitioners take the position that the court has the power to pass on these questions so far as their proper disposition rests with the authorities of the Government of the United States. That is, the court is competent to take appropriate action looking to a proper application of the Settlement of War Claims Act in the light of a rational interpretation of some unambiguous terms of the agreement of August 10, 1922, terms of a very conventional character often employed in international practice.

The proceeding instituted in the District Court is a "case" within the meaning of Art. III, § 2, Cl. 1 of the Constitution.

Solicitor General Biddle, with whom *Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Francis J. McNamara* were on the brief, for Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of the Treasury, respondents.

The question of the validity of the sabotage awards is of a political character, is conclusively determined by the certificate of the Secretary of State, and is not open to judicial inquiry.

Apart from statute, the question of the validity of the sabotage awards is for the exclusive determination of the Executive Department.

The claims of American nationals against Germany presented to the Commission are the claims of the United States; and funds held by the United States for the payment of awards are the property of the United States until paid to the private claimants.

Apart from the statute, the Secretary of State may accept or reject the sabotage awards in his sole discretion until payment is ultimately made to the private claimants.

The authority of the Secretary of State to accept or reject the sabotage awards in his sole discretion is recognized and confirmed in the Settlement of War Claims Act.

Irrespective of the political nature of the inquiry, certification of the sabotage awards by the Secretary of State is conclusive, and not subject to judicial review.

Mr. William D. Mitchell, with whom *Messrs. Frederic R. Coudert, Lester H. Woolsey, Amos J. Peaslee,* and *John J. McCloy* were on the brief, for Lehigh Valley Railroad Company, intervener-respondent.

The validity of the awards is not open to inquiry in the courts and the case does not present a justiciable controversy.

The question of the validity of the awards, involving as it does a dispute between the two Governments about the jurisdiction and powers of the Commission and the interpretation and effect of an international compact between the United States and Germany, is a political matter involving foreign relations, in which under our Constitution, the Judicial Department may not interfere.

The provisions of the Settlement of War Claims Act of 1928 routing awards of the Commission through the State Department for certification to the Treasury, instead of having the awards certified by the Commission to the Treasury, is a legislative recognition of the fact that the subject is one involving our agreements and relations with a foreign government, and gives the Secretary of State the opportunity to hold up an award, if he believes that it did an injustice to Germany, or for any other reason requires correction. The Secretary of State had full power to refrain from certifying an award if it should seem open to objection. *Frelinghuysen* v. *Key,* 110 U. S. 63; *Boynton* v. *Key,* 139 U. S. 306; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423.

The decisions of the Commission, including those respecting its powers and jurisdiction, are not open to review or collateral attack in the domestic courts.

If the question as to the validity of the awards is considered, their validity should be upheld.

The retirement of the German Commissioner did not deprive the Umpire and the American Commissioner of power to dispose of the cases.

The claim that there were genuine issues as to material questions of fact, which made it improper to grant summary judgment, is not properly raised and is devoid of merit.

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

Petitioners, Z. & F. Assets Realization Corporation and American-Hawaiian Steamship Company, are holders of awards of the Mixed Claims Commission, United States and Germany. These awards have been certified by the Secretary of State and are thus payable out of the fund established by the Settlement of War Claims Act of 1928.[1] Petitioners seek a judgment declaring that later awards purporting to be made by the Mixed Claims Commission in favor of the Lehigh Valley Railroad Company, the Agency of Canadian Car and Foundry Company, Limited, the Bethlehem Steel Company and others, are null and void, and restraining the certification of these awards by the Secretary of State and their payment by the Secretary of the Treasury. The Lehigh Valley Railroad Company intervened as a defendant.

Defendants, the Secretary of State and the Secretary of the Treasury, moved to dismiss petitioners' bills for want of jurisdiction and for failure to state a claim upon which relief could be granted. The intervener defendant filed an answer and moved for summary judgment. The District Court dismissed the bills (31 F. Supp. 371) and its judgment was affirmed by the Court of Appeals. 114 F. 2d 464. We granted certiorari, *post*, p. 632.

The Mixed Claims Commission, United States and Germany, was set up pursuant to an agreement of August 10, 1922,[2] to determine the amount to be paid by Germany in satisfaction of her financial obligations under the Treaty of Berlin of August 25, 1921.[3] The Commission consisted of three members, one appointed by the United States, another by Germany, and an Umpire se-

[1] 45 Stat. 254.

[2] 42 Stat. 2200.

[3] 42 Stat. 1939.

lected by the two Governments. The Umpire was "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." It was further provided that should the Umpire or any of the Commissioners die or retire, or be unable for any reason to discharge his functions, the vacancy should be filled in the same manner as the original appointment. It was agreed that the decisions of the Commission and those of the Umpire should be accepted as final and binding upon the two Governments.

The Settlement of War Claims Act of 1928 created in the Treasury a "German Special Deposit Account." Section 2 provided that the Secretary of State should certify from time to time to the Secretary of the Treasury the awards of the Mixed Claims Commission, and the Secretary of the Treasury was directed to pay out of the amounts placed in the account the principal of each award so certified, with interest as stated.

The claims covered by the awards attacked by petitioners arose out of the destruction of property caused by explosions at Black Tom and Kingsland, New Jersey, in 1916 and 1917. These claims were dismissed by the Commission in 1930, and petitions for rehearing were denied in 1931 and 1932. In the following year the American agent sought to reopen the cases upon the ground that in its decision of 1930 the Commission had been misled by "fraudulent, incomplete, collusive and false evidence" on the part of witnesses for Germany. The German Government denied the power of the Commission to reopen and the Umpire, Mr. Justice Roberts, finding that there was a disagreement upon the question between the Commissioners, decided, in December, 1933, that the Commission was competent to determine its own jurisdiction by the interpretation of the Agreement creating it. The Umpire further decided that, while the Com-

mission was without power to reopen a case merely for the presentation of after-discovered evidence, the Commission was still sitting as a court and did have power to consider the charge that it had been misled by fraud and collusion, and for that purpose to reopen the cases in order that it might consider the further evidence tendered by the American agent, and that offered in reply on behalf of Germany, and either confirm the decisions theretofore made or alter them as justice and right might demand.

Thereafter, the German agent filed an answer denying the allegations of fraud and evidence was presented. After argument, the Commission, in June, 1936, rendered a decision, the German Commissioner concurring, by which the ruling of 1932 denying a rehearing was set aside, and the question whether there should be a rehearing was reserved for a hearing which should be separate and distinct from an argument on the merits unless Germany should consent to a different course.

Efforts to obtain a settlement of the claims were unsuccessful and, after much additional evidence had been introduced, the Commission, in January, 1939, heard extended arguments by the agents of the respective Governments. The American agent had requested that the Commission should not only set aside the original decision of 1930 but should also proceed to a final decision on the merits, as it was contended that the evidence presented to support the application for rehearing also established the responsibility of Germany for the destruction of the property as claimed. It also appears that the German Commissioner insisted that, before the motion for rehearing should be granted, the Commission should examine the proofs tendered by the United States to determine whether the claims had been made good. This, as stated by the Umpire, was upon the ground that even though the Commission had been misled by false and

fraudulent testimony, that would be immaterial if, upon an independent consideration, the United States in its own cases had failed to sustain its burden of proof. The American Commissioner and the Umpire thereupon had agreed to go beyond what they thought the necessary function of the Commission in the circumstances and had proceeded to canvass with the German Commissioner the cases as made by the United States.

During the course of that investigation, on March 1, 1939, the German Commissioner withdrew from the Commission. At the time of his withdrawal, the two Commissioners, according to the contention of the American Commissioner and as found by the Umpire, were in disagreement upon the points in issue. On receiving notice of a meeting of the Commission to be held on June 15, 1939, the German agent said that he would not appear and the German Embassy advised the Secretary of State that, since the withdrawal of the German Commissioner, the Commission was incompetent to make decisions.

At the meeting held pursuant to the notice, the American Commissioner filed a certificate of disagreement with an opinion sustaining the jurisdiction of the Commission. The Umpire thereupon decided that there did exist a disagreement between the two Commissioners,—a disagreement of which he was personally cognizant and which was also shown by the certificate and opinion of the American Commissioner; that the jurisdiction of the Commission was not ousted by the withdrawal of the German Commissioner "after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented"; that the United States "had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany"; and that upon

the record as it then stood the cases for the claims were made out.

Thereupon, the American agent moved for awards in favor of the United States on behalf of the sabotage claimants. An order was entered setting aside the decision of 1930, and determining that the liability of Germany had been established and that, as it appeared that Germany did not intend to take part in further proceedings of the Commission, awards should be made upon the Commission's findings and opinion.

On October 3, 1939, the German Chargé d'Affaires addressed an elaborate communication to the Secretary of State making a detailed statement supplementary to a note of July 11, 1939, with respect to the alleged illegal acts of the Umpire, and protesting against all further measures by the Umpire, the American Commissioner and the American agent, which were aimed at securing awards in the Black Tom and Kingsland cases. The Secretary of State replied, on October 18, 1939, that it would be highly inappropriate for the Department to endeavor to determine the course of the proceedings of the Commission; that the Secretary had entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite the severe and, as he believed, "entirely unwarranted criticisms," and that he was constrained to invite attention to the fact "that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion."

Notice was given of a meeting of the Commission to be held on October 30, 1939, which the German Commissioner did not attend, and awards were then made in favor of the claimants. The Umpire stated that he

had found the awards to be accurately and properly calculated and had joined the American Commissioner in signing them.

The awards were certified by the Secretary of State to the Secretary of the Treasury on October 31, 1939, pursuant to the Settlement of War Claims Act of 1928. On the same day, this suit was brought, the complaint being filed before, and process being served on the Secretary of State after, his certification of the awards.

The Court of Appeals has held that the question with respect to the validity of the awards in favor of the sabotage claimants is political in its nature and that the District Court was without jurisdiction to entertain it.

There are, however, certain preliminary questions which are indubitably appropriate for judicial consideration, and we think that the proper answer to these questions is determinative of the whole case.

The first question is whether petitioners have standing to bring this suit. Except for the situation created by the Settlement of War Claims Act of 1928, they would have no such standing. They could not be heard to complain of action upon claims other than their own. And Congress, with or without awards, could provide for the payment of the claims in question without let or hindrance by petitioners. But petitioners contend that the Settlement of War Claims Act created a fund in the Treasury, known as the "German Special Deposit Account"; that petitioners with other earlier award-holders are entitled by the Act to payment out of that fund; that the fund is insufficient to pay petitioners' claims in full if payments are permitted to be made to the sabotage claimants; and hence that petitioners have standing to complain of an unlawful depletion of the fund to their injury by means of such payments.

We think that in these circumstances as shown by the bills petitioners are entitled to sue to protect such inter-

ests as they may have under the Act. Compare *Houston* v. *Ormes*, 252 U. S. 469; *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121. But as their standing rests solely upon the provisions of the Act, they may not escape its terms or succeed in a challenge to payments for which the Act is found to provide.

The next question is with respect to the effect that should be given under the terms of the statute to the action of the Secretary of State in certifying the awards. Congress has authorized and required the Secretary of the Treasury to pay out of the special account the awards which the Secretary of State has certified. There is no question that the Secretary of State has given his certificate in this instance. It is adequate in form and substance under the terms of the Act.

Petitioners contend that the certification is a mere ministerial act. It is said to mean merely that the award is a genuine document, in the same sense that a notary public authenticates the signature of a grantor in a deed. We think that this construction of the Act is inadmissible. The notarial conception of the function of the Secretary of State in this matter ignores his rôle in the conduct of foreign affairs as the right hand of the Executive and in particular his relation to proceedings for the determination of claims of the United States against foreign governments. There can be no doubt of the constitutional authority of Congress to lodge with the Secretary of State the authority to consider and pass upon the regularity and validity of the awards made by the Mixed Claims Commission for the statutory purpose of qualifying them for payment out of the account in the Treasury. Congress had complete power to decide what payments should be made from that account and to attach such conditions as it saw fit. Congress not only had this power but it was natural and appropriate that Congress should entrust to the Secretary of State the decision

of questions that might arise with respect to the propriety of the payment of awards made by the Commission and to require his affirmative action through certification before payment. The Mixed Claims Commission had been created by an executive agreement. The claims to be considered by the Commission were only those sponsored and presented by the United States against Germany. They were presented as claims of the United States, the national claimants themselves having no standing save as they were represented by the United States. See *Frelinghuysen* v. *Key,* 110 U. S. 63, 75, 76; *Boynton* v. *Blaine,* 139 U. S. 306, 323, 325; *Williams* v. *Heard,* 140 U. S. 529, 537, 538. The claims so sponsored were presented and handled by an American agent appointed by the President. It was obvious, as the present contentions abundantly illustrate, that the proceedings before such a commission might easily give rise to questions between the governments concerned and might involve diplomatic representations or protests with which it would be the duty of the Secretary of State to deal. Whatever might be said of such representations or protests, or the occasion for them, or with respect to the existence of any international right or obligation arising from the agreement setting up the Commission, Congress could, and naturally would, require the views of the Secretary of State before appropriating money for the payment of awards, and, in creating a special fund for that purpose, would look to the Secretary of State for the exercise of his appropriate authority on behalf of the Executive and thus for his judgment upon the question whether the proceedings had been such as duly to qualify the awards for payment. See *Frelinghuysen* v. *Key, supra; Boynton* v. *Blaine, supra.* We find nothing in the Settlement of War Claims Act which points to a different purpose.

It is suggested that the Secretary of State construed his action in certifying as merely ministerial because he acted at once on the presentation of the awards. But the argument overlooks the fact that the Secretary of State had long been cognizant of the questions that had arisen in relation to the Commission's authority to grant a rehearing and make the awards. As early as October, 1933, the German Government had notified the Secretary of State that it regarded the Commission as without authority to grant a rehearing on the sabotage claims. The Secretary of State had informed the American agent that the question of jurisdiction was one properly to be decided by the Commission itself and he directed the American agent to bring the matter to the attention of the American Commissioner, or the full Commission, for the purpose of obtaining the decision of the Umpire on that disputed point. In March, 1939, the American Commissioner informed the Secretary of State of the withdrawal of the German Commissioner and reviewed the circumstances. In June, 1939, petitioners themselves formally communicated to the Secretary of State their objections to the proceedings. In the same month the German Embassy advised the Secretary of State that its Government regarded the Commission as incompetent to make decisions because of the German Commissioner's withdrawal. This was followed by a further protest delivered to the Secretary of State in July and a detailed statement by the German Government of its grounds in its communication of October 3, 1939, to which the Secretary of State replied on October 18, 1939, in the note from which we have quoted. Thus, when the actual awards were presented the Secretary of State had before him these diplomatic representations and was fully conversant with all the proceedings of the Commission, with the action of the German Commissioner and the attitude of his Government, and with the contentions of peti-

tioners. We find no basis for concluding that the Secretary of State in certifying the awards did not act after due deliberation or fail to express his considerate judgment, as we think the statute contemplated.

We are of the opinion that for the purpose of payment under the statute the certificate of the Secretary of State must be deemed to be conclusive. We do not need to consider whether Congress could commit to the judiciary the determination of the validity of the challenged claims (See *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423), for Congress has not done so but has made payment out of the fund depend upon the Secretary's certificate. The question in this relation is simply one of the intent of Congress as disclosed by the Act. Congress has expressly directed payments to be made from the special account of the awards "so certified." The literal and natural import of this provision is that finality is to be accorded to the certificate of the Secretary of State and we perceive no ground for limiting the terms of the Act by construction. On the contrary, the nature of the questions presented and their relation to the conduct of foreign affairs within the province of the Secretary of State support the conclusion that the statute should have effect according to its explicit terms.

In view of the statutory provisions governing this case, we have no occasion to consider the circumstances in which an international agreement, or action thereunder, may be deemed to vest rights in private persons, or the scope of such rights in particular cases. See *Comegys* v. *Vasse,* 1 Pet. 193; *Mellon* v. *Orinoco Iron Co., supra.* Petitioners must claim solely by virtue of their interest in the fund created by the statute and under its terms they are not entitled to complain of payments out of that fund of awards which the Secretary of State has certified.

The judgment of the Court of Appeals is

Affirmed.

[Over.]

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

MR. JUSTICE BLACK, concurring:

MR. JUSTICE DOUGLAS and I concur in the judgment of affirmance but on the ground that the petitioners set up no justiciable controversy which the court had power to determine. The questions raised by the petitions involve relations between the United States and Germany, which we believe are constitutionally committed exclusively to the legislative and executive departments.

The sole ground upon which petitioners prayed relief in the District Court was that awards made by the Mixed Claims Commission were "wholly null and void and without jurisdiction on the part of the alleged Commission." A declaratory judgment was sought to have the awards declared null and void, and to enjoin the Secretary of State from certifying and the Secretary of the Treasury from paying such awards made by the Commission. In addition petitioners asked a mandatory injunction to require the Secretary of the Treasury to pay petitioners without regard to other awards of the Commission certified by the Secretary of State.

The Secretary of State and the Secretary of the Treasury moved to dismiss on the grounds, among others, that the complaint stated no cause of action; the court had no jurisdiction to review the action of the Mixed Claims Commission; the court was without power to pass upon the jurisdiction of the Mixed Claims Commission; and the court had no jurisdiction to restrain the Secretary of State from certifying awards of the Commission or to enjoin the Secretary of the Treasury from paying the claims so certified. The District Court dismissed and the Circuit Court of Appeals affirmed on the ground that the actions of the Mixed Claims Commission in making awards and the Secretary of State in certifying

them were committed for determination to the political department of government and therefore the courts were without power to review their determination. We agree with their conclusion. And in this view we believe the certifications of the Secretary of State must be deemed final and conclusive in the courts, not because the conduct of the Secretary and the Commission preceding certification meets approval of the courts, but because power to make final determination rests with the political departments of government alone.

The fundamental questions raised by the petitions as presented to the District Court, were: Who can challenge the propriety of the Commission's awards? Does the judicial branch of government, rather than the political, possess the power finally to determine the propriety of the awards? And the fact that petitioners sought to challenge the Commission's power by proceedings against the Secretaries of State and the Treasury, and not by direct suit against the Commission, is immaterial. If petitioners cannot directly attack the Commission in the courts, neither can they, in the absence of Congressional consent, assail the propriety of its awards through the expedient of suits against others charged with responsibility for executing the final determination of the Commission.

The Mixed Claims Commission was set up pursuant to an agreement between the United States and Germany. The agreement gave the Commission full power to hold hearings to determine "the amount to be paid by Germany in satisfaction of Germany's financial obligations" under two treaties previously made between the two countries. The agreement further provided that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two governments." The Commission was set up with an Umpire and all of the awards

were reported to the Secretary of State by the Commission.

While petitioners contend that they have the right to challenge the certification of the Secretary of State, it is to be remembered that their petitions ultimately rest solely upon the premise that it is his duty to refuse to carry out the Commission's awards because of alleged impropriety of the proceedings of the Commission. They say that the Commission was without jurisdiction and power to make awards to certain claimants other than themselves; payment of these awards out of a fund that is limited in amount will result in diminishing payments to them below the full amount of their award with interest; since the Commission was without power—as they charge—to make these other awards, the Secretary of State should not have certified them for payment; and for the same reason the Treasury should not pay them. They assert a right through court procedure to challenge payment to the other claimants by reason of an Act of Congress of 1928.[1]

But the 1928 Act provides that the Secretary shall from time to time certify to the Secretary of the Treasury the awards of the Mixed Claims Commission of the United States, and that the Secretary of the Treasury is authorized and directed to pay "the principal of each award so certified, plus the interest thereon, in accordance with the award, . . ." Nowhere in the Act is there any language which either expressly or by fair implication indicates a purpose of Congress to permit some claimants to resort to the courts—as petitioners here have done—to determine the propriety of awards by the Mixed Claims Commission to other claimants.

The exact challenge made by petitioners against the awards of the Commission is the subject of a diplomatic

[1] 45 Stat. 254.

controversy between the United States and Germany. Germany's contention is the same as petitioners'. And the Secretary of State, in charge of our foreign affairs, has declined to accede to Germany's contention that the particular awards here in controversy were improper and should not be certified or paid. The immediate subject matter of petitioners' complaint, upon which rests the power of the Court to act, if it has any power, has therefore been repudiated by the political branch of our government. A contrary conclusion by the courts would bring about a square clash between the executive and judicial branches of government. And far more than this. Whoever is entrusted finally to determine what government must or must not do in a dispute between nations is the ultimate arbiter of momentous questions of public policies affecting this nation's relations with the other countries of the world.

The controversy here bears all the earmarks of that type of controversies which our Constitution has confided exclusively to the executive or political departments of government, and concerning which this Court has many times repeated "that the action of the political branches of the government in a matter that belongs to them, is conclusive." [2] Since this clearly appeared from the face of the pleadings at the very outset, the District Court properly stayed its hands and renounced power to proceed.

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[2] *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, 420; *United States ex rel. Boynton* v. *Blaine*, 139 U. S. 306, 320, 321, 322–6; *Frelinghuysen* v. *Key*, 110 U. S. 63. No good purpose would be served by setting out the numerous decisions of this Court to the same effect. For a collection of such cases see Digest of the U. S. Supreme Court Reports, vol. 4, Courts, §§ 49–63.

JACKSON, ATTORNEY GENERAL, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* IRVING TRUST CO., EXECUTOR, ET AL.

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

No. 75. Argued December 19, 1940.—Decided January 6, 1941.

1. An award of a District Court under the Trading with the Enemy Act can not be attacked for alleged fraudulent collusion by a motion on affidavits made to that court after payment has been made and the time for appeal has expired. *Semble* that the remedy would be by bill of review. P. 499.
2. Years after the rendition and payment of an award under § 9 (a) of the Trading with the Enemy Act, from which no appeal was taken, the Attorney General, on behalf of the United States and as successor to the Alien Property Custodian, by a motion to the District Court supported by affidavits, sought to have the judgment set aside for want of jurisdiction, on the ground that the beneficial owner of the claim was an "enemy" as defined by that Act and that, therefore, the suit was not authorized by the Act, but was a suit against the United States without its consent. *Held*:

   (1) That the complaint in the suit stated a case within the terms of the Act, and the District Court had jurisdiction to determine every issue necessary to the establishment of the claim. P. 500.

   (2) That the status, enemy or non-enemy, of the alleged beneficial owner, upon which was based the "jurisdictional" question of the motion, having been an issue raised by the pleadings and proceedings in the case, was determinable by the District Court, however labeled. P. 502.

   (3) Whether the particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. P. 503.

   (4) If the District Court had erred in dealing or in failing to deal with any issue involved, the remedy was by appeal. P. 503.

109 F. 2d 714, affirmed.

CERTIORARI, 310 U. S. 621, to review the reversal of a decree of the District Court, 27 F. Supp. 44, setting aside, on motion, for want of jurisdiction, a former decree which had been rendered under § 9 (a) of the Trading with the Enemy Act.

Assistant Attorney General Shea, with whom *Solicitor General Biddle* and *Messrs. Francis J. McNamara, Melvin H. Siegel,* and *Richard H. Demuth* were on the brief, for petitioner.

A suit under § 9 (a) of the Trading with the Enemy Act is a suit against the United States; the District Court has jurisdiction over it only to the extent to which the United States has consented to be sued. One of the conditions imposed by this Act is that the suit shall be brought by one who is not an "enemy." This condition was plainly not met.

At the time when the suit was commenced, all the assets of the partnership of Crossman & Sielcken, including the claim sued on, had passed, pursuant to the partnership agreement, to the estate of Sielcken, and neither Sorenson nor Nielsen had any personal interest in the recovery. It is clear, therefore, that the suit was brought on behalf of Sielcken's estate. At the time of his death, Sielcken was an "enemy." The status of the estate was that of an enemy. The estate owned the debt claim and was the sole party interested in the recovery. It is, therefore, perfectly apparent that the suit against the Custodian on the claim was not one authorized by § 9 (a).

Since the District Court had no power in the case, its judgment was void and was properly vacated on the present motion. *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506.

The opposite conclusion reached by the court below was based on the premise that the jurisdictional issue was adjudicated in the original action and that therefore the judgment entered was beyond attack, even though the

court which entered it was entirely without jurisdiction. This conclusion was thought to be required by the decision in *Stoll* v. *Gottlieb,* 305 U. S. 165. The court below further held that the 1929 judgment was beyond attack even if the jurisdictional issue was not adjudicated in the original action. This ruling was thought to be required by the decision in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371. This court has since held that a judgment rendered against the United States without its consent is "void" and that such a judgment is not *res judicata* of the jurisdiction of the court in which it was rendered, at least where the jurisdictional issue was not adjudicated in the original suit. *United States* v. *U. S. Fidelity & Guaranty Co., supra.* It is the Government's position that the present case falls directly within the rule of the *Fidelity & Guaranty Co.* case.

The doctrine of *res judicata* may be subject to other and competing policies. Here the private interest in the finality of litigation must, we believe, yield to the public policy which forbids suits against the United States without its consent, a policy peculiarly strong in the case of this statute.

Moreover, a motion to vacate is not a collateral attack but a method of direct review to which the doctrine of *res judicata* is not applicable. The decree under review was simply an exercise by the District Court of its plenary power to vacate its own judgments at any time for want of jurisdiction.

Mr. Nathan L. Miller, with whom *Messrs. Leonard B. Smith* and *Selden Bacon* were on the brief, for respondents.

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

In a suit brought in the District Court of the United States for the Southern District of New York under

§ 9 (a) of the Trading with the Enemy Act,[1] a decree was entered on December 30, 1929, directing payment to the plaintiffs of a stated amount out of the property of a German corporation which had been seized by the Alien Property Custodian. There was no appeal and the amount awarded was paid.

In 1938 the United States moved upon affidavits to set aside the decree, contending that the court had been without jurisdiction. The District Court granted the motion upon that ground. 27 F. Supp. 44. The Circuit Court of Appeals reversed and reinstated the original decree. 109 F. 2d 714. Certiorari was granted. 310 U. S. 621.

It appears that the suit had been brought in 1927 by John S. Sorenson and Thorlief S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken. The bill of complaint alleged that plaintiffs and Hermann Sielcken, the deceased partner, were citizens and residents of the United States; that the partnership had its principal place of business in New York City and had not at any time been a "resident" in enemy territory and had not been an enemy or ally of enemy within the meaning of the Trading with the Enemy Act; that Zentral-Einkaufs-Gesellschaft, m. b. H., a German corporation described as Z. E. G., was indebted to Crossman & Sielcken for cargoes purchased by the latter for Z. E. G. during 1915 and consigned to neutral ports where they had been seized and condemned by the British Government; and that the Alien Property Custodian had assets of Z. E. G. which had been seized under the Trading with the Enemy Act. The bill prayed for a decree establishing the debt claimed by the plaintiffs and ordering its payment to them out of the property so held. The bill declared that it was filed pursuant to § 9 (a) of the Trading with

[1] 40 Stat. 411, 419, as amended, 42 Stat. 1511.

the Enemy Act and that the court had jurisdiction to entertain it by virtue of the express terms of that provision.

The defendants, the Alien Property Custodian and the Treasurer of the United States appeared generally. They moved to dismiss the bill on the grounds (1) that it appeared affirmatively therefrom that no debt was owing to the plaintiffs from any enemy whose property had been seized and was then held, (2) that it appeared affirmatively that no debt was owing to the plaintiffs by Z. E. G., and (3) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the provisions of the Act. The defendants also answered denying knowledge as to the averments of the bill which set forth the citizenship and residence of the plaintiffs and Sielcken and the *locus* of the partnership, and those concerning the transactions said to have given rise to the debt. As an affirmative defense, it was alleged that there were prior claims to the seized property of Z. E. G. The latter being joined as defendant also answered putting in issue allegations relating to the claim and setting up various affirmative defenses. One of these asserted that plaintiffs did not have title to the cause of action, since the Alien Property Custodian was alleged to have seized the assets of Crossman & Sielcken as an enemy firm because Sielcken resided in Germany and became an enemy. Other defenses of Z. E. G. averred that the partnership of Crossman & Sielcken had been dissolved through the outbreak of the war, and that the claim thereupon had passed to Sielcken and upon his death to his German executors who had entered into an arbitration agreement with Z. E. G., and that the arbitrators had found no liability on its part.

On the trial, at the close of the evidence on both sides, defendants moved to dismiss upon the ground that plaintiffs had failed to prove their case. The District Court denied the motions and held that the partnership had

not been dissolved by the outbreak of the war and that Z. E. G. was indebted as claimed; that the executors of Sielcken in Germany had no authority to dispose of a partnership asset which had come into existence long prior to our entering the war; and that plaintiffs were entitled to a decree for the relief prayed for. Decree was entered accordingly.

While the present motion to vacate the decree was upon the sole ground that the court had no jurisdiction to enter it, there was some attempt in the affidavits on the motion to show that the decree was collusive. But, as the Circuit Court of Appeals observed, there was no bill of review presenting such a question and no justification for setting aside a decree upon that ground merely upon affidavits. The Government expressly disclaims any challenge to that ruling. As to the question of jurisdiction, the Circuit Court of Appeals held that the District Court upon the trial of the suit was obliged to resolve disputed questions of fact and that its decision that the jurisdictional facts were established could not be attacked collaterally. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371.

Petitioner thus states the question upon which review is asked in this Court: "Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an 'enemy,' as defined by that Act."

Petitioner argues that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus the suit was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.

We hold the argument untenable. There is no question here of the sort presented in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity. The United States had expressly consented in § 9 (a) of the Trading with the Enemy Act that suits might be brought by a non-enemy claimant to have his claim against an enemy debtor satisfied out of the latter's property held by the Alien Property Custodian. The pertinent parts of the section are set forth in the margin.[2]

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[2] "Sec. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the

The statute provides that any person not an enemy or ally of enemy [3] "claiming" any interest or right in the property seized or to whom any debt may be owing by the alien enemy may sue the Custodian and Treasurer. He may sue "to establish the interest, right, title, or debt so claimed." The court is to determine whether his claim is established. If the claim is "so established," the court is to order the delivery of property or payment "to which the court shall determine said claimant is entitled." Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of the claim.

The suit in question was precisely within the terms of the Act. It was a suit by plaintiffs Sorenson and Nielsen as surviving partners, in which they alleged their citizenship and residence in the United States (and this does not now appear to be questioned), to recover a debt claimed to be owing to the firm by an enemy corporation. The allegations of the bill of complaint met the requirements of the statute in every respect. It

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case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ."

[3] Section 2 of the Trading with the Enemy Act provides:

"Sec. 2. The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

set forth the plaintiffs' claim, their non-enemy status, the transactions out of which their claim arose, and that they had given notice of the claim as the statute required. The denials of the answers and the affirmative defenses presented issues which the court was competent to try. All these issues were necessarily before the court in the performance of its statutory duty to determine whether the plaintiffs had established their claim to the debt. Thus, the status of the plaintiffs, of the partnership, and of Sielcken, the deceased partner, the effect of his death, his interest in the assets under the partnership agreement, the nature of the transactions with Z. E. G., whether it was indebted to the firm and whether the surviving partners were entitled to recover the debt, that is, every issue which could be litigated in the suit was by the very terms of the Act submitted to the determination of the court.

Petitioner says that the jurisdictional point was not contested or adjudicated at the trial. That, while the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death it was the duty of the surviving partners to pay over to his executor the capital, property and business of the firm, it was not suggested that these facts raised the jurisdictional issue. Petitioner urges that the District Judge held that while Sielcken may have been an 'enemy' as defined in the Act, 'he did not become an enemy within the meaning of the dissolution doctrine, at least so far as transactions occurring prior to the war were concerned.' And to support the argument, petitioner relies upon a colloquy between the District Judge and counsel in the course of the trial. Respondent rejoins that in the same colloquy the District Judge observed that 'the partnership agreement was between American citizens' and that it did not follow from the war and the provisions of the Trading with the Enemy Act that Sielcken was

'an alien enemy in the sense that a national of the country with which we are at war is an alien enemy.' And the District Judge further observed that the status of the property in question 'had become fixed prior to the war' and that it was not a consequence of the war that the partnership was so far dissolved 'as to change the rights with respect to that property.' From any point of view, the colloquy affords no adequate basis for petitioner's contention. We agree with the Circuit Court of Appeals that when the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue under the Trading with the Enemy Act.

By the provisions of that Act the jurisdiction of the District Court attached when the suit was brought upon the claim which the plaintiffs as non-enemy claimants set forth. However the issues were labeled the court was authorized to determine them. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 274; *Stoll* v. *Gottlieb, supra,* p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479; *Chicot County Drainage District* v. *Baxter State Bank, supra; Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken.

The judgment of the Circuit Court of Appeals is

Affirmed.

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

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HAMMEL ET UX.

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

No. 49. Argued December 11, 1940.—Decided January 6, 1941.

1. A loss sustained by an individual taxpayer upon the foreclosure sale of an interest in real estate which he had acquired for profit, *held,* in computing taxable income under the Revenue Act of 1934, deductible only to the limited extent allowed by §§ 23 (j) and 117 (d) for losses from "sales" or exchanges of capital assets, and not in full under § 23 (e) (2). Pp. 505, 510.
2. The language, the purpose, and the legislative history of the provisions of the Revenue Act of 1934 relating to capital gains and losses support the view that no distinction was intended between losses from forced sales and losses from voluntary sales of capital assets. P. 510.
3. Courts are not free to reject the literal or usual meaning of the words of a statute, when adoption of that meaning will not lead to absurd results nor thwart the obvious purpose of the statute. P. 510.
4. In this case, the foreclosure sale, and not the decree of foreclosure, was the definitive event which established the loss within the meaning and for the purpose of the Revenue Act. P. 512.
5. The view that the loss in this case may not be treated as a loss from a sale because by the state law the vendor in a land contract may declare a forfeiture upon default, can not be sustained, since it does not appear from the record that the contract in this case contained a forfeiture clause, nor that there was in fact a forfeiture apart from the foreclosure sale. P. 512.

108 F. 2d 753, reversed.

CERTIORARI, 310 U. S. 619, to review the affirmance of a decision of the Board of Tax Appeals redetermining a deficiency in income tax.

Mr. Norman D. Keller, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. John J. Sloan for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to say whether a loss sustained by an individual taxpayer upon the foreclosure sale of his interest in real estate, acquired for profit, is a loss which, under § 23 (e) (2) of the 1934 Revenue Act, 48 Stat. 680, may be deducted in full from gross income for the purpose of arriving at taxable income, or is a capital loss deductible only to the limited extent provided in §§ 23 (e) (2), (j), and 117.

In the computation of taxable income § 23 (e) (2) of the 1934 Revenue Act permits the individual taxpayer to deduct losses sustained during the year incurred in any transaction for profit. Subsection (j) provides that "losses from sales or exchanges of capital assets" shall be allowed only to the extent of $2,000 plus gains from such sales or exchanges as provided by § 117 (d). By § 117 (b) it is declared that "capital assets" "means property held by the taxpayer . . . but does not include stock in trade of the taxpayer . . . or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Respondent taxpayers, with other members of a syndicate, purchased "on land contract" a plot of land in Oakland County, Michigan, for the sum of $96,000, upon a down payment of $20,000. The precise nature of the contract does not appear beyond the fact that payments for the land were to be made in installments, and the vendor retained an interest in the land as security for payment of the balance of the purchase price. Before the purchase price was paid in full the syndicate defaulted on its payments. The vendor instituted foreclosure proceedings by suit in equity in a state court which resulted in a judicial sale of the property, the vendor becoming the purchaser, and in a deficiency judgment against the members of the syndicate. Respond-

ents' contribution to the purchase money, some $4,000, was lost.

The commissioner, in computing respondents' taxable income for 1934, treated the taxpayers' interest in the land as a capital asset and allowed deduction of the loss from gross income only to the extent of $2,000 as provided by §§ 23 (j) and 117 (d), in the case of losses from sales of capital assets. The Board of Tax Appeals ruled that the loss was deductible in full. The circuit court of appeals affirmed, 108 F. 2d 753, holding that the loss established by the foreclosure sale was not a loss from a "sale" within the meaning of § 23 (j). We granted certiorari, 310 U. S. 619, to resolve a conflict of the decision below with that of the court of appeals for the second circuit in *Commissioner* v. *Electro-Chemical Engraving Co.*, 110 F. 2d 614.

It is not denied that it was the foreclosure sale of respondents' interest in the land purchased by the syndicate for profit, which finally liquidated the capital investment made by its members and fixed the precise amount of the loss which respondents seek to deduct as such from gross income. But they argue that the "losses from sales" which by § 23 (j) are made deductible only to the limited extent provided by § 117 (d) are those losses resulting from sales voluntarily made by the taxpayer, and that losses resulting from forced sales like the present not being subject to the limitations of § 117 (d) are deductible in full like other losses under § 23 (e) (2).

To read this qualification into the statute respondents rely on judicial decisions applying the familiar rule that a restrictive covenant against sale or assignment refers to the voluntary action of the covenantor and not to transfers by operation of law or judicial sales *in invitum*. See *Guaranty Trust Co.* v. *Green Cove & M. R. Co.*, 139 U. S. 137; *Gazlay* v. *Williams*, 210 U. S. 41; *Riggs*

v. *Pursell,* 66 N. Y. 193. But here we are not concerned with a restrictive covenant of the taxpayer, but with a sale as an effective means of establishing a deductible loss for the purpose of computing his income tax. The term sale may have many meanings, depending on the context, see Webster's New International Dictionary. The meaning here depends on the purpose with which it is used in the statute and the legislative history of that use. Hence the respondents argue that the purpose of providing in the 1934 Act for a special treatment of gains or losses from capital assets was to prevent tax avoidance by depriving the taxpayer of the option allowed to him by the earlier acts, to effect losses deductible in full by sales of property at any time within two years after it was acquired, which until held for that period was not defined as a capital asset, § 208 Revenue Act of 1924, 43 Stat. 253; § 208 Revenue Act of 1926, 44 Stat. 19, and § 101 of the Revenue Act of 1928, 45 Stat. 811.

It is said that since losses from foreclosure sales not within the control of the taxpayer are not within the evil aimed at by the 1934 Act, they must be deemed to be excluded from the reach of its language. To support this contention respondents rely on the report of the Ways and Means Committee submitting to the House the bill which, with amendments not now material, became the Revenue Act of 1934. The Committee in pointing out a "defect" of the existing law said: "Taxpayers take their losses within the two year period and get full benefit therefrom and delay taking gains until the two-year period has expired, thereby reducing their taxes." H. Rept. 704, 73d Cong., 2d Sess., pp. 9 and 10.

But the treatment of gains and losses from sales of capital assets on a different basis from ordinary gains and losses was not introduced into the revenue laws by the 1934 Act. That had been a feature of every revenue

law beginning with the Act of 1921, 42 Stat. 227, and each had defined as capital losses "losses from sales or exchanges of capital assets." The 1934 Act made no change in this respect but for the first time it provided that "capital assets" should include all property acquired by the taxpayer for profit regardless of the length of time held by him and that capital gains and losses from sales of capital assets should be recognized in the computation of taxable income according to the length of time the capital assets are held by the taxpayer, varying from 100% if the capital asset is held for not more than a year to 30% if it is held more than ten years. § 117 (a). Finally, for the first time, the statute provided that capital losses in excess of capital gains should be deducted from ordinary income only to the extent of $2,000. Thus by treating all property acquired by the taxpayer for profit as capital assets and limiting the deduction of capital losses in the manner indicated, the Act materially curtailed the advantages which the taxpayer had previously been able to gain by choosing the time of selling his property.

The definition of capital losses as losses from "sales" of capital assets, as we have pointed out, was not new. As will presently appear, the legislative history of this definition shows that it was not chosen to exclude from the capital assets provisions losses resulting from forced sales of taxpayers' property. And, if so construed, substantial loss of revenue would result under the 1934 Act, whose purpose was to avoid loss of revenue by the application of the capital assets provisions. In drafting the 1934 Act the Committee had before it proposals for stabilizing the revenue by the adoption of the British system under which neither capital gains nor losses enter into the computation of the tax. In declining to follow this system in its entirety the Committee said: "It is deemed wiser to attempt a step in this direction without

letting capital gains go entirely untaxed." It accordingly reduced the tax burden on capital gains progressively with the increase of the period up to ten years, during which the taxpayer holds the capital asset, and permitted the deduction, on the same scale, of capital losses, but only to the extent that there are taxable capital gains, plus $2,000. In thus relieving capital gains from the tax imposed on other types of income, it cannot be assumed, in the absence of some clear indication to the contrary, that Congress intended to permit deductions in full of losses resulting from forced sales of the taxpayers' property, from either capital gains or ordinary gross income, while taxing only a fraction of the gains resulting from the sales of such property. See *White* v. *United States,* 305 U. S. 281, 292; *Helvering* v. *Inter-Mountain Life Ins. Co.,* 294 U. S. 686, 689, 690.

The taxation of capital gains after deduction of capital losses on a more favorable basis than other income, was provided for by § 206 of the 1921 Revenue Act, as the means of encouraging profit-taking sales of capital investments, H. Rept. No. 350, 67th Cong., 2d Sess., p. 8. *Burnet* v. *Harmel,* 287 U. S. 103, 106. In this section, as in later Acts, capital net gain was defined as "the excess of the total capital gain over the sum of capital deductions and capital losses"; capital losses being defined as the loss resulting from the sale or exchange of capital assets. In submitting the proposed Revenue Act of 1924, the House committee pointed out that the 1921 Act contained no provision for limiting deduction of capital losses where they exceeded the amount of capital gains. H. Rept. No. 179, 68th Cong., 1st Sess., p. 14. This was remedied by providing in § 208 (c) that the amount by which the tax is reduced on account of a capital loss shall not exceed 12½% of the capital loss. In commenting on this provision the Committee said, p. 20: "If the amount by which the tax is to be increased on account of capital gains is limited to 12½% of the capital gain

it follows logically that the amount by which the tax is reduced on account of capital losses shall be limited to the 12½% of the loss." This provision was continued without changes now material until the 1934 Act. § 208 (c) in the 1924 and 1926 Acts; § 101 (b) in the 1928 and 1932 Acts, 47 Stat. 191.

Congress thus has given clear indication of a purpose to offset capital gains by losses from the sale of like property and upon the same percentage basis as that on which the gains are taxed. See *United States* v. *Pleasants,* 305 U. S. 357, 360. This purpose to treat gains and deductible losses on a parity but with a further specific provision provided by § 117 (d) of the 1934 Act, permitting specified percentages of capital losses to be deducted from ordinary income to the extent of $2,000, would be defeated in a most substantial way if only a percentage of the gains were taxed but losses on sales of like property could be deducted in full from gross income. This treatment of losses from sales of capital assets in the 1924 and later Acts and the reason given for adopting it afford convincing evidence that the "sales" referred to in the statute include forced sales such as have sufficed, under long accepted income tax practice, to establish a deductible loss in the case of non-capital assets. Such sales can equally be taken to establish the loss in the case of capital assets without infringing the declared policy of the statute to treat capital gains and losses on a parity.

We can find no basis in the language of the Act, its purpose or its legislative history, for saying that losses from sales of capital assets under the 1934 Act, more than its predecessors, were to be treated any differently whether they resulted from forced sales or voluntary sales. True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, *United*

States v. *Katz,* 271 U. S. 354, 362, or would thwart the obvious purpose of the statute, *Haggar Co.* v. *Helvering,* 308 U. S. 389. But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure.

It is not without significance that Congress, in the 1934 Act, enlarged the scope of its provisions relating to losses from sales of capital assets by including within them losses upon the disposition of the taxpayer's property by methods other than sale and without reference to the voluntary action of the taxpayer. It thus treats as losses from sales or exchanges the loss sustained from redemption of stock, § 115 (c), retirement of bonds, § 117 (f), losses from short sales, § 117 (e) (1), and loss sustained by failure of the holder of an option to exercise it, § 117 (e) (2), although none of these transactions involves a loss from a sale. See *McClain* v. *Commissioner, post,* p. 527.

The scope of the capital loss provisions was still further enlarged by § 23 (k) (2) of the Revenue Act of 1938, 52 Stat. 447, which provides that if securities, which are capital assets, are ascertained to be worthless and are charged off within the taxable year the loss, with an exception not now material, shall be considered as a loss arising from a sale or exchange. These provisions disclose a consistent legislative policy to enlarge the class of deductible losses made subject to the capital assets provisions without regard to the voluntary action of the taxpayer in producing them. We could hardly suppose that Congress would not have made provision for the like treatment of losses resulting from a forced sale of the taxpayer's property acquired for profit either in the 1934 or 1938 Act, if it had thought that the term "sales or exchanges" as used in both acts did not include such sales of the taxpayer's property.

Respondents also advance the argument, sustained in *Commissioner* v. *Freihofer,* 102 F. 2d 787, that the definitive event fixing respondents' loss was not the foreclosure sale but the decree of foreclosure which ordered the sale and preceded it. But since the foreclosure contemplated by the decree was foreclosure by sale and the foreclosed property had value which was conclusively established by the sale for the purposes of the foreclosure proceeding, the sale was the definitive event establishing the loss within the meaning and for the purpose of the revenue laws. They are designed for application to the practical affairs of men. The sale, which finally cuts off the interest of the mortgagor and is the means for determining the amount of the deficiency judgment against him, is a means adopted by the statute for determining the amount of his capital gain or loss from the sale of the mortgaged property.

The court below also thought that the loss suffered by respondents could not be treated as a loss from a sale since by the law of Michigan the vendor upon a land-contract containing the usual forfeiture clause had the right to deprive respondents and their joint adventurers of all interest in the property by a declaration of forfeiture, and that the only additional advantage of foreclosure was to obtain a deficiency judgment. But there is nothing in this record to show that the land contract in this case contained a forfeiture clause. Even if it did, it does not appear that there was in fact a forfeiture apart from the sale on foreclosure. Cf. *Davidson* v. *Commissioner,* 305 U. S. 44, 46; *Helvering* v. *Midland Insurance Co.,* 300 U. S. 216, 224; *United States* v. *Phellis,* 257 U. S. 156, 172.

Reversed.

Mr. Justice Roberts is of opinion that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 108 F. 2d 753.

ELECTRO-CHEMICAL ENGRAVING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 62. Argued December 12, 1940.—Decided January 6, 1941.

A loss sustained by a corporation upon foreclosure sale of its mortgaged property, *held*, in computing taxable income under the Revenue Act of 1934, deductible only to the limited extent allowed by §§ 23 (j) and 117 (d) for losses from "sales" or exchanges of capital assets. *Helvering* v. *Hammel, ante,* p. 504, followed. P. 514.

110 F. 2d 614, affirmed.

CERTIORARI, 310 U. S. 622, to review the reversal of a decision of the Board of Tax Appeals redetermining a deficiency in income tax.

Mr. George P. Halperin, with whom *Mr. Bernard S. Barron* was on the brief, for petitioner.

Mr. Norman D. Keller, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a companion case to *Helvering* v. *Hammel, ante,* p. 504.

The question is whether the loss suffered by petitioner on foreclosure sale of his mortgaged property, acquired for profit, may be deducted in full from gross income or only to the extent provided by § 117 (d) of the 1934 Revenue Act. The statutory provisions involved are those of the 1934 Act relating to capital gains or losses, particularly "losses from sales or exchanges of capital assets" considered in the *Hammel* case which are made applicable to petitioner, a corporation, by § 23 (f) (j).

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The Board of Tax Appeals ruled that petitioner's loss was deductible in full from its ordinary income. The court of appeals for the second circuit reversed the Board, 110 F. 2d 614, holding that the loss sustained by petitioner was a loss from a sale of capital assets, § 23 (j), which under § 117 (d) could be deducted from the gross income only to the extent of capital gains, plus $2,000. We granted certiorari, 310 U. S. 622, so that the case might be considered with the conflicting decision of the court of appeals for the sixth circuit in the *Hammel* case, 108 F. 2d 753. For the reasons stated in our opinion in the *Hammel* case we think that this case was rightly decided below.

Affirmed.

MR. JUSTICE ROBERTS dissents.

H. J. HEINZ COMPANY *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 73. Argued December 17, 18, 1940.—Decided January 6, 1941.

1. The question of the responsibility of an employer, under the National Labor Relations Act, for unauthorized activities of supervisory employees is not one of legal liability on principles of agency or *respondeat superior,* but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them in the bargaining process any advantage of a kind which the Act proscribes. To that extent the employer is amenable to the Board's authority to prevent repetition of such activities and to remove the consequences of them upon the employees' right of self-organization. Pp. 518, 521.

So *held* where the employer, when advised of activities of supervisory employees encouraging the formation of a plant union, took no step to notify the employees that such activities were unauthorized, or to correct their impression that support of a rival labor union was not favored by the employer and would result in reprisals. P. 521.

2. Whether the continued existence of a labor union, the formation of which was influenced by unfair labor practices, constitutes an obstacle to the employees' right of self-organization, is a question of fact to be determined by the Board from all the circumstances attending those practices. P. 522.
3. An order of the National Labor Relations Board requiring the disestablishment of a labor union, the formation of which was influenced by unfair labor practices, *held* supported by the evidence. P. 522.
4. Refusal of an employer, on request of a labor organization, to sign a written contract embodying the terms of an agreement which he has reached with it concerning wages, hours, and working conditions, is a refusal to bargain collectively and an unfair labor practice under § 8 (5) of the Act. P. 525.
5. Under § 10 (c) of the National Labor Relations Act, the Board may require an employer who has reached an agreement with a labor organization concerning wages, hours, and working conditions, to sign a written contract embodying the terms of the agreement. P. 526.

110 F. 2d 843, affirmed.

CERTIORARI, 310 U. S. 621, to review a judgment directing enforcement of an order of the National Labor Relations Board.

Mr. Earl F. Reed, with whom *Messrs. Roy G. Bostwick* and *Donald W. Ebbert* were on the brief, for petitioner.

Assistant Solicitor General Fahy, with whom *Solicitor General Biddle,* and *Messrs. Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Three questions are presented by the petition for certiorari in this case.

First. Whether there is support in the evidence for the finding of the National Labor Relations Board that petitioner has been guilty of the unfair labor practices

defined by § 8 (1) and (2) of the Act, interference with the exercise by its employees of their rights of self-organization guaranteed by § 7 of the Act, and more particularly interference with the formation and organization of a labor union of its employees.

Second. Whether the National Labor Relations Board exceeded its authority in ordering the disestablishment of a labor union in whose organization petitioner had interfered, and

Third. Whether the Board could validly find that petitioner's refusal to join with representatives of the labor organization authorized to represent its employees in collective bargaining, in signing a written contract embodying the terms of their agreement concerning wages, hours and working conditions, constituted a refusal to bargain collectively in violation of § 8 (5) of the Act, and whether the Board exceeded its authority in ordering petitioner to join in signing the agreement.

This is a proceeding brought by the National Labor Relations Board in the Court of Appeals for the Sixth Circuit to enforce the Board's order directing petitioner to cease certain unfair labor practices in which it found that petitioner had engaged, in connection with the organization of the Heinz Employees Association, a plant labor organization of petitioner's employees; to disestablish the Association; to recognize and bargain collectively with the Canning and Pickle Workers Local, Union No. 325, a labor organization affiliated with the American Federation of Labor; and to sign a written contract embodying any agreement which petitioner and the Union may reach respecting wages, hours and working conditions of petitioner's employees. The court of appeals confirmed the findings of the Board and directed compliance with the Board's order without modification. 110 F. 2d 843. We granted certiorari, 310 U. S. 621, the questions raised by the petition being of public impor-

tance in the administration of the National Labor Relations Act.

The Board found that during April and May, 1937, the two rival labor organizations, the Association and the Union, sought to organize petitioner's employees at its Pittsburgh plant. Petitioner's proposal that an election be held to determine which organization represented a majority of its employees was rejected by the Union which called a strike on May 24, 1937. The strike was ultimately settled by a written contract signed by petitioner, the Union, and the Association, which provided for an election, by the employees, under the supervision of a regional director of the National Labor Relations Board for the choice of an organization to represent them in collective bargaining. Meanwhile, and before the election, a majority of petitioner's two thousand employees at the Pittsburgh plant had signed petitions for membership in the Association, but upon the election held June 8, 1937, a majority of the employees cast their ballots for the Union. Petitioner has since recognized and bargained with the Union, but has refused to embody its agreement with the Union in a written contract.

Before the election the Union had lodged a complaint with the Board concerning the participation by petitioner in the attempted organization of the Association by petitioner's employees. The Board found that petitioner had been guilty of unfair labor practices by interfering in the organization of the Association, contrary to the Act. It found in detail that petitioner, through superintendent, foremen and other supervising employees, had interfered with, restrained and coerced its employees in the exercise of their rights to organize in violation of §§ 7, 8 (1) of the Act; that it had dominated and interfered with the formation of the Association and contributed to its support within the meaning of § 8 (2), and that it had refused to sign an agreement with the Union.

On the basis of these and subsidiary findings which need not now be stated, the Board made its order, the terms of which so far as now relevant have already been set forth.

Petitioner's Responsibility for Unfair Labor Practices. It is unnecessary to make a detailed examination of the evidence supporting the Board's findings respecting unfair labor practices both because the court below, after a thorough examination of the record has confirmed the Board's findings, and because of the nature of petitioner's contention with respect to them. Petitioner does not deny that there is evidence supporting the findings that petitioner's superintendent, during the organization campaign, upbraided employees for attending Union meetings, threatened one with discharge if he joined the Union, spoke to them disparagingly of the Union and directed some of petitioner's foremen to enroll the employees in the Association; or that there was evidence supporting the finding that a general foreman working throughout petitioner's Pittsburgh plant was active in disparaging the Union and its members to employees, and in urging them to repudiate the Union organization, or that three other foremen in charge of particular buildings or departments were active in dissuading employees from joining the Union. All three spoke disparagingly of the Union, one at a meeting of employees which he had called; and two were active in questioning employees concerning their labor union sympathies. Two of them threatened employees with discharge or loss of work or privileges if the Union were recognized.

There was also evidence that other foremen or forewomen in charge of large groups of employees engaged in similar activities; and that some solicited employees to join the Association; that one of the three foremen induced an employee to solicit signatures to the Association petition during working hours without loss of pay,

and suggested the names of other employees to aid in this work. There was also evidence that leaders or supervisors of employee groups were allowed to go about the plant freely during working hours and without loss of pay to solicit memberships in the Association which was done in the presence of the foremen.

Petitioner does not seriously dispute this evidence or challenge the findings of the Board summarizing it. The contention is that the activities of these supervisors of employees are not shown to have been authorized or ratified by petitioner; that following a complaint by a representative of the Union, about May 1st, one of petitioner's officers instructed the superintendent that the employees had a right to organize and that he wished the supervising force to understand that they should not be interfered with in any way in organizing, and that on May 21st the officer in question called a meeting of the supervisory force at which he gave like instructions; that there is no evidence of like activities after this time and that since the election petitioner has consistently recognized and bargained with the Union. From all this petitioner concludes that it is not chargeable with any responsibility for the acts of its supervisory employees and that consequently the evidence does not support the findings of unfair labor practices on its part, or justify the Board's order prohibiting petitioner, its officers and agents from interfering with the administration of the Association or contributing to its support.

Notwithstanding the knowledge from the start of some of petitioner's officers, of the organization campaign, and notwithstanding the unusual excitement and activity in petitioner's plant attending it, we assume that all were unaware of the activities of its supervisory staff complained of, and did nothing to encourage them before the complaint of their activities made by a representative of the Union about May 1st. At that time the cam-

paign for membership in the rival unions was at its height and resulted, as announced some three or four weeks later, in a majority of petitioner's employees signing as members of the Association.

It is conceded that petitioner's superintendent and foremen have authority to recommend the employment and discharge of workmen. It is in evidence that they can recommend wage increases and that the group leaders also issued orders directing and controlling the employees and their work, with authority to recommend their discharge. There is evidence supporting the Board's conclusion that the employees regarded the foremen and the group leaders as representatives of the petitioner and that a number of employees signed as members of the Association only because of the fear of loss of their jobs or of discrimination by the employer induced by the activities of the foremen and group leaders.

We do not doubt that the Board could have found these activities to be unfair labor practices within the meaning of the Act if countenanced by petitioner, and we think that to the extent that petitioner may seek or be in a position to secure any advantage from these practices they are not any the less within the condemnation of the Act because petitioner did not authorize or direct them. In a like situation we have recently held that the employer, whose supervising employees had, without his authority, so far as appeared, so participated in the organization activities of his employees as to prejudice their rights of self-organization, could not resist the Board's order appropriately designed to preclude him from gaining any advantage through recognizing or bargaining with a labor organization resulting from such activities. *International Association of Machinists* v. *National Labor Relations Board, ante,* p. 72. See *National Labor Relations Board* v. *Link-Belt Co., post,* p. 584.

The question is not one of legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior,* but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them.

This is the more so here where petitioner, when advised of the participation of his supervising employees in the organization campaign, took no step, so far as appears, to notify the employees that those activities were unauthorized, or to correct the impression of the employees that support of the Union was not favored by petitioner and would result in reprisals. From that time on the Board could have found that petitioner was as responsible for the effect of the activities of its foremen and group leaders upon the organization of the Association as if it had directed them in advance. The Board could have concluded that this effect was substantial, for it was in the succeeding three weeks that more than one-half of the majority of petitioner's employees who joined the Association signed their petitions for membership. We think there was adequate basis for the Board's order prohibiting petitioner, its officers and agents, from interfering with the exercise of its employees' rights of self-organization or with the administration of the Association or contributing to its support.

The Order Disestablishing the Association. What we have said of the unfair labor practices found by the Board, when considered with its unchallenged findings as to the relations of petitioner to the two unions, affords

the answer to petitioner's contention that the Board was without authority to compel disestablishment of the Association. Disestablishment is a remedial measure under § 10 (c) to be employed by the Board in its discretion to remove the obstacle to the employees' right of self-organization, resulting from the continued or renewed recognition of a union whose organization has been influenced by unfair labor practices. Whether this recognition is such an obstacle is an inference of fact to be drawn by the Board from all the circumstances attending those practices. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 250.

Petitioner argues that as it has now recognized the Union and bargains with it, it should be equally free to recognize the Association instead of the Union whenever the former represents a majority of the employees. But in weighing this contention the Board could consider, as it did, that petitioner had failed to notify its employees that it repudiated the participation of its supervising employees in the organization of the Association and so has not removed the belief of the employees that petitioner favored and would continue to favor the Association and the employees joining it over others; that it had not mentioned the name of the Union in its bulletins announcing the terms of its agreement with the Union, and although it had reached an agreement with the Union had persistently refused to sign any written contract with it.

From this and other circumstances disclosed by the evidence, the Board inferred, as it might, that the influence of the participation of petitioner's employees in the organization of the Association had not been removed and that there was danger that petitioner would seek to take advantage of such continuing influence to renew

its recognition of the Association and control its action. This we think afforded adequate basis for the Board's order. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra; National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461, 462; *National Labor Relations Board* v. *Link-Belt Co., post,* p. 584. Nothing in the order precludes members of the Association from establishing an organization independently of participation by petitioner and its officers and agents, and from securing recognition through certification of the Board or an election as provided by § 9 (c) of the Act.

The Employer's Refusal to Sign a Written Agreement. It is conceded that although petitioner has reached an agreement with the Union concerning wages, hours and working conditions of the employees, it has nevertheless refused to sign any contract embodying the terms of the agreement. The Board supports its order directing petitioner, on request of the Union, to sign a written contract embodying the terms agreed upon on the ground, among others, that a refusal to sign is a refusal to bargain within the meaning of the Act.

In support of this contention it points to the history of the collective bargaining process showing that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms.[1] This experience has shown that refusal to

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[1] Lewis L. Lorwin, The American Federation of Labor, p. 309; Commons and Associates, History of Labor in the United States, vol. II, pp. 179–181, 423–424, 480; Perlman and Taft, History of Labor in the United States, 1896–1932, vol. IV, pp. 9–10; Paul Mooney, Collective Bargaining, pp. 13–14; Twentieth Century Fund, Inc., Labor and the Government, p. 339.

Concerning the growth and extent of signed trade agreements, see National Labor Relations Board, Division of Economic Research

sign a written contract has been a not infrequent means of frustrating the bargaining process through the refusal to recognize the labor organization as a party to it and the refusal to provide an authentic record of its terms which could be exhibited to employees, as evidence of the good faith of the employer. Such refusals have proved fruitful sources of dissatisfaction and disagreement.[2] Contrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.[3]

Before the enactment of the National Labor Relations Act it had been the settled practice of the administrative agencies dealing with labor relations to treat the signing of a written contract embodying a wage and hour agreement as the final step in the bargaining process.[4] Congress, in enacting the National Labor Relations Act, had before it the record of this experience, H. Rept. No. 1147, 74th Cong., 1st Sess., p. 5, and see also pp. 3, 7, 15–18, 20–22, 24; S. Rept. No. 573, 74th Cong., 1st Sess., pp. 2, 8, 9, 13, 15, 17. The House Committee recom-

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Bull. No. 4, Written Trade Agreements in Collective Bargaining, pp. 213–236, 49–209; U. S. Dept. of Labor, Bureau of Labor Statistics, Five Years of Collective Bargaining, pp. 5–7; Saposs and Gamm, Rapid Increase in Contracts, 4 Labor Relations Reporter No. 15, p. 6.

[2] Sumner H. Slichter, Annals of the American Academy (March, 1935), pp. 110–120; R. R. R. Brooks, When Labor Organizes, p. 224. Cf. Matter of Inland Steel Co., 9 N. L. R. B. 783, 796–797.

[3] Carroll R. Daugherty, Labor Problems in American Industry (Rev. ed. 1938), pp. 936–937; Mitchell, Organized Labor, p. 347; George G. Groat, An Introduction to the Study of Organized Labor in America (2d ed. 1926), pp. 337–339, 341, 345, 346; First Annual Report, National Mediation Board, pp. 1–2.

[4] The National Mediation Board administering the Railway Labor Act of 1926, as amended in 1934, 44 Stat. 577, 48 Stat. 1185, interpreted that Act which imposed a duty "to exert every reasonable

mended the legislation as "an amplification and clarification of the principles enacted into law by the Railway Labor Act and by § 7 (a) of the National Industrial Recovery Act." H. Rept. 1147, *supra,* p. 3 and stated, page 7, that §§ 7 and 8 of the Act guaranteeing collective bargaining to employees was a reënactment of the like provision of § 7 (a) of the National Industrial Recovery Act, see *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 236; *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332, 342.

We think that Congress, in thus incorporating in the new legislation the collective bargaining requirement of the earlier statutes included as a part of it, the signed agreement long recognized under the earlier acts as the final step in the bargaining process. It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow, as petitioner argues, that, having reached an agreement, he can refuse to sign it, because he has never agreed to sign one. He may never have agreed to bargain but the

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effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . .," to require signed contracts. See First Annual Report, National Mediation Board (1935), pp. 1–2, 36.

The National Labor Board, created to administer § 7 (a) of the National Industrial Recovery Act, 48 Stat. 195, held that the duty to bargain collectively imposed by that section included an obligation to embody agreed terms in a signed trade agreement. See, Matter of Harriman Hosiery Mills, 1 N. L. B. 68; Matter of Pierson Mfg. Co., 1 N. L. B. 53; Matter of National Aniline & Chemical Co., 2 N. L. B. 38; Matter of Connecticut Coke Co., 2 N. L. B. 88. See, also, Matter of Whittier Mills Co., Textile Labor Relations Board, Case No. 34. Its successor, the first National Labor Relations Board did likewise. See, Matter of Houde Engineering Co., 1 N. L. R. B. (old) 35; Matter of Denver Towel Supply Co., 2 N. L. R. B. (old) 221; Matter of Colt's Patent Fire Arms Co., 2 N. L. R. B. (old) 155.

statute requires him to do so. To that extent his freedom is restricted in order to secure the legislative objective of collective bargaining as the means of curtailing labor disputes affecting interstate commerce. The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A business man who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

Petitioner's refusal to sign was a refusal to bargain collectively and an unfair labor practice defined by § 8 (5). The Board's order requiring petitioner at the request of the Union to sign a written contract embodying agreed terms is authorized by § 10 (c). This is the conclusion which has been reached by five of the six courts of appeals which have passed upon the question.[5]

Affirmed.

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

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[5] *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board,* 114 F. 2d 930 (C. C. A. 1st); *Art Metals Construction Co.* v. *National Labor Relations Board,* 110 F. 2d 148 (C. C. A. 2d); *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. 2d 632 (C. C. A. 4th); *Wilson & Co., Inc.* v. *National Labor Relations Board,* 115 F. 2d 759 (C. C. A. 8th); *Continental Oil Co.* v. *National*

Counsel for Parties.

McCLAIN *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 55. Argued December 12, 1940.—Decided January 6, 1941.

1. Losses sustained by holders of corporate and municipal bonds upon their surrender for cash to the obligors, *held* deductible, in computing taxable income under the Revenue Act of 1934, only to the limited extent provided by § 117 (d), relating to losses from sales or exchanges of capital assets, and not in full as bad debts under § 23 (k). The amounts received in such transactions are amounts received upon the "retirement" of the bonds, within the meaning of § 117 (f). P. 529.
2. In common understanding and according to dictionary definition the word "retirement" is broader in meaning than the word "redemption." P. 530.
3. The correction of inconsistencies and inequalities in the operation of a statute of the United States is for Congress and not the courts. P. 530.

110 F. 2d 878, affirmed.
108 F. 2d 642, reversed.

CERTIORARI, 310 U. S. 620, to review judgments which, in No. 55 affirmed, and in No. 58 reversed, orders of the Board of Tax Appeals sustaining the Commissioner's disallowance of deductions in income tax returns. See 40 B. T. A. 60.

Mr. Edward D. Smith, Jr., with whom *Mr. M. E. Kilpatrick* was on the brief, for petitioner in No. 55.

Labor Relations Board, 113 F. 2d 473 (C. C. A. 10th). Contra, *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9 (C. C. A. 7th); *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, 111 F. 2d 869 (C. C. A. 7th).

*Together with No. 58, *Helvering, Commissioner of Internal Revenue*, v. *Thomson, Executrix*, on writ of certiorari, 310 U. S. 620, to the Circuit Court of Appeals for the Second Circuit.

Miss Helen R. Carloss, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the Commissioner of Internal Revenue.

Mr. T. F. Davies Haines for respondent in No. 58.

Mr. Justice Roberts delivered the opinion of the Court.

These cases present the question whether upon the surrender of bonds or debentures in exchange for a money payment less than cost, a taxpayer may deduct the loss from his gross income as a bad debt under § 23 (k) [1] or must treat it as a capital loss under § 117 (f) [2] of the Revenue Act of 1934.

In number 55 it appears that the taxpayer owned $15,000 par value of bonds of a water district, acquired by gift. The district being in financial difficulties offered to pay $7,476.75 for them. The offer was accepted and the bonds delivered. In his tax return the taxpayer claimed a deduction of $7,523.25 as for a bad debt charged off. The Commissioner disallowed the deduction, and the Board of Tax Appeals and the Circuit Court of Appeals [3] sustained his ruling.

In number 58 the facts are that the taxpayer bought $25,000 par value of debentures for $24,750. The issuer's affairs were placed in the hands of a receiver. A plan of reorganization provided that the receiver should pay $5.00 for each $1000 debenture surrendered for cancellation. The taxpayer availed himself of this provision, and in his tax return claimed a deduction of $24,625, as for a bad debt. The Commissioner disallowed the claim,

[1] 48 Stat. 689; 26 U. S. C. § 23 (k).
[2] 48 Stat. 715; 26 U. S. C. § 117 (f).
[3] 110 F. 2d 878.

and the Board of Tax Appeals affirmed his decision. The Circuit Court of Appeals reversed.[4]

By reason of the conflict of decision we granted certiorari in both cases.

The earlier revenue acts contained sections similar to 23 (k) of the Act of 1934. They also embodied provisions for calculation of taxes on capital net gains. None of them included any section like 117 (f). Prior to the adoption of the 1934 Act it had been held that the phrase "sale or exchange" of capital assets, employed in those Acts, was not descriptive of the redemption or call for repayment of corporate securities, and hence gain thereby occasioned was to be treated as ordinary income,[5] and loss so arising was to be deducted from gross income as a bad debt.[6]

The Revenue Act of 1934, by sub-section (f) of § 117, provided that for the purposes of the title dealing with capital gains and losses, "amounts received by the holder upon the retirement" of such securities as are here involved, "shall be considered as amounts received in exchange therefor."

It is plain that Congress intended by the new subsection (f) to take out of the bad debt provision certain transactions and to place them in the category of capital gains and losses. The question is whether by employing the word "retirement" the transactions here involved were so transferred. We hold that they were.

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[4] 108 F. 2d 642.

[5] Watson *v.* Commissioner, 27 B. T. A. 463; Braun *v.* Commissioner, 29 B. T. A. 1161. This view was adopted by this Court as respects the Revenue Act of 1928, subsequent to the adoption of the Act of 1934. *Fairbanks* v. *United States,* 306 U. S. 436.

[6] *Commonwealth Bank* v. *Lucas,* 59 App. D. C. 317; 41 F. 2d 111; *Lebanon National Bank* v. *Commissioner,* 76 F. 2d 792; *Pacific National Bank* v. *Commissioner,* 91 F. 2d 103.

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"Retirement" aptly describes what occurred in the instant cases. The statute does not use the word in an unusual or artificial sense. In common understanding and according to dictionary definition the word "retirement" is broader in scope than "redemption"; is not, as contended, synonymous with the latter, but includes it. Nothing in the legislative history of the provision requires us to attribute to the term used a meaning narrower than its accepted meaning in common speech.

The taxpayer in number 58 urges that to hold subsection (f) applicable in his case would give the provision an unjust effect, since, if he had refused to surrender his debentures for the trifling consideration offered, he could have charged off their whole cost as a bad debt under § 23 (k). The answer is that we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation.

The court below held in number 58 that the phrase "retirement" could properly be applied only to voluntary action on the debtor's part in fulfilment of his promise to pay. This is but to say that retirement means no more than call and redemption pursuant to the terms of the obligation. But as we have said, the two are not in common understanding the same.

The judgment in number 55 is affirmed, and that in number 58 is reversed.

No. 55, affirmed.
No. 58, reversed.

VOELLER ET AL. *v.* NEILSTON WAREHOUSE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 97. Submitted December 18, 1940.—Decided January 6, 1941.

A state statute providing that, where a corporation authorizes the sale or other disposition of all or substantially all of its assets, a dissenting shareholder shall have the right to be paid the fair cash value of his shares, and that the amount demanded of the corporation by the dissenting shareholder as such fair cash value shall, after six months,—if the corporation does not make a counter-offer, request an appraisal, or abandon the sale—"conclusively be deemed to be equal to" the fair cash value, *held,* in its operation as to majority stockholders, not a deprivation of their property without due process in violation of the Fourteenth Amendment, although the statute made no provision for notice to them as individuals, or opportunity for them to be heard, in respect to the dissenting stockholder's demand. P. 535.

The corporation sufficiently represents the majority stockholders, for the purposes of notice and of invoking the jurisdiction of this Court on the constitutional question. P. 537.

136 Ohio St. 427; 26 N. E. 2d 442, reversed.

CERTIORARI, *post,* p. 624, to review a judgment denying recovery to minority stockholders upon a state statute held unconstitutional.

Messrs. Carrington T. Marshall and *Orland R. Crawfis* submitted for petitioners.

Mr. Francis J. Wright submitted for respondents.

A statute creating a presumption which operates to deny a fair opportunity to rebut it deprives of due process. *Heiner* v. *Donnan,* 285 U. S. 312, 329; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Bailey* v. *Alabama,* 219 U. S. 219. So in the case even of *prima facie* presumptions. *Manley* v. *Georgia,* 279 U. S. 1; *Western & Atlantic Railroad* v. *Henderson,* 279 U. S. 639.

The controversy here is between two classes or groups of shareholders, dissenting and non-dissenting; and only their individual rights are involved. *Geiger* v. *American Seeding Machine Co.*, 124 Ohio St. 222. The corporation, being in liquidation, was a mere stakeholder for the shareholders.

The majority shareholders, though they voted in favor of the sale and knew that certain votes were cast against it, were not charged with notice of further proceedings taken pursuant to § 8623–72. Section 8623–65 and § 8623–72 are separate and distinct; the former deals with corporate action taken by shareholders, the latter with the rights of shareholders. Merely because certain shareholders dissented to certain corporate action, it does not follow that they will file demands under § 8623–72; or that, if filed, the demands will be rejected.

The majority shareholders, though they knew of the authorization of the sale, were not bound to keep themselves advised as to further proceedings by the dissenters.

It is elementary that the board of directors is not the representative of the shareholders as respects their individual rights but only in corporate matters. Especially is this so when the corporation is in liquidation and nothing remains to be done except distribute the assets to the shareholders. Only they, and as individuals, are interested in the method of distribution. Since only the individual rights of shareholders *inter se* were involved, they were themselves entitled to notice. Notice to the corporation was not notice to the shareholders.

Even if it be assumed that they had notice, the majority stockholders still were powerless to act and without opportunity to be heard.

The Supreme Court of Ohio has held that suggested procedure by shareholders in behalf of the corporation was not available to the majority shareholders, and that they had no standing to maintain such an action.

This is a decision on the procedural law of Ohio which will be accepted by this Court. Moreover, the state court has held that majority shareholders can not maintain an action the object of which is to have the fair cash value of dissenters' shares determined, this being limited by the statute to the corporation and the dissenters. This also is a purely procedural matter governed solely by the law of Ohio.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari in this case to review a decision of the Supreme Court of Ohio invalidating a state statute on the ground that it constituted a denial of procedural due process guaranteed by the Fourteenth Amendment.[1] The statute in question provided that the value placed upon his stock by a dissenting shareholder should, after six months and under certain circumstances, "conclusively be deemed to be equal to" the fair cash value.[2] The state court held that since the statute required that the demands of the dissenters be made known only to the corporation, the majority shareholders were unconstitutionally deprived of property without notice and an opportunity to be heard.

Concretely, the question was raised here in the following manner: Petitioners, holders of stock in respondent corporation, were among those who dissented when a vote was called on a sale of substantially all the corporate assets. Two-thirds of the shareholders voted for the sale, which was thereupon consummated. Petitioners gave written notice to the corporation of their objection, the number of shares they held, and the claimed fair cash value of their stock. The corporation refused in writing to pay the amount asked, but made no counter-

[1] 136 Ohio State 427, 26 N. E. 2d 442.

[2] Ohio Code Ann. (Throckmorton, 1940) § 8623-72, paragraph 7.

offer. Neither party filed a petition for appraisal. After six months had elapsed, petitioners filed suit in the Court of Common Pleas, asking that judgment be rendered in their favor for the amounts originally claimed.

All of these proceedings were in accordance with the applicable Ohio law.[3] In their suit, petitioners relied on a section of that law which provided that the value claimed by the dissenting shareholders should "conclusively be deemed to be equal to" fair cash value if the corporation had neither made a counter-offer nor requested an appraisal.[4] One of the majority shareholders filed an intervening petition on behalf of herself and all other shareholders similarly situated, alleging that the section of the statute involved was unconstitutional. A judge of the Court of Common Pleas struck out this intervention at the request of petitioners, saying that the statute was constitutional, the petition for intervention irrelevant, and the majority shareholders without standing to intervene.[5] No appeal was taken from this ruling. When the case came on for trial on the merits, a different judge sat, and it was his opinion that the statute was unconstitutional. The Court of Appeals, one judge dissenting, reversed the trial court, and was itself reversed, two judges dissenting, by the Supreme Court of Ohio.

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[3] Ohio Code Ann. (Throckmorton, 1940) §§ 8623–65, 8623–72.

[4] The exact language is: "If such petition [for appraisal] is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

[5] The judge said: "The failure to take advantage of the statutory provisions may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty."

It was the opinion of the Supreme Court that the statute had "an unconstitutional operation against the majority stockholders, as being violative of the due process section of the Fourteenth Amendment to the federal Constitution." And the correctness of that conclusion is the only question properly before this Court. All other questions presented involve state law, for the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution.

We agree with petitioner's position that notice to the corporation of the demand for payment constituted notice to the majority stockholders, and that such notice was an adequate compliance with the constitutional requirement of due process. The objective of the Ohio statute permitting the right of appraisal to dissenting shareholders was the elimination of abuses that had long been a fixture in the field of corporate finance.[6] To assure that the right to appraisal would be promptly resorted to and to provide for the contingency that in some cases no such resort would be taken, the Ohio legislature thought it advisable to provide that under some circumstances the original offer or counter-offer should

[6] At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to coöperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted. See S. E. C. Report on the Work of Protective and Reorganization Committees, Part VII, pp. 557, 590. The Ohio appraisal statute here in issue was not adopted until after respondent had acquired its charter, but the Ohio Constitution expressly reserves to the state the right to alter or repeal the corporate law. Ohio Const., Art. 13, § 2.

conclusively be deemed equal to the fair cash value. The corporation was given the right to avoid the effect of being compelled to pay the claimed value either by making a counter-offer or by requesting an appraisal. In addition, it was given the right to avoid both appraisal and payment of the claimed value by abandoning its original purpose to sell its assets. The dissenting shareholders could, by requesting an appraisal, likewise avoid accepting the corporation's counter-offer. Thus the corporation is compelled to pay or the dissenting shareholder to accept payment of the amount of the offer or counter-offer only if none of the many available alternatives are pursued before the expiration of a six-month period. The provisions, in effect, operate as statutes of limitations. After the lapse of a period of time, given defenses—attacks on value—can no longer be asserted.

It is true, as respondent urges, that after the majority authorizes the corporation to effect a sale, the alternatives are thereafter expressly open only to the corporation and the dissenters; no provision is made for notice to the majority shareholders as individuals. But the majority, by their vote approving the sale of assets, have indicated their intention to remain part and parcel of the corporation; the dissenters, on the other hand, by voting against the sale and by demanding payment, have indicated an intention to sever relationships. If thereafter the failure of the directors to make a counter-offer materially prejudices the financial stake of the majority, it is no more a want of due process to consider the majority bound thereby than it is to consider them bound by any other act of management. The majority are participants in a corporate enterprise. In entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages. What is claimed to be a disadvantage here is a necessary con-

comitant of the system and its most distinctive attribute—representation of the collective interest of shareholders by selected corporate management.

The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions.[7] Yet here the corporation would have us say that it is sufficiently the representative of the majority to raise in their behalf the constitutional issue, but not sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes, and accordingly we find it necessary to reverse the judgment below.[8]

There is nothing unusual in such a holding; the rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his clients; and a corporation may represent the collective interests of its shareholders. In this case, in fact, the unappealed ruling of the trial judge on the attempted intervention by the majority stands as an adjudication that in those respects here material the majority had committed their interests to the corporation itself.

Reversed.

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[7] *Tyler* v. *Judges,* 179 U. S. 405; *Hendrick* v. *Maryland,* 235 U. S. 610, 621. And see Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347–348, and cases there cited.

[8] *Christopher* v. *Brusselback,* 302 U. S. 500, 504; cf. *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485, 491.

VANDENBARK *v.* OWENS-ILLINOIS GLASS CO.

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

No. 141. Argued December 13, 1940.—Decided January 6, 1941.

A judgment of a District Court, ruled by the state law and correctly applying that law as interpreted by the state supreme court when the judgment was rendered, must be reversed, on appeal, if in the meantime the state court has disapproved of its former rulings and adopted a contrary interpretation. P. 541.

110 F. 2d 310, reversed.

CERTIORARI, *post*, p. 635, to review the affirmance of a judgment dismissing an action for damages on account of personal injuries alleged to have been caused by the negligence of the defendant.

Messrs. Paul D. Smith and *Thomas H. Sutherland* for petitioner.

Mr. Lawrence Earl Broh-Kahn, with whom *Mr. Lloyd T. Williams* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari brings before us for review the determination of the Circuit Court of Appeals that cases at law sounding in tort, brought in the federal courts on the ground of diversity of citizenship, are ruled by the state law as declared by the state's highest court when the judgment of the trial court is entered and not by the state law as so declared at the time of entry of the appellate court's order of affirmance or reversal. We granted the certiorari because of the uncertainty of the law upon this question as contained in this Court's former decisions.

The petitioner here, Virginia Vandenbark, the plaintiff below, is a citizen of Arizona. The defendant, respondent here, the Owens-Illinois Glass Company, is a corporation of Ohio. Petitioner brought an action in the United States District Court for the Northern District of Ohio alleging that as an employee of respondent she had contracted various occupational diseases including silicosis through the negligence of respondent. The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action. This ruling was affirmed by the Circuit Court of Appeals with the statement that under the law of Ohio no recovery was permitted, at the time of the judgment in the trial court, for the type of occupational disease alleged by the petitioner to have been contracted by her as the result of respondent's negligence.[1]

It is conceded that at the time the motion to dismiss was sustained neither the Ohio Workmen's Compensation Act [2] nor the common law, as interpreted by the supreme court of that state, gave a right of recovery to petitioner. The constitution of Ohio [3] authorized the passing of laws establishing a state fund out of which compensation for death injuries or occupational diseases was to be paid employees in lieu of all other rights to compensation or damages from any employer who complied with the law. At the time of the dismissal of the petition by the trial court no provision had been made by statute for any of the occupational diseases included in petitioner's complaint. Respondent had fully complied with the Workmen's Compensation Act. The Ohio constitution and compensation statutes passed pursuant to its authority had been consistently construed by the Ohio courts as

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[1] *Vandenbark* v. *Owens-Illinois Glass Co.*, 110 F. 2d 310, 312.

[2] Ohio Gen. Code (Page, 1937) § 1465–70.

[3] Art. 2, § 35.

withdrawing the common law right and as denying any statutory right to recovery for petitioner's occupational diseases.[4] After the action of the trial court in dismissing the petition, the Ohio supreme court reversed its former decisions and, in an opinion expressly overruling them, declared occupational diseases such as complained of by petitioner compensable under Ohio common law.[5]

While *Erie R. Co.* v. *Tompkins*[6] made the law of the state, as declared by its highest court, effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for discussing at what step in the cause the state law would be finally determined. In that case no change occurred in the state decisions between the accident and our judgment. There is nothing in the Rules of Decision section to point the way to a solution.[7]

During the period when *Swift* v. *Tyson*[8] (1842–1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law. As a consequence some decisions hold that a different interpretation of state law by state courts after a decision in a fed-

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[4] *Zajachuck* v. *Willard Storage Battery Co.*, 106 Ohio St. 538; 140 N. E. 405; *Mabley & Carew Co.* v. *Lee*, 129 Ohio St. 69, 73; 193 N. E. 745.

[5] *Triff* v. *National Bronze & Aluminum Foundry Co.*, 135 Ohio St. 191, 205; 20 N. E. 2d 232.

[6] 304 U. S. 64.

[7] U. S. Code, Title 28, § 725. "Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

[8] 16 Pet. 1.

eral trial court does not require the federal reviewing court to reverse the trial court.[9]

In *Burgess* v. *Seligman,* cited in the preceding note, a statute of Missouri relating to the liability of stockholders of a Missouri corporation was interpreted by the state supreme court contrary to the prior decision of the federal trial court. This Court affirmed the trial court, saying

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued." [10]

What we conceive, however, to be the true rule to guide a federal appellate court where there has been a change of decision in state courts subsequent to the judgment of the district court was stated, before any of the opinions just cited, in *United States* v. *Schooner Peggy.*[11] The Court there said

"It is, in the general, true, that the province of an appellate court is only to enquire 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."

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[9] *Pease* v. *Peck,* 18 How. 595, 599; *Morgan* v. *Curtenius,* 20 How. 1; *Burgess* v. *Seligman,* 107 U. S. 20, 33; *Concordia Insurance Co.* v. *School District,* 282 U. S. 545, 553.

[10] Cf. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 356.

[11] 1 Cranch 103, 110.

It is true this Court was speaking of the intervention of a treaty and also that it expressed a caution against retrospective operation between private parties but the principle quoted has found acceptance in a variety of situations. *Kibbe* v. *Ditto*[12] and *Moores* v. *National Bank*[13] hold that subsequent decisions as to married women's rights control review. *Sioux County* v. *National Surety Company*[14] gives effect to a later decision on a statute as to surety bonds. In *Oklahoma Packing Co.* v. *Oklahoma Gas Co.*,[15] we applied as determinative a state decision, clarifying the local law, handed down after the decree then under consideration here.

While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees.[16] It has vacated judgments of state courts because of contrary intervening decisions,[17] and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it.[18] Where, after judgment below, a declaration of war changed the standing of one litigant from an alien belligerent to an enemy, this Court took cognizance of the change and modified the action below because of the new status.[19] Similarly repeal of criminal laws or of a constitutional provision without a saving clause deprives appellate courts of jurisdiction to

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[12] 93 U. S. 674; see discussion of this case in *Bauserman* v. *Blunt*, 147 U. S. 647, 655–56.

[13] 104 U. S. 625, 629.

[14] 276 U. S. 238, 240.

[15] 309 U. S. 4, 7–8.

[16] *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n*, 273 U. S. 126, 130; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 26.

[17] *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Patterson* v. *Alabama*, 294 U. S. 600, 607.

[18] *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478; *Freeborn* v. *Smith*, 2 Wall. 160, 174.

[19] *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

entertain further proceedings under their sanctions.[20] These instances indicate that the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.

Respondent earnestly presses upon us the desirability of applying the rule that appellate courts will review a judgment only to determine whether it was correct when made; that any other review would make the federal courts subordinate to state courts and their judgments subject to changes of attitude or membership of state courts, whether that change was normal or induced for the purpose of affecting former federal rulings. While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.[21] Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.

Reversed.

MR. JUSTICE MCREYNOLDS concurs in the result.

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

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[20] *United States* v. *Chambers,* 291 U. S. 217, 222.

[21] We have applied the rule enunciated in the case of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, that state law as determined by the state's highest court is to be followed as a rule of decision in the federal courts, to determinations by state intermediate appellate courts. *West* v. *American Telephone & Telegraph Co., ante,* p. 223; *Fidelity Union Trust Co.* v. *Field, ante,* p. 169; *Six Companies of California* v. *Joint Highway District, ante,* p. 180; *Stoner* v. *New York Life Insurance Co., ante,* p. 464.

PALMER ET AL., TRUSTEES, *v.* CONNECTICUT RAILWAY & LIGHTING CO.

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

No. 38. Argued November 15, 1940.—Decided January 6, 1941.

1. In a railroad reorganization under § 77 of the Bankruptcy Act, upon rejection by the trustees of a 999-year lease of street railway properties having 969 years to run, the measure of the lessor's damages is the present value of the rent reserved less the present rental value of the remainder of the term. *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493, 504. P. 555.
2. In applying this rule to so long a lease, since the evidence of damages is necessarily limited to a period of definite forecast, the damage may be estimated for a limited future period upon evidence of rental value derived from a period of past operation of the leased property. P. 555.

   There being no suggestion that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated, it is fair to presume, until something else is shown, that for the long years ahead the rent and rental value are the same. Consequently, proof of rental value smaller in amount than the rent reserved, for a term of years shorter than the remainder of the lease, is, in the absence of evidence as to other years, proof of the damage in such shorter period. P. 557.
3. Opinion evidence of rental value may be considered in determining the lessor's damages, but has little, if any, probative force beyond the immediate years and can not be permitted to fix rental value for the purpose of determining damages in the indefinite future. P. 556.
4. Upon evidence of past earnings of demised street car properties over a period of fourteen years, including three years of operation by the lessor after rejection of the lease, the Circuit Court of Appeals, reversing the District Court, estimated the probable earnings for eleven years succeeding the rejection, upon the basis of which, and of the rent reserved for that period, it found and awarded damages to the lessor. *Held*:

   (1) There being no dispute over the facts proven, the sufficiency of the proof of damage was for the Court of Appeals. P. 558.

(2) This Court, on this review, deals with the method of proving damages, not the measure. P. 558.

(3) The evidence formed an adequate basis for a reasoned judgment and justified an award. P. 558.

(4) Although the business changed from trolley to bus transportation within two years of the end of the base period, and management changed from lessee to lessor, in view of the established character of the business these changes were not sufficient to affect the probative value of past experience. P. 559.

(5) Nothing is more indicative of the value of franchises and properties of street railways and bus lines, for lease or sale, than past earnings. P. 560.

(6) In proving compensatory damages, certainty in the fact of damage is essential; certainty as to the amount goes no further than to require a basis for a reasoned conclusion; the injured party is not to be barred from a fair recovery by impossible requirements. P. 560.

(7) The failure of the lessor to produce further evidence, through experts or transportation surveys, was not fatal to its case. P. 561.

109 F. 2d 568, affirmed.

CERTIORARI, 309 U. S. 653, to review a judgment reversing an order of the District Court and awarding damages to the present respondent for rejection of its lease in a railroad reorganization case.

Mr. James Garfield, with whom *Mr. Hermon J. Wells* was on the brief, for petitioners.

Respondent's right to recover damages for the rejection of the lease depends upon whether it will be injured by the destruction of the entire remainder of the term. It can not waive, nor can the courts waive for it, the latter part of the term. It could not recover for a loss in the early part of the term without proving that there would be no offset to that loss during the later part.

To decide on the basis of an initial loss and disregard the later portion of the term is equivalent to finding that the rental value of the property will not during that period equal the rent. Such a finding can not be made

without proof. To say that proof may be dispensed with because it is too difficult is either to say that the court may remake the contract for the parties by shortening the term of the lease or that the burden of proof shifts when it becomes too heavy to bear. Neither, we submit, is true.

The landlord can, therefore, recover only if he has been injured through losing the difference between rent and rental value for the entire remainder of term for which he bargained. Citing: This case, 305 U. S. 504, 505; *City Bank Co.* v. *Irving Trust Co.,* 299 U. S. 433, 443; *Pennsylvania Steel Co.* v. *New York City Railway Co.,* 198 F. 721, 759.

The universal rule is that damages for loss of future rent will not be awarded for part of the unexpired term without proof of damage for the whole term. *Pennsylvania Steel Co.* v. *New York City Railway Co., supra; In re Wise Shoes, Inc.,* 64 F. 2d 1023. Cf. *People ex rel. Nelson* v. *West Town State Bank,* 299 Ill. App. 242; 373 Ill. 106.

As the mind of the trial judge was not satisfied by the evidence of damage, the appellate court should not have awarded damages on the basis of that evidence.

The general purpose of the change in the statute was to protect the other creditors in a reorganization from disproportionate awards to those who, like landlords or other executory contractors, receive back their property. *Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, 454.

The word "actual" clearly imports that because of the danger that speculative elements might enter into the otherwise unlimited determination of a landlord's damages, Congress intended to prescribe a requirement that such damages must be proved in such fashion as to satisfy the court that they would certainly be suffered. If any doubt existed they could not be allowed. Therefore, if the trial judge's mind was not satisfied, his finding

that the evidence was insufficient should be given the weight and significance which attach to a finding of fact by a jury or by an administrative tribunal and should not be reversed except for an error of law.

The evidence does not show damages to reasonable certainty. The only evidence contained in the record which could conceivably throw any light on the subject of rental value consists of the past earnings, actual or estimated, of the leased property, its book value before rejection, the statement that the demised trolley properties were in part converted to buses prior to repossession in November, 1936, and wholly so converted shortly thereafter, and the value on December 31, 1938, of the property then belonging to the respondent.

No evidence was offered of the character of the territory served or the existence or possibility of competitive transportation agencies therein, nor of developments or trends or prospects in the art, or in that territory. There was no testimony as to what future developments might be expected or how they would affect the character, volume or profitableness of respondent's enterprise.

Even as to "the past" respondent's showing was limited to the earnings and estimated earnings of the property averaged for five different periods all of them ending with December 31, 1938, and none of them extending further back than 1924. These averages were then projected for 37 years into the future after making certain additions to prospective earnings on the basis of this Court's ruling that the sinking funds which came into respondent's possession on termination of the lease would increase the earning power of the property.

A period which does not include even one complete economic cycle can not be considered a reliable base for forecasting even so small a part of the remainder of the term as the next eight years.

The record contains no evidence as to whether conditions in the industry or the territory are now, or are likely to be, similar to those during the past fourteen years.

From the record, all that the appellate judges could have known of the character of the property was simply that it was trolleys which were gradually being converted into buses. Of the territory served, they had, of course, the familiarity of well-informed citizens. Of the history of operations, they had nothing except net earnings. Of the general economic conditions, again, they had no more than the knowledge of any well-informed persons, for they were offered nothing else.

The value base which the respondent used is not tenable. It was an appraisal of the properties after they had been in the control of the respondent for over two years and after a substantial part of them had been abandoned and all had been converted from trolleys into buses.

The record is devoid of findings on another element necessary to the determination of damages, viz., the amount to be added to post-rejection earnings on account of respondent's acquisition of the sinking funds on the termination of the lease. So far as appears, the court did not consider the earnings history of the leased properties prior to 1925, when the proportion of depression to prosperity was very much less than during the fourteen subsequent years. It erred in failing to take into account all of the elements which should have gone into a computation of damages.

Mr. George W. Martin for respondent.

The formula laid down by this Court for calculating the amount of the landlord's claim for the loss of his lease is that the damages are "the difference between the rental value of the remainder of the term and the

rent reserved, both discounted to present worth." *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 443; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 450; *Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493, 504.

The Court has stated this rule of damages as though it were a mathematical formula for ascertaining an answer in dollars; but of course, in addition, it is a recognized method of ascertaining the value to the landlord of the lost lease at the time of its rejection. Because, what the landlord loses is his lease, and the damages are merely the net value of the lease.

The District Court considered that the formula was a mathematical prescription, which must be worked out from rent day to rent day all through the balance of the term of a lease in order to make sure that in no rent period, or in no series of rent periods, sufficient net avails should be realized from the property to recoup or even to exceed the amount of the lost rentals. The factor which causes the difficulty in the application of the formula in such a way is not the amount of the reserved rent and its present value discounted, but the amount of the rental value presumably based on the future net operating income from the property. In a situation like this, where the lease has no market value whatever, the formula for ascertaining the value of the lease must be applied; but it must be applied in such a way that "the damage will be based on evidence which satisfies the mind." 305 U. S. 505.

What this means is that when the evidence as to future rental value of the property attempts to cover so long a span of time into the future that, to the mind of the ordinary man, no conviction is carried that the conclusion which is going to be reached is not just pure speculation, then a point is arrived at where "reasonable certainty" disappears and prospective losses beyond that point can no longer be recovered. All this is merely

the application of "the usual rules as to the measure of damages." Williston on Contracts (Rev. Ed.), § 1346; *Hetzel* v. *Baltimore & Ohio R. Co.,* 169 U. S. 26, 28.

Obviously, it was not the intention of this Court in *Connecticut Railway Co.* v. *Palmer,* 305 U. S. 493, to lay down a novel rule of damages—an all-or-nothing rule which required that each unit of time over the remainder of a term of 900 years should be accounted for as a period of a loss to the landlord. It was evident on the previous appeal that this Court considered the far future as unpredictable.

If this Court had intended to lay down an all-or-nothing rule, it would have dismissed the previous appeal. 305 U. S. 493.

When this Court reversed on the last appeal, it did not reverse on the ground that the appellant had received too much, but too little; and, when the claim was sent back for a new trial before the District Court, the opinion of this Court was to be construed, not as laying down a novel rule of damages, but as a caution against an award of damages on anything like a 969-year basis. The reason is plain: no ordinarily prudent man could possibly estimate the value of the lost lease as of the time of rejection on any such basis; but this does not mean that the lease has not a present value, nor that that value can not be ascertained by the application of the formula to data which are reasonably certain, so far as any one can see, to be true and applicable; and the Court of Appeals, applying this common-sense interpretation of this Court's opinion, came to the conclusion that reasonable certainty was attained by allowing the respondent damages for eleven years subsequent to rejection of the lease, *i. e.,* three years prior to the trial in the District Court for which the damages are fully known, and eight years for which damages are estimated according to past experience for fourteen years.

This was the net value of the lease at the time it was destroyed by rejection. It is not the result of the application of a precise mathematical formula for a limited number of years, and the ignoring of a subsequent vast period of time. It is a conclusion that the subsequent vast period of time is not an element which can enter into the present net value of the lease. This subsequent time has been weighed and found to be incommensurable with reasonable certainty. See A. L. I. Restatement of Contracts, § 331 (a); *Hedrick* v. *Perry,* 102 F. 2d 802, 807; *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 106 F. 2d 45, 51; affd., 309 U. S. 390; *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359; *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U. S. 689, 697; *Pieczonka* v. *Pullman Co.,* 102 F. 2d 432, 434.

By leave of Court, *Messrs. Robert G. Dodge* and *Talcott M. Banks, Jr.* filed a brief on behalf of the Trustees of the property of Old Colony Railroad Company, as *amici curiae,* urging reversal.

Mr. Justice Reed delivered the opinion of the Court.

This certiorari, which we allowed because of its importance, involves problems of proving a lessor's claim for damages for rejection of its lease in a proceeding under § 77 of the Bankruptcy Act. The lease, demising respondent's street railway properties and equipment in Connecticut for 999 years from 1906, was rejected on December 18, 1935, by petitioners, the trustees of the debtor, the New York, New Haven and Hartford Railroad Company.[1] The annual rent reserved at rejection was close to $1,050,000 with tax, sinking fund, interest

[1] The lease originally covered additional properties, but as to these the debtor no longer had an interest.

and bond retirement adjustments, which are not material to our discussion.

After rejection the lessor filed a claim for damages under subsection (b) of § 77. The applicable provisions are as follows:

". . . In case an executory contract or unexpired lease of property shall be rejected, . . . any person injured by such . . . rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . ."

The claim was allowed, limited to the damages accrued or which might accrue before the winding up of the reorganization. This Court on a previous certiorari [2] disapproved that measure of damages and laid down as the measure "the present value of the rent reserved less the present rental value of the remainder of the term." On remand to the district court, the lessor undertook to prove damages according to the approved measure by introducing evidence of the present value (January 1, 1936), at four per cent discount, of the rent reserved under the lease for forty years only (to December 31, 1975). This amounted to around twenty million dollars. For a corresponding period evidence of rental value similarly discounted was offered. The difference was submitted as the damages for rejection. No proof of rent reserved or rental value beyond the forty years was offered as respondent was advised such proof would be too uncertain to carry conviction.

To prove rental value, respondent offered evidence of annual earnings for each of the forty years. These earnings were made up of the earning power of a sinking fund, plus an adjustment of the annual payments re-

[2] *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493, 504.

quired by the lease to be made to the sinking fund, plus the operating profits of the transportation properties. For 1936–1938 the actual earnings were used. This was the period after rejection and before trial when the demised properties were operated by or for respondent. For 1939–1975 earnings were estimated by alternative calculations of average annual earnings, before federal taxes, over four prior base periods each ending December 31, 1938: (1) the preceding year and a half of 100% bus operation; (2) the three years of actual operation, following rejection, during which the transition from trolleys to buses had been completed; (3) ten years, 1929–1938, the accounts for which were partly reconstructed because before the reorganization the demised premises were utilized in conjunction with others not involved here; and, finally, (4) fourteen years, 1925–1938.[3] The earning power of the sums in the sinking fund and the annual payments to it were assumed to be fixed. To get the rental value, these two fixed sums were added to the operating profit calculated from each of the four base periods. Since earnings were erratic, varying from $78,000 to $775,000 in the fourteen-year period, the annual rental value for the future varied according to the base used. Likewise, the damages calculated for forty years showed a range of from nine and a half to thirteen and a third million. It is substantially correct to say that no evidence in disagreement with the base figures was produced for the petitioner. Nor did petitioner introduce any evidence on its part to establish a different amount of damages.

The district court refused to find future earnings by projecting the average earnings of any of the four base

[3] To fill out the data petitioner calculated the proportionate rent reserved and the actual earnings for the short period between the date of rejection, December 17, 1935, and January 1, 1936.

periods. It pointed out that in its view the 100% bus operation was too new and had coincided with too great a shrinkage of earnings to serve as a safe guide. The data for 1936–1938 were deemed unconvincing because they were derived in a substantial measure from trolley operations, now abandoned, and because the period was one of economic depression. The ten and the fourteen-year bases were disapproved as irrelevant because of trolley operation, and as speculative because of the impossibility of forecasting the relative frequency of profitable and unprofitable years from this past experience. The court pointed out that no evidence of transportation experts or surveys was offered to assist it in appraising possibilities of the development of the territory, of increased operating efficiency or the effects of consolidation.[4] Furthermore, the trial court was of the view that even with acceptable proof of annual rental value for forty years, or other period materially shorter than the unexpired term of the lease, no conclusion could be reached as to the present rental value of the remainder of the term, because that portion of the term beyond the reach of the proof offered might have profits or losses which would upset the calculations for earlier years. The district court then struck out the accrued damages of more than a million dollars allowed on the former hearing and set aside the provision of the same order permitting accrued damages to be proven up to the date of final hearing.

The circuit court of appeals was of the view that "in effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast." 109 F. 2d 568, 571. It thought that the evidence of earnings over the four-

[4] See another New Haven long term lease, *In re New York, N. H. & H. R. Co.*, 30 F. Supp. 541, where evidence of this kind appears.

teen-year experience was adequate to enable it to draw a reasoned conclusion as to probable earnings for eleven years. For the three years, 1936–1938, these were known; for the other eight years, the average annual earnings for the preceding 14-year period were adopted. An allowance of the damages at time of rejection was made in the amount of $4,411,837.61.[5]

The certiorari brings here the questions of whether proof of damages for a portion of an unexpired lease is sufficient to fix damages for the whole remaining term and whether the circuit court of appeals may allow damages on the sole basis of past earnings, evidence which the district judge has held does not satisfy his mind.

First. Litigation over a 999-year lease naturally brings up incidents difficult to reconcile with known and established legal formulae. Since conveyancers and business men alike have long utilized the characteristic provisions of leases to accomplish transfers of rights in real estate for extensive periods without payment of the purchase price, such long term agreements have become a well recognized legal implement, especially in corporate realty transactions and railroad consolidations and mergers. Its reservations of rent, provisions for taxes and operation are firmly embedded in our financial, corporate and title structures.[6] Business and government alike are ac-

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[5] The preciseness of this figure as to the amount of damage is illusory. It is obtained by accepting estimated interest rate and average earnings for eight years in the future, reduced to present cash value, as shown by respondent on a table covering forty years and deducting this from the agreed rent, discounted.

[6] Nearly forty thousand miles of road are leased by Class I railroads from 292 lessors. Class I roads operate over 93 per cent of all railroad mileage. Leased property represents over 15 per cent of this total. Over four billion dollars is invested in railroad property under lease. Tables 1, 129, 156 and 162. Statistics of Railways in the United States 1938. See Meck & Masten, Railroad Leases and Reorganization, 49 Yale Law Journal 626.

customed to fix the rental value of property for long term leases and the value of the lease over and above the rent reserved at varying periods of the term.[7] In pending railroad reorganizations, themselves, appraisals of rental values must be considered.[8] That such determinations recur with some frequency demonstrates their practical possibility.

The petitioner contends, however, that evidence of rental value for a 40-year period, no matter how certain it may be, is inadequate to enable a court to establish the damages for the entire 969 remaining years. Its argument is that one cannot be sure the truncated portion will not show sufficient gain to absorb all losses. Since certain proof for distant years cannot be produced, this objection leaves the lessor to qualified opinion evidence as to annual rental value, discounted for the term to show present damage. Such an opinion necessarily

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[7] Tax Cases: In many tax cases long-term leases have been valued, though frequently without any statement of the evidence or method used. Northern Hotel Co., 3 B. T. A. 1099, 1102; Newman Theatre Co., 4 B. T. A. 390; L. S. Donaldson Co., 12 B. T. A. 271; A. H. Woods Theatre Co., 12 B. T. A. 827; Consolidated Investment Co., 13 B. T. A. 1252; Hotel Wisconsin Realty Co., 16 B. T. A. 334; James Bldg. Co., 22 B. T. A. 658; Martha Realty Co., 22 B. T. A. 342, 344; *New York ex rel. Delaware & Hudson Canal Co.* v. *Feitner,* 61 App. Div. 129; 70 N. Y. S. 500; *Appeal Tax Court* v. *Western Maryland R. Co.,* 50 Md. 274, 298; *Philadelphia, W. & B. R. Co.* v. *Appeal Tax Court,* 50 Md. 397; *New York ex rel. Gorham Mfg. Co.* v. *State Tax Comm'n,* 197 App. Div. 852; 189 N. Y. S. 241. Eminent Domain Cases: *Matter of the City of New York: Beers* v. *Schlessinger,* 120 App. Div. 700; 105 N. Y. S. 779; *In re Park Site,* 247 Mich. 1; 225 N. W. 498. Contract Cases: *Bondy* v. *Harvey,* 218 App. Div. 126; 217 N. Y. S. 877; *Williams* v. *Burrell,* 1 C. B. 402.

[8] E. g. New York, New Haven & Hartford Railroad Company Reorganization, 239 I. C. C. 337, 351, 386, 387, 389, 453; *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 36 F. Supp. 193, 205 *et seq.;* same, 239 I. C. C. 485, 537, 553; Erie Railroad Company Reorganization, 239 I. C. C. 653, 685, 689.

proceeds from presumably adequate knowledge of what lessees, desiring but not requiring the facilities, would be willing to pay for a new lease and lessors, in a similar attitude toward renting, to accept for the remainder of the term. While such evidence is admissible for consideration in forming a judgment upon damages, it has little, if any, probative force beyond the immediate years. Certainly such opinion evidence alone cannot be permitted to fix rental value for purposes of damages in the indefinite future. The final objective of the proof is not how much the remainder is worth now but what damages the lessor has suffered. For this he is awarded compensation. The measure of that damage is rent less rental value, a matter of judgment to be reached in the light of pleading and proof supplemented by judicial knowledge.

The law for purposes of damages does not treat a broken lease of a thousand years as though it ran only for a limited time, the damages for which are measurable. But since evidence of the damage is necessarily limited to a time of "definite forecasts" the rule of rental value permits the use of data for only a limited number of years to determine damages. The number of years to be considered depends upon the fullness and quality of the evidence offered to establish the damages. Hence, whether a limited term beyond the reach of forecasts or the whole term is to be used as a base for rental value, the evidence of earnings would be projected the same number of years. This, we think, is what was meant by the circuit court of appeals when it treated the lease "in effect" as one with a term within the range of predictability as to rental value.

However nebulous the concept of a long lease may be, it is not a fiction but an actual instrument. Nothing appears in the record to suggest that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated. At the time

the lease was executed, it is fair to assume the parties thought the annual rent reserved and rental value were the same. Without proof to the contrary only nominal damages would be allowed the claimant. And, until something else is shown, courts are entirely justified in assuming that for the long years ahead the rent and the rental value are the same.[9] As a consequence, evidence of rental value smaller in amount than the rent reserved for a term shorter than the remainder of the lease is, in the absence of testimony as to other years, proof of the damages for the years covered. Since the presumption is that the rent and rental value for the remainder of the term are the same, the damage proven is to be considered as all the damage for the rejection of the lease.

Second. The petitioner also contends that the circuit court of appeals erred in setting aside the district court's decree refusing the claim on the ground that the evidence, detailed above, did not satisfy the mind as to the amount of damages. In the view of the trial court, there was a failure of proof. The correctness of the judgment of the appellate court in directing an allowance of the claim depends not upon its power, which we think is clear,[10] but upon its conclusion as to the persuasive character of the evidence, whether it is too speculative, whether it showed the damage to reasonable certainty. As there was no significant dispute over the facts proven, the conclusion as to the sufficiency of the evidence was for the reviewing court. We deal, in this review, with the method of the proof of damages, not the measure. Narrowed even more, the issue is whether the evidence offered justifies an award, whether the quantum of proof produced forms an adequate basis for a reasoned judgment.

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[9] 2 Sedgwick, Damages, 9th Ed., § 610.

[10] Cf. *Ridings* v. *Johnson,* 128 U. S. 212, 218; *United States* v. *Rio Grande Irrigation Co.,* 184 U. S. 416, 423.

Future rental value cannot be susceptible of precise proof. As it depends, so far as the amount of damages for breach of a lease is concerned, upon future profits, it partakes of the nature of loss of earning capacity or of credit. To require proof of rental value approaching mathematical certitude would bar a recovery for an actual injury suffered. All that can be done is to place before the court such facts and circumstances as are available to enable an estimate to be made based upon judgment and not guesswork.[11] Every anticipatory breach of an obligation, and every appraisal of damage involving the present value of property involves a prediction as to what will occur in the future. Present market value of property is but the resultant of the prediction of many minds as to the usability of property and probable financial returns from that use, projected into the future as far as reasonable, intelligent men can foresee the future.

The proof of future profits by the evidence of past profits in an established business gives a reasonable basis for a conclusion.[12] It is true that this business changed from trolley to bus within two years of the end of the base period and that management changed from lessee to

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[11] *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563; *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 379; *Eckington & S. H. Ry. Co.* v. *McDevitt*, 191 U. S. 103, 112, 113; cf. *dicta* in *United States* v. *Behan*, 110 U. S. 338, 344; see Restatement of Contracts, § 331, particularly comment (a); *United States Trust Co.* v. *O'Brien*, 143 N. Y. 284, 290; 38 N. E. 266; *Ball* v. *Pardy Construction Co.*, 108 Conn. 549, 551; 143 A. 855; *Commonwealth Trust Co.* v. *Hachmeister Lind Co.*, 320 Pa. 233; 181 A. 787; 1 Sedgwick, Damages, 9th Ed., § 170 (a) *et seq.*; 1 Sutherland, Damages, 4th Ed., § 67.

[12] 5 Williston, Contracts, Rev. Ed. § 1346 A; *Bagley* v. *Smith*, 10 N. Y. 489, 498; *Dickinson* v. *Hart*, 142 N. Y. 183, 188; 36 N. E. 801; *Macan* v. *Scandinavia Belting Co.*, 264 Pa. 384, 392; 107 A. 750; *Commonwealth Trust Co.* v. *Hachmeister Lind Co.*, 320 Pa. 233, 242; 181 A. 787.

lessor but we think the fact of transportation in the same communities for more than a quarter of a century sufficed to give the operation the classification of an established business. Here different methods of operation or normal changes in the executive staffs do not seem sufficient to interfere with the probative value of past experience. Franchises and property of street railways and bus lines are difficult of appraisal. Nothing is more indicative of their value for lease or sale of the fee than past earnings. If we were to adopt the view that the interest conveyed is a defeasible fee,[13] its defeasance dependent upon a condition such as nonpayment of annual instalments of the purchase price, the same difficulties exist. The unknown subtrahend would be the present value, instead of the rental value. Evidence of value would be made up of the items of proof. One of the most important of these, in the case of property such as here involved, would be past earnings.

This Court has sustained recoveries for future profits over four years based solely upon evidence of the profits of an established business for the past four years. We there approved an instruction which told the jury, "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." [14]

The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent

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[13] *Ocean Grove Camp Meeting Assn.* v. *Reeves,* 79 N. J. L. 334, 338–39; 75 A. 782.

[14] *Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U. S. 359, 379.

certainty.[15] Damages for breach of the lease were in contemplation of the parties when the contract was made.[16] The lease contained a covenant of reëntry without prejudice to right of action for arrears of rent or breach of covenants. The provision in the Bankruptcy Act gives a new right of recovery in bankruptcy only. This right of recovery is an unsecured claim of the character of a claim for a deficiency above the value of inadequate collateral.

Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.[17] The certainty of the evidence as to damages for rejection of a lease depends upon the same tests as in other situations where damages are difficult of proof. This Court, recently, in an infringement case [18] was required to appraise the value of opinion evidence as to the part of profits attributable to the use of a pirated play, an obviously elusive fact. No expert thought any greater percentage than ten should be attributed to the play. The lower court allowed twenty so that the award might by no possibility be too small. We approved because "what is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment . . ."

Satisfactory evidence was presented for the three years of actual operation of the properties covered by this lease. We think that prior earnings of the same property over fourteen years was a fair base to use to project the estimate of the earnings for the eight years of future

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[15] *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 564, 565; *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 379; *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26, 37, 38.

[16] *Hadley* v. *Baxendale*, 9 Exch. 341.

[17] *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562, 563; 1 Sedgwick, Damages, 9th Ed., § 170; *United States Trust Co.* v. *O'Brien*, 143 N. Y. 284, 289; 38 N. E. 266.

[18] *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 406–408.

operation. The failure to produce further evidence, either through experts or transportation surveys, was not fatal to respondent's case, even though such evidence is admissible. We see no reason to disagree with the conclusion of the circuit court of appeals that under the evidence presented the damages for eight years might be predicted with a "fair degree of certainty."

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

On January 3, 1939, this Court unanimously decided that the "actual damage or injury" caused the lessor through the disaffirmance by the trustees of the New Haven of the lease now in controversy was a provable claim. *Connecticut Ry.* v. *Palmer,* 305 U. S. 493. If Congress had intended to rule out the legal provability of a claim for damages arising through the disaffirmance of what remains of a 999-year lease it could easily have done so, instead of providing for proof of the damages flowing from the termination of such an unexpired lease. And if, upon the prior consideration of the status of this very lease, this Court had intended to rule that loss due to the disaffirmance of the unexpired term of 969 years is in the nature of things beyond rational proof, it surely would not have taken twelve pages to avoid saying so. Both Congress and this Court have thus sponsored the conviction that proof of some damage is not outside the adjudicatory process.

But what is to be assessed is the value of a terminated long-term lease and not the value of an included short-term. Therefore, neither the decision of the district court nor that of the circuit court of appeals in reversing it seems to me satisfactory. Although the two courts reached contradictory conclusions, their views appear to suffer from the same intrinsic vice. Starting with man's inability to pierce into a future of 969 years, both courts

deemed the present value of a lease running for such a period beyond calculable forecast. Therefore, Judge Hincks said in effect, when an end is put to the benefits accruing from such a lease, the loss to the lessor cannot be translated into dollars and cents. Judge Patterson, on the other hand, treated the lease as though it were a lease for an ascertainable, included short term, and deemed eleven years as the limit for sure judgment. Since the lease is not a short-term lease, it is, according to the district court, nothing for purpose of giving rise to damages. Since the lease is for too long a term, we will snip off an included short term as though it were a short-term lease, concluded the circuit court of appeals.

Both these dispositions result in avoidance, through over-simplification, of an extremely complicated problem which Congress has put up to the courts. Since neither the district court nor the circuit court of appeals applied the directions of this Court in *Connecticut Ry.* v. *Palmer, supra,* however difficult and subtle they may have been, neither disposition should stand. The case should be sent back to the district court where an opportunity should be given to make proofs appropriate to the nature of the problem to be solved, namely, ascertainment on a tough business basis of the damage that sprang into existence from the disaffirmance of the remaining 969-year term rather than from the disaffirmance of a supposed 11-year lease.

MR. JUSTICE DOUGLAS, dissenting:

MR. JUSTICE BLACK and I are of the view that respondent's proof was wholly inadequate to establish under § 77 (b) of the Bankruptcy Act the extent of its "actual damage or injury" as a result of the rejection of this lease, since the evidence offered failed to show what was "the present value of the rent reserved less the present rental

value of the remainder of the term"—the measure of damages established for this very claim in *Connecticut Railway & Lighting Co.* v. *Palmer,* 305 U. S. 493, 504.

We are dealing here with an unexpired term of 969 years. But the claim allowed is for a term which does not cover that span. It covers only an unexpired term of 11 years. For the reasons stated in *Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, we think that if Congress had provided in § 77 that lessors should not be allowed to prove for damages in excess of an 11 year unexpired term, the limitation would be constitutional. Such legislation would have a firm constitutional basis in the bankruptcy power. But the making of such a limitation is a legislative, not a judicial, function. In view of the wording of § 77(b) we do not think this Court has the power to substitute the value of one property interest for the value of an entirely different one. Sec. 77(b) says that "actual damage or injury" shall be allowed. Yet it would be a mere coincidence if "actual damage or injury" for an 11 year term were the "actual damage or injury" for a 969 year term. Hence the District Court correctly refused to substitute any lesser term for the one here in question. No authority, we believe, can be found which can justify speculating a claimant into a loss through the easy assumption that he had a property interest which in fact he did not have.

There is a related objection to the allowance of this claim. It is plain that any attempted computation of future rental values of this property for the next 969 years would at best be a mere flight "into the realm of pure speculation" which this Court condemned when the case was here before. 305 U. S. 493, 505. From our point in history 969 years hence is perpetuity. It covers a longer span that from 1941 A. D. to 500 years before Columbus discovered America. To project past earnings of a present enterprise through such vicissitudes of time

would be to assume a static quality in society which even a decade of history would disprove. This was tacitly admitted by respondent before the District Court. The Circuit Court of Appeals recognized the impossibility of such a task. It therefore produced a substitute method. It computed the annual estimated values for each future year for as long a period as it could venture an estimate. That, however, misses the nature of the problem. Under the rule laid down by this Court, the great unknown in such cases is the "present rental value of the remainder of the term." The actual damage, if any, to the lessor is suffered all at once. For § 77, like former § 77B (*City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 440) extends the doctrine of anticipatory breach (*Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581) to leases of realty. Where there is such a breach "compensation therefor may be recovered at once for the whole loss, though the consequence be a continuing one, if the future damage resulting therefrom can be ascertained with certainty." *James* v. *Kibler's Adm'r*, 94 Va. 165, 173; 26 S. E. 417. The liability of the lessee for damages is single, not multiple. But § 77 (b), unlike some state rules (*Hermitage Co.* v. *Levine*, 248 N. Y. 333; 162 N. E. 97), calls for an ascertainment of the full deficiency not at the end of the term but on rejection of the lease.

Lessors claiming damages under § 77 (b), like claimants in ordinary bankruptcy proceedings (*Rasmussen* v. *Gresly*, 77 F. 2d 252, 254; *Whitney* v. *Dresser*, 200 U. S. 532), carry the burden of establishing the existence and amount of the claim. Their proof must satisfy the "usual rules as to the measure of damages"; they "must show damages to reasonable certainty." *Connecticut Railway & Lighting Co.* v. *Palmer, supra,* at p. 505. While absolute certainty is not required where a claim for damages is sought (*Hetzel* v. *Baltimore & Ohio R.*

Co., 169 U. S. 26, 37), the evidence must be sufficient for the exercise of an informed judgment as to the amount. Where the existence or extent of the damage is a matter of mere conjecture or guesswork, the claim will be denied. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 F. 721, 759. When the instant case was here before, the *Pennsylvania Steel Co.* case was cited for the statement, "The difficulties of proof are well recognized." 305 U. S. at 504. In the *Pennsylvania Steel Co.* case damages for breach of a lease with an unexpired term of 995 years were disallowed in receivership proceedings, the court saying (p. 759): "Who could foretell the results of operation by the owner, the growth of the city, improvements in motive power, or reductions in cost? Who could foresee whether a lease could be made to another railroad company or the terms thereof? . . . The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain."

Those observations are peculiarly apt when applied to the facts in this record. Here there is no evidence as to market value. Cf. *Metropolitan Bldg. Co.* v. *King County*, 62 Wash. 409; 113 P. 1114. Nor has there been any fair, *bona fide* reletting. Cf. *James* v. *Kibler's Adm'r, supra.* In this record there is no substantial evidence as to value except estimated past earnings. Useful as past earnings may be in certain situations where a short and limited forecast is being made (*Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359) they are indeed treacherous when used as the sole basis for appraisal.[1] The value of a going enterprise is dependent on earnings. A forecast of earnings must take into consideration the numerous and variable fac-

[1] 1 Bonbright, Valuation of Property, c. XII.

tors which affect income-producing capacity.[2] Those factors vary from business to business. Here we are dealing with passenger transportation by bus. Certainly any forecast of earnings should embrace an expert study of problems peculiar to this field—the territory served, population trends, competitive conditions, the record of companies in comparable territory, and the like. Any estimate which wholly ignores such factors and relies entirely on past earnings ignores the very conditions which alone can impeach or sustain the credibility of past earnings as a measure of future earnings.[3] Cf. *Hammond Lumber Co.* v. *County of Los Angeles,* 104 Cal. App. 235; 285 P. 896.

The problem of determining the present value of this unexpired term of 969 years is not different from the problem of valuing a fee interest.

The fact that this instrument is called a "lease" is no barrier to such an appraisal. For, as stated by this Court in *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 163 U. S. 564, 582, where a so-called "lease" was construed: "What it was styled by the parties does not determine its character or their legal relations." The court has not only the power but the duty to determine its real character by consideration of all its intrinsic and extrinsic characteristics. *Id.,* at p. 582. A lease renewable forever or a lease in perpetuity (as here) is the equivalent of a fee interest. It has been so treated in

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[2] Bonbright, *op. cit., supra,* note 1; Dewing, Financial Policy of Corporations, pp. 319 *et seq.;* Graham & Dodd, Security Analysis, c. I; Kniskern, Real Estate Appraisal & Valuation, pp. 235 *et seq.;* Mason, The Street Railway in Massachusetts, c. 6; McMichael, Long & Short Term Leaseholds.

[3] In the Matter of Breeze Corporations, Inc., 3 S. E. C. D. & R. 709; In the Matter of Mining & Development Corp., 1 S. E. C. D. & R. 786.

Connecticut, where the instant lease was made, for purposes of taxation. *Connecticut Spiritualist Camp-Meeting Assn.* v. *Town of East Lyme,* 54 Conn. 152, 155–156; 5 A. 849. As stated in *Piper* v. *Meredith,* 83 N. H. 107, 110; 139 A. 294, "it is well settled law that a perpetual lease upon condition conveys to the lessee a determinable or base fee." Or as stated in *Whittelsey* v. *Porter,* 82 Conn. 95, 102, a 999 year lease is "practically a fee defeasible only upon failure to perform certain conditions." And see *Montgomery* v. *Town of Branford,* 107 Conn. 697, 702; 142 A. 574; *Wells* v. *Savannah,* 181 U. S. 531; *Leary* v. *Jersey City,* 248 U. S. 328; *Trustees of Elmira* v. *Dunn,* 22 Barb. 402. The mere reversionary interest of the lessor in a perpetual lease is so remote and speculative as to defy valuation. See *Chicago West Division Ry. Co.* v. *Metropolitan West Side Elevated R. Co.,* 152 Ill. 519, 524–526; 38 N. E. 736. As stated by the Supreme Court of Errors of Connecticut, the reversion under a 999 year lease becomes a "mere imaginary estate." *Brainard* v. *Town of Colchester,* 31 Conn. 407, 411. Whatever may be the precise catalogue of all rights of the lessee (*Goodwin* v. *Goodwin,* 33 Conn. 314; *Dennis Appeal,* 72 Conn. 369; 44 A. 545) and whatever may have been the business and legal reasons for use of the 999 year lease rather than the acquisition of the assets by merger, consolidation or otherwise,[4] it is plain that for all practical purposes the lessee retains such full control and such complete enjoyment of the property that he may properly be treated as the owner. Such a lease is in effect "a practical sale." *Lord* v. *Town of Litchfield,* 36 Conn. 116, 126.

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[4] McMichael, *op. cit., supra,* note 2, c. I; Meck & Masten, Railroad Leases and Reorganization, 49 Yale L. J. 626; Niehuss & Fisher, Problems of Long Term Leases, 2 Mich. Bus. Studies, Pamphlet 8; The Long Term Ground Lease: A Survey, 48 Yale L. J. 1400.

Thus the problem of determining the present value of the unexpired term of 969 years is no different from determining the value of land in an action for breach of a contract to purchase it. There the rule is that the vendor may recover compensation for his actual loss measured by the difference between the price he was to receive [5] (less the amount paid) and the value of the land at the time of breach. 3 Sedgwick on Damages (9th ed.) §§ 1023 *et seq; In re Marshall's Garage,* 63 F. 2d 759. In making that valuation the conventional rules governing appraisals of the worth of fee interests would be applicable. 1 Bonbright, Valuation of Property, chs. XIII, XIV.

In sum, whatever rule of damages is applied to this situation, the proof submitted is not adequate for appraisal of the property interest here involved without violating the well-established rule against allowance of speculative damages, announced by this Court on the first appeal. No reasons of policy have been suggested which justify deviation from those well-established principles. The fact that the "lease" extends over a period of almost ten centuries accentuates the necessity for close adherence to the rule, not for its relaxation.

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[5] Future payments would of course be reduced to present worth. *Bondy* v. *Harvey,* 218 App. Div. 126; 217 N. Y. S. 877.

RAILROAD COMMISSION OF TEXAS ET AL. *v.* ROWAN & NICHOLS OIL CO.

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

No. 218. Argued December 12, 13, 1940.—Decided January 6, 1941.

1. An order of the Texas Railroad Commission limiting the daily allowable production of the East Texas oil field and providing a method for its distribution among the several well owners, *held:*
   (1) Consistent with the Fourteenth Amendment, p. 572.
   (2) Not so clearly a violation of a State statute, Vernon's Texas Annotated Civil Statutes, art. 6049c, § 7, as to warrant an injunction in the federal courts, p. 577,
   as applied to an operating company which challenged the basis of the formula and claimed that by its minimum and maximum "allowables" it unduly favored wells of small capacity and impaired the future productivity of wells in high-producing and "thinly" drilled areas. Cf., *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *post*, p. 614.
2. In matters of this kind the due process clause does not require that the judgment of an expert state commission be supplanted by the individual view of judges based on the conflicting testimony, prophecies and impressions of expert witnesses. P. 576.

Reversed.

APPEAL from a decree of the District Court, of three judges, which enjoined the enforcement of an order regulating production of oil in the East Texas field.

Mr. James P. Hart, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, *Edgar W. Cale, Tom D. Rowell, Jr.,* and *E. R. Simmons,* Assistant Attorneys General, were on the brief, for appellants.

Mr. Dan Moody, with whom *Mr. Rice M. Tilley* was on the brief, for appellee.

The decision of this Court in 310 U. S. 573, was not decisive of the issues in this case. The order in that

case was materially different. The order here attacked subjects the appellee to a greater degree of discrimination, in that it receives a smaller percentage of the allowable oil under this order than under the old order in the first case.

Under Texas law the owner of land owns the oil and gas in place thereunder, and under the conventional form of oil and gas lease, such as is involved in this case, the lessee owns the oil and gas in place, and is entitled to a fair chance to recover the same, or its equivalent in kind; or, otherwise stated, to an equal opportunity with other operators to realize for his leasehold.

The present order of the Commission, allocating approximately 75% of the "allowable" on a per well basis, which, as to such 75%, admittedly gives no consideration to reserves under the respective leases, ability of wells to produce, pressures, sand conditions, or density of drilling on the respective leases, ignores the differences that would have to be taken into consideration in arriving at any reasonable or equitable distribution. Such order results in waste by causing premature encroachment of water and low pressure areas; and is arbitrary, unjust, unreasonable, and confiscatory. It operates to deny appellee the equal protection of the law, takes its property without due process, and contravenes the laws of Texas.

Mr. Justice Frankfurter delivered the opinion of the Court.

In conformity with the regulatory scheme devised by Texas for exploiting and safeguarding its oil resources, the Railroad Commission of that state in 1938 issued an order formulating a method for distributing among well owners the total amount of oil which it then allowed to

be produced in the East Texas field. The enforcement of this order was enjoined by lower federal courts at the suit of the complainant in the present case, Rowan & Nichols Oil Company, 28 F. Supp. 131; 107 F. 2d 70. To avoid the dislocation resulting from this judicial frustration of its order, the Commission, by an order of September 11, 1939, had to devise a new plan of proration. Its action in doing so was again promptly challenged in a federal district court in Texas. A decree enjoining the Commission followed, and an appeal from that decree is the matter now before us. Judicial Code, §§ 238, 266, as amended, 28 U. S. C. §§ 345, 380.

The challenged order of the Commission concededly satisfies all procedural requirements. It was part of a continuous process of administrative responsibility, preceded by a specific hearing affecting the immediate situation, with full opportunity given to the Oil Company to develop the facts and arguments which it later renewed below and here.

The Commission's action now in controversy cannot be severed from the earlier order which it replaced. Both set limits, incontestably valid, *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, on the daily production of the East Texas field. In both litigations the Oil Company claimed to be a victim of illegalities in the method of distributing this total allowable production among the different classes of oil producers.

So far as relief in the federal courts is concerned, we found in the prior phase of this continuing litigation that the order of the Commission was without infirmity. 310 U. S. 573; *post,* p. 614. In the order which was then before us each well was allowed 2.32 per cent of its hourly potential production, except that wells not capable of producing 20 barrels a day at open flow were, in conformity with the Marginal Well Statute (Vernon's Texas Annotated Civil Statutes, art. 6049b), allowed full capacity,

and wells which could not produce over 20 barrels a day at 2.32 per cent of their hourly potential were allowed 20 barrels a day. The order distributed, in round numbers, a total allowable of 522,000 barrels as follows: 5,250 a day to 451 wells having a capacity of less than 20 barrels; 380,640 to 19,032 wells which at 2.32 per cent of hourly potential could not produce over 20 barrels; 136,610 to 6,325 wells at the rate of 2.32 per cent of hourly potential. This adjustment by the state's expert agency of what in our former opinion we called "as thorny a problem as has challenged the ingenuity and wisdom of legislatures" was attacked on two grounds. It was claimed that an hourly potential formula fatally omitted other relevant factors, especially acre-feet of sand. Further it was urged that the minimum allowance of 20 barrels, which nearly absorbed the total production, constituted an illegitimate discrimination against high-producing and thinly drilled areas. We rejected these arguments as an attempt to substitute a judicial judgment for the expert process invented by the state in a field so peculiarly dependent on specialized judgment. We said in effect that the basis of present knowledge touching proration was so uncertain and developing, that sounder foundations are only to be achieved through the fruitful empiricism of a continuous administrative process. Further, that ought not to be stifled by drawing from the generalities of the Constitution allegiance to one as against another speculative assumption even though delusively clothed in formal findings of fact.

In the order now before us the Commission allowed a total production of 691,000 barrels, and the formula of allocation took into consideration two other factors—bottomhole pressure and the quality of the surrounding sand of the wells—as well as hourly potential. By this formula 514 wells incapable of producing 20 barrels a day at open flow absorbed 6,245 barrels, 25,456 wells were

allotted a minimum of 20 barrels, thus absorbing 509,000 barrels, leaving 176,000 barrels to be distributed among these latter wells according to the new allocation formula. Under the first order, the minimum per well allowance of 20 barrels accounted for 98 per cent of the limited production; under the later order only 75 per cent was needed to satisfy the 20 barrel allowance. The lease involved in this litigation was allowed by the first order an output of 154 barrels a day, or .029 per cent of the total allowable; now it may produce 260 barrels a day, which is .037 per cent of the total. This comparison of the practical operation of the two orders exposes the emptiness of the claim that a constitutional line can be drawn between them.

The accommodation of conflicting private interests in the East Texas oil field, with due regard to the public welfare, is beset with perplexities, both geological and economic. As we read the records in these cases, this picture emerges. The huge oil resources of that region, viewed in cross-section from east to west, are roughly triangular in shape. On the lower western side the pressure of an oil-water face furnishes the principal energy of the field. As the oil is withdrawn, the pressure is decreased. The drive of the water from the west forces the oil eastward, and the westernmost wells are first exhausted. The reduced pressure in the field shortens the life of the wells on the extreme eastern edge, with the result that the wells nearer the center of the field, like those of the Rowan & Nichols Company, are likely to be most long-lived. Thus it is that a production formula dependent on current reserves of oil in place—a consideration which greatly influenced the court below and was urged before us—contains elements of unfairness to wells on the edge of the field by disregarding the migration of oil from west to east. Other factors further complicate the situation. The surface is often divided into

small tracts, and the Commission, acting under the authority of the Texas statutes, has permitted the drilling of wells by small owners in order to prevent practical forfeiture of their interests. Small producers have investments in existing wells with low capacities, and these wells need a minimum daily production sufficient to justify their enterprise. In addition to all this, any scheme of proration duly mindful of all those considerations, hardly mathematically commensurable, which constitute the total well-being of a society, must assure the continued operation of a sufficient number of wells for an adequate exploitation of the state's oil resources.

In achieving a reconciliation of these tangled and partly conflicting aims, the Commission evidently regarded the 20 barrel minimum allowance as a guiding factor, taking its cue doubtless in part from the policy underlying the Texas Marginal Well Statute, *supra.* The justification for the Commission's order was its conviction that the minimum allowance accelerates the rate of production of the densely drilled areas on the edges of the field most subject to losses from the migration of the oil, that such allowance is an appropriate incentive to the drilling of small tracts, and that thereby investment losses in low-producing wells are minimized.

Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. For its own good reasons Texas vested authority over these difficult and delicate problems in its Railroad Commission. Presumably that body, as the permanent representative of the state's regulatory relation to the oil industry equipped to deal with its ever-changing aspects, possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals.

Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its own judgment. For it appears that the court below nullified the Commission's action without even having the record of the Commission before it. When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses.

This record gives little justification for confidence in such testimony as the basis for judicial dogmatism. Take, for instance, the question of the amount of recoverable oil remaining in the field. One expert testifying for the Company in this case gave an estimate of 3,180,000,000 barrels, while in another case a year previously his estimate had been a billion barrels less. Similarly, in regard to the crucial issue of the 20 barrel minimum, although it was common ground that some minimum was essential to avoid fatal losses of investment, what that minimum should be was clearly not shown to be capable of mathematical ascertainment, and no expert on behalf of the Oil Company proved that the minimum of the Commission bore no relation to the legislative policy to be enforced by the Commission.

The Constitution does not provide that the federal courts shall strike a balance between ascertainable facts and dubious inferences underlying such a complicated and elusive situation as is presented by the Texas oil fields in order to substitute the court's wisdom for that

of the legislative body. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582. The real answer to any claims of inequity or to any need of adjustment to shifting circumstances is the continuing supervisory power of the expert commission. In any event, a state's interest in the conservation and exploitation of a primary natural resource is not to be achieved through assumption by the federal courts of powers plainly outside their province and no less plainly beyond their special competence. The Fourteenth Amendment was not intended for such ends.

The court below also erred in holding the order a violation of the Texas statute requiring proration on a "reasonable basis." Vernon's Texas Annotated Civil Statutes, art. 6049c, § 7. In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts, *post,* p. 614.

The decree is vacated and the case is remanded to the district court for dismissal of the complaint.

Vacated.

The Chief Justice, Mr. Justice McReynolds, and Mr. Justice Roberts dissent for the reasons stated in the dissenting opinion in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.,* 310 U. S. 573. They are of opinion that the facts disclosed by the record do not differ materially from those found in the earlier case and require the affirmance of the judgment.

276055°—41——37

RAILROAD COMMISSION OF TEXAS ET AL. *v.* HUMBLE OIL & REFINING CO.

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

No. 57. Argued December 12, 1940.—Decided January 6, 1941.

Decided upon the authority of *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co., ante,* p. 570.
Decree vacated.

Mr. James P. Hart, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, *Edgar W. Cale, Tom D. Rowell, Jr.,* and *E. R. Simmons,* Assistant Attorneys General, were on the brief, for appellants. *Mr. Norman L. Meyers* was on a brief for G. A. Sadler, appellant.

Mr. Rex G. Baker, with whom *Messrs. Robert E. Hardwicke, E. E. Townes,* and *R. E. Seagler* were on the brief, for appellee.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is a companion case to *Railroad Commission* v. *Rowan & Nichols Oil Co., ante,* p. 570. There are minor variations in the facts of the two cases, but not of sufficient moment to call for particularization. The decision in the *Rowan & Nichols* case is decisive of this.

The decree is vacated and the case is remanded to the district court for dismissal of the complaint.

Vacated.

THE CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS dissent.

RECONSTRUCTION FINANCE CORP. ET AL. *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.

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

No. 69. Argued December 16, 17, 1940.—Decided January 6, 1941.

1. The proper procedure for taking appeals under § 250 of the Bankruptcy Act, as amended, from orders making or refusing to make allowances of compensation or reimbursement under Chapter X, is by filing in the Circuit Court of Appeals, within the time prescribed by § 25 (a), applications for leave to appeal, not by filing notices of appeal in the District Court. P. 581.
2. Rule 73 (a) of the Federal Rules of Civil Procedure, which provides that when an appeal "is permitted by law from a District Court to a Circuit Court of Appeals" it may be taken by filing with the District Court a notice of appeal, is inapplicable to appeals under § 250 of the Bankruptcy Act, which may be had only in the discretion of the Circuit Court of Appeals. P. 581.
3. Although appeals under § 250 must be "taken to" the Circuit Court of Appeals within the time prescribed by § 25 (a), it is not required also that they be "allowed" within that time. P. 582.
4. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted. P. 582.
5. Where, subsequent to *London* v. *O'Dougherty,* 102 F. 2d 524, and prior to *Dickinson Industrial Site* v. *Cowan,* 309 U. S. 382, notices of appeals from compensation orders under § 77B of the Bankruptcy Act were filed in the District Court, within the appeal period prescribed by § 25 (a), although no application for leave to appeal was made to the Circuit Court of Appeals, *held* that the Circuit Court of Appeals was not without jurisdiction to allow the appeals. Pp. 580, 582.

111 F. 2d 37, reversed.

CERTIORARI, 310 U. S. 622, to review a judgment dismissing appeals from compensation orders of the bankruptcy court.

Assistant Solicitor General Fahy, with whom *Solcitor General Biddle* and *Messrs. Richard H. Demuth, James F. Dealy, Clifford J. Durr, Hans A. Klagsbrunn, Charles M. McCarthy, J. M. Richardson Lyeth,* and *Emery H. Sykes* were on the brief, for petitioners.

Mr. John Gerdes for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Dickinson Industrial Site v. *Cowan,* 309 U. S. 382, decided on March 11, 1940, held that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act (52 Stat. 840) may be had only at the discretion of the Circuit Court of Appeals. Prior to that decision the Circuit Court of Appeals for the Second Circuit had held that appeals from such orders (involving $500 or more) could be had as a matter of right. *London* v. *O'Dougherty,* 102 F. 2d 524. Subsequent to the decision in the *London* case and prior to the decision of *Dickinson Industrial Site* v. *Cowan, supra,* petitioners endeavored to take appeals from compensation orders, which had been entered in reorganization proceedings under former § 77 B (48 Stat. 912), by filing within the appeal period provided by § 25 (a) of the Bankruptcy Act, notices of appeal in the District Court. No application for leave to appeal was made to the Circuit Court of Appeals at any time. Some of the appeals were argued in May, 1939, the balance in February, 1940, some of the notices of appeal having been filed in the District Court in March, 1939, and some in November, 1939. While the matter was under advisement in the Circuit Court of Appeals we decided *Dickinson Industrial Site* v. *Cowan, supra.* Thereupon certain respondents moved for dismissal of the appeals for want of jurisdiction. All of the appeals were

dismissed, some on those motions and some by the court *sua sponte*. 111 F. 2d 37. The case is here on petition for certiorari which we granted in view of the importance of the procedural problem in administration of the Bankruptcy Act and of the asserted substantial conflict of the decision below with *Baxter* v. *Savings Bank*, 92 F. 2d 404, and *Wilson* v. *Alliance Life Ins. Co.*, 102 F. 2d 365, decided by the Circuit Court of Appeals for the Fifth Circuit.

Sec. 250 of the Chandler Act provides that appeals from compensation orders "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." Petitioners contend that when § 250 states that such appeals may be taken "in the manner . . . provided for appeals by this Act," it necessarily makes applicable § 24 (b) which provides that such appellate jurisdiction shall be exercised "by appeal and in the form and manner of an appeal." They argue, therefore, that Rule 73 (a) of the Federal Rules of Civil Procedure, which allows an appeal to be taken "by filing with the district court a notice of appeal" in those cases where an "appeal is permitted by law from a district court to a circuit court of appeals," governs appeals under § 250 as well as other appeals, since General Order No. 36 makes those rules applicable to appeals in bankruptcy, "except as otherwise provided in the Act." In our view, however, Rule 73 (a) is not applicable to appeals under § 250 (see 2 Collier on Bankruptcy (14th ed.) p. 918) for they are permissive appeals which may be had not as of right but only in the discretion of the Circuit Court of Appeals. Since § 250 provides that they may "be taken to and allowed by the circuit court of appeals," the proper procedure for taking them is by filing in the Circuit Court of Appeals, within the time prescribed in § 25 (a), applications for leave to appeal, not by filing notices of

appeal in the District Court as was done here. As respondents maintain, that is the fair implication from our conclusion in *Dickinson Industrial Site* v. *Cowan, supra,* at p. 385, that such appeals "may be had only at the discretion of the Circuit Court of Appeals." But while the appeals under § 250 must be "taken to" the Circuit Court of Appeals within the time prescribed in § 25 (a) we do not think it is the fair intendment of that section that they must also be "allowed" within that time. Cf. *In re Foster Construction Corp.,* 49 F. 2d 213; *Price* v. *Spokane Silver & Lead Co.,* 97 F. 2d 237. If that were true, the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted.

The court below was in substantial agreement with the foregoing construction of § 250. It went on to hold, however, that since petitioners did not seek an allowance of their appeals in that court within the time prescribed in § 25 (a), it had no jurisdiction to allow them. We take a different view.

The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. Cf. *Taylor* v. *Voss,* 271 U. S. 176, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that

petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty, supra.* This conclusion does not do violence to *Shulman* v. *Wilson-Sheridan Hotel Co.,* 301 U. S. 172. As we indicated in *Dickinson Industrial Site* v. *Cowan, supra,* the *Shulman* case stated the rule of permissive appeals which was carried over into § 250. The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. Cf. *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174.

For the reasons stated, we hold that the Circuit Court of Appeals had the power to allow the appeals.

Reversed.

MR. JUSTICE REED, concurring.

I am of opinion that timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and that the practice followed in this case cannot be reduced to a mere procedural irregularity. *Farrar* v. *Churchill,* 135 U. S. 609, 612–13; *Old Nick Williams Co.* v. *United States,* 215 U. S. 541; *Shulman* v. *Wilson-Sheridan Hotel Co.,* 301 U. S. 172. However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty,* 102 F. 2d 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 254–255. In rare instances such as the case at bar this power is appropriate for curing even jurisdictional defects. Cf. *Rorick* v. *Commissioners,* 307 U. S. 208, 213.

MR. JUSTICE ROBERTS joins in this opinion.

NATIONAL LABOR RELATIONS BOARD *v.* LINK-BELT COMPANY.*

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

No. 235. Argued December 18, 1940.—Decided January 6, 1941.

1. An order of the National Labor Relations Board requiring an employer to disestablish a labor organization of its employees, and directing the employer to reinstate or to make whole certain employees against whom the Board found the employer had discriminated in regard to hire or tenure of employment because of their union membership and activities, *held* based on findings supported by substantial evidence. Pp. 585–597.
2. In reaching the conclusion that there was no evidence in this case from which it could be inferred that the employees did not, with complete independence and freedom from domination, interference or support of the employer, form their own union, the Circuit Court of Appeals substituted its judgment on disputed facts for that of the Board—a power denied it by Congress. P. 596.
3. It is for the Board, not the courts, to determine whether the disestablishment of a labor organization is required, notwithstanding its subsequent conduct, in order to dissipate completely the effects of unfair labor practices which aided its formation. P. 600.
4. The evidence in this case sustains the findings of the Board that certain employees were discharged and discriminated against in violation of § 8 (1) and (3) of the Act. P. 600 *et seq.*

110 F. 2d 506, reversed.

CERTIORARI, *post*, p. 629, to review a judgment refusing to order enforcement of portions of an order of the National Labor Relations Board.

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*Together with No. 236, *National Labor Relations Board* v. *Independent Union of Craftsmen*, also on writ of certiorari, *post*, p. 629, to the Circuit Court of Appeals for the Seventh Circuit.

Mr. Robert B. Watts, with whom *Solicitor General Biddle, Assistant Solicitor General Fahy,* and *Messrs. Thomas E. Harris, Laurence A. Knapp,* and *Morris P. Glushien* were on the brief, for petitioner.

Mr. Henry E. Seyfarth, with whom *Mr. Herbert Pope* was on the brief, for respondent in No. 235.

Mr. Benjamin Wham for respondent in No. 236.

Mr. Justice Douglas delivered the opinion of the Court.

The court below refused to enforce certain portions of an order of the National Labor Relations Board, entered in proceedings [1] under § 10 of the Act (49 Stat. 449), requiring an employer to cease and desist from dominating or interfering with a labor organization and to withdraw recognition from it as a collective bargaining representative of employees; and directing the employer to reinstate or to make whole certain employees [2] against whom the Board found the employer had discriminated because of their union membership and activities. Enforcement of those portions of the order was refused because, in the view of the court below, they were not

[1] These proceedings were instituted on charges filed in 1937 and 1938 by Lodge 1604 of Amalgamated Association of Iron, Steel and Tin Workers of North America, affiliated with the Steel Workers Organizing Committee, and through it with the Committee for Industrial Organization. The complaint, as amended, charged that the employer, respondent in No. 235, had engaged in unfair labor practices within the meaning of § 8 (1), (2), and (3) of the Act; 29 U. S. C. § 158 (1), (2), and (3). Independent Union of Craftsmen, respondent in No. 236, was allowed to intervene, was represented by counsel and participated throughout the proceedings.

[2] The Board did not sustain the charges that certain other employees had been discharged because of their union activities.

"supported by evidence" as required by § 10 (e) of the Act. The petition for writs of certiorari was granted because of the importance in an orderly administration of the Act of the mandate contained in § 10 (e) that the findings of the Board as to the facts "if supported by evidence, shall be conclusive." See *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206.

Disestablishment of Independent. Independent Union of Craftsmen was organized within a few days after the decision by this Court, on April 12, 1937, of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, which upheld the constitutionality of the Act. From 1933 down to that date the employer, Link-Belt Co., had maintained a company union, apparently continuing to recognize it even after passage of the Act in 1935 and even though under the Act it was concededly an improper bargaining unit. In any event, that union remained in existence until Independent's membership drive was successfully concluded. The organization of Independent was conceived on April 12 and 13, 1937, by certain employees, who were disappointed at the decision upholding the constitutionality of the Act. Linde, who was a leader in organizing Independent, testified: "A. The Wagner Act had been declared constitutional, and a group of us were dismayed, I am frank to admit, or we thought there was nothing for us to do. Q. Why were you dismayed? A. I will tell you, we had banked our hopes that it would be declared illegal, and immediately the labor unrest and trouble would have stopped and our company would proceed and all the other companies would proceed to enjoy the prosperity which we thought was coming at that time." The membership drive took place in the main on April 14, 15, and 16, resulting in a membership of 760 out of about 1,000 employees. The constitution was drafted on April 17. On April 18, it

was decided to seek dissolution of the old company union and recognition of Independent. Accordingly, on April 19 an agreement was reached between the employee representatives and plant manager Berry dissolving the old union; and he was asked to obtain exclusive recognition for Independent. That request was granted by the employer on April 21; and Independent held its first meeting on April 22.

An "inside" union, as well as an "outside" union, may be the product of the right of the employees to self-organization and to collective bargaining "through representatives of their own choosing," guaranteed by § 7 of the Act. The question here is whether the Board was justified in concluding that Independent was not the result of the employees' free choice because the employer had intruded to impair their freedom.

Respondents point to numerous earmarks of independence which Independent evidences. They emphasize that after it was recognized it held many bargaining conferences and as a result obtained wage increases, changes in seniority policy, bonus payments for night workers, a better vacation policy, better lighting and air conditions, and improved safety measures—in fact, all of its major objectives except a closed shop. They stress the facts that it is not financed by the employer, that its meetings are held off company property, that its leadership is substantially different from the employee representation in the old company union, and that its genesis was a suggestion made not by the employer but by a group of employees.

In the latter connection they urge that the employees chose Independent because that was the type of labor organization which they honestly preferred; or as stated by one of the employees who led the membership drive, "It was so big a feature that they (the employees) were all anxious to get on the band wagon and do something.

That was the general attitude." And they maintain that there was in fact no connection between Independent and the old company union; that the success of Independent's membership drive was not the result of any compulsion or belief as respects the employer's attitude.

It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates.

Here no one fact is conclusive. But the whole congeries of facts before the Board supports its findings.

The employer's attitude towards unions is relevant. As we have indicated, it maintained a company union both before and after the Act. And the court below sustained the Board's finding as to the employer's long-standing industrial espionage, through the National Metal Trades Association, which continued at least until an investigation was made late in 1936 by the La Follette Committee of the Senate.[3] Further, the employer evidenced hostility towards an "outside" union. In 1936, plant manager Berry told the board of the company union that "in the event outside people came into our plant and told us how to run the plant, then I had enough of industry." At the hearing he testified that he meant "that the Link Belt Company was able and had

[3] Subcommittee of the Committee on Education and Labor, United States Senate, of which Senator Robert M. La Follette, Jr., was Chairman. This Subcommittee acted pursuant to S. Res. 266, 74th Cong., 2d Sess., and held extensive hearings beginning in 1936.

for many years ran their organization and we did not need outside people to tell us how to run the plant economically and efficiently." In September, 1936, Salmons, an employee of 14 years standing, who was an employee representative in the company union and who became dissatisfied with it, initiated the formation of Amalgamated, an "outside" organization.[4] Amalgamated held its first organizing meeting on September 20, 1936. Salmons was discharged the next day by plant manager Berry for "spreading union propaganda around here." He was given half an hour to leave. The employer does not deny this but adds that Salmons was discharged because he engaged in union activities on company time. That he did solicit on company time seems clear, though it could hardly have been extensive as his foreman testified that he was not aware of it. Yet in his association with the company union, he apparently was allowed a similar freedom. That fact, his position of leadership in Amalgamated, the apparent absence of the customary warning, his somewhat precipitate discharge, the failure of the employer to discharge representatives of Independent who, as we shall see, solicited on company time with the knowledge and approval of at least some of the supervisors, made permissible the Board's conclusion that Salmons' activity on behalf of the "outside" union was the basic cause of his discharge.[5] On September 21, 1936, another employee, Novak, who had been employed by the company for over 11 years, was also discharged without warning by Berry, who believed, mistakenly it would seem, that Novak was a member of and solicitor

[4] See note 1, *supra*. Amalgamated apparently had about 400 members before Independent started its membership drive in April, 1937.

[5] Salmons was rehired on December 21, 1936, after mediation by the Board on the understanding that he would not engage in union activities on company time.

for Amalgamated. Berry gave him half an hour to get out, after charging him with being "an organizer and instigator for a union"—a charge which Novak denied.[6] The Board found and the court below sustained the finding that Novak was discharged in violation of the Act because of his alleged union activities. We agree.

Amalgamated, as well as Independent, solicited on company time. But a review of the record indicates that the instances of solicitation by Amalgamated on company time were scattered over a period of months and were apparently more sporadic than those of Independent. At least they do not appear to have had the magnitude and intensity of the acts of solicitation on company time by Independent. There is considerable testimony by members of the supervisory staff that they were instructed not to take sides in the union competition and not to allow solicitation on company time. Plant manager Berry testified on direct examination that those instructions were given after April 12, 1937; and on cross-examination he admitted that they were given only after April 19, 1937, at which time Independent had acquired a membership of 760 men. It is argued here that the employer warned solicitors for Independent and threatened them with dismissal for engaging in union activities on the company's time. And Froling, chairman of the company union and active solicitor for Inde-

[6] Novak was reinstated in January, 1937, with the understanding that he would not engage in union activities on company time. According to him, the condition extended to union activities at all times. According to the company, it covered only union activities on company time. The Board did not resolve the conflict but noted that Novak as a result of his understanding, did not join Amalgamated until after the Act had been upheld in April, 1937. Novak delayed accepting the proposal of reinstatement because of the possible implication that thereby he would tacitly admit that he had earlier engaged in union activities.

pendent, testified that he was wary about soliciting in the plant on company time in front of foremen, for although he did not remember any foreman warning him, he nevertheless was afraid of being discharged because of what had happened to Salmons on account of his activities. It is therefore contended that no discrimination in favor of Independent can be inferred; that the quick success of Independent in obtaining a majority was due not to the employer's support but to the employees' enthusiasm for that union. The Board stresses the fact that employee representatives in the company union were extremely active solicitors for Independent. It points out that at least six of the employee representatives under the company union were active solicitors—Froling virtually admitting that he solicited the entire machine shop—110 to 120 men—during working hours. Kowatch, an employee, signed up between 100 and 250 men, about one-fourth on company time and twice punched out his time with the permission of the foreman to solicit in the foundry. The company counters with the fact that there were many solicitors for Independent of whom those representatives were a mere minority—less than a third. There is this to be said, however, about those conflicting claims. Most of the company union representatives were active and prominent in Independent's membership drive and during that drive apparently enjoyed somewhat the same privilege of moving freely about the plant which they had been allowed as company union representatives—a privilege withdrawn after Independent had been recognized. The instances when supervisors remonstrated with solicitors for Independent seem to be restricted to around six or seven in number, and some of those related to activities *after* the April membership drive was completed. As respects one of the latter instances, Linde, an employee soliciting for Independent, stated that foremen warned the men: " 'You are on union

business. My God, don't let me catch you or we will fire you,' or words to that effect." But, as the Board concluded, it seems impossible to infer that, in view of the extensive and intensive solicitation for Independent in the plant on company time, the supervisory staff were not aware of the campaign and did not acquiesce in it. Beyond that is the active support of Independent by some of the supervisory staff. There is abundant testimony that Siskauskis, a foreman, actively solicited for Independent. One employee, Lackhouse, who earlier had joined Amalgamated but who was soliciting for Independent in April 1937, testified:

"He took the sheets in my hand—the first sheet I had already filled, with the heading on it, and I had nothing but blank sheets left, and he went around the machines, the molders right off the side floor there, and he told them to sign up for the Inside union here, and he signed up I believe ten, and about five of them he signed up in his own handwriting. The majority of them in the foundry don't know how to write. Q. And did you see him sign up these other men? A. I seen him sign up actually about seven or eight, I am sure, in his own handwriting. He went as far as one crane man who was working right above him, and he was going up to him and he was going to explain what it was all about, and he says, 'Oh, heck, he don't know how to write,' so he wrote down his name, too. I don't remember his name, I know it was John, the crane man in his department. I just don't know his last name. Q. And then did Mr. Shaskinskis (*sic*) give you back the paper? A. Yes, he returned them back to me after he had the names on them."

This episode was confirmed at least in part by Johnson, an employee.

Another employee, Balcauski, testified as follows respecting Siskauskis' solicitation:

"He walked to me and he said, 'Stanley, why don't you join in the C. I. O.'—I mean this here, the independent craftsmen's union. I said, 'I am already with the C. I. O.' He says, 'The hell with the C. I. O.' He says, 'Join in with the craftsmen's union.' He says, 'We are going to have our union.' Then I repeated, I says, 'Do you know under the Wagner Law that is not allowed for the foreman to go and organize the workingmen on the company time or on his own time?' He told me this, he said, 'To hell with that.' So I says, 'If you want to sign up independent, go ahead, I ain't going to waste my time.' And I walked away."

Balcauski further testified respecting Siskauskis' solicitation of employees: "He told them, 'If you don't sign up'—I heard it with my own ears—he said, 'you are going to get out of here.' "

Still another employee, Thomas, testified:

"Q. Did anybody ask you to join the Independent Union? A. Everybody, Splitz (Siskauskis) comes to me with piece of paper, sign your name. I say I can't sign my name. He says, 'All right, I sign it myself.' And he signed it himself, my name. Q. Did he say anything more to you about it? A. That is all that day. The second day he come around again. He say, 'Joe, sign name.' I say, 'I sign yesterday.' He say, 'All right, it is no good, I threw it away.' Q. It is no good, he threw it away? A. Sure. I didn't sign no place. 'Joe,' he say, 'Sign him up anyhow, or maybe lose job.' Q. Splitz says to sign up or maybe you lose job? A. Yes. I says, 'I sign him up if you want to.' He come in Thursday about this piece of paper again and he say, 'Joe, sign name.' I say, 'What is the matter, I sign him up twice, I sign him up before yesterday and I sign him again.' He say, 'Something wrong, no good.' I say, 'I quit, I don't want sign at all.' Q. You didn't want to sign? A.

No. Q. You didn't sign either day? A. I don't sign. At noontime he come to me and he say—I was by him over there and he say, 'Come on, Joe, come in office sometime, we want to see you.' Q. Did you go in the office? A. Yes. . . . Q. Some man with a mustache was sitting there? A. Yes, sir. He says, 'What you want?' I say, 'Splitz sent me in office, you want something?' He said he didn't want nothing from me. Splitz come in then and grabbed my hand, and he say, 'Give him piece of paper.' He say, 'sign his name.' I can't sign name, I say I will not sign. I said two times I sign, I don't like it. He say, 'Sign anyhow.' Q. Who said that? A. Splitz, 'Go ahead, sign again.' I say, 'I am going out, go to work.' Q. You did not sign? A. No. A couple of times he come to me and say, 'Sign them up.' I don't sign no place. A lot of people don't sign, I no sign."

Bozurich, an employee, testified as follows with respect to the attitude of Siskauskis towards Amalgamated:

". . . then he went on with remarks that it would be very bad if C. I. O. would come into the shop. And I said, 'What would be bad about it?' I said, 'If the workers want it who can stop them?' 'Well,' he said, 'if C. I. O. comes in the company will close the plant.' He said, 'You see during the depression it was hard to be without a job.' I said, 'Company can't lock—close the shop because of the union.' I says, 'That would be considered as a lock-out.' And he said, 'Who can stop them?' 'Well,' I said, 'the government.' He said, 'The company runs the plant and not the government.' I said, 'There is such a thing as government Labor Board here who takes care of those members,' and I believe I referred him to—well, to be exact, I read in the paper about a certain company somewhere in New York or New Jersey that due to C. I. O. activities closed their plant and

moved the machinery out, things like that, to get away from the union. So I call his attention to that, to the best of my recollection from the newspaper, that the Labor Board takes action; they got company to put machinery back. At least that is the way I understood it so the illustration to him is that we are not afraid of that kind. Then he twisted his lips and said 'Oh,' he says, 'you better keep away from something like that,' he said, 'and if you want anything it is best to go to boss yourself.' "

There is also testimony that Siskauskis signed for illiterate employees, though, with one possible exception, apparently not against their will. Siskauskis denied that he made any such statements or that he ever solicited for Independent. The Board refused to believe that all the opposing testimony was fabricated, and found his denials unconvincing.

Lackhouse, an employee, testified that he obtained permission from Nyberg, his foreman, to solicit for Independent, Nyberg saying, "Well, if you have to, you have to, Frank, so you might as well go ahead on it." Lackhouse was delayed about half an hour in getting started when Olson, an assistant superintendent, took him aside in a separate room and, according to Lackhouse, "compared the differences between the outside union and the inside union; and he told me about it up there, how much better off we would be if we organized amongst us fellows, among our fellow workmen ourselves and kept the outside union out, that you will never get anywhere with them, just striking all the time, and give me the differences, and I listened to him about it." Lackhouse testified that thereupon he solicited in the plant during working hours: "I was absent from my job from one o'clock until quitting time walking through the whole foundry." On direct examination Olson denied this

conversation. On cross-examination he admitted talking briefly with Lackhouse about "a rumor that the boys are trying to form an independent union." Nyberg was not called. The Board believed Lackhouse.

There was considerable testimony, not denied, that Belov, a night boss, also solicited for Independent. According to one employee, Kalamarie, Belov did so on written instructions left by foreman McKinney which Kalamarie read. Kalamarie testified as follows respecting this conversation with Belov about those instructions:

"Q. So when he (Belov) got this note to solicit for the Independent Union he was a little bit puzzled by it and he asked your advice about it? A. He did. Q. You advised him that inasmuch as his superior officer, Mr. McKinney, had ordered him to do it, he had better go ahead and do it? A. That is right, if he wanted to keep his job, I imagine he should."

McKinney denied that he had left any such instructions, though it apparently was his custom to leave written instructions for the night bosses on things he wanted done. Belov was not called. Because of that and because of the contradictory character of McKinney's testimony on certain matters, the Board believed Kalamarie.

Tomas, an employee, testified that his boss, Big Louie, "a kind of assistant foreman," solicited for Independent getting about ten signatures; that Big Louie told him that "they were trying to get the C. I. O. out of there."

The court below was unable to find any evidence from which it could be inferred that the employees did not, with complete independence and freedom from domination, interference or support of the employer, form their own union. But we are of the opinion that

the Court of Appeals in reaching that conclusion substituted its judgment on disputed facts for the Board's judgment—a power which has been denied it by the Congress. Sec. 10 (e) provides that the "findings of the Board as to the facts, if supported by evidence, shall be conclusive." As we stated in *National Labor Relations Board* v. *Waterman Steamship Corp., supra,* at pp. 208–209: ". . . 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 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." Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. The Board, like other expert agencies dealing with specialized fields (see *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 304) has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony.

The Board had the right to believe that the maintenance of the company union down to the date when Independent's membership drive was completed was not a mere coincidence. The circumstantial evidence makes credible the finding that complete freedom of choice on the part of the employees was effectively forestalled by maintenance of the company union by the employer until its abandonment would coincide with the recognition of Independent. The declared hostility towards an

"outside" union, the long practice of industrial espionage, the quick recognition of Independent, the support given Independent's membership drive by some of the supervisory staff, the prominence of company union representatives in that drive, the failure of the employer to wipe the slate clean and announce that the employees had a free choice, the belated instructions to the supervisory staff not to interfere—all corroborate the conclusion that the employer facilitated and aided the substitution of the union, which it preferred, for its old company union. But respondents contend that there is no evidence that the employees had a settled conviction that the employer preferred a certain type of labor organization or that they were under compulsion from the employer in choosing between Independent and Amalgamated. There were, however, forces at work in the plant which make tenable the conclusion of the Board that the employer had intruded so as effectively to restrain the employees' choice. The employer's attitude towards an "outside" union coupled with the discharge of Salmons and Novak for activities on behalf of Amalgamated would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated. That the discrimination against Salmons had some effect is not denied, for Froling, a witness for Independent, insisted that even he furtively solicited for Independent because of the price paid by Salmons. When that discrimination is contrasted to the apparent acquiescence by the management in the open solicitation by Independent, we cannot say that the Board was unjustified in the conclusion which it drew. As we stated in *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78, "Slight suggestions as to the employers choice between unions may have telling effect among men who

know the consequences of incurring that employer's strong displeasure." Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. As we indicated in *International Association of Machinists* v. *National Labor Relations Board, supra,* the strict rules of *respondeat superior* are not applicable to such a situation. If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere. If the employees "would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates." *International Association of Machinists* v. *National Labor Relations Board, supra.* Here such inferences were wholly justified. The attitude of the employer towards an "outside" organization was clearly conveyed. When that was followed by solicitation for Independent on the part of supervisors who had general authority over the men, it would be unfair to conclude that the employees did not feel an actual pressure from the management. That fact, the failure of the employer to announce its impartiality, its delay in advising the supervisors to remain neutral until Independent had acquired its majority, the favors shown Independent, the discharge of Salmons and Novak, its past union policy, all are part of the imponderables which the Board was entitled to appraise. The fact that these various forces at work were subtle rather than direct does not mean that they were none-

theless effective. Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge.

Respondents suggest that an order of disestablishment would make Independent an innocent victim of the employer's inaction or of its unwelcome action. It is urged that the subsequent conduct of Independent demonstrates its independence and that an order directing the employer to cease and desist all interference with the employees and with Independent is wholly adequate for the evil at hand. The Board, however, was not forced to conclude that the subsequent activities of Independent erased the effects of the employer's earlier discrimination, any more than it was compelled to believe that the employer's later show of impartiality obliterated the consequences of its prior interference with the employees' freedom of choice. We cannot assume that the employees will be free from improper restraints and will have the complete freedom of choice which the Act contemplates where the effect of the unfair labor practice is not completely dissipated. The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra; National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board, supra.*

The order of disestablishment must be enforced.

Discharges of Employees. The court below rejected the finding of the Board that Salmons had been discharged in violation of § 8 (1) and (3) of the Act. For the reasons already stated, we think that the court erred and that the Board was right.[7]

[7] The Board ordered no affirmative relief with respect to Salmons as he had been reinstated under an agreement with the company that he would not receive back pay.

The Board found that in April, 1937, employment manager Staskey conditioned the employment of Frank Solinko upon the acceptance of membership in the Independent by his father, Pete Solinko; and that therefore the company had violated § 8 (3) of the Act.[8] The Board credited the testimony of Pete and Frank Solinko against testimony of Staskey and an employee named Kowatch. Kowatch was a solicitor for Independent whom Pete Solinko said Staskey had told him to see. Pete, a member of Amalgamated, joined Independent. So did Frank, who later, however, joined Amalgamated. The evidence is somewhat confusing. But even according to Staskey, Pete Solinko did show him an Independent card the day Frank was hired. The court below noted that even if the testimony of Pete were true, the conversation occurred two months before Frank was hired; and even if it took place on the day he was hired, then it was after Independent had been recognized by the company as the bargaining agent for the employees. We think, however, that the Board's finding was justified. Whenever the conversation took place, the conditioning of Frank's employment upon Pete's joining Independent was a violation of § 8 (3) of the Act in absence of a valid closed-shop agreement, not present here. Viewed in that light, it also corroborates the conclusion of the Board that the employer interfered with the collective bargaining process by supporting Independent, though the episode took place after Independent's membership drive was completed.

Karbol and Cumorich were discharged May 19, 1937. In April, 1937, Belov, according to their testimony, had asked them to join Independent. They refused. In the latter part of April, 1937, they joined Amalgamated.

[8] No affirmative relief was ordered as respects Pete Solinko, who was laid off in January, 1938.

The company's claim is that they were discharged for unsatisfactory work after time studies had shown their inefficiency and after the day foreman, McKinney, had warned them that their work was not satisfactory. On the other hand, they denied that anyone had given them any such warning or had criticized their work; they testified that at the time of their discharge Belov stated that they were good workmen and that he did not know why they were discharged. The Board reviewed the time studies and found they did not reveal with any degree of precision the relative efficiency of the men. It concluded that they were discharged because they joined Amalgamated. The evidence as to inefficiency is quite inconclusive. The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew these men had joined Amalgamated and was displeased or wanted to make an example of them.

The court below also refused to enforce the Board's order reinstating and making whole Kalamarie who was discharged according to the Board because of his union activities. He, like Karbol and Cumorich, did not accede to the solicitation of Belov on behalf of Independent. He had joined Amalgamated in March, 1937, was an active solicitor for it, and served on its grievance committee. As a member of that committee, he called on plant manager Berry to protest the lay-off of a union man. Shortly thereafter, Belov, Kalamarie's night boss, received instructions from the day foreman to lay Kalamarie off for a week if his work did not improve. November 30, 1937, he was permanently laid off for an alleged lack of work as a welder and in connection with a general reduction of employees. Until his promotion as a welder a few months earlier Kalamarie for some time had been an acetylene burner. He testified that when

he took the job as welder, he was promised that he could go back to burning without loss of his seniority rights if welding ran out. This was denied by the foreman. When he was laid off, men junior to him as burners were retained. He protested. The company insists that the refusal to restore Kalamarie to his old position as burner was consistent with its occupational seniority policy. On this there is some contradiction in the record. There is testimony that under company practice an employee retained (or at least might be given) his original seniority if he was promoted to another position in the same department. The reasons stated for not restoring Kalamarie to his old seniority position were that he did not ask to be put back and that the company would have had to lay off a burner senior to him. These statements were contrary to the facts as found by the Board. On this state of the record we think that the Board was justified in concluding that Kalamarie was in fact discharged because of his activities for Amalgamated.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals with directions to enforce the Board's order in full.

Reversed.

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

DECISIONS PER CURIAM, ETC., FROM OCTOBER 7, 1940, THROUGH JANUARY 6, 1941.*

No. 21. BACARDI CORPORATION OF AMERICA *v.* BONET, TREASURER, ET AL. October 7, 1940. Manuel I. Domenech, present Treasurer of Puerto Rico, substituted as a party respondent in the place and stead of Rafael Sancho Bonet, former Treasurer, on motion of *Mr. Preston B. Kavanagh* for the petitioner.

No. 327. FUTRALL, RECEIVER, *v.* RAY. October 7, 1940. A. F. Rawlings, present Receiver of the Lee County National Bank, substituted as the party petitioner in the place and stead of E. B. Futrall, former Receiver, on motion of *Mr. George P. Barse* for the petitioner.

No. 104. SNEAD & COMPANY *v.* STEINMETZ. Appeal from the Court of Errors and Appeals of New Jersey. October 14, 1940. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Alaska Packers Association* v. *Industrial Accident Commission,* 294 U. S. 532. *Mr. R. Robinson Chance* for appellant. *Mr. William T. Cahill* for appellee. Reported below: 123 N. J. L. 497; 124 N. J. L. 450; 9 A. 2d 801; 12 A. 2d 678.

No. 265. VAN DYKE ET AL. *v.* WISCONSIN TAX COMMISSION ET AL.; and

No. 266. FIRST WISCONSIN TRUST CO., TRUSTEE, *v.* SAME. Appeals from the Supreme Court of Wisconsin.

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* For decisions on applications for certiorari, see *post,* pp. 623, 644; for rehearing, *post,* p. 723. For cases disposed of without consideration by the Court, *post,* p. 720.

October 14, 1940. *Per Curiam:* The motions to affirm are granted, and the judgments are affirmed. *Pearson* v. *McGraw,* 308 U. S. 313. *Messrs. Douglass Van Dyke* and *George D. Van Dyke* for appellants. *Messrs. John E. Martin,* Attorney General of Wisconsin, and *Harold H. Persons,* Assistant Attorney General, for appellees. Reported below: 235 Wis. 128; 292 N. W. 313.

No. 276. Columbus & Chicago Motor Freight, Inc. *v.* Public Service Commission of Indiana et al. Appeal from the District Court of the United States for the Northern District of Indiana. October 14, 1940. *Per Curiam:* The judgment is affirmed. *Hendrick* v. *Maryland,* 235 U. S. 610; *McDonald* v. *Thompson,* 305 U. S. 263; *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Eichholz* v. *Public Service Commission,* 306 U. S. 268. *Mr. Philip Lutz, Jr.* for appellant. *Messrs. Omer Stokes Jackson,* Attorney General of Indiana, and *Urban C. Stover,* Deputy Attorney General, for appellees.

No. 156. Holmes, State Auditor, *v.* Springfield Fire & Marine Insurance Co. Appeal from the District Court of the United States for the District of Montana. October 14, 1940. *Per Curiam:* The judgment is reversed. *Osborn* v. *Ozlin,* 310 U. S. 53. *Messrs. Harrison J. Freebourn,* Attorney General of Montana, *Enor K. Matson,* First Assistant Attorney General, *Lee Metcalf,* Assistant Attorney General, and *Earle N. Genzberger* for appellant. Reported below: 32 F. Supp. 964.

No. 114. Wacker-Wabash Corporation *v.* City of Chicago. Appeal from the Supreme Court of Illinois.

October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30, 36; *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421, 427. *Mr. Howard F. Bishop* for appellant. *Messrs. Barnet Hodes* and *J. Herzl Segal* for appellee. Reported below: 372 Ill. 521; 25 N. E. 2d 23.

No. 170. Yazoo & Mississippi Valley Railroad Co. *v.* Board of Mississippi Levee Commissioners. Appeal from the Supreme Court of Mississippi. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Nashville, C. & St. L. Ry. v. Browning,* 310 U. S. 362, 368–369; *New York Rapid Transit Co.* v. *New York City,* 303 U. S. 573, 578–581; *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413, 423–424. *Messrs. Richard C. Beckett, V. W. Foster,* and *E. C. Craig* for appellant. *Mr. Pat H. Eager, Jr.* for appellee. Reported below: 188 Miss. 889; 195 So. 704.

No. 222. Kirkpatrick *v.* Stelling. Appeal from the District Court of Appeal, 1st Appellate District, of California. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Honeyman* v. *Jacobs,* 306 U. S. 539; *Richmond Mortgage Corporation* v. *Wachovia Bank Co.,* 300 U. S. 124. *Mr. John H. Riordan* for appellant. *Mr. Arthur G. Shoup* for appellee. Reported below: 36 Cal. App. 2d 658; 98 P. 2d 566.

No. 143. Crow et al., Constituting the Arkansas State Board of Chiropractic Examiners, et al. *v.*

STROUD ET AL. Appeal from the Supreme Court of Arkansas. October 14, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Dent* v. *West Virginia,* 129 U. S. 114, 121–124; *Watson* v. *Maryland,* 218 U. S. 173, 176–177; *Collins* v. *Texas,* 223 U. S. 288, 294–297. *Mr. Edward H. Coulter* for appellants. Reported below: 199 Ark. 814; 136 S. W. 2d 1025.

No. 213. HORNE ET AL. *v.* CITY OF OCALA. Appeal from the Supreme Court of Florida. October 14, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Leigh* v. *Greene,* 193 U. S. 79; *Longyear* v. *Toolan,* 209 U. S. 414, 418; *Ontario Land Co.* v. *Yordy,* 212 U. S. 152, 156–158. *Mr. H. M. Hampton* for appellants. *Mr. L. W. Duval* for appellee. Reported below: 143 Fla. 108; 196 So. 441.

No. 441. H. E. BUTT GROCERY CO. ET AL. *v.* SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Appeal from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. October 14, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Liggett Co.* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co.,* 294 U. S. 87; *Great A. & P. Tea Co.* v. *Grosjean,* 301 U. S. 412. *Mr. Dan Moody* for appellants. *Mr. Cecil C. Rotsch* for appellees. Reported below: 137 S. W. 2d 823.

No. 115. LUCKENBACH TERMINALS, INC. *v.* TOWNSHIP OF NORTH BERGEN ET AL. Appeal from the Court of Chancery of New Jersey. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal

is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *McCoy* v. *Shaw,* 277 U. S. 302; *Doyle* v. *Atwell,* 261 U. S. 590; *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Mr. Clarence Kelsey* for appellant. *Mr. Nicholas S. Schloeder* for North Bergen, and *Mr. John A. Hartpence* for New Jersey Junction R. Co. et al., appellees. Reported below: 125 N. J. Eq. 562; 127 *id.* 93; 6 A. 2d 548; 11 A. 2d 46.

No. 286. SINCLAIR REFINING CO. *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented federal question. (1) *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443; (2) *Louisville & Nashville R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Holmes* v. *Conway,* 241 U. S. 624, 631–632; *Hardware Dealers Insurance Co.* v. *Glidden Co.,* 284 U. S. 151, 158. *Messrs. Roy T. Osborn* and *F. Carter Johnson, Jr.* for appellant. *Mr. E. Leland Richardson* for appellee. Reported below: 195 La. 288; 196 So. 349.

No. 299. SOUTHWESTERN BELL TELEPHONE CO. *v.* LEE; and

No. 300. SAME *v.* HANNA. Appeals from the Supreme Court of Arkansas. October 14, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are 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. Edward B. Downie* and *E. W. Clausen* for appellant. *Suzanne Chalfant Lighton* for

appellee in No. 299. *Mr. Charles D. Atkinson* for appellee in No. 300. Reported below: 200 Ark. 318; 140 S. W. 2d 132.

No. 326. CORCORAN *v.* CITY OF CHICAGO. Appeal from the Supreme Court of Illinois. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for 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) *Escanaba & Lake Michigan Co.* v. *Chicago,* 107 U. S. 678, 688–689; *Permoli* v. *First Municipality,* 3 How. 589, 610; *Cincinnati* v. *Louisville & Nashville Railroad Co.,* 223 U. S. 390, 401. (3) *Pearson* v. *Yewdall,* 95 U. S. 294, 296; *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 217. *Mr. Charles C. Spencer* for appellant. *Messrs. Barnet Hodes* and *J. Herzl Segal* for appellee. Reported below: 296 Ill. App. 645; 373 Ill. 567; 16 N. E. 2d 922; 27 N. E. 2d 451.

No. 158. BADER *v.* ILLINOIS. Appeal from the Supreme Court of Illinois; and

No. 189. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* DELTA & PINE LAND CO. Appeal from the Supreme Court of Mississippi. October 14, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Mr. Wm. Scott Stewart* for appellant in No. 158. *Mr. Wm. M. Hall* for appellants in No. 189. *Messrs. John E. Cassidy,* Attor-

ney General of Illinois, and *A. B. Dennis,* Assistant Attorney General, for appellee in No. 158. *Messrs. Marcellus Green* and *Garner W. Green* for appellee in No. 189. Reported below: No. 158, 372 Ill. 345; 23 N. E. 2d 691; No. 189, 189 Miss. 496; 195 So. 667.

No. 240. WRIGHT *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES. Appeal from the District Court of Appeal, 4th Appellate District, of California. October 14, 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. The motion for leave to proceed further *in forma pauperis* is also denied. *Mr. Morris Lavine* for appellant. *Mr. James E. Shelton* for appellee. Reported below: 35 Cal. App. 2d 264; 95 P. 2d 194.

No. —. POWELL *v.* SANFORD, WARDEN;

No. —. JOHNSON *v.* METROPOLITAN CASUALTY INSURANCE CO.; and

No. —. EX PARTE NORMAN H. WILSON. October 14, 1940. Applications denied.

No. —, original. EX PARTE EMMET H. BOZEL. October 14, 1940. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application for a writ of habeas corpus to the District Court.

No. —, original. EX PARTE JOHN DYE;

No. —, original. EX PARTE FRANK L. ROBERSON;

No. —, original. Ex parte Taylor Seals;
No. —, original. Ex parte Lindley J. Hansen;
No. —, original. Ex parte Roy Whitson; and
No. —, original. Ex parte Selvie W. Wells. October 14, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Thomas K. Case. October 14, 1940. The motion for leave to file petition for writ of mandamus or prohibition is denied.

No. —, original. Ex parte Berkshire Knitting Mills. October 14, 1940. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. Liske *v.* Bar Association of Nassau County et al. October 14, 1940. The motion for leave to file bill of complaint is denied.

No. 9, original. Arkansas *v.* Tennessee. October 14, 1940. Decree entered. See *ante,* p. 1.

No. 666, October Term, 1928. Stilz *v.* Bethlehem Shipbuilding Corporation. October 14, 1940. The motion for leave to file a bill of review in the District Court is denied. See 279 U. S. 834.

No. 896, October Term, 1939. McCampbell *v.* Warrich Corporation et al. October 14, 1940. The motion for a writ of certiorari to supply omissions from the record and for an order for further proof is denied. *Messrs.*

Lewis H. Barnes, Carmi A. Thompson, and *Orville Smith* for petitioner. *Messrs. Elmer M. Leesman* and *Harold L. Reeve* for respondents. See 310 U. S. 631.

No. 2. NEW WORLD LIFE INSURANCE CO. *v.* UNITED STATES. October 14, 1940. The motion to dismiss is denied. *Messrs. Walter E. Barton* and *Wm. Marshall Bullitt* for petitioner. *Solicitor General Biddle* for the United States. See *post,* p. 620.

No. 3. UNITED STATES *v.* NORTHERN PACIFIC RAILWAY CO. ET AL. October 14, 1940. Motion for leave to file brief of the Minority Stockholders of the Northern Pacific Railway Company denied.

No. 230. VILES *v.* JOHNSON, JUDGE, DISTRICT COURT, CITY & COUNTY OF DENVER. See *post,* p. 644.

No. 950, October Term, 1939. ARROW DISTILLERIES, INC. *v.* ALEXANDER, ADMINISTRATOR. October 14, 1940. Motion for leave to withdraw petition for rehearing granted.

No. 191. UNITED STATES *v.* GOLTRA ET AL., EXECUTORS. Appeal from the Court of Claims. October 14, 1940. Motion to dismiss or affirm denied.

No. 459, October Term, 1939. H. ROUW COMPANY *v.* CRIVELLA. October 14, 1940. It is ordered that the mandate in this case be and it hereby is recalled. The judgment of this Court dated May 27, 1940, 310 U. S. 612, is modified so as to provide that the reversal shall be without costs to either party in this Court. The petition for rehearing is denied.

No. 117. CONTINENTAL ASSURANCE CO. *v.* TENNESSEE. See *ante*, p. 5.

No. —, original. EX PARTE DAVID H. JOHNSON;
No. —, original. EX PARTE MERRITT B. SCHUYLER;
No. —, original. EX PARTE CLARENCE M. BRUMMITT; and
No. —, original. EX PARTE M. J. CUSICK. October 21, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 11, original. KANSAS *v.* MISSOURI. October 21, 1940. The answer of the defendant is received and ordered filed. The motion to reconsider the order denying E. A. Cole leave to intervene is denied. See 310 U. S. 616.

No. 11, original. KANSAS *v.* MISSOURI. October 21, 1940. It is ordered that Dean G. Acheson, Esq., of Washington, D. C., be, and he is hereby, appointed Special Master in this cause.

No. 681, October Term, 1939. RAILROAD COMMISSION OF TEXAS ET AL. *v.* ROWAN & NICHOLS OIL CO. October 21, 1940.

It is ordered that the following sentence on page 4 of the opinion handed down June 3, 1940, 310 U. S. 580, be stricken from the opinion:

"Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."

It is further ordered that the following paragraph be added at the close of the opinion:

"While the presence of a federal question may also open up state issues, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes (1925), art. 6049c, § 7. The Texas decisions, insofar as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 316; 83 S. W. 2d 935; 87 S. W. 2d 1069. But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

The motion for leave to present oral argument is denied.

The petition for rehearing is denied.

No. 26. West India Oil Co. (Puerto Rico) *v.* Bonet, Treasurer of Puerto Rico. October 23, 1940. Manuel V. Domenech, present Treasurer of Puerto Rico, substituted as the party respondent herein in the place and stead of Rafael Sancho Bonet, former Treasurer, on motion of *Mr. James R. Beverley* for the petitioner.

No. 337. SCHWINN *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 28, 1940. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is affirmed on the sole ground that the certificate of citizenship was illegally procured. *Herman Max Schwinn, pro se. Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 112 F. 2d 74.

No. 431. KEATON *v.* OKLAHOMA CITY ET AL. Appeal from the Supreme Court of Oklahoma. October 28, 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. W. C. Sullivan* and *Chas. Hill Johns* for appellant. *Mr. Edward M. Box* for appellees. Reported below: 187 Okla. 593; 102 P. 2d 938.

No. —. EX PARTE CHARLES N. WILLIAMS. October 28, 1940. Application denied.

No. —, original. EX PARTE KENNETH GERARD. October 28, 1940. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. —, original. EX PARTE ROBERT CONSIDINE. October 28, 1940. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. Ex parte Street & Smith Publications, Inc. October 28, 1940. The motion for leave to file petition for writ of prohibition is denied.

No. —, original. Ex parte National Labor Relations Board. October 28, 1940. The motion for leave to file petition for writs of mandamus and prohibition is denied.

Nos. 133 and 134. Lisenba *v.* California. Appeals from the Supreme Court of California. October 28, 1940. The motions for leave to proceed *in forma pauperis* are granted. The appeals are dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is granted. *Mr. Morris Lavine* for appellant. Reported below: 14 Cal. 2d 403; 94 P. 2d 569.

No. 37. Stern Brothers & Co. *v.* Helvering, Commissioner of Internal Revenue. Certiorari, 310 U. S. 617, to the Circuit Court of Appeals for the Eighth Circuit. November 12, 1940. Judgment affirmed, per stipulation of counsel to abide the decision in *United States* v. *Stewart, ante,* p. 60. *Messrs. Arthur Mag* and *John H. McEvers* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 108 F. 2d 309.

No. 446. Schmidt *v.* Minnesota State Board of Medical Examiners. Appeal from the Supreme Court of Minnesota. November 12, 1940. *Per Curiam:* The motion for leave to file the statement as to jurisdiction

is granted. The appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Mr. Ray E. Lane* for appellant. *Mr. John A. Weeks* for appellee. Reported below: 207 Minn. 526, 649; 292 N. W. 255.

No. 246. MARTIN *v.* CALIFORNIA. Appeal from the Supreme Court of California. November 12, 1940. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Milford B. Martin, pro se.*

No. —, original. EX PARTE FRED J. BECKER. November 12, 1940. A rule is ordered to issue, returnable December 9, next, requiring the respondent to show cause why leave to file the petition for writ of habeas corpus should not be granted.

No. —, original. EX PARTE LOUIS BURALL. November 12, 1940. A rule is ordered to issue, returnable December 9, next, requiring the respondent to show cause why leave to file the petition for writ of mandamus should not be granted.

No. 356. BAKER ET AL. *v.* GROSSJEAN ET AL.; and

No. 399. BLAYDES ET AL. *v.* C. H. LITTLE & CO. ET AL. Appeals from the Supreme Court of Tennessee. November 18, 1940. *Per Curiam:* The motions for leave to file supplemental statements as to jurisdiction are granted.

The appeals are dismissed for want of a substantial federal question. *Lent* v. *Tillson,* 140 U. S. 316, 328; *Paulsen* v. *Portland,* 149 U. S. 30, 40; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283; *Fidelity National Bank* v. *Swope,* 274 U. S. 123, 130. *Mr. Horace C. Young* for appellants. *Mr. Nat Tipton* for appellees.

No. 128. MOSBACHER *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. November 18, 1940. *Per Curiam:* The petition for writ of certiorari is granted, the judgment is reversed, and the cause is remanded to the Court of Claims for further proceedings. *Neuberger* v. *Commissioner of Internal Revenue, ante,* p. 83. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 90 Ct. Cls. 247; 30 F. Supp. 703.

No. —. EX PARTE ALBERT LEIGHTON. November 18, 1940. Application denied.

No. —, original. EX PARTE HENRY EARL DUNLAP; and No. —, original. EX PARTE ALFRED BAUER. November 18, 1940. The motions for leave to file petitions for writs of certiorari are denied.

No. —, original. EX PARTE DAVID H. JOHNSON. November 25, 1940. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE DAVID L. SIMON. November 25, 1940. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. UNITED STATES *v.* ALABAMA. November 25, 1940. A rule is ordered to issue, returnable January 6th next, requiring the defendant to show cause why leave to file the bill of complaint should not be granted.

No. 2. NEW WORLD LIFE INSURANCE CO. *v.* UNITED STATES. Certiorari, 310 U. S. 654, to the Court of Claims. Argued November 18, 19, 1940. Decided December 9, 1940. *Per Curiam:* The judgment is affirmed upon the first ground set forth in the opinion of the Court of Claims with respect to investment expenses, the views expressed on the second question considered by the Court of Claims as to the right of deduction on account of insurance reserves not being an essential basis for the judgment and being contrary to *Helvering* v. *Oregon Mutual Life Insurance Co., ante,* p. 267. *Mr. William Marshall Bullitt,* with whom *Mr. Walter E. Barton* was on the brief, for petitioner. *Mr. Arnold Raum,* with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Guy Patten* were on the brief, for the United States. Reported below: 88 Ct. Cls. 405; 26 F. Supp. 444.

No. 547. NATIONAL LABOR RELATIONS BOARD *v.* FOOTE BROTHERS GEAR & MACHINE CORP.; and

No. 548. SAME *v.* INDEPENDENT UNION OF GEAR WORKERS. On petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. December 9, 1940. *Per Curiam:* The petition for writs of certiorari is granted. The motion to reverse is also granted, the judgments are reversed, and the causes are remanded to the Circuit Court of Appeals with directions to determine the questions presented upon the record as certified by the National Labor Relations Board

pursuant to § 10 (e) of the National Labor Relations Act. *Solicitor General Biddle* and *Mr. Robert B. Watts* for petitioner. *Mr. Silas H. Strawn* for respondent in No. 547. *Mr. Benjamin Wham* for respondent in No. 548. Reported below: 114 F. 2d 611.

No. —, original. Ex parte Edward Quinn;
No. —, original. Ex parte Hugh A. Bowen;
No. —, original. Ex parte Fred Rothermel; and
No. —, original. Ex parte Lloyd Rubin. December 9, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte John D. Hardy. December 9, 1940. The rule to show cause is discharged and the motion for leave to file petition for writ of habeas corpus is denied.

No. 176. Lewis, Executrix, et al. *v.* Fontenot, Collector, et al.;
No. 177. Lewis, Testamentary Executrix, et al. *v.* United States et al.; and
No. 178. Lewis, Testamentary Executrix, et al. *v.* United States Department of Agriculture et al. December 9, 1940. Application denied. *Agnes E. Lewis, pro se.* Reported below: 110 F. 2d 65.

No. 561. Equitable Loan Society, Inc., et al. *v.* Bell, Secretary of Banking, et al. Appeal from the Supreme Court of Pennsylvania. December 16, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Griffith* v. *Connecticut,* 218 U. S. 563; *Noble State Bank* v. *Haskell,* 219 U. S. 104,

111–113; *Engel* v. *O'Malley,* 219 U. S. 128, 136–137; *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374. *Mr. William A. Schnader* for appellants. *Mr. Orville J. Brown* for appellees. Reported below: 339 Pa. 449; 14 A. 2d 316.

No. —. Blosser *v.* United States. December 16, 1940. Application denied.

No. —, original. Ex parte Joseph E. Jones. December 16, 1940. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. Ex parte Claud Offill. December 16, 1940. The rule to show cause is discharged and the motion for leave to file petition for writ of habeas corpus is denied.

No. 47. Wisconsin et al. *v.* F. W. Woolworth Co. Certiorari, 310 U. S. 619, to the Supreme Court of Wisconsin. Argued November 20, 1940. Decided December 23, 1940. *Per Curiam:* The judgment is reversed on the authority of *Wisconsin* v. *J. C. Penney Co., ante,* p. 435. Mr. Justice Stone took no part in the consideration or decision of this cause. *Messrs. Harold H. Persons,* Assistant Attorney General of Wisconsin, and *James Ward Rector,* Deputy Attorney General, with whom *Mr. John E. Martin,* Attorney General, was on the brief, for petitioners. *Mr. Martin A. Schenck,* with whom *Messrs. Edward Cornell* and *G. Burgess Ela* were on the brief, for respondent. Reported below: 233 Wis. 305; 289 N. W. 685.

No. 617. Harris *v.* Whittle, Sheriff. Appeal from the Supreme Court of Georgia. January 6, 1941. *Per*

Curiam: The appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Mr. Benjamin E. Pierce* for appellant. Reported below: 190 Ga. 850; 10 S. E. 2d 926.

No. —, original. Ex parte Clarence Kelly. January 6, 1941. The motion for leave to file petition for writ of habeas corpus is denied.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 7, 1940, THROUGH JANUARY 6, 1941.

No. 90. Sampayo *v.* Bank of Nova Scotia. October 14, 1940. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, granted. *Mr. F. B. Fornaris* for petitioner. *Mr. Henri Brown* for respondent. Reported below: 109 F. 2d 743.

No. 72. Beal, County Attorney, et al. *v.* Missouri Pacific Railroad Corp. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Edwin Vail,* Assistant Attorneys General, for petitioners. *Messrs. J. A. C. Kennedy, G. L. De Lacy, R. E. Svoboda,* and *E. J. Svoboda* for respondent. Reported below: 108 F. 2d 897.

No. 78. A. C. Frost & Co. *v.* Coeur D'Alene Mines Corp. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Idaho granted. *Messrs. Ernest L. Wilkinson, Charles J. Kappler,* and *John W. Cragun* for petitioner. *Messrs. James A. Wayne* and *W. H. Langroise* for respondent. Reported below: 61 Idaho 21; 98 P. 2d 965.

No. 85. Federal Trade Commission *v.* Bunte Brothers, Inc. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biddle* for petitioner. *Messrs. Theodore E. Rein* and *Samuel G. Clawson* for respondent. Reported below: 110 F. 2d 412.

No. 97. Voeller et al. *v.* Neilston Warehouse Co. et al. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Messrs. Carrington T. Marshall* and *Orland R. Crawfis* for petitioners. *Mr. Francis J. Wright* for respondents. Reported below: 136 Ohio St. 427; 26 N. E. 2d 442.

No. 120. Palmer et al., Trustees, *v.* Webster & Atlas National Bank, Trustee. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Hermon J. Wells* for petitioners. *Mr. Robert H. Davison* for respondent. Reported below: 111 F. 2d 215.

No. 188. United States *v.* Cowden Manufacturing Co. October 14, 1940. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biddle*

for the United States. *Mr. Phil D. Morelock* for respondent. Reported below: 91 Ct. Cls. 75; 32 F. Supp. 141.

No. 194. MARYLAND CASUALTY CO. *v.* PACIFIC COAL & OIL CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Paca Oberlin* and *Parker Fulton* for petitioner. Reported below: 111 F. 2d 214.

No. 200. RECONSTRUCTION FINANCE CORPORATION *v.* J. G. MENIHAN CORPORATION ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. George H. Harris* for respondents. Reported below: 111 F. 2d 940.

No. 212. HURON HOLDING CORP. ET AL. *v.* LINCOLN MINE OPERATING CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Daniel Gordon Judge* for petitioners. *Messrs. D. Worth Clark* and *William H. Langroise* for respondent. Reported below: 111 F. 2d 438.

No. 237. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LEGIERSE ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. Frederick O. McKenzie* for respondents. Reported below: 110 F. 2d 734.

No. 251. MILLINERY CREATOR'S GUILD, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. October 14, 1940. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Francis L. Driscoll* for petitioners. *Messrs. N. A. Townsend* and *Richard P. Whiteley* for respondent. Reported below: 109 F. 2d 175.

No. 253. HIGGINS *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Selden Bacon* and *Orwill V. W. Hawkins* for petitioner. *Mr. N. A. Townsend* for respondent. Reported below: 111 F. 2d 795.

No. 257. HORMEL *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. R. C. Alderson* for petitioner. *Mr. N. A. Townsend* for respondent. Reported below: 111 F. 2d 1.

No. 274. MAASS, SOLE SURVIVING EXECUTOR, *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Wilbur C. Davidson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 111 F. 2d 78.

No. 291. EQUITABLE LIFE INSURANCE CO. *v.* HALSEY, STUART & CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Joseph G. Gamble* and *Alden B. Howland* for petitioner. *Messrs. Edward R. Johnston*

and *Floyd E. Thompson* for respondent. Reported below: 112 F. 2d 302.

No. 293. ARMOUR & COMPANY *v.* ALTON RAILROAD CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Charles J. Faulkner, John Potts Barnes,* and *Paul E. Blanchard* for petitioner. *Messrs. Bryce L. Hamilton* and *Frank H. Towner* for Holman D. Pettibone, Trustee, et al., and *Messrs. Kenneth F. Burgess, James F. Oates, Jr.,* and *Douglas F. Smith* for other respondents. Reported below: 111 F. 2d 913.

No. 327. RAWLINGS, RECEIVER, *v.* RAY. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. George P. Barse* and *Lee Roy Stover;* and *Harriet Buckingham* for petitioner. Reported below: 111 F. 2d 695.

No. 346. MAGUIRE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Albert H. Veeder* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 111 F. 2d 843.

No. 349. KELLEAM ET AL. *v.* MARYLAND CASUALTY CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Warren E. Miller* for petitioners. *Mr. John J. Carmody* for the Maryland Casualty Co., and *Mr. W. V. Pryor* for Mrs. Ethel Riddler et al., respondents. Reported below: 112 F. 2d 940.

No. 74. STONER *v.* NEW YORK LIFE INSURANCE CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Kendall B. Randolph* for petitioner. *Messrs. Paul M. Peterson, William H. Becker,* and *Louis H. Cooke* for respondent. Reported below: 109 F. 2d 874.

No. 92. GUGGENHEIM *v.* RASQUIN, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Paul B. Barringer, Jr.* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 110 F. 2d 371.

No. 113. GAINES ET UX. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Frank E. Karelsen, Jr.* and *Frederick Baum* for petitioners. *Attorney General Jackson* for respondent. Reported below: 111 F. 2d 144.

No. 183. TAFT ET UX. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the second question presented by the petition. *Messrs. Henry W. Taft* and *Clarence Castimore* for petitioners. *Attorney General Jackson* for respondent. Reported below: 111 F. 2d 145.

Nos. 242 and 243. PHILADELPHIA COMPANY ET AL. *v.* DIPPLE ET AL. October 14, 1940. Petition for writs of

certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. W. A. Seifert, Lee C. Beatty,* and *Hill Burgwin* for petitioners. *Mr. A. E. Kountz* for respondents. Reported below: 111 F. 2d 932.

No. 121. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHWEST STEEL ROLLING MILLS, INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. D. G. Eggerman* for respondent. Reported below: 110 F. 2d 286.

Nos. 281 and 282. WOODS, COURT TRUSTEE, *v.* CITY NATIONAL BANK & TRUST CO. OF CHICAGO ET AL. October 14, 1910. Motion to dispense with the printing of an additional record, and petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit, granted. *Mr. Weightstill Woods* for petitioner. *Mr. Vincent O'Brien* for respondents. Reported below: 111 F. 2d 834.

No. 235. NATIONAL LABOR RELATIONS BOARD *v.* LINK-BELT COMPANY; and

No. 236. SAME *v.* INDEPENDENT UNION OF CRAFTSMEN. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Solicitor General Biddle* and *Mr. Charles Fahy* for petitioner. *Mr. Herbert Pope* for respondent in No. 235. Mr. *Benjamin Wham* for respondent in No. 236. Reported below: 110 F. 2d 506.

No. 368. TYLER, EXECUTRIX, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Pe-

tition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Harry B. Betty* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 111 F. 2d 422.

No. 371. ESTATE OF KELLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. J. Smith Christy* and *Ferdinand T. Weil* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 113 F. 2d 833.

No. 255. RODDEWIG, CHAIRMAN, ET AL. *v.* SEARS, ROEBUCK & Co.; and

No. 256. SAME *v.* MONTGOMERY WARD & Co., INC. October 14, 1940. Petition for writs of certiorari to the Supreme Court of Iowa granted. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. John M. Rankin,* Attorney General of Iowa, and *John E. Mulroney,* Assistant Attorney General, for petitioners. *Messrs. Charles Lederer, Joseph G. Gamble,* and *Ralph L. Read* for respondent in No. 255. *Messrs. Stuart S. Ball* and *Maxwell A. O'Brien* for respondent in No. 256. Reported below: 228 Iowa 1273, 1301; 292 N. W. 130, 142.

No. 205. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* EUBANK. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Messrs. Harry J. Rudick* and *John W. Drye, Jr.* for respondent. Reported below: 110 F. 2d 737.

No. 267. SIX COMPANIES OF CALIFORNIA ET AL. *v.* JOINT HIGHWAY DISTRICT NO. 13 OF CALIFORNIA. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the first question presented by the petition. *Messrs. Paul S. Marrin, Max Thelen, DeLancey C. Smith,* and *Jewel Alexander* for petitioners. *Messrs. Theodore P. Wittschen* and *Archibald B. Tinning* for respondent. Reported below: 110 F. 2d 620.

No. 287. BROWDER *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Walter H. Pollak* and *Carl S. Stern;* and *Carol King* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. Raoul Berger, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 97.

No. 338. WARSZOWER *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Osmond K. Fraenkel* and *Edward I. Aronow* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 100.

No. 330. OPP COTTON MILLS, INC., ET AL. *v.* ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DE-

PARTMENT OF LABOR. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Ben F. Cameron* and *W. Gordon McKelvey* for petitioners. *Messrs. N. A. Townsend* and *Gerard Reilly* for respondent. Reported below: 111 F. 2d 23.

No. 377. EDWARDS *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. J. Forrest McCutcheon* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll, William J. Connor, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 286.

No. 362. UNITED STATES *v.* BETHLEHEM STEEL CORPORATION ET AL.; and

No. 363. UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION *v.* BETHLEHEM SHIPBUILDING CORPORATION, LTD. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE STONE, MR. JUSTICE ROBERTS, and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Solicitor General Biddle* for petitioners. *Mr. Frederick H. Wood* for respondents. Reported below: 113 F. 2d 301.

No. 381. Z. & F. ASSETS REALIZATION CORPORATION *v.* HULL, SECRETARY OF STATE, ET AL.; and

No. 382. AMERICAN-HAWAIIAN STEAMSHIP CO. *v.* SAME. October 14, 1940. Petitions for writs of cer-

tiorari to the Court of Appeals for the District of Columbia granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. Frank Roberson, John F. Condon, Jr., John Bassett Moore,* and *Joseph M. Proskauer* for petitioner in No. 381. *Mr. Fred K. Nielsen* for petitioner in No. 382. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel* and *Francis J. McNamara* for the Secretary of State et al., and *Mr. William D. Mitchell* for the Lehigh Valley Railroad Co., respondents. Reported below: 114 F. 2d 464.

No. 364. SMITH *v.* O'GRADY, WARDEN. October 21, 1940. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Supreme Court of Nebraska is granted. *Albert Smith, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer, C. S. Beck,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent.

No. 304. CARTER OIL CO. *v.* WELKER ET AL. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. L. G. Owen* and *Henry I. Green* for petitioner. *Messrs. William M. Acton, Paul J. Wimsey,* and *Lawrence T. Allen* for respondents. Reported below: 112 F. 2d 299.

No. 336. BERRY *v.* UNITED STATES. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. C. L. Dawson* for petitioner. *Solicitor General Biddle* and *Messrs. Julius C. Martin* and *Wilbur C. Pickett* for the United States. Reported below: 111 F. 2d 615.

No. 344. CONWAY *v.* O'BRIEN. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Herbert G. Barber, Paul E. Lesh,* and *Jerome F. Barnard* for petitioner. *Mr. Edwin W. Lawrence* for respondent. Reported below: 111 F. 2d 611.

No. 369. HEMPHILL *v.* UNITED STATES. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Melville Monheimer* 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: 112 F. 2d 505.

No. 373. JUST ET AL. *v.* CHAMBERS, EXECUTRIX. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Samuel W. Fordyce, Walter R. Mayne, M. L. Mershon,* and *W. O. Mehrtens* for petitioners. *Messrs. Raymond Parmer* and *Vernon Sims Jones* for respondent. Reported below: 113 F. 2d 105.

No. 384. BREISCH *v.* CENTRAL RAILROAD OF NEW JERSEY. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Fred B. Gernerd* for petitioner. *Mr. George W. Aubrey* for respondent. Reported below: 112 F. 2d 595.

No. 393. UNITED STATES *v.* PELZER. October 21, 1940. Petition for writ of certiorari to the Court of Claims

granted. *Solicitor General Biddle* for the United States. *Mr. Robert A. Littleton* for respondent. Reported below: 90 Ct. Cls. 614; 31 F. Supp. 770.

No. 337. SCHWINN *v.* UNITED STATES. See *ante*, p. 616.

Nos. 133 and 134. LISENBA *v.* CALIFORNIA. See *ante*, p. 617.

No. 141. VANDENBARK *v.* OWENS-ILLINOIS GLASS CO. October 28, 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*, granted. *Messrs. Paul D. Smith* and *Thomas H. Sutherland* for petitioner. *Messrs. Lloyd T. Williams* and *Lawrence E. Broh-Kahn* for respondent. Reported below: 110 F. 2d 310.

No. 173. WALKER *v.* JOHNSTON, WARDEN. October 28, 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*, granted. *Mr. Charles E. Wyzanski, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for respondent. Reported below: 109 F. 2d 436.

No. 315. EVANS *v.* UNITED STATES. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed *in forma pauperis*, granted. *Mr. Richard H. Wels* for petitioner. *Solicitor General Biddle, Assistant*

Attorney General Rogge, and *Mr. William W. Barron* for the United States. Reported below: 113 F. 2d 935.

No. 319. SHERWIN *v.* UNITED STATES; and

No. 320. SHERIDAN *v.* UNITED STATES. October 28, 1940. The motion for leave to proceed *in forma pauperis* is granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted. *Mr. Earl C. Demoss* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll,* and *William J. Connor* for the United States. Reported below: 112 F. 2d 503.

No. 400. CONSOLIDATED ROCK PRODUCTS CO. ET AL. *v.* DU BOIS; and

No. 444. BADGLEY ET AL. *v.* SAME. October 28, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Paul R. Watkins* and *Dana Latham* for petitioners in No. 400. *Messrs. Homer I. Mitchell* and *John C. Macfarland* for petitioners in No. 444. *Mr. Kenneth E. Grant* for respondent. By leave of Court, *Solicitor General Biddle* and *Messrs. Richard H. Demuth, David W. Knowlton, Chester T. Lane, Martin Riger, George Rosier, Homer Kripke,* and *Irving S. Rogers* filed briefs on behalf of the Interstate Commerce Commission et al., as *amici curiae,* in support of petitioners. Reported below: 114 F. 2d 102.

No. 421. INDIANAPOLIS ET AL. *v.* CHASE NATIONAL BANK, TRUSTEE, ET AL.;

No. 422. SAME *v.* CHASE NATIONAL BANK, TRUSTEE;

No. 423. CHASE NATIONAL BANK, TRUSTEE, *v.* CITIZENS GAS CO. ET AL.; and

No. 424. CHASE NATIONAL BANK, TRUSTEE, *v.* INDIANAPOLIS GAS CO. ET AL. October 28, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. William H. Thompson, Edward H. Knight, Perry O'Neal,* and *Patrick J. Smith* for petitioners in Nos. 421 and 422 and respondents in Nos. 423 and 424. *Messrs. Howard F. Burns, William L. Taylor,* and *Harvey J. Elam* for the Chase National Bank. *Messrs. Paul Y. Davis* and *William G. Sparks* for Citizens Gas Co., and *Messrs. Louis B. Ewbank* and *William R. Higgins* for Indianapolis Gas Co., respondents in Nos. 423 and 424. Reported below: 113 F. 2d 217.

No. 425. METROPOLITAN CASUALTY INSURANCE CO. *v.* STEVENS. October 28, 1940. Petition for writ of certiorari to the Supreme Court of Michigan granted. *Mr. Alan W. Boyd* for petitioner. *Messrs. Archibald Broomfield* and *Lloyd T. Crane* for respondent. Reported below: 293 Mich. 31; 291 N. W. 211.

No. 264. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PAN-AMERICAN LIFE INSURANCE CO. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Biddle* for petitioner. *Messrs. Eugene J. McGivney* and *William Marshall Bullitt* for respondent. Reported below: 111 F. 2d 366.

No. 413. CONTINENTAL OIL CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted, limited to the first and second questions presented by the petition. *Messrs. James J. Cosgrove,*

Elmer L. Brock, John P. Akolt, E. R. Campbell, and *Milton Smith* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Morris P. Glushien* for respondent. Reported below: 113 F. 2d 473.

No. 419. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HUTCHINGS. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Biddle* for petitioner. Reported below: 111 F. 2d 229.

No. 436. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ESTATE OF ENRIGHT ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. James D. Carpenter, Jr.* for respondents. Reported below: 112 F. 2d 919.

No. 437. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* SCHAFFNER. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biddle* for petitioner. *Messrs. Isaac H. Mayer, Carl Meyer, Herbert A. Friedlich,* and *Louis A. Kohn* for respondent. Reported below: 113 F. 2d 449.

No. 442. NATIONAL LABOR RELATIONS BOARD *v.* EXPRESS PUBLISHING CO. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Biddle* and *Mr. Charles Fahy* for petitioner. Reported below: 111 F. 2d 588.

No. 472. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GAMBRILL;

No. 473. SAME *v.* CAMPBELL;

No. 474. SAME *v.* KNOX; and

No. 475. SAME *v.* ROGERS. November 12, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. Reported below: 112 F. 2d 530.

No. 484. UNITED STATES *v.* COOPER CORPORATION ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for the United States. *Messrs. Luther Day, Lyman M. Bass, Paul H. Arthur, John C. Bruton, Jr., Charles Wesley Dunn, Thurlow M. Gordon, Paul Van Anda,* and *Joseph F. Murray* for respondents. Reported below: 114 F. 2d 413.

No. 447. WESTINGHOUSE ELECTRIC & MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Roswell L. Gilpatric, Charles P. Reinwald, Donald C. Swatland,* and *F. Harold Smith* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts,* and *Laurence A. Knapp,* and *Miss Ruth Weyand* for respondent. Reported below: 112 F. 2d 657.

No. 479. PFAFF ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for

the Second Circuit granted. *Mr. Laurence Sovik* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 113 F. 2d 114.

No. 486. POWERS *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Ralph G. Boyd* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 115 F. 2d 209.

No. 494. UNITED STATES *v.* RYERSON ET AL.; and

No. 495. RYERSON ET AL. *v.* UNITED STATES. November 12, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Biddle* for the United States. *Messrs. Walter T. Fisher* and *Wm. N. Haddad* for respondents in No. 494 and petitioners in No. 495. Reported below: 114 F. 2d 150.

No. 564. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* OREGON MUTUAL LIFE INSURANCE CO. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. William Marshall Bullitt* for respondent. Reported below: 112 F. 2d 468.

No. 128. MOSBACHER *v.* UNITED STATES. See *ante*, p. 619.

No. 500. UNITED STATES *v.* SHERWOOD. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor Gen-*

eral Biddle for the United States. *Messrs. M. Carl Levine* and *David Morgulas* for respondent. Reported below: 112 F. 2d 587.

No. 510. ESTATE OF ABENDROTH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 511. ESTATE OF BLACQUE ET AL. *v.* SAME. November 18, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Rollin Browne, James D. Ouchterloney,* and *George Craven* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 114 F. 2d 1017.

No. 516. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* RICHTER. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the first question presented by the petition for the writ. *Solicitor General Biddle* for petitioner. *Messrs. Richard H. Wilmer* and *Douglas L. Hatch* for respondent. Reported below: 114 F. 2d 452.

No. 517. HORT *v.* COMMISSIONER OF INTERNAL REVENUE. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the first question presented by the petition for the writ. *Messrs. Walter J. Rosston* and *Edwin Hort* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 112 F. 2d 167.

No. 537. FASHION ORIGINATORS' GUILD OF AMERICA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs.*

Charles B. Rugg, Milton C. Weisman, Archibald Cox, and *Melvin A. Albert* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 114 F. 2d 80.

No. 547. National Labor Relations Board *v.* Foote Brothers Gear & Machine Corp.; and

No. 548. Same *v.* Independent Union of Gear Workers. See *ante,* p. 620.

No. 521. Pittsburgh Plate Glass Co. *v.* National Labor Relations Board; and

No. 523. Crystal City Glass Workers' Union *v.* Same. December 9, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. J. W. McAfee, Leland Hazard,* and *Joseph T. Owens* for petitioner in No. 521. *Mr. Henry H. Oberschelp* for petitioner in No. 523. *Solicitor General Biddle* and *Mr. Robert B. Watts* for respondent. Reported below: 113 F. 2d 698.

No. 535. United States *v.* Chicago, Milwaukee, St. Paul & Pacific Railroad Co. et al. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Biddle* for the United States. *Messrs. F. W. Root, A. C. Erdall, A. N. Whitlock,* and *C. S. Jefferson* for respondents. Reported below: 113 F. 2d 919.

No. 549. Public Service Commission of Missouri et al. *v.* Brashear Freight Lines, Inc., et al. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. James H. Linton, Daniel C. Rogers,* and *Edgar*

H. Wayman for petitioners. *Messrs. Kenneth Teasdale* and *Paul G. Koontz* for respondents. Reported below: 114 F. 2d 1.

No. 584. COMMERCIAL MOLASSES CORPORATION *v.* NEW YORK TANK BARGE CORP., CHARTERED OWNER. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. T. Catesby Jones* and *Leonard J. Matteson* for petitioner. *Mr. Robert S. Erskine* for respondent. Reported below: 114 F. 2d 248.

No. 550. MOORE *v.* ILLINOIS CENTRAL RAILROAD CO. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Geo. Butler* and *Garner W. Green* for petitioner. *Messrs. James L. Byrd, Clinton H. McKay, E. C. Craig,* and *V. W. Foster* for respondent. Reported below: 112 F. 2d 959.

No. 558. NYE ET AL. *v.* UNITED STATES ET AL. December 23, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. J. Bayard Clark* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. Raoul Berger, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 1006.

No. 587. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. January 6, 1941. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, granted. *Samuel R. Toucey, pro se. Messrs. Samuel W. Sawyer* and *Louis H. Cooke* for respondent. Reported below: 112 F. 2d 927.

No. 603. GRAY, DIRECTOR OF THE BITUMINOUS COAL DIVISION, DEPARTMENT OF THE INTERIOR, ET AL. *v.* POWELL ET AL. January 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Biddle* and *Mr. Abe Fortas* for petitioners. *Messrs. W. R. C. Cocke* and *Jos. F. Johnston* for respondents. Reported below: 114 F. 2d 752.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 7, 1940, THROUGH JANUARY 6, 1941.

No. 158. BADER *v.* ILLINOIS; and

No. 189. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* DELTA & PINE LAND CO. See *ante,* p. 610.

No. 240. WRIGHT *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES. See *ante,* p. 611.

No. 896, October Term, 1939. MCCAMPBELL *v.* WARRICH CORPORATION ET AL. See *ante,* p. 612.

No. 230. VILES *v.* JOHNSON, JUDGE. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Colorado, and motion for leave to proceed further *in forma pauperis,* denied. The motion for leave to file petition for writ of mandamus is also denied. *Edmond L. Viles, pro se.* Reported below: 100 Colo. 50; 65 P. 2d 1089.

No. 309. BENSON *v.* UNITED STATES. October 14, 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 DOUGLAS took no part in the consideration and decision of these applications. *Thomas W. Benson, pro se.* Reported below: 112 F. 2d 422.

No. 83. MILLER *v.* MILLER. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Oklahoma, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John Ladner* for petitioner. Reported below: 186 Okla. 566; 99 P. 2d 515.

No. 84. THOMPSON *v.* O'GRADY, WARDEN. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Fred V. Thompson, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent. Reported below: 137 Neb. 641; 290 N. W. 716.

No. 91. BELIN *v.* BELIN ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Edna Delonis Belin, pro se. Mr. R. K. Lewis* for respondents. Reported below: 141 Fla. 886; 194 So. 333.

No. 99. HAWK *v.* O'GRADY, WARDEN. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Henry Hawk, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,*

Assistant Attorneys General, for respondent. Reported below: 137 Neb. 639; 290 N. W. 911.

No. 132. CLAWANS *v.* WHITE. October 14, 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. *Lillian Clawans, pro se.* Reported below: 71 App. D. C. 362; 112 F. 2d 189.

No. 144. BATES *v.* JOHNSTON, WARDEN. October 14, 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. *A. L. Bates, pro se.* Reported below: 111 F. 2d 966.

No. 157. MOORE *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Arkansas, and motion for leave to proceed further *in forma pauperis,* denied. *Mrs. W. A. Moore, pro se.* Reported below: 199 Ark. 1035; 138 S. W. 2d 384.

No. 166. PENNSYLVANIA EX REL. TOLIVER *v.* ASHE, WARDEN. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Louis Toliver, pro se.* Reported below: 336 Pa. 206; 8 A. 2d 541.

No. 176. LEWIS, EXECUTRIX, ET AL. *v.* FONTENOT, COLLECTOR FOR THE DISTRICT OF LOUISIANA, ET AL.;

No. 177. LEWIS, TESTAMENTARY EXECUTRIX, ET AL. *v.* UNITED STATES ET AL.; and

No. 178. LEWIS, TESTAMENTARY EXECUTRIX, ET AL. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. October 14, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motions for leave to proceed further *in forma pauperis,* denied. *Agnes E. Lewis, pro se.* Reported below: 110 F. 2d 65.

No. 228. HARTENFELD *v.* UNITED STATES. October 14, 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. Julian C. Ryer* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *James P. O'Brien* for the United States. Reported below: 113 F. 2d 359.

No. 232. ROSSIGNOL *v.* UNITED STATES. October 14, 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. James Frank Kemp* for petitioner. Reported below: 112 F. 2d 745.

No. 234. COLE *v.* UNITED STATES. October 14, 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. C. L. Dawson* for petitioner. Reported below: 112 F. 2d 203.

No. 250. WEST *v.* UNITED STATES. October 14, 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. James Frank Kemp* for petitioner. Reported below: 113 F. 2d 68.

No. 260. PATTON *v.* BALDI, SUPERINTENDENT, ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Karlton A. Patton, pro se. Mr. Charles F. Kelley* for respondents.

No. 272. JACKSON *v.* O'GRADY, WARDEN. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *James E. Jackson, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent.

No. 278. STEELE *v.* O'GRADY, WARDEN. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *John Steele, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent.

No. 279. BROUGH *v.* ARIZONA. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Arizona, and motion for leave to proceed further *in forma pauperis,* denied. *Dale Oren Brough, pro se.* Reported below: 55 Ariz. 276; 101 P. 2d 196.

No. 313. DOUGHERTY *v.* FLORIDA. October 14, 1940. Petition for writ of certiorari to the Supreme Court of

Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. W. D. Bell* for petitioner. Reported below: 193 Fla. 578; 197 So. 501.

No. 314. WALEY *v.* JOHNSTON, WARDEN. October 14, 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. *Harmon Metz Waley, pro se.* Reported below: 112 F. 2d 749.

No. 340. SCHNEIDER, ADMINISTRATRIX, *v.* LEHIGH VALLEY RAILROAD CO. October 14, 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. Jacob Kirschenbaum* for petitioner. *Mr. Clifton P. Williamson* for respondent. Reported below: 112 F. 2d 712.

No. 378. CAPONIGRI *v.* CONGLETON, TRUSTEE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Abraham Alboum* for petitioner. Reported below: 114 F. 2d 813.

No. 76. MCBRIDE, ASSIGNOR, *v.* TEEPLE, ASSIGNOR. October 14, 1940. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied for want of jurisdiction. *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693; *Pacific Northwest Canning Co.* v. *Skookum Packers' Assn.,* 283 U. S. 858; *Fessenden* v. *Wilson,* 284 U. S. 640; *Chase* v. *Avery,* 307 U. S. 638. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. J. H. Bruninga* and

J. H. Sutherland for petitioner. *Mr. Frederick Schafer* for respondent. Reported below: 27 C. C. P. A. (Patents) 961; 109 F. 2d 789.

No. 107. IN THE MATTER OF JOSEPH RUBINSTEIN; and No. 108. IN THE MATTER OF CHARLES RUBINSTEIN. October 14, 1940. The motion to dispense with printing portions of the record is granted. The petition for writs of certiorari to the Supreme Court of Ohio is denied. *Mr. Brien McMahon* for petitioners. *Mr. Charles Auerbach* for respondents. Reported below: 136 Ohio St. 341; 25 N. E. 2d 680.

No. 116. MASCUCH *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Harry W. Colmery* for petitioner. *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: 111 F. 2d 602.

No. 119. PHILIPPINE NATIONAL BANK *v.* PHILIPPINE TRUST CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme Court of the Philippines denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Ramon Diokno* for petitioner. *Messrs. Allison D. Gibbs* and *Finley J. Gibbs* for respondents.

No. 129. LLOYD-SMITH *v.* BICKNELL, RECEIVER. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE REED took no part in the consideration and de-

cision of this application. *Messrs. Boykin C. Wright* and *James A. Fowler, Jr.* for petitioner. *Mr. Chester W. Cuthell* for respondent. Reported below: 109 F. 2d 527.

No. 135. CAMARATO *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. William E. Leahy, William J. Hughes, Jr., James F. Reilly,* and *Frederic M. P. Pearse* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. James P. O'Brien, George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 111 F. 2d 243.

No. 137. WOLF *v.* SCHRAM, RECEIVER; and

No. 138. DAVIS *v.* SAME. October 14, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of these applications. *Mr. William Alfred Lucking* for petitioners. *Messrs. Frank E. Wood* and *Robert S. Marx* for respondent. Reported below: 111 F. 2d 144, 146.

No. 164. WILSON *v.* THELEN. October 14, 1940. The motion to proceed on the typewritten record is granted. The petition for writ of certiorari to the Supreme Court of Montana is denied. *Messrs. Louis P. Donovan* and *John D. Jenswold* for petitioner. *Mr. George E. Hurd* for respondent. Reported below: 110 Mont. 305; 100 P. 2d 923.

No. 175. HITCHCOCK *v.* HITCHCOCK. October 14, 1940. The motion to proceed on the typewritten petition

is granted. The petition for writ of certiorari to the Supreme Court of Illinois is denied. *Winifred Hitchcock, pro se. Wiley Hitchcock, pro se.* Reported below: 373 Ill. 352; 26 N. E. 2d 108.

No. 204. LACKNER *v.* ILLINOIS BELL TELEPHONE CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this application. *Mr. Melvin L. Griffith* for petitioner. *Mr. Kenneth F. Burgess* for respondent. Reported below: 111 F. 2d 136.

No. 209. CHAPMAN BROTHERS CO. *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. William H. Campbell* for petitioner. *Mr. Edmund W. Pugh* for respondent. Reported below: 111 F. 2d 86.

No. 263. ST. MARIE ET AL. *v.* UNITED STATES, TRUSTEE, ET AL. October 14, 1940. The motion to proceed on the typewritten record is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is denied for the reason that application therefor was not made within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Messrs. Thomas L. Sloan* and *Williamson S. Summers* for petitioners. *Solicitor General Biddle* and *Assistant Attorney General Littell* for the United States. Reported below: 108 F. 2d 876.

No. 271. ALBERS, RECEIVER, *v.* FARLEY ET AL. October 14, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Homer D. Dines* and *Llewellyn A. Luce* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Thomas E. Harris* for respondents. Reported below: 112 F. 2d 401.

No. 295. UNITED STATES *v.* POLAKOFF ET AL.; and

No. 296. SAME *v.* FALLON. October 14, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE MURPHY took no part in the consideration and decision of these applications. *Solicitor General Biddle* for the United States. *Messrs. Irving Spieler* and *Louis Halle* for respondents in No. 295; and *Mr. Myles A. Walsh* for respondent in No. 296. Reported below: 112 F. 2d 888, 894.

No. 297. MORRIS ET AL. *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Frank J. Looney* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. J. Albert Woll, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 112 F. 2d 522.

No. 342. KIMMICH *v.* NEW YORK CLEARING HOUSE ASSOCIATION ET AL. October 14, 1940. The motion to

proceed on typewritten papers is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is denied. *Charles Kimmich, pro se.* *Mr. Inzer B. Wyatt, Jr.*, for New York Clearing House Assn., and *Messrs. John W. Davis* and *Edwin Foster Blair* for William C. Potter, respondents. Reported below: 112 F. 2d 135.

No. 343. Mohonk Realty Corp. *v.* Wise Shoe Stores, Inc. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Douglas took no part in the consideration and decision of this application. *Mr. David W. Kahn* for petitioner. *Mr. Joseph M. Proskauer* for respondent. Reported below: 111 F. 2d 287.

No. 354. Ritter et al. *v.* Milk & Ice Cream Drivers & Dairy Employees Union Local 336 et al. October 14, 1940. The motion to dispense with the printing and service of portions of the record is granted. The petition for writ of certiorari to the Supreme Court of Ohio is denied. *Messrs. Charles Auerbach* and *Ray T. Miller* for petitioners. *Mr. William J. Corrigan* for the Milk & Ice Cream Drivers & Dairy Employees Union, and *Mr. Raymond T. Jackson* for the Telling Belle-Vernon Co., respondents. Reported below: 136 Ohio St. 582; 27 N. E. 2d 406.

No. 357. Davis *v.* United States. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Mr. Justice Douglas took no part in the consideration and decision of this application. *Mr. W. B. Harrell* for petitioner. *Solicitor General Biddle, Assistant Attorney General*

Rogge, and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 112 F. 2d 926.

No. 375. SOUTHERN PACIFIC CO. *v.* THE EASTERN GLADE; and

No. 376. SAME *v.* POSTAL STEAMSHIP CORPORATION. October 14, 1940. The motion to use the certified record in Nos. 73 and 74, October Term, 1939, is granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit is denied. *Messrs. Chauncey I. Clark* and *Burton H. White* for petitioner. *Mr. John C. Crawley* for respondents. Reported below: 112 F. 2d 297.

No. 67. WILLIAMS ET AL. *v.* TOOKE ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. A. McAskill* for petitioners. *Messrs. C. D. Turner* and *Donald Campbell* for respondents. Reported below: 108 F. 2d 758.

No. 77. LUMBERMENS MUTUAL CASUALTY CO. *v.* MCIVER ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henry Graham Balter* for petitioner. *Mr. Carl B. Sturzenacker* for respondents. Reported below: 110 F. 2d 323.

No. 80. BRASHEAR ET AL. *v.* INTERMOUNTAIN BUILDING & LOAN ASSN. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alexander B. Baker* for petitioners. *Messrs. James C. Inglebretsen, Earl Warren,* Attorney General of California, and *Frank Richards,*

Deputy Attorney General, for respondents. Reported below: 109 F. 2d 857.

No. 81. DULUTH, MISSABE & IRON RANGE RY. CO. *v.* Ross. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. Dennis F. Donovan, Elmer F. Blu,* and *Clarence J. Hartley* for petitioner. *Messrs. I. K. Lewis* and *Henry J. Grannis* for respondent. Reported below: 207 Minn. 648; 291 N. W. 610.

No. 93. CARPENTER ET AL. *v.* HAMILTON. October 14, 1940. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. A. L. Wirin* for petitioners. *Mr. Edwin A. Meserve* for respondent. Reported below: 15 Cal. 2d 130; 98 P. 2d 1027.

No. 94. KELLEY ET AL. *v.* SYRACUSE ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold E. Stonebraker* for petitioners. *Messrs. Henry R. Ashton* and *George H. Mitchell* for respondents.

No. 95. HUMBLE OIL & REFINING CO. ET AL. *v.* TURNBOW ET AL. October 14, 1940. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Messrs. Ben H. Powell, Wyman S. Gideon, John E. Green, Jr.,* and *Joe S. Brown* for petitioners. *Messrs. Gerald C. Mann, Edgar Cole, James P. Hart,* and *Carl L. Phinney* for respondents. Reported below: 133 S. W. 2d 191.

No. 96. TRIPPETT ET AL. *v.* POLARIS IRON CO. ET AL. October 14, 1940. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. Huffman Lewis* for petitioners. Reported below: 110 F. 2d 362.

No. 100. HAWKE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alan W. Davidson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 109 F. 2d 946.

No. 101. DUPONT *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Percy W. Phillips* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch, Morton K. Rothschild,* and *Warner W. Gardner* for respondent. Reported below: 110 F. 2d 641.

No. 102. ATLANTIC REFINING CO. *v.* JAMES B. BERRY SONS' CO., INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Theodore S. Kenyon, Roy W. Johns,* and *Edgar F. Baumgartner* for petitioner. *Messrs. Thomas G. Haight* and *William F. Hall* for respondent. Reported below: 106 F. 2d 644.

No. 103. ADLER'S CREAMERY, INC. *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Rubin* for petitioner. *Solicitor General*

Biddle, Assistant Attorney General Arnold, and *Messrs. James C. Wilson* and *John S. L. Yost* for the United States. Reported below: 110 F. 2d 482.

No. 105. Union Trust Co., Former Executor, *v.* Commissioner of Internal Revenue. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul Y. Davis, Kurt F. Pantzer,* and *William G. Sparks* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth,* and *Miss Louise Foster* for respondent. Reported below: 111 F. 2d 60.

No. 106. Washington County Fire Insurance Co. *v.* Driscoll, Collector of Internal Revenue. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William G. Heiner* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 110 F. 2d 485.

No. 110. Lee H. Marshall Heirs et al. *v.* Commissioner of Internal Revenue. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Denby* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 111 F. 2d 935.

No. 111. Doyle et ux. *v.* Helvering, Commissioner of Internal Revenue. October 14, 1940. Petition for

writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas M. Wilkins* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Joseph M. Jones* for respondent. Reported below: 110 F. 2d 157.

No. 118. CHAIN O'MINES, INC., ET AL. *v.* UNITED GILPIN CORPORATION ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Felix J. Streyckmans* for petitioners. *Mr. Abraham W. Brussell* for respondents. Reported below: 109 F. 2d 617.

No. 122. CORNETT *v.* SWIFT COAL & TIMBER CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cleon K. Calvert* for petitioner. *Messrs. Samuel M. Wilson* and *E. L. McDonald* for respondents. Reported below: 112 F. 2d 387.

No. 123. MOON *v.* HOME LIFE INSURANCE CO.; and

No. 124. SAME *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas West Peyton IV* for petitioner. *Mr. Harry Scherr* for respondents. Reported below: 110 F. 2d 184.

No. 127. J. E. RILEY INVESTMENT CO. ET AL. *v.* SAKOW. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. Joseph Sullivan* for petitioners. *Messrs. Cecil H. Clegg* and *Herman Weinberger* for respondent. Reported below: 110 F. 2d 345.

No. 130. WILLARD MANUFACTURING CO. *v.* KENNEDY, FORMER COLLECTOR; and

No. 131. SAME *v.* McCUEN, COLLECTOR. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Walker Taylor* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Thomas E. Harris* for respondents. Reported below: 109 F. 2d 83.

No. 139. CHICAGO & NORTH WESTERN RY. CO. ET AL. *v.* ROCKWELL LIME CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. J. N. Davis, Carson L. Taylor, Lowell Hastings, P. F. Gault, C. S. Jefferson,* and *William T. Faricy* for petitioners. *Mr. Thomas B. Lantry* for respondents. Reported below: 373 Ill. 309; 26 N. E. 2d 99.

No. 140. VILLAGE OF HAVERSTRAW *v.* POTTS. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Warner Pyne* for petitioner. *Mr. David Paine* for respondent. Reported below: 110 F. 2d 58.

No. 142. DELANEY *v.* ROGAN, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph D. Brady* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for respondent. Reported below: 110 F. 2d 336.

No. 145. REA ET AL., TRUSTEES, *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. James A. Cosgrove* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch, Thomas G. Carney,* and *Thomas E. Harris* for respondent. Reported below: 110 F. 2d 898.

No. 146. SPLINT COAL CORP. *v.* ANDERSON, ADMINISTRATRIX. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cleon K. Calvert* for petitioner. Reported below: 109 F. 2d 896.

No. 147. LONGO *v.* NEW JERSEY. October 14, 1940. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. A. J. Isserman* for petitioner. *Mr. Atwood C. Wolf* for respondent. Reported below: 122 N. J. L. 108; 124 *id.* 176; 4 A. 2d 15; 11 A. 2d 33.

No. 148. TYNG *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wayne Johnson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent.

No. 150. GILSTRAP ET AL. *v.* STANDARD OIL CO. ET AL.; and

No. 151. GILSTRAP *v.* SAME. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *A. M. Gilstrap, Cora D. Gilstrap, Vera G. White, pro se,* and *Mr. A. L. Wirin* for petitioners. *Messrs. Felix T. Smith* and *Francis R. Kirkham* for Standard Oil Co. of Ohio, and *Messrs. Oscar Lawler* and *Max Felix* for Standard Oil Co. of California; *Messrs. Homer W. Buckley* and *James H. Oakley* for Earl Warren et al.; and *Messrs. Grove J. Fink* and *Percy E. Towne* for Hearst Publications, Inc., et al., respondents. Reported below: 108 F. 2d 736.

No. 152. J. GREENEBAUM TANNING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John L. McInerney* and *Leon B. Lamfrom* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 110 F. 2d 984.

No. 153. CALDWELL *v.* CALIFORNIA. October 14, 1940. Petition for writ of certiorari to the Superior Court in and for the County of Los Angeles, Appellate Department, of California, denied. *Messrs. William E. Burby* and *G. W. Nix* for petitioner.

No. 154. UNITED STATES EX REL. DARCY *v.* SUPERINTENDENT OF COUNTY PRISONS OF PHILADELPHIA, ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Osmond K. Fraenkel, Francis Fisher Kane,* and *Philip Dorfman* for petitioner. *Mr. Charles F. Kelley* for respondents. Reported below: 111 F. 2d 409.

No. 155. TOWN OF LARGO, FLORIDA, *v.* RICHMOND. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. A. McMullen* for petitioner. *Messrs. Giles J. Patterson* and *T. M. Shackelford, Jr.* for respondent. Reported below: 109 F. 2d 740.

No. 159. MANILA ELECTRIC CO. *v.* YATO, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Mr. James M. Ross* for petitioner. *Messrs. Nathan R. Margold, Frederic L. Kirgis,* and *John B. Jago* for respondent.

No. 160. SMITH ET AL. *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Myron G. Ehrlich* and *Charles E. Ford* for petitioners. *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: 112 F. 2d 217.

No. 161. ENGEBRETSON, TRUSTEE, *v.* WEST ET AL.; and

No. 162. SAME *v.* MARCELL ET AL. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Giller* for petitioner. *Messrs. Norris Brown* and *U. S. G. Cherry* for respondents. Reported below: 111 F. 2d 528.

No. 163. FRIEDMAN ET AL. *v.* ATLANTA ET AL. October 14, 1940. Petition for writ of certiorari to the Supreme

Court of Georgia denied. *Mr. Young H. Fraser* for petitioners. *Mr. J. C. Murphy* for respondents. Reported below: 189 Ga. 862; 7 S. E. 2d 911.

No. 165. HENDRON ET AL. *v.* YOUNT-LEE OIL CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. A. McAskill* for petitioners. *Messrs. C. D. Turner* and *Donald Campbell* for respondents. Reported below: 108 F. 2d 759.

No. 167. THORNBURGH, ADMINISTRATOR, *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lawrence E. Goldman* for petitioner. *Solicitor General Biddle* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Richard H. Demuth,* and *Fendall Marbury* for the United States. Reported below: 111 F. 2d 278.

No. 168. OVERBURY *v.* PLATTEN ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward V. Conwell* for petitioner. *Mr. Melville J. France* for respondents. Reported below: 108 F. 2d 155.

No. 169. BUCHSBAUM *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Homer Hendricks, J. R. Sherrod,* and *Robert N. Miller* for petitioner. *Solicitor General Biddle* for respondent.

No. 171. HYGIENIC PRODUCTS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Meyer A. Cook* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 111 F. 2d 330.

No. 172. NAKDIMEN ET AL. *v.* BAKER. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James B. McDonough, G. O. Patterson,* and *Edward H. Patterson* for petitioners. *Messrs. Harold R. Small* and *Thomas B. Pryor* for respondent. Reported below: 111 F. 2d 778.

No. 174. UNITED DRUG CO. *v.* OBEAR-NESTER GLASS CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William F. Davis, Jr.* and *Delos G. Haynes* for petitioner. *Messrs. Lawrence C. Kingsland* and *Edmund C. Rogers* for respondent. Reported below: 111 F. 2d 997.

No. 179. WOODS, COURT TRUSTEE, *v.* ARLINGTON, INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Weightstill Woods* for petitioner. *Mr. Vincent O'Brien* for respondent. Reported below: 111 F. 2d 834.

No. 181. FLEISHHACKER *v.* BLUM ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Her-*

man Phleger, Maurice E. Harrison, and *John Ford Baecher* for petitioner. *Mr. Harold C. Morton* for respondents. Reported below: 109 F. 2d 543.

No. 182. STRATES ET AL. *v.* DIMOTSIS ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Keeling* for petitioners. Reported below: 110 F. 2d 374.

No. 184. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HORSESHOE LEASE SYNDICATE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Biddle* for petitioner. *Mr. George S. Atkinson* for respondent. Reported below: 110 F. 2d 748.

No. 185. PENNSYLVANIA-READING SEASHORE LINES *v.* CAWMAN, ADMINISTRATRIX. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Alfred E. Driscoll* for petitioner. *Mr. James H. McHale* for respondent. Reported below: 110 F. 2d 832.

No. 186. DE LA TORRE *v.* FIRST NATIONAL BANK OF NEW YORK. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry G. Molina* for petitioner. *Mr. Earle T. Fiddler* for respondent. Reported below: 110 F. 2d 976.

No. 193. BAKER *v.* ARKANSAS. October 14, 1940. Petition for writ of certiorari to the Supreme Court of

Arkansas denied. *Messrs. A. G. Bush* and *W. R. Donham* for petitioner. Reported below: 199 Ark. 1005; 137 S. W. 2d 938.

No. 195. COMMERCIAL CASUALTY INSURANCE CO. *v.* STINSON. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert E. Plunkett* for petitioner. *Mr. U. S. Bratton* for respondent. Reported below: 111 F. 2d 63.

No. 196. SOUTHERN MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles C. Trabue, Jr.,* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent.

No. 197. CASHMAN *v.* MARSHALL'S U. S. AUTO SUPPLY, INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Randal C. Harvey* for petitioner. *Mr. T. M. Lillard* for respondent. Reported below: 111 F. 2d 140.

No. 198. COX *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 199. CHILDERS *v.* SAME. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert Stone* and *Ellis D. Bever* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall*

Key, J. Louis Monarch, Joseph M. Jones, and *Richard H. Demuth* for respondent. Reported below: 110 F. 2d 934.

Nos. 202 and 203. MARYLAND CASUALTY CO. *v.* ALFORD, ADMINISTRATOR. October 14, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. John J. Carmody* and *John J. Wilson* for petitioner. Reported below: 111 F. 2d 388.

No. 206. GALLEGOS ET AL. *v.* SMITH, CORPORATION COMMISSIONER OF OREGON. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alexander B. Baker* and *John F. Reilly* for petitioners. Reported below: 111 F. 2d 805.

No. 207. COMPRESS OF UNION ET AL. *v.* STONE, TAX COMMISSIONER. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Marcellus Green, J. N. Flowers, Clyde L. Hester,* and *Garner W. Green, Sr.,* for petitioners. Reported below: 49 Miss. 188; 193 So. 329.

No. 208. KULESZA ET AL. *v.* AMERICAN CAR & FOUNDRY CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold O. Mulks* for petitioners. *Messrs. Samuel W. Banning* and *Ephraim Banning* for respondent. Reported below: 111 F. 2d 58.

No. 215. TOVREA PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1940. Petition for writ of

certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Denison Kitchel* for petitioner. *Solicitor General Biddle* and *Messrs. Warner W. Gardner, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 111 F. 2d 626.

No. 216. COMMISSIONERS OF THE SINKING FUND OF LOUISVILLE *v.* ANDERSON, RECEIVER. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence S. Poston* for petitioner. *Messrs. Frank E. Wood, Robert S. Marx, Harry Kaspir,* and *George P. Barse* for respondents. Reported below: 110 F. 2d 961.

No. 217. KELLEY *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. L. Dawson* for petitioner. *Solicitor General Biddle* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Warner W. Gardner,* and *Keith L. Seegmiller* for the United States. Reported below: 110 F. 2d 922.

No. 220. FULLER ET AL. *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioners. *Assistant Attorney General Rogge* and *Messrs. N. A. Townsend, William W. Barron, W. Marvin Smith,* and *Fred E. Strine* for the United States. Reported below: 110 F. 2d 815.

No. 221. RITTER ET AL. *v.* WYOGA GAS & OIL CORPORATION. October 14, 1940. Petition for writ of certiorari

to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Fred Katzmaier* for petitioners. *Mr. Samuel S. Jennings, Jr.* for respondent. Reported below: 110 F. 2d 524.

No. 223. ADLER (NOW COWLEY-BROWN) *v.* ADLER. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Ode L. Rankin* for petitioner. *Mr. Floyd E. Thompson* for respondent. Reported below: 373 Ill. 361; 26 N. E. 2d 504.

No. 224. HAYWARD ET AL. *v.* CITY OF CORPUS CHRISTI. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. David M. Wood* for petitioners. *Mr. W. A. Keeling* for respondent. Reported below: 111 F. 2d 637.

No. 226. NOLAND *v.* NOLAND ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Calvin S. Mauk* for petitioner. *Mr. Chas. F. Blackstock* for respondents. Reported below: 111 F. 2d 322.

No. 227. LAND OBEROESTERREICH *v.* GUDE ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel R. Wachtell* for petitioner. *Messrs. A. Spotswood Campbell* and *Karl T. Frederick* for respondents. Reported below: 109 F. 2d 635.

No. 229. AMIOT, GUARDIAN, ET AL. *v.* KANSAS CITY LIFE INSURANCE CO. October 14, 1940. Petition for

writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick T. Harward* for petitioners. *Mr. Oscar C. Hull* for respondent. Reported below: 109 F. 2d 916.

No. 233. JAMES B. BERRY SONS' CO. *v.* NEW YORK CENTRAL RAILROAD CO., LESSEE. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. John L. Nesbit* for petitioner. *Mr. John J. Danhof* for respondent. Reported below: 338 Pa. 500; 12 A. 2d 588.

No. 238. STOODY COMPANY *v.* CARLTON METALS, INC. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Fred H. Miller* for petitioner. Reported below: 111 F. 2d 920.

No. 239. KRAFT *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank M. Avery* for petitioner. *Assistant Attorney General Clark* and *Messrs. N. A. Townsend, Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* for respondent. Reported below: 111 F. 2d 370.

No. 247. SAFWAY STEEL SCAFFOLDS CO. *v.* PATENT SCAFFOLDING CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. S. L. Wheeler* and *Max W. Zabel* for petitioner. *Messrs. C. P. Goepel* and *George I. Haight* for respondents. Reported below: 110 F. 2d 1008.

No. 249. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* RECTOR & DAVIDSON. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Biddle* for petitioner. *Mr. Eustis Myres* for respondent. Reported below: 111 F. 2d 332.

No. 252. BRINKLEY *v.* FISHBEIN. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will A. Morriss* for petitioner. *Mr. W. L. Matthews* for respondent. Reported below: 110 F. 2d 62.

No. 254. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MALLINCKRODT ET AL., TRUSTEES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Biddle* for petitioner. *Messrs. Harry W. Kroeger* and *Daniel N. Kirby* for respondents. Reported below: 109 F. 2d 933.

No. 258. PERSON *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *L. K. Person, pro se. Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 112 F. 2d 1.

No. 261. MARYLAND CASUALTY CO. *v.* BOULT. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Brunini* for petitioner. Reported below: 111 F. 2d 257.

No. 262. SHAW-WALKER COMPANY ET AL. *v.* NATIONAL BENEFIT LIFE INSURANCE CO. ET AL. October 14, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Levi H. David, Robert H. McNeill,* and *Henry Lincoln Johnson, Jr.,* for petitioners. *Messrs. John E. Laskey* and *Francis C. Brooke* for respondents. Reported below: 71 App. D. C. 276; 111 F. 2d 497.

No. 270. BOLLES *v.* TOLEDO TRUST COMPANY, EXECUTOR. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. George D. Welles* for petitioner. *Mr. Gustavus Ohlinger* for respondent. Reported below: 136 Ohio St. 517; 27 N. E. 2d 145.

No. 275. BARNES, TRADING AS BARNES & LOFLAND, *v.* REED, RECEIVER. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Michael J. Ryan* for petitioner. Reported below: 112 F. 2d 714.

No. 277. AUTOMATIC DEVICES CORP. *v.* SINKO TOOL & MFG. CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Drury W. Cooper, Thomas J. Byrne,* and *Henry M. Huxley* for petitioner. *Messrs. Bernard A. Schroeder, Russell Wiles,* and *George A. Chritton* for respondent. Reported below: 112 F. 2d 335.

No. 280. SUBIN ET AL., TRADING AS ARCADIA HOSIERY CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1940. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Third Circuit denied. *Messrs. Charles L. Guerin* and *Thomas F. Gain* for petitioners. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 112 F. 2d 326.

No. 285. JACKSON, TRUSTEE, *v.* LYNCH, RECEIVER. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence W. Hull* for petitioner. *Mr. Leonard J. Meyberg* for respondent. Reported below: 111 F. 2d 1003.

No. 288. WILLIAMS *v.* NATIONAL SURETY CORPORATION. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Kenneth W. Coulter, Boone T. Coulter,* and *Edward H. Coulter* for petitioner. *Messrs. C. H. Moses* and *Roy H. Callahan* for respondent. Reported below: 110 F. 2d 873.

No. 289. SOUTHERN STEAMSHIP CO. *v.* MEYNERS. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joseph W. Henderson, J. Newton Rayzor,* and *Thomas F. Mount* for petitioner. *Mr. Lewis Fisher* for respondent. Reported below: 110 F. 2d 376.

No. 292. WEST SIDE TENNIS CLUB *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence A. Baker* for petitioner. *Solicitor General Biddle, Assistant Attorney Gen-*

eral Clark, and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 111 F. 2d 6.

No. 294. WESTOVER, TRUSTEE, *v.* VALLEY NATIONAL BANK. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alexander B. Baker* for petitioner. *Messrs. John L. Gust* and *W. L. Barnum* for respondent. Reported below: 112 F. 2d 61.

No. 298. WERTZ, TRUSTEE, *v.* NATIONAL CITY BANK OF EVANSVILLE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank W. Cottle* for petitioner. *Mr. Isidor Kahn* for respondent. Reported below: 115 F. 2d 65.

No. 301. TIMKEN-DETROIT AXLE CO. *v.* LEMPCO PRODUCTS, INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey* and *William A. Strauch* for petitioner. Reported below: 110 F. 2d 307.

No. 302. BALINOVIC *v.* EVENING STAR NEWSPAPER CO. October 14, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Alvin L. Newmyer, David G. Bress,* and *Lewis H. Shapiro* for petitioner. *Messrs. Edmund L. Jones* and *George Monk* for respondent. Reported below: 113 F. 2d 505.

No. 303. WILLIAMS *v.* GOLDEN, MARSHAL. October 14, 1940. Petition for writ of certiorari to the Supreme

Court of Missouri denied. *Mr. Robert W. Hall* for petitioner. *Messrs. Edgar H. Wayman* and *Oliver Senti* for respondent. Reported below: 345 Mo. 1121; 139 S. W. 2d 485.

No. 305. FROST LUMBER INDUSTRIES, INC. *v.* REPUBLIC PRODUCTION CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. *Mr. James H. Durbin* for respondent. Reported below: 112 F. 2d 462.

No. 306. TRAVELERS INSURANCE CO. *v.* PRICE ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Paul Jackson* for petitioner. *Mr. Lloyd E. Elliott* for respondents. Reported below: 111 F. 2d 776.

No. 307. ROYAL INSURANCE CO. *v.* SMITH. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Percy V. Long* for petitioner. *Messrs. A. B. Bianchi* and *James M. Hanley* for respondent. Reported below: 111 F. 2d 667.

No. 308. MISSOURI, BY AND THROUGH THE UNEMPLOYMENT COMPENSATION COMMISSION, *v.* EARHART, TRUSTEE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harry G. Waltner, Jr.,* for petitioner. *Messrs. J. Francis O'Sullivan* and *Maurice J. O'Sullivan* for respondent. Reported below: 111 F. 2d 992.

No. 310. WOODS, COURT TRUSTEE, *v.* CITY NATIONAL BANK & TRUST CO. OF CHICAGO ET AL. October 14, 1940.

Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Weightstill Woods* for petitioner. *Mr. Vincent O'Brien* for respondents. Reported below: 111 F. 2d 834.

No. 316. MEHRLUST *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Andrew B. Trudgian* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Berryman Green,* and *Richard H. Demuth* for respondent. Reported below: 112 F. 2d 717.

No. 317. HUFFMAN *v.* CITY OF WICHITA. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Thomas E. Elcock* and *John W. Adams* for petitioner. *Mr. Benj. F. Hegler* for respondent. Reported below: 151 Kan. 679; 101 P. 2d 219.

No. 318. BONNER ET AL. *v.* SUITER ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. H. A. Ledbetter* for petitioners. *Mr. Malcolm E. Rosser* for respondents. Reported below: 112 F. 2d 912.

No. 323. AMERICAN NATIONAL BANK *v.* CITY OF SANFORD ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Stuart B. Warren, J. Blanc Monroe,* and *Monte M. Lemann* for petitioner. *Mr. Robert J. Pleus* for the City of Sanford, and *Solicitor General*

Biddle, Assistant Attorney General Shea, and *Mr. Melvin H. Siegel* for the United States, respondents. Reported below: 112 F. 2d 435.

No. 324. DAVIS ET AL. *v.* CITY OF HOMESTEAD ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles A. Carroll* for petitioners. *Mr. Robert J. Pleus* for the City of Homestead, and *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for the United States, respondents. Reported below: 112 F. 2d 438.

No. 325. STEVENS *v.* EDWARDS ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Palmer Garrett* for petitioner. *Mr. Thomas B. Adams* for respondents. Reported below: 112 F. 2d 534.

No. 328. UNITED STATES TRUST CO. OF NEW YORK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry J. Ahlheim* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Joseph M. Jones* for respondent. Reported below: 111 F. 2d 576.

No. 329. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* TAWES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Jos. M. Rault* and *Benjamin W. Yancey* for petitioner. *Solicitor General Biddle, Assistant Attor-*

ney General Shea, and *Messrs. Paul A. Sweeney* and *Wm. A. Van Siclen* for respondent. Reported below: 111 F. 2d 92.

No. 335. ALAMITOS LAND CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Melvin D. Wilson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth,* and *Miss Louise Foster* for respondent. Reported below: 112 F. 2d 648.

No. 347. FOOD MACHINERY CORP. *v.* FRUIT TREATING CORPORATION ET AL. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frederick S. Lyon, Leonard S. Lyon,* and *O. K. Reaves* for petitioner. *Messrs. Albert M. Austin, John B. Sutton,* and *G. L. Reeves* for respondents. Reported below: 112 F. 2d 119.

No. 348. OREGON SHORT LINE RAILROAD CO. ET AL. *v.* UNITED STATES. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George H. Smith* for petitioners. *Solicitor General Biddle* and *Mr. Robert E. Mulroney* for the United States. Reported below: 113 F. 2d 212.

No. 350. LIEBERMAN ET AL. *v.* CITY OF PHILADELPHIA. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. David D. Goff* and *George V. Strong* for petitioners. *Messrs. Francis F. Burch* and *Abraham Wernick* for respondent. Reported below: 112 F. 2d 424.

No. 358. PORTER-WADLEY LUMBER CO. ET AL. *v.* BAILEY; and

No. 359. SAME *v.* PRUITT. October 14, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John B. Files* and *Joseph H. Jackson* for petitioners. Reported below: 110 F. 2d 974.

Nos. 360 and 361. LONG ISLAND DRUG CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Otho S. Bowling* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *John A. Gage* for respondent. Reported below: 111 F. 2d 593.

No. 365. NATIONAL UNION FIRE INSURANCE CO. *v.* EGGERS, CLAIMANT. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Jos. M. Rault, Geo. H. Terriberry,* and *Walter Carroll* for petitioner. *Mr. Edward Arthur Kelly* for respondent. Reported below: 112 F. 2d 347.

No. 370. PALMER ET AL. *v.* MCCARTHY. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward R. Brumley* for petitioners. *Mr. Thomas J. O'Neill* for respondent. Reported below: 113 F. 2d 721.

No. 372. WALL *v.* STATE BOARD OF BAR EXAMINERS. October 14, 1940. Petition for writ of certiorari to the Supreme Court of New Jersey denied. *Mr. William G. Wall* for petitioner. *Messrs. David T. Wilentz,* Attor-

ney General of New Jersey, and *Joseph Lanigan* for respondent. Reported below: 124 N. J. L. 560; 12 A. 2d 852.

No. 383. UNITED STATES HOFFMAN MACHINERY CORP. *v.* CUMMINGS-LANDAU LAUNDRY MACHINERY CO. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel L. Morris* for petitioner. *Mr. Clarence B. Des Jardins* for respondent. Reported below: 113 F. 2d 424.

No. 385. CITY OF ST. LOUIS ET AL. *v.* LINDSAY. October 14, 1940. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. E. H. Wayman* and *Anne M. Evans* for petitioners. *Messrs. Harry B. Hawes* and *Carl L. Ristine* for respondent. Reported below: 345 Mo. 1141; 139 S. W. 2d 906.

No. 401. TURNBOW ET AL. *v.* FARMERS' COOPERATIVE EXCHANGE, INC. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles E. Townsend* for petitioners. *Mr. Frederick S. Lyon* for respondent. Reported below: 111 F. 2d 728.

No. 452. MCCULLOCH *v.* LOFTUS. October 14, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Charles A. McCulloch, pro se,* and *Mr. William Lemke* for petitioner. *Mr. Marvin H. Taylor* for respondent. Reported below: 113 F. 2d 723.

No. 367. KNIGHT *v.* HUDSPETH, WARDEN. October 21, 1940. Petition for writ of certiorari to the Circuit

Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied 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. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Charles H. Knight, pro se.* Reported below: 112 F. 2d 137.

No. 126. ALEXANDER *v.* O'GRADY, WARDEN. October 21, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Earl Alexander, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent. Reported below: 137 Neb. 645; 290 N. W. 718.

No. 149. DAVIS *v.* O'GRADY, WARDEN. October 21, 1940. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Otha Davis, pro se. Messrs. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* and *Charles F. Bongardt,* Assistant Attorneys General, for respondent. Reported below: 137 Neb. 708; 291 N. W. 82.

No. 353. JOHNSON *v.* SANFORD, WARDEN. October 21, 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. *Charlie W. Johnson, pro se.* Reported below: 112 F. 2d 739.

No. 366. CARPENTER *v.* HUDSPETH, WARDEN. October 21, 1940. Petition for writ of certiorari to the Circuit

Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Leo Carpenter, pro se.* Reported below: 112 F. 2d 126.

No. 389. RANDLE *v.* UNITED STATES. October 21, 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. Robert H. McNeill* for petitioner. Reported below: 113 F. 2d 945.

No. 391. BARNOWSKI *v.* HUDSPETH, WARDEN. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Otto Barnowski, pro se.* Reported below: 113 F. 2d 984.

No. 390. MCDONALD *v.* HUDSPETH, WARDEN. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Walter McDonald, pro se.* Reported below: 113 F. 2d 984.

No. 68. MCCOY *v.* WEST VIRGINIA. On petition for writ of certiorari to the Supreme Court of Appeals of West Virginia; and

No. 355. PAINTER *v.* BALTIMORE & OHIO RAILROAD CO. On petition for writ of certiorari to the Supreme Court of Pennsylvania. October 21, 1940. The petitions for writs of certiorari in these cases are denied for the reason that the applications therefor were not made within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Arthur McCoy, pro se.*

Mr. J. Thomas Hoffman for petitioner in No. 355. Reported below: No. 68, 7 S. E. 2d 89; No. 355, 339 Pa. 271; 13 A. 2d 396.

No. 322. HART ET AL. *v.* UNITED STATES. October 21, 1940. The motion for leave to file a supplemental petition for writ of certiorari is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. MR. JUSTICE MURPHY took no part in the consideration and decision of these applications. *Messrs. Hugh M. Wilkinson, O. R. McGuire,* and *David V. Cahill* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Mr. Fred E. Strine* for the United States. Reported below: 112 F. 2d 128.

No. 351. BAIR *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Horace S. Davis* and *Sterling M. Wood* for petitioner. *Messrs. E. G. Toomey, Louis Ferrari,* and *Edmund Nelson* for respondent. Reported below: 112 F. 2d 247.

No. 403. THOMPSON, TRUSTEE, *v.* WILEY. October 21, 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 granted. The petition for writ of certiorari to the Supreme Court of Arkansas is denied. *Messrs. Thos. T. Railey, W. L. Curtis,* and *Thomas B. Pryor* for petitioner. *Messrs. Theron W. Agee* and *David S. Partain* for respondent. Reported below: 200 Ark. 574; 140 S. W. 2d 676; 142 S. W. 2d 944.

No. 379. SIMMONS (ROSA F. SIMMONS, TEMPORARY ADMINISTRATRIX, SUBSTITUTED IN PLACE OF W. S. SIMMONS, DECEASED) *v.* PEAVY-WELSH LUMBER CO. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of the opinion that the petition for writ of certiorari should be granted. *Mr. Edgar J. Oliver* for petitioner. *Messrs. Robert M. Hitch* and *Archibald B. Lovett* for respondent. Reported below: 112 F. 2d 662; 113 *id.* 812.

No. 109. LANGSTON ET AL. *v.* SOUTH CAROLINA. October 21, 1940. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for petitioners. Reported below: 195 S. C. 190; 11 S. E. 2d 1.

No. 225. IN THE MATTER OF BLUESTONE. October 21, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Morton D. Bluestone, pro se. Mr. Robert T. McCracken* for the Supreme Court of Pennsylvania.

No. 290. IRVING TRUST CO. *v.* UNITED STATES. October 21, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. E. F. Colladay, Wilton H. Wallace,* and *Martin Saxe* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Daniel F. Hickey* for the United States. Reported below: 90 Ct. Cls. 310; 30 F. Supp. 290.

No. 311. GLIWA ET AL. *v.* UNITED STATES STEEL CORP. ET AL. October 21, 1940. Petition for writ of certiorari

to the Supreme Court of Pennsylvania denied. *Agnes Gliwa, pro se.* Reported below: 338 Pa. 149; 12 A. 2d 784.

No. 334. GLIWA ET AL. *v.* UNITED STATES STEEL CORP. ET AL. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Agnes Gliwa, pro se.* Reported below: 111 F. 2d 281, 646.

No. 341. COUNTY OF FRESNO ET AL. *v.* COMMODITY CREDIT CORPORATION. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Earl Warren,* Attorney General of California, *H. H. Linney,* Deputy Attorney General, and *James J. Arditto* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Arnold Raum,* and *Berryman Green* for respondent. Reported below: 112 F. 2d 639.

No. 374. JACKSON ET AL. *v.* UNITED GAS PUBLIC SERVICE CO. ET AL. October 21, 1940. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Aubrey M. Pyburn* for petitioners. Reported below: 198 So. 633.

No. 380. NGIM AH OY *v.* HAFF, DISTRICT DIRECTOR, U. S. IMMIGRATION AND NATURALIZATION SERVICE. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ernest B. D. Spagnoli* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for respondent. Reported below: 112 F. 2d 607.

No. 386. CONTINENTAL OIL CO. *v.* JONES, COLLECTOR OF INTERNAL REVENUE. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. D. A. Richardson* and *A. L. Hull* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch, Arnold Raum,* and *Joseph M. Jones* for respondent. Reported below: 113 F. 2d 557.

No. 388. O/Y WIPU, OWNER OF "THE WILJA," *v.* DREYFUS ET AL., CO-PARTNERS. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edgar R. Kraetzer* for petitioner. *Mr. Henry E. Otto* for respondents. Reported below: 113 F. 2d 646.

No. 394. UNITED STATES *v.* RALSTON. October 21, 1940. Petition for writ of certiorari to the Court of Claims denied. *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: 91 Ct. Cls. 91.

No. 395. ALASKA STEAMSHIP CO. *v.* PACIFIC COAST COAL CO. ET AL. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Cassius E. Gates* and *Edwin G. Dobrin* for petitioner. *Messrs. T. Catesby Jones, James W. Ryan,* and *Lane Summers* for Pacific Coast Coal Co. et al.; and *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Paul A. Sweeney,* and *Richard H. Demuth* for the United States, respondents. Reported below: 112 F. 2d 952.

No. 396. Buggs *v.* Ford Motor Company. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edgar B. Tolman* and *Jacob Geffs* for petitioner. *Messrs. Carl Muskat, Clifford B. Longley,* and *Wallace R. Middleton* for respondent. Reported below: 113 F. 2d 618.

No. 398. Hamilton Laboratories, Inc. *v.* Massengill, doing business as S. E. Massengill Company. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. B. Morton* for petitioner. *Mr. Clair V. Johnson* for respondent. Reported below: 111 F. 2d 584.

No. 402. Main & McKinney Building Co. *v.* Commissioner of Internal Revenue. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward S. Boyles* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Arnold Raum* for respondent. Reported below: 113 F. 2d 81.

No. 404. Southern Minerals Corp. *v.* Simmons et al. October 21, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Dan Moody* for petitioner. Reported below: 111 F. 2d 333.

No. 431. Keaton *v.* Oklahoma City et al. See *ante,* p. 616.

No. 345. Clark *v.* Alabama. On petition for writ of certiorari to the Supreme Court of Alabama; and

No. 392. PENNSYLVANIA EX REL. MONTGOMERY *v.* ASHE, WARDEN. On petition for writ of certiorari to the Superior Court of Pennsylvania, Pittsburgh District. October 28, 1940. The motions for leave to proceed further *in forma pauperis* are denied for the reason that the Court, upon examination of the papers herein submitted, finds that the applications for writs of certiorari were not filed within the time provided by law. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). The petitions for writs of certiorari are therefore also denied. *Mr. George W. Chamlee* for petitioner in No. 345. *Lee Montgomery, pro se. Messrs. Thomas S. Lawson,* Attorney General of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondent in No. 345. Reported below: No. 345, 239 Ala. 380; 195 So. 260.

No. 488. TROSS *v.* WEST VIRGINIA. October 28, 1940. Motion for leave to proceed further *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of West Virginia, Mineral County, denied. *Mr. F. E. Parrack* for petitioner.

No. 410. DILLON *v.* UNITED STATES; and

No. 411. CROWLEY *v.* UNITED STATES. October 28, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Edward L. O'Connor* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 334.

No. 416. STATE NATIONAL BANK OF MAYSVILLE *v.* CHESAPEAKE & OHIO RAILWAY CO. October 28, 1940.

Petition for writ of certiorari to the Court of Appeals of Kentucky denied. MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. H. E. McElwain, Jr.* for petitioner. *Mr. LeWright Browning* for respondent. Reported below: 280 Ky. 444; 283 *id.* 443; 133 S. W. 2d 511; 141 S. W. 2d 869.

No. 244. MADDEN ET AL. *v.* LYKES BROS.-RIPLEY STEAMSHIP CO. ET AL. October 28, 1940. The motion to proceed on the typewritten record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. Alex. W. Swords* for petitioners. Reported below: 110 F. 2d 968.

No. 405. NOLL *v.* HUNT, ADMINISTRATRIX. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lee Douglas* for petitioner. Reported below: 112 F. 2d 288.

No. 406. YOKOHAMA SPECIE BANK, LTD. *v.* HU SHIH, AMBASSADOR OF THE REPUBLIC OF CHINA TO THE UNITED STATES. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Carroll Single* for petitioner. *Messrs. Lyman Henry, Frederick W. Dorr,* and *Archie M. Stevenson* for respondent. Reported below: 113 F. 2d 329.

No. 407. MONTGOMERY WARD & CO. *v.* FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Stuart S. Ball* for petitioner.

Solicitor General Biddle, Assistant Attorney General Arnold, and *Messrs. Robert L. Stern, George A. McNulty, Gerard D. Reilly,* and *Irving J. Levy* for respondent. Reported below: 114 F. 2d 384.

No. 412. First National Bank of Chicago et al. *v.* Commissioner of Internal Revenue. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope, Francis H. Uriell,* and *Benjamin M. Price* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 112 F. 2d 260.

No. 414. Booth Fisheries Corp. *v.* Coe, Commissioner of Patents. October 28, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Henry M. Huxley, Benjamin V. Becker,* and *Frank Greenberg* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 114 F. 2d 462.

No. 415. Roetter *v.* McKey, Trustee. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry Leroy Jones* for petitioner. *Mr. Charles R. Aiken,* and *Messrs. Benedict S. Deinard* and *George Edward Leonard* filed briefs in opposition. Reported below: 114 F. 2d 129.

No. 417. Fuel Credit Corporation *v.* Howard et al. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Theodore L. Bailey for petitioner. *Messrs. John E. Purdy* and *Edmund F. Lamb* for respondents. Reported below: 111 F. 2d 571.

No. 418. SMITH, RECEIVER, ET AL. *v.* MILLS. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Orlo R. Deahl* and *S. J. Crumpacker* for petitioners. *Mr. Robert A. Grant* for respondent. Reported below: 113 F. 2d 404.

No. 420. BEN ADLER SIGNS, INC. ET AL. V. WAGNER SIGN SERVICE, INC. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max W. Zabel* for petitioners. *Mr. Albert G. McCaleb* for respondent. Reported below: 112 F. 2d 264.

No. 426. STROBL *v.* ZIDEK. October 28, 1940. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied. *Samuel Strobl, pro se. John Zidek, Jr., pro se.* Reported below: 304 Ill. App. 385; 26 N. E. 2d 700.

No. 427. CITY OF HURON *v.* EVENSON, TRUSTEE. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Max Royhl* for petitioner. *Mr. Perry F. Loucks* for respondent. Reported below: 113 F. 2d 598.

No. 428. MOORE *v.* HORTON, TRUSTEE IN BANKRUPTCY. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Richard Ford* and *Merlin Wiley* for petitioner.

Mr. Jason L. Honigman for respondent. Reported below: 110 F. 2d 189.

No. 429. School Board of Norfolk et al. *v.* Alston et al. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. M. Hughes, Jr.* for petitioners. *Messrs. Leon A. Ransom, Thurgood Marshall, Benjamin Kaplan,* and *W. Robert Ming, Jr.* for respondents. Reported below: 112 F. 2d 992.

No. 430. Stanolind Pipe Line Co. *v.* Oklahoma Tax Commission. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Donald Campbell, Guy H. Woodward,* and *John H. Cantrell* for petitioner. *Mr. F. M. Dudley* for respondent. Reported below: 113 F. 2d 853.

No. 432. Einson-Freeman Co., Inc. *v.* Corwin, Former Collector of Internal Revenue, et al. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel Gordon James Judge* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. J. Louis Monarch* for respondents. Reported below: 112 F. 2d 683.

No. 433. Canadian River Gas Co. et al. *v.* Federal Power Commission. October 28, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Wales H. Madden, C. H. Keffer, Elmer L. Brock, John P. Akolt, E. R. Campbell, Milton Smith,* and *William A. Dougherty* for petitioners. *Solicitor General Biddle, Assistant Attorney General Shea,*

and *Messrs. Melvin H. Siegel* and *Thomas E. Harris* for respondent. Reported below: 110 F. 2d 350; 113 *id.* 1010.

No. 446. SCHMIDT *v.* MINNESOTA STATE BOARD OF MEDICAL EXAMINERS. See *ante,* p. 617.

No. 246. MARTIN *v.* CALIFORNIA. See *ante,* p. 618.

No. 449. VERNON *v.* ALABAMA. November 12, 1940. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Walter S. Smith* for petitioner. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, *William H. Loeb,* and *Prime F. Osborn,* Assistant Attorneys General, for respondent. Reported below: 239 Ala. 593; 196 So. 96.

No. 457. ADAMS *v.* BOYCE ET AL. November 12, 1940. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Melville Adams, pro se. Mr. W. I. Gilbert* for Dr. William A. Boyce et al., and *Mr. Woodward M. Taylor* for Lutheran Hospital Society, respondents. Reported below: 37 Cal. App. 2d 541; 99 P. 2d 1044.

No. 397. JACOBS *v.* UNITED STATES. November 12, 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. Fred G. Benton* for petitioner. Reported below: 112 F. 2d 51.

No. 477. WAGGONER *v.* UNITED STATES. November 12, 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. *Mr. Philip F. Dodson* for petitioner. Reported below: 113 F. 2d 867.

No. 455. RIPPERGER, RECEIVER, *v.* A. C. ALLYN & CO., INC., ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Jacob K. Javits* and *Percival E. Jackson* for petitioner. *Mr. Claire W. Hardy* for A. C. Allyn & Co., and *Mr. John C. Bruton, Jr.* for the First Boston Corporation, respondents. Reported below: 113 F. 2d 332.

No. 476. MCQUILLEN ET AL. *v.* NATIONAL CASH REGISTER CO. ET AL. November 12, 1940. The motion to dispense with the printing of the record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is denied. The CHIEF JUSTICE took no part in the consideration and decision of these applications. *Mr. Israel Gorovitz* for petitioners. *Mr. James Piper* for the National Cash Register Co., and *Mr. William L. Marbury, Jr.* for Ezra M. Kuhns et al., respondents. Reported below: 112 F. 2d 877.

No. 480. MELVILLE ET AL. *v.* WEYBREW ET AL. On petition for writ of certiorari to the Supreme Court of Colorado. November 12, 1940. The motion to supplement the record is denied. The petition for writ of certiorari is denied for the reason that the application therefor was not made within the time provided by law.

Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Mr. I. B. Melville* for petitioners. Reported below: 106 Colo. 121; 103 P. 2d 7.

No. 434. Missouri Pacific Transportation Co. et al. *v.* Parker, Administrator, et al. November 12, 1940. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Wm. McCraw, W. J. Holt,* and *Steve Carrigan* for petitioners. *Mr. W. F. Denman* for respondents. Reported below: 200 Ark. 620; 140 S. W. 2d 997.

No. 435. Continental Casualty Co. *v.* United States. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Purnell M. Milner* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* for the United States. Reported below: 113 F. 2d 284.

No. 439. Van Riper *v.* United States. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John S. Wise, Jr.* for petitioner. *Solicitor General Biddle* and *Messrs. Hugh A. Fisher, George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 113 F. 2d 929.

No. 440. Estate of Gund et al. *v.* Commissioner of Internal Revenue. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Claude M. Houchins* and *George R. Hunt* for petitioners. *Solicitor General Bid-*

dle, Assistant Attorney General Clark, and *Messrs. J. Louis Monarch* and *L. W. Post* for respondent. Reported below: 113 F. 2d 61.

No. 443. HARE ET AL. *v.* HENDERSON ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. D. Gordon* for petitioners. *Mr. E. J. Fountain* for respondents. Reported below: 113 F. 2d 277.

No. 450. SCHOMMER ET AL. *v.* WILKERSON, JUDGE, ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. Schwartz* for petitioners. *Messrs. James M. Sheean, J. F. Dammann, Henry F. Tenney,* and *William J. Froelich* for respondents. Reported below: 112 F. 2d 311.

No. 451. HARVEY *v.* CITY OF ST. PETERSBURG. November 12, 1940. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. C. I. Carey* for petitioner. *Mr. Erle B. Askew* for respondent. Reported below: 143 Fla. 559; 197 So. 116.

No. 453. WEILL *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David J. Colton* for petitioner. *Mr. Edgar R. Kraetzer* for respondent. Reported below: 113 F. 2d 720.

No. 454. UNITED STATES FOR THE USE AND BENEFIT OF LUCHINI ET AL. *v.* FERRO CONCRETE CONSTRUCTION CO.

ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. R. Gaynor Wellings* for petitioners. *Messrs. William H. Edwards* and *Gerald W. Harrington* for respondents. Reported below: 112 F. 2d 488.

No. 456. LONG *v.* CALIFORNIA. November 12, 1940. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Herbert W. Erskine* for petitioner. Reported below: 15 Cal. 2d 590; 96 P. 2d 354, 1021; 103 P. 2d 969.

No. 458. LARSON *v.* PACIFIC MUTUAL LIFE INSURANCE CO. November 12, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles M. Haft* for petitioner. *Messrs. Francis X. Busch* and *Orville J. Taylor* for respondent. Reported below: 373 Ill. 614; 27 N. E. 2d 458.

No. 459. DUNN *v.* ICKES, SECRETARY OF THE INTERIOR. November 12, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Raymond M. Hudson* and *Geoffrey Creyke, Jr.* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 115 F. 2d 36.

No. 460. SPENCER, TRUSTEE, *v.* HIRAM WALKER & SONS GRAIN CORP., LTD. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Max Kahn* for petitioner. Reported below: 112 F. 2d 221.

No. 461. CATAHOULA BANK *v.* KIRBY. November 12, 1940. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. Wood H. Thompson* for petitioner. *Mr. Frank J. Looney* for respondent. Reported below: 112 F. 2d 124.

No. 462. BURGESS, CO-ADMINISTRATRIX, ET AL. *v.* RELIANCE LIFE INSURANCE CO. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Paul M. Peterson* and *William H. Becker* for petitioners. Reported below: 112 F. 2d 234.

No. 464. TSUNE-CHI YU *v.* CARL BYOIR & ASSOCIATES, INC. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. H. H. Nordlinger* for petitioner. *Messrs. Maxwell C. Katz* and *Otto C. Sommerich* for respondent. Reported below: 112 F. 2d 885.

No. 465. STANDARD GAS & ELECTRIC CO. *v.* TAYLOR ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. A. Louis Flynn, Jacob K. Javits,* and *Wilbur J. Holleman* for petitioner. *Mr. Jason L. Honigman* for John M. Taylor et al.; *Messrs. William P. Sidley* and *James F. Oates, Jr.* for the Reorganization Committee; *Messrs. George S. Ramsey* and *Villard Martin* for H. N. Greis, Trustee, and *Solicitor General Biddle* and *Messrs. Chester T. Lane, Bernard D. Cahn,* and *Homer Kripke* for the Securities & Exchange Commission, respondents. Reported below: 113 F. 2d 266.

No. 331. HOUSTON ET AL., TRUSTEES, ET AL. *v.* SWINFORD, U. S. DISTRICT JUDGE, ET AL.;

No. 332. KOHN ET AL. *v.* CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL.; and

No. 333. KOHN ET AL. *v.* SWINFORD, U. S. DISTRICT JUDGE, ET AL. November 12, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey H. Smith* for George S. Houston et al., and *Mr. Frank M. Dailey* for Central Distributing Co., petitioners.

No. 463. WOLFE *v.* MURPHY ET AL. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George E. Wallace* for petitioner. *Mr. G. E. Lyons* for respondents. Reported below: 112 F. 2d 885.

No. 466. GILBERT ET AL. *v.* PEORIA & EASTERN RAILWAY CO. ET AL.; and

No. 467. EWEN ET AL. *v.* SAME. November 12, 1940. Petitions for writs of certiorari to the District Court of the United States for the Southern District of New York denied. *Mr. Mark Hyman* for petitioners in No. 466. *Mr. Charles S. Aronstram* for petitioners in No. 467. *Mr. Jacob Aronson* for the Peoria & Eastern Railway Co., respondent. Reported below: 34 F. Supp. 332.

No. 469. PELELAS *v.* CATERPILLAR TRACTOR CO. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Homer H. Marshman* for petitioner. *Mr. Frank T. Miller* for respondent. Reported below: 113 F. 2d 629.

No. 470. R. P. FARNSWORTH & CO., INC. *v.* ELECTRICAL SUPPLY CO. November 12, 1940. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James C. Henriques* for petitioner. *Messrs. Robert E. Milling* and *Robert E. Milling, Jr.* for respondent. Reported below: 112 F. 2d 150; 113 *id.* 111.

No. 471. DUNN *v.* CALIFORNIA. November 12, 1940. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District of California, denied. *Mr. Herbert W. Erskine* for petitioner. *Messrs. Earl Warren,* Attorney General of California, and *J. Q. Brown,* Deputy Attorney General, for respondent. Reported below: 40 Cal. App. 2d 6; 104 P. 2d 119.

No. 478. METROPOLITAN BUILDING & LOAN ASSN. ET AL. *v.* TEXAS UNEMPLOYMENT COMPENSATION COMMISSION ET AL. November 12, 1940. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Mr. Dan Moody* for petitioners. *Messrs. Gerald C. Mann,* Attorney General of Texas, *George W. Barcus,* and *R. W. Fairchild,* Assistant Attorneys General, for respondents. Reported below: 139 S. W. 2d 309.

No. 481. CROSS *v.* MARYLAND CASUALTY CO. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. B. Handley* for petitioner. *Mr. J. P. Jackson* for respondent. Reported below: 112 F. 2d 58.

No. 482. NEW YORK LIFE INSURANCE CO. *v.* CALHOUN. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, James C. Jones, Jr.,*

and *Louis H. Cooke* for petitioner. *Mr. William R. Gentry* for respondent. Reported below: 114 F. 2d 526.

No. 487. Acme Freight Lines, Inc. *v.* Lee, State Comptroller. November 12, 1940. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. C. D. Rinehart* for petitioner. *Messrs. George Couper Gibbs,* Attorney General of Florida, and *Nathan Cockrell,* Assistant Attorney General, for respondent. Reported below: 143 Fla. 635; 197 So. 499.

No. 489. Dallas Machine & Locomotive Works, Inc. *v.* Willamette-Hyster Co. et al. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Theodore J. Geisler* and *Amasa M. Holcombe* for petitioner. *Messrs. Albert G. McCaleb* and *Austin F. Flegel, Jr.* for respondents. Reported below: 112 F. 2d 623.

No. 490. International Company of St. Louis *v.* Sloan, Receiver. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. William L. Mason* for petitioner. *Mr. T. M. Lillard* for Sloan, and *Messrs. George E. Brammer, Joseph Brody,* and *Clyde B. Charlton* for Occidental Life Insurance Co., respondents. Reported below: 114 F. 2d 326.

No. 491. Bastian Bros. Co. *v.* McGowan, Collector of Internal Revenue. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas H. Remington* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 113 F. 2d 489.

No. 497. MATTHEWS, TRUSTEE, *v.* UNITED STATES. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Sam Costen* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 113 F. 2d 452.

No. 501. TILLES *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Harry B. Hawes* and *Carl L. Ristine* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. J. Louis Monarch* and *Thomas E. Harris* for respondent. Reported below: 113 F. 2d 907.

No. 505. KESSEL ET AL. *v.* VIDRIO PRODUCTS CORP. November 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Robert Cohler* for petitioners. *Messrs. Russell Wiles, George A. Chritton,* and *Jules L. Brady* for respondent. Reported below: 113 F. 2d 381.

No. 492. PRICE *v.* MOINET, U. S. DISTRICT JUDGE. November 18, 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. Section 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Homer C. Price, pro se.* Reported below: 116 F. 2d 500.

No. 546. IN RE CAMPBELL. November 18, 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. *Helen Douglas Campbell, pro se.* Reported below: 116 F. 2d 949.

No. 506. A. B. & M. Liquidation Corporation *v.* Pelham Hall Co. et al. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. Mr. Justice Douglas took no part in the consideration and decision of this application. *Messrs. Richard Wait* and *Charles P. Curtis, Jr.* for petitioner. *Mr. Robert H. Davison* for respondents. Reported below: 112 F. 2d 498.

No. 231. Helvering, Commissioner of Internal Revenue, *v.* Jennings et al. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Biddle* for petitioner. Reported below: 110 F. 2d 945.

No. 485. Gray et al. *v.* Blight, Administratrix. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. T. R. Boone* for petitioners. Reported below: 112 F. 2d 696.

No. 493. New York Handkerchief Manufacturing Co. *v.* National Labor Relations Board. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John L. McInerney* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf,* and *Miss Ruth Weyand* for respondent. Reported below: 114 F. 2d 144.

No. 496. ELKLAND LEATHER CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Morgan* for petitioner. *Solicitor General Biddle* and *Mr. Robert B. Watts* for respondent. Reported below: 114 F. 2d 221.

No. 499. NEELY *v.* MERCHANTS TRUST CO., ADMINISTRATOR, ET AL. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. A. Schnader, Albert G. Avery,* and *George Gordon Battle* for petitioner. *Messrs. Theodore D. Parsons* and *Frank F. Groff* for respondents. Reported below: 113 F. 2d 499.

No. 507. SITCHON *v.* AMERICAN EXPORT LINES, INC. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Macy* for petitioner. *Mr. Kenneth Gardner* for respondent. Reported below: 113 F. 2d 830.

No. 530. RICHMAN *v.* NIELSEN, ADMINISTRATRIX. November 18, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Blaine Simons* for petitioner. *Mr. George J. Danforth* for respondent. Reported below: 114 F. 2d 343.

No. 526. CADY ET AL. *v.* MURPHY. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Richard Wait* and *Robert*

Hale for petitioners. *Mr. Nathan W. Thompson* for respondent. Reported below: 113 F. 2d 988.

No. 503. FARBER *v.* UNITED STATES. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Chellis M. Carpenter* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. Fred E. Strine* and *W. Marvin Smith* for the United States. Reported below: 114 F. 2d 5.

No. 509. MORGAN, ADMINISTRATOR, *v.* HINES, ADMINISTRATOR OF VETERANS' AFFAIRS. November 25, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Warren E. Miller* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, W. Marvin Smith,* and *John M. George* for respondent. Reported below: 113 F. 2d 849.

No. 512. KONG DIN QUONG *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lambert O'Donnell* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. Durward E. Balch* and *George F. Kneip* for respondent. Reported below: 112 F. 2d 96.

Nos. 514 and 515. MEYER, ADMINISTRATOR, ET AL. *v.* UNITED STATES. November 25, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Sev-

enth Circuit denied. *Messrs. Ford W. Thompson* and *Henry Davis* for petitioners. *Solicitor General Biddle* for the United States. Reported below: 113 F. 2d 387.

No. 519. Bureau of Unemployment Compensation *v.* Independent Gasoline Co., Inc. November 25, 1940. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Messrs. Ellis Arnall* and *Clifford Walker* for petitioner. Reported below: 190 Ga. 613; 10 S. E. 2d 58.

No. 520. Laughlin, Administrator, *v.* Pink, Superintendent. November 25, 1940. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Oscar R. Houston* and *Francis X. Nestor* for petitioner. *Mr. Alfred C. Bennett* for respondent. By leave of Court, *Messrs. Wendell P. Barker* and *Morris Amchan* filed a brief on behalf of the Department of Banking, of Nebraska, as *amicus curiae,* in support of petitioner. Reported below: 258 App. Div. 789, 876; 283 N. Y. 68; 284 N. Y. 593; 16 N. Y. S. 2d 101; 17 N. Y. S. 2d 221; 27 N. E. 2d 505; 29 N. E. 2d 668.

No. 524. Den Norske Amerikalinje, A/S *v.* Blumenthal Import Corporation. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Griffin* and *Wharton Poor* for petitioner. *Mr. Martin Detels* for respondent. Reported below: 114 F. 2d 262.

No. 525. Reading Company *v.* Larkin. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jno.*

T. Brady for petitioner. *Messrs. George Kunkel* and *Walter H. Compton* for respondent. Reported below: 114 F. 2d 416.

No. 518. OBEAR-NESTER GLASS CO. *v.* WALGREEN DRUG STORES, INC., ET AL. November 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lawrence C. Kingsland* and *Edmund C. Rogers* for petitioner. *Messrs. Vernon M. Dorsey, Edward S. Rogers, John H. Bruninga,* and *John H. Sutherland* for respondents. Reported below: 113 F. 2d 956.

No. 112. FLOYD ET AL. *v.* EGGLESTON ET AL. December 9, 1940. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Crampton Harris* for petitioners. *Messrs. David B. Tammell* and *Victor C. Mieher* for respondents. Reported below: 137 S. W. 2d 182.

No. 536. INGELS *v.* STATE OF WASHINGTON. December 9, 1940. Petition for writ of certiorari to the Supreme Court of the State of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Ted Ingels, pro se.* Reported below: 4 Wash. 2d 676; 104 P. 2d 944.

No. 557. HAZZARD ET AL. *v.* CHASE NATIONAL BANK. December 9, 1940. Petition for writ of certiorari to the Supreme Court of New York denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Jack Lewis Kraus II, Smith W. Brookhart, John J. Burns, Morris L. Ernst, Moses H. Grossman, Benjamin S. Kirsh,* and *Joel R.*

Parker for petitioners. *Messrs. Wm. Dean Embree* and *Lawrence Bennett* for respondent. Reported below: 257 App. Div. 950; 258 *id.* 709; 282 N. Y. 652; 283 N. Y. 682; 14 N. Y. S. 2d 147, 1021; 26 N. E. 2d 801; 28 N. E. 2d 406.

No. 522. ROBERTS, ADMINISTRATOR, *v.* BATHURST, EXECUTRIX. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederic Gilbert Bauer* for petitioner. *Mr. Shelton Pitney* for respondent. Reported below: 112 F. 2d 543.

No. 531. JOHN DEMARTINI CO., INC., ET AL. *v.* THE MAUI ET AL. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. Hasket Derby* and *Joseph C. Sharp* for petitioners. *Messrs. Herman Phleger* and *Maurice E. Harrison* for respondents. Reported below: 113 F. 2d 1018.

No. 534. RAY *v.* UNITED STATES. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Francis Murphy* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 114 F. 2d 508.

No. 554. EUREKA LODGE NO. 5, INDEPENDENT ELKS, ET AL. *v.* GRAND LODGE IMPROVED, BENEVOLENT PROTECTIVE ORDER OF ELKS OF THE WORLD. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James G. Martin* for petitioners. *Mr. Perry W. Howard* for respondent. Reported below: 114 F. 2d 46.

No. 445. CITY OF VERO BEACH *v.* RITTENOURE INVESTMENT CO. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert J. Pleus* and *Austin M. Cowan* for petitioner. *Mr. W. E. Stanley* for respondent. Reported below: 113 F. 2d 269.

No. 527. CARL M. LOEB, Jr. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 528. HENRY A. LOEB *v.* SAME. December 9, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur B. Hyman* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 113 F. 2d 664.

No. 544. REEVES ET AL. *v.* AMERICAN SECURITY & TRUST CO., TRUSTEE, ET AL. December 9, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. S. Wallace Dempsey* and *Bruce Fuller* for petitioners. Reported below: 115 F. 2d 145.

No. 551. RAYMOND *v.* COMMISSIONER OF INTERNAL REVENUE. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James F. Oates, Jr.* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 114 F. 2d 140.

No. 552. CAIN, DOING BUSINESS AS CAIN'S TRUCK LINES, *v.* BOWLBY. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Robert L. Holliday* for petitioner. Reported below: 114 F. 2d 519.

No. 567. PAN ATLANTIC STEAMSHIP CORP. *v.* FYFE ET AL., DOING BUSINESS AS UNITED FIBRE CO. December 9, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Russell C. Gay* for petitioner. *Mr. Henry N. Longley* for respondents. Reported below: 114 F. 2d 72.

No. 468. LYNCH *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. December 16, 1940. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Henry L. Lynch, pro se.*

No. 560. SIDIS *v.* F-R PUBLISHING CORPORATION. December 16, 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. Edwin J. Lukas* for petitioner. *Mr. Morris L. Ernst* for respondent. Reported below: 113 F. 2d 806.

No. 532. KORTEPETER *v.* UNITED STATES; and

No. 533. DERBYSHIRE *v.* UNITED STATES. December 16, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul Y. Davis* and *William G. Sparks* for petitioners. *Solicitor General Biddle* and *Mr. Harry B. Wirin* for the United States. Reported below: 114 F. 2d 124.

No. 553. LENIHAN ET AL. *v.* TRI-STATE TELEPHONE & TELEGRAPH CO. ET AL. December 16, 1940. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. David J. Erickson* for petitioners. *Messrs. Tracy J. Peycke, Clarence B. Randall, Ralph A. Stone,*

and *C. M. Bracelen* for the Tri-State Telephone & Telegraph Co.; *Messrs. R. S. Wiggin* and *John F. Bonner* for Minneapolis; and *Messrs. J. A. A. Burnquist,* Attorney General of Minnesota, *Alfred W. Bowen* and *George T. Simpson* for Charles Munn et al., respondents. Reported below: 208 Minn. 172; 293 N. W. 601.

No. 555. Texas Company *v.* National Labor Relations Board. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry T. Klein, James H. Pipkin,* and *Lionel P. Marks* for petitioner. *Solicitor General Biddle, Assistant Solicitor General Fahy,* and *Messrs. Thomas E. Harris, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 112 F. 2d 744.

No. 559. Williams *v.* New Jersey-New York Transit Co. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Tuttle* for petitioner. *Mr. James S. Hays* for respondent. Reported below: 113 F. 2d 649.

No. 562. Preston *v.* Kaw Pipe Line Co. et al. December 16, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Earle C. Calhoun, O. B. Martin,* and *Albert L. Orr* for petitioner. *Mr. Jos. G. Carey* for respondents. Reported below: 113 F. 2d 311.

No. 566. Whiteman *v.* RCA Manufacturing Co., Inc. et al.; and

No. 570. RCA Manufacturing Co., Inc. *v.* Whiteman et al. December 16, 1940. Petitions for writs of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Maurice J. Speiser* for Whiteman. *Messrs. Joseph M. Hartfield* and *George C. Sprague* for W. B. O. Broadcasting Corporation, respondent in Nos. 566 and 570. *Messrs. David Mackay* and *Lawrence B. Morris* for RCA Manufacturing Co. Reported below: 114 F. 2d 86.

Nos. 571 and 572. HORMANN *v.* NORTHERN TRUST CO. ET AL. December 16, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Carl V. Wisner* and *Carl V. Wisner, Jr.* for petitioner. *Mr. Hamilton Moses, Jr.* for respondents. Reported below: 114 F. 2d 118.

No. 513. BAUMEISTER *v.* NEW YORK. December 23, 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 J. Baumeister, pro se.* Reported below: 258 App. Div. 783; 283 N. Y. 625; 15 N. Y. S. 2d 727; 28 N. E. 2d 32.

No. 623. BETZ *v.* ESTATE OF BRILL. December 23, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Mary B. Betz, pro se.* Reported below: 337 Pa. 525; 12 A. 2d 50.

No. 483. STATE OF WASHINGTON *v.* INLAND EMPIRE REFINERIES, INC., ET AL. December 23, 1940. Petition for writ of certiorari to the Supreme Court of the State of Washington denied for the reason that the judgment of the court below rests upon a non-federal ground ade-

quate to support it. *Lynch* v. *New York,* 293 U. S. 52; *New York City* v. *Central Savings Bank,* 306 U. S. 661. *Messrs. Smith Troy,* Attorney General, and *John E. Belcher,* Assistant Attorney General, for petitioner. *Messrs. F. G. Dorety, Thomas Balmer,* and *Edwin C. Matthias* for Great Northern Railway Co., respondent. Reported below: 3 Wash. 2d 651; 101 P. 2d 975.

No. 573. STEIN *v.* ST. LOUIS PUBLIC SERVICE CO., DEBTOR, ET AL. December 23, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Hyman G. Stein* for petitioner. *Mr. Thomas E. Francis* for respondents. Reported below: 114 F. 2d 53.

No. 578. GWINNER *v.* HEINER, FORMERLY COLLECTOR OF INTERNAL REVENUE. December 23, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Messrs. William A. Seifert* and *William Wallace Booth* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 114 F. 2d 723.

No. 568. PINEY COKING COAL LAND CO. *v.* JAMES, STATE TAX COMMISSIONER. December 23, 1940. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. William H. Sawyers* and *Ashton File* for petitioner. *Messrs. Clarence W. Meadows,* Attorney General of West Virginia,

and *W. Holt Wooddell,* Assistant Attorney General, for respondent. Reported below: 10 S. E. 2d 578.

No. 569. MUNICIPAL ACCEPTANCE CORP. *v.* JAMES, STATE TAX COMMISSIONER. December 23, 1940. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. Anan Raymond* and *Ashton File* for petitioner. *Messrs. Clarence W. Meadows,* Attorney General of West Virginia, and *W. Holt Wooddell,* Assistant Attorney General, for respondent. Reported below: 10 S. E. 2d 574.

No. 574. KING COUNTY ET AL. *v.* W. J. LAKE & CO., INC. December 23, 1940. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Messrs. Elias A. Wright* and *W. A. Toner* for petitioners. Reported below: 3 Wash. 2d 500; 101 P. 2d 357; 104 P. 2d 599.

No. 575. PRODUCERS PIPE LINE CO. *v.* MARTIN, COMMISSIONER OF REVENUE FOR KENTUCKY, ET AL. December 23, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. Miller Holland* for petitioner. Reported below: 113 F. 2d 817.

No. 581. GREAT AMERICAN INSURANCE CO. *v.* COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO; and

No. 585. COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO *v.* GREAT AMERICAN INSURANCE CO. ET AL. December 23, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs.*

Forrest E. Single and *Chauncey I. Clark* for the Great American Insurance Co. *Messrs. Frank J. McConnell, T. Catesby Jones,* and *Leonard J. Matteson* for Companhia de Navegacao. Reported below: 114 F. 2d 361.

No. 605. Jackson County *v.* Reed, Trustee. December 23, 1940. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. John B. Pew* and *Rufus Burrus* for petitioner. *Mr. David M. Proctor* for respondent. Reported below: 346 Mo. 720; 142 S. W. 2d 862.

No. 617. Harris *v.* Whittle, Sheriff. See *ante,* p. 622.

No. 538. Fried *v.* United States. January 6, 1941. 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. *Louis Fried, pro se.*

No. 545. Miller *v.* Kirwan. January 6, 1941. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Locke Miller, pro se. Mr. H. H. Hoppe* for respondent.

No. 438. Bell *v.* Johnston, Warden. January 6, 1941. 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. *Robert Vivion Bell, pro se.*

No. 596. LOWE *v.* UNITED STATES. January 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied without prejudice to an application to the District Court to reduce the fines to an amount allowed by statute. *Mr. F. E. Withrow* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 115 F. 2d 596.

Nos. 598 and 599. HARVARD STATE BANK *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. January 6, 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 granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit and to the District Court of the United States for the District of Maryland is denied. MR. JUSTICE ROBERTS and MR. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Messrs. Meyer Abrams* and *Gersh I. Moss* for petitioner. *Messrs. Henry W. Anderson* and *Leonard D. Adkins* for respondents. Reported below: 115 F. 2d 455.

No. 580. YOUNG ET AL. *v.* COUNTY OF VENTURA. January 6, 1941. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. *Messrs. Robert M. Clarke, Milton K. Young,* and *Charles C. Montgomery* for petitioners. *Mr. H. F. Orr* for respondent. Reported below: 35 Cal. App. 2d 732; 104 P. 2d 102.

No. 589. NEWHOUSE ET AL. *v.* CORCORAN IRRIGATION DISTRICT. January 6, 1941. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ralph R. Eltse* and *W. Coburn Cook* for petitioners. *Messrs. F. G. Athearn* and *Milton T. Farmer* for respondent. Reported below: 114 F. 2d 322.

No. 591. Pacific National Bank of San Francisco *v.* Merced Irrigation District. January 6, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Herman Phleger* and *W. Coburn Cook* for petitioner. *Messrs. Stephen W. Downey* and *C. Ray Robinson* for respondent. Reported below: 114 F. 2d 654.

No. 592. Street & Smith Publications, Inc. *v.* Blair, Judge, et al. January 6, 1941. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. E. L. Klett* and *J. I. Kilpatrick* for petitioner.

No. 593. Stern *v.* Gillman et al. January 6, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Michael Halperin* for petitioner. Reported below: 114 F. 2d 28.

No. 595. Glass *v.* Ickes. January 6, 1941. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. C. L. Dawson* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 117 F. 2d 273.

No. 638. Bituminous Coal Producers Board for District No. 8 *v.* Powell et al. January 6, 1941. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Burr Tracy Ansell* for petitioner. Reported below: 114 F. 2d 752.

No. 539. MINNESOTA *v.* DULUTH, MISSABE & NORTHERN RAILWAY CO. ET AL.;

No. 540. SAME *v.* DULUTH & IRON RANGE RAILWAY CO. ET AL.;

No. 541. SAME *v.* SPIRIT LAKE TRANSFER RAILWAY CO. ET AL.;

No. 542. SAME *v.* OLIVER IRON MINING CO.; and

No. 543. SAME *v.* PROCTOR WATER & LIGHT CO. January 6, 1941. Petition for writs of certiorari to the Supreme Court of Minnesota denied. *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, for petitioner. *Messrs. Elmer F. Blu, Clarence J. Hartley, George W. Morgan,* and *Cleon Headley* for respondents. Reported below: 207 Minn. 618, 630, 637; 292 N. W. 401, 407, 411.

No. 590. UTLEY *v.* UNITED STATES. January 6, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *James Utley, pro se. Solicitor General Biddle* and *Messrs. Wendell Berge* and *Fred E. Strine* for the United States. Reported below: 115 F. 2d 117.

No. 597. TEXAS COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. January 6, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry T. Klein* for petitioner. *Solicitor General Biddle, Assistant Solicitor General Fahy,* and *Messrs. Thomas E. Harris, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent.

No. 607. AMERICAN LUMBERMENS MUTUAL CASUALTY CO. *v.* SUTCLIFFE, ADMINISTRATRIX, ET AL. January 6, 1941. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick A. Keck* for petitioner. *Mr. Anthony J. Travia* for respondents. Reported below: 115 F. 2d 410.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 6, 1941.

Nos. 70 and 71. GRAND TRUNK WESTERN RAILROAD CO. *v.* STEPHENSON, ADMINISTRATRIX. Certiorari, 310 U. S. 623, to the Circuit Court of Appeals for the Seventh Circuit. July 1, 1940. Dismissed per stipulation pursuant to Rule 35. *Mr. Silas H. Strawn* for petitioner. *Mr. Ralph F. Potter* for respondent. Reported below: 110 F. 2d 401.

No. 219. DOWNER *v.* O'BRIEN, SHERIFF, ET AL. Appeal from the Supreme Court of Illinois. August 30, 1940. Dismissed per stipulation pursuant to Rule 35. *Mr. Lee R. La Rochelle* for appellant. *Mr. John E. Cassidy,* Attorney General of Illinois, for appellees. Reported below: 373 Ill. 383; 26 N. E. 2d 488.

No. 6. MURRAY, RECEIVER OF INTERBOROUGH RAPID TRANSIT CO., *v.* CITY OF NEW YORK ET AL.; and

No. 7. ROBERTS, RECEIVER OF MANHATTAN RAILWAY CO., *v.* MURRAY, RECEIVER, ET AL. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. September 18, 1940. Dismissed per stipulation pursuant to Rule 35. *Messrs. Carl M. Owen, Nathan L. Miller,* and *James L. Quackenbush* for Murray, Receiver of Interborough Rapid Transit Co.; *Wilbur Cummings*

for Interborough Rapid Transit Co.; *John W. Davis* and *Edwin S. S. Sunderland* for Guaranty Trust Co. et al.; *Phillip A. Carroll* for J. Herbert Case et al.; *Jesse E. Waid* and *J. M. Hartfield* for Bankers Trust Co.; *Louis Boehm* for Norman Johnson et al.; and *Ira W. Hirshfield* for Dwight F. Faulkner, Jr. et al. *Messrs. William C. Chanler, William G. Mulligan, Jr., Paxton Blair,* and *John D. Hill* for the City of New York; *John J. Curtin, Joseph H. Choate, Jr.,* and *Chester W. Cuthell* for the Transit Commission; *Charles E. Hughes, Jr.* and *Allen S. Hubbard* for Roberts, Receiver of the Manhattan Railway Co.; *Harold C. McCollom* for Central Hanover Bank; *Arthur A. Gammell* and *Timothy N. Pfeiffer* for Chase National Bank; *Boykin C. Wright* and *Clifton Murphy* for Van Santvoord Merle-Smith et al.; *Rayford W. Alley* for William S. Kies et al.; *William V. Hodges* for Nathan L. Amster et al.; *Charles Franklin* for Manhattan Ry. Co.; and *John B. Doyle* and *Franklin C. Laughlin* for Harold Palmer et al. Reported below: 103 F. 2d 889.

No. 321. KEEFE ET AL. *v.* BRODERICK, COLLECTOR. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. September 20, 1940. Dismissed per stipulation pursuant to Rule 35. *Mr. Ira Lloyd Letts* for petitioners. *Solicitor General Biddle* and *Mr. N. A. Townsend* for respondent. Reported below: 112 F. 2d 293.

No. 98. BAILEY ET AL., EXECUTORS, *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. September 27, 1940. Dismissed per stipulation pursuant to Rule 35. *Mr. Gordon H. Block* for petitioners. *Solicitor General Biddle* and *Mr. N. A. Townsend* for the United States. Reported below: 89 Ct. Cls. 364; 90 *id.* 644; 31 F. Supp. 778.

No. 63. RYAN *v.* EMPLOYERS' LIABILITY ASSURANCE CORP. Certiorari, 310 U. S. 621, to the Circuit Court of Appeals for the Sixth Circuit. September 28, 1940. Dismissed per stipulation pursuant to Rule 35. *Mr. M. Y. Yost* for petitioner. *Mr. John R. Kistner* for respondent. Reported below: 109 F. 2d 690.

No. 125. MISSOURI PACIFIC TRANSPORTATION CO. *v.* TALLEY. On petition for writ of certiorari to the Supreme Court of Arkansas. October 7, 1940. Dismissed on motion of counsel for the petitioner. *Mr. C. H. Moses* for petitioner. *Messrs. Theron W. Agee* and *David S. Partain* for respondent. Reported below: 199 Ark. 835; 136 S. W. 2d 688.

No. 241. BURLEIGH *v.* UNITED STATES, ACTING FOR AND IN BEHALF OF THE FARM CREDIT ADMINISTRATION. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 7, 1940. Dismissed pursuant to stipulation of counsel. *Mr. Guy E. Kelly* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 110 F. 2d 793.

No. 339. HART *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 7, 1940. Dismissed on motion of counsel for the petitioner. *Mr. O. R. McGuire* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Mr. Fred E. Strine* for the United States. Reported below: 112 F. 2d 128.

No. 248. NATIONAL LABOR RELATIONS BOARD *v.* STERLING ELECTRIC MOTORS, INC. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Cir-

cuit. October 28, 1940. Dismissed on motion of counsel for the petitioner. *Solicitor General Biddle* and *Messrs. Charles Fahy* and *Robert B. Watts* for petitioner. *Mr. Earle M. Daniels* for respondent. Reported below: 109 F. 2d 194; 112 *id.* 63; 114 *id.* 738.

No. 508. LANE COTTON MILLS CO. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. December 9, 1940. Dismissed on motion of counsel for the petitioner. *Messrs. Charles Rosen, Alfred C. Kammer, Benjamin W. Dart, Henry P. Dart,* and *Esmond Phelps* for petitioner. Reported below: 111 F. 2d 814.

PETITIONS FOR REHEARING DENIED, FROM OCTOBER 7, 1940, THROUGH JANUARY 6, 1941.*

No. 621, October Term, 1939. VILES *v.* PRUDENTIAL INSURANCE CO.; and

No. 854, October Term, 1939. MOON *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. October 14, 1940. The motions for leave to file petitions for rehearing in these cases are denied. 309 U. S. 695; 310 U. S. 658.

No. 459, October Term, 1939. H. ROUW COMPANY *v.* CRIVELLA. See *ante,* p. 613.

No. —, original, October Term, 1939. EX PARTE EDMOND C. FLETCHER. October 14, 1940. 310 U. S. 615.

No. —, original, October Term, 1939. EX PARTE ALBERT LEIGHTON. October 14, 1940. 309 U. S. 641.

*See Table of Cases Reported for references to earlier orders in these cases, unless otherwise indicated.

No. 671, October Term, 1939. SONTAG CHAIN STORES CO., LTD. *v.* NATIONAL NUT COMPANY OF CALIFORNIA. October 14, 1940. 310 U. S. 281.

No. 705, October Term, 1939. UNITED STATES *v.* DICKERSON. October 14, 1940. 310 U. S. 554.

No. 713, October Term, 1939. UNITED STATES ET AL. *v.* AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. October 14, 1940. 310 U. S. 534.

No. 752, October Term, 1939. BORCHARD ET AL. *v.* CALIFORNIA BANK ET AL. October 14, 1940. 310 U. S. 311.

No. 785, October Term, 1939. LOWMAN *v.* FEDERAL LAND BANK OF LOUISVILLE ET AL. October 14, 1940. 310 U. S. 656.

No. 853, October Term, 1939. NORTH WHITTIER HEIGHTS CITRUS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. October 14, 1940. 310 U. S. 632.

No. 882, October Term, 1939. FRETWELL *v.* GILLETTE SAFETY RAZOR CO. October 14, 1940. 310 U. S. 627.

No. 896, October Term, 1939. MCCAMPBELL *v.* WARRICH CORPORATION ET AL. October 14, 1940. 310 U. S. 631; *ante,* p. 612.

No. 938, October Term, 1939. PARSONS ET AL. *v.* CHILDS ET AL. October 14, 1940. 310 U. S. 640.

No. 939, October Term, 1939. UNITED STATES ex rel. TSEVDOS *v.* REIMER, COMMISSIONER OF IMMIGRATION. October 14, 1940. 310 U. S. 645.

No. 954, October Term, 1939. DECOPPET ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. 310 U. S. 646.

No. 999, October Term, 1939. JANE HOLDING CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1940. 310 U. S. 653.

No. 1028, October Term, 1939. BRADLEY *v.* SIMPSON, SOLICITOR GENERAL EX REL. OF PIEDMONT CIRCUIT, GEORGIA. October 14, 1940. 310 U. S. 643.

No. 1038, October Term, 1939. TOUCHTON *v.* CITY OF FORT PIERCE. October 14, 1940. 310 U. S. 652.

No. 1057, October Term, 1939. ZISKIN *v.* UNITED STATES. October 14, 1940. 310 U. S. 654.

No. 681, October Term, 1939. RAILROAD COMMISSION OF TEXAS ET AL. *v.* ROWAN & NICHOLS OIL CO. See *ante*, p. 614.

No. —. JOHNSON *v.* METROPOLITAN CASUALTY INSURANCE CO. October 28, 1940.

No. 452. MCCULLOCH *v.* LOFTUS. October 28, 1940.

No. 322. HART ET AL. *v.* UNITED STATES. November 12, 1940. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration and decision of this application.

No. 94. KELLEY ET AL. *v.* CITY OF SYRACUSE ET AL. November 12, 1940.

No. 123. MOON *v.* HOME LIFE INSURANCE COMPANY OF NEW YORK; and

No. 124. MOON *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. November 12, 1940.

No. 156. HOLMES, STATE AUDITOR, *v.* SPRINGFIELD FIRE & MARINE INSURANCE CO. November 12, 1940.

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No. 299. SOUTHWESTERN BELL TELEPHONE CO. *v.* LEE. November 12, 1940.

No. 300. SOUTHWESTERN BELL TELEPHONE CO. *v.* HANNA. November 12, 1940.

No. 313. DOUGHERTY *v.* FLORIDA. November 12, 1940.

No. 323. AMERICAN NATIONAL BANK *v.* CITY OF SANFORD ET AL. November 12, 1940.

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No. 290. IRVING TRUST CO. *v.* UNITED STATES. November 18, 1940.

No. 403. THOMPSON, TRUSTEE, *v.* WILEY. November 18, 1940.

No. 404. SOUTHERN MINERALS CORP. *v.* SIMMONS ET AL. November 18, 1940.

No. 123. MOON *v.* HOME LIFE INSURANCE COMPANY OF NEW YORK; and

No. 124. MOON *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. November 25, 1940. Motion for leave to file a second petition for rehearing denied.

No. 276. COLUMBUS & CHICAGO MOTOR FREIGHT, INC. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL. November 25, 1940.

No. 428. MOORE *v.* HORTON, TRUSTEE IN BANKRUPTCY. November 25, 1940.

No. —. JOHNSON *v.* METROPOLITAN CASUALTY INSURANCE CO.; and

No. 230. VILES *v.* JOHNSON, JUDGE. December 9, 1940. The motions for leave to file petitions for rehearing are denied.

No. 314. WALEY *v.* JOHNSTON, WARDEN. December 9, 1940. Motion for leave to file petition for rehearing granted, and the petition is denied.

No. 476. MCQUILLEN ET AL. *v.* NATIONAL CASH REGISTER CO. ET AL. December 9, 1940. The petition for rehearing is denied. The CHIEF JUSTICE took no part in the consideration and decision of this application.

No. 16. INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL & DIE MAKERS LODGE NO. 35, ETC. *v.* NATIONAL LABOR RELATIONS BOARD. December 9, 1940.

No. 26. WEST INDIA OIL CO. (PUERTO RICO) *v.* DOMENECH, TREASURER OF PUERTO RICO. December 9, 1940.

No. 435. CONTINENTAL CASUALTY CO. *v.* UNITED STATES. December 9, 1940.

No. 492. PRICE *v.* MOINET, JUDGE. December 9, 1940.

No. 420. BEN ADLER SIGNS, INC. ET AL. *v.* WAGNER SIGN-SERVICE, INC. December 16, 1940. Motion for leave to file petition for rehearing denied.

No. 13. UNITED STATES *v.* STEWART. December 16, 1940.

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No. 31. AMERICAN UNITED MUTUAL LIFE INSURANCE CO. *v.* CITY OF AVON PARK. December 23, 1940.

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No. 32. FIDELITY UNION TRUST CO. ET AL. *v.* FIELD. January 6, 1941.

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AMENDMENT OF RULES

ORDER

It is ordered that Rule V of the Rules of Practice and Procedure in Criminal Cases be, and the same is hereby, amended to read as follows:

"V. *Supersedeas.* An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence. The trial court or the circuit court of appeals may stay the execution of any sentence to pay a fine or fine and costs upon such terms as it may deem proper. It may require the defendant pending the appeal to pay to the clerk in escrow the whole or any part of such fine and costs, to submit to an examination as to his assets, or to give a supersedeas bond, and it may likewise make any appropriate order to restrain the defendant from dissipating his assets and thereby preventing the collection of such fine."

OCTOBER 21, 1940.

ORDER

It is ordered that paragraph 2 of Rule 36 of the Rules of this Court be amended so as to read as follows:

"2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal, unless, after notice and hearing and for good cause shown, the judge or justice

allowing the appeal fixes a different amount or orders security other than the bond; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

OCTOBER 21, 1940.

Rules of Procedure and Practice for the Trial of Cases Before Commissioners and for Taking and Hearing of Appeals to the District Courts of the United States, prescribed pursuant to the Act of Congress of October 9, 1940.

ORDER.

Pursuant to the provisions of § 2 of the Act of Congress, approved October 9, 1940, 54 Stat. 1058, conferring jurisdiction upon certain United States Commissioners to try petty offenses committed on Federal reservations,

IT IS ORDERED on this sixth day of January, 1941, that the following rules be adopted as the Rules of Procedure and Practice for the Trial of Cases Before Commissioners and for Taking and Hearing of Appeals to the District Courts of the United States.

IT IS FURTHER ORDERED that these rules shall be applicable to proceedings instituted on or after February 1, 1941, and to pending proceedings except to the extent that in the opinion of the Commissioner or the Court their application would not be feasible or would work injustice.

I. INFORMATION AND WARRANT.

A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged offense was committed and the place where it was committed and a description of the alleged offense.

If arrest is made on view, an information setting forth the same matters shall be made and filed before trial.

II. Trial.

The date of trial shall be fixed at such a time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

The trial shall be conducted as are trials of criminal cases in the District Court by a District judge in a criminal case where a jury is waived.

III. Docket.

The Commissioner's proceedings shall be entered in his docket, which shall show: (1) The defendant's written consent to be tried before the Commissioner; (2) the date of the information and upon whose oath it was made; (3) the date of the issue and service of the warrant; (4) the defendant's plea or pleas; (5) the names of the witnesses for the United States and for the defendant and a condensed summary of the testimony of each, and of any documentary evidence received; (6) the judgment and sentence of the Commissioner.

IV. Appeal.

1. Motions subsequent to judgment of conviction shall not be entertained by the Commissioner.

2. An appeal shall be taken within five days after entry of judgment of conviction. An appeal shall be taken by filing with the Commissioner a notice in duplicate stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and the appellant's attorney, if any; a general statement of the nature of the offense; the date of the judgment; the sentence imposed and, if the appellant is in custody, the prison where he is confined. The notice shall also contain a succinct statement of the grounds of appeal which shall serve as the appellant's assignments

of error and shall follow substantially the form hereto annexed.

3. The Commissioner shall immediately forward to the Clerk of the District Court the duplicate notice of appeal together with a transcript of his docket entries and copies of the information, the warrant, the defendant's written consent to be tried before the Commissioner, and any order concerning bail, pending appeal, certified under his hand and seal. From the time of the filing of the Commissioner's certificate the District Court shall have supervision and control of the proceedings on appeal and may at any time, upon five days' notice, entertain a motion to dismiss it or for directions to the Commissioner or to vacate or modify any order of the Commissioner in relation to the appeal, including any order for the granting of bail.

4. An appeal from a judgment of conviction stays the execution of the judgment unless the defendant, pending his appeal, shall elect to enter upon the service of the sentence.

5. The defendant shall not be admitted to bail pending appeal from a judgment of conviction save as follows: Bail may be granted by the Commissioner or by the District Court or any judge thereof; but bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the District Court.

6. The record on appeal shall consist of the matters certified by the Commissioner pursuant to paragraph 3. No bill of exceptions and no assignments of error other than those set forth as ground for appeal shall be required. The defendant shall not be entitled to a trial *de novo* in the District Court and the decision of the Commissioner upon questions of fact shall not be reëxamined by the District Court. Only errors of law apparent from the record as certified by the Commissioner shall be considered by the court.

V. New Trial for After-Discovered Evidence.

Within sixty days after conviction a defendant may move for a new trial on the ground of after-discovered evidence. The motion shall be in writing, addressed to the Commissioner and shall set forth under oath the nature of the evidence and the reason it was unavailable at the trial. A copy of the motion shall forthwith be served upon the United States Attorney. The Commissioner shall transmit the motion together with a transcript of his docket entries to the District Court. That court shall hear the motion, and, if it deems a sufficient showing has been made, may vacate the judgment of conviction and direct the Commissioner to re-try the case.

VI. District Court Rules.

The District Courts may, by order or standing rule, not inconsistent with these rules, regulate the practice and procedure on appeals from convictions before a Commissioner.

FORM OF NOTICE OF APPEAL UNDER RULE IV.

In the District Court of the United States
For the ..... District of .....

UNITED STATES OF AMERICA *vs.*	Appeal from the Judgment and Sentence of....., United States Commissioner.

.....
Name and address of appellant.....
.....
Name and address of appellant's attorney.....
.....
Offense.....
.....
Date of judgment.....
Brief description of judgment or sentence.....
.....
Name of prison where now confined, if not on bail.....
.....

I, the above named Appellant, hereby appeal to the United States District Court for the ..... District of ..... from the judgment above-mentioned on the grounds set forth below.

(Signed).....
Appellant.

Dated.....

Grounds of appeal:

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