

460, 462; *Macdonough v. Starbird*, 105 Calif. 15, 19. Compare *Pollock v. Farmers Loan & Tr. Co.*, 157 U. S. 429.

The Supreme Court of Oklahoma also rested its denial to petitioners of the right to recover the 1926 tax upon the ground that, having failed to pay the tax for the year when due, they were barred by the provisions of §§ 9971 and 9973 of the Compiled Oklahoma Statutes for 1921. Under these sections, relief by injunction against the collection of any tax is forbidden and a suit to recover a tax alleged to be illegally assessed is allowed only if paid "at the time and in the manner provided by law." But the petitioners' allegations, admitted on demurrer, are that the tax was paid under duress and compulsion to prevent the issue of respondent's warrant for its collection, to prevent the stopping by respondent of further royalty payments to them, and to prevent the accumulation of statutory penalties. These allegations are sufficient to bring the case within the ruling of this Court in *Ward v. Love County*, *supra*, that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. The judgment below will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HENRY FORD & SON, INCORPORATED, v. LITTLE
FALLS FIBRE COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 47. Argued December 4, 1929.—Decided January 6, 1930.

A private business corporation, licensed by the Federal Power Commission to use, for development of electric power, the surplus water from a dam in the Hudson River, constructed under acts of Con-

gress, placed flash-boards on the crest of the dam, as the license permitted but did not require it to do, and thus raised the level of the water-pool to such an extent as to diminish the head and impair the value of a dam and water-power belonging to riparian proprietors above on the Mohawk River, a navigable tributary of the Hudson. The parties so injured sued the licensee in the New York courts and were awarded damages and an injunction restraining it from maintaining the flash-boards. *Held*:

1. That the interest of the plaintiffs in the use of the water, even though subject to destruction under the power of the United States to control navigation, was, so far as the state laws were concerned, a vested right acquired under those laws, and as such was, by § 27 of the Federal Water Power Act, expressly saved from destruction or appropriation without compensation by licensees of the Commission; and that the licensee, by acceptance of the license under § 6 of that Act, must be deemed to have agreed to recognize and protect such interests. Pp. 375, 377.

2. Whether § 21 of the Federal Water Power Act, giving to licensees the power of eminent domain, confers on them the power to condemn rights such as those of the plaintiffs, and whether it might have been invoked by the licensee in this case, were questions not before the Court. P. 379.

249 N. Y. 495, affirmed.

CERTIORARI, 279 U. S. 829, to review a judgment entered in the Supreme Court of New York on remittitur from the Court of Appeals, restraining the above-named petitioner from maintaining flash-boards on a dam in the Hudson River, and awarding damages.

Mr. Charles E. Nichols, Jr., with whom *Messrs. Robert E. Whalen, Clifford B. Longley, and Wallace R. Middleton* were on the brief, for petitioner.

We are dealing with navigable waters of the United States over which Congress has control for purposes of navigation. In the exercise of this power, Congress has proceeded to erect a dam across the Hudson River, including a lock for the passage of boats, and has dredged and maintained the channel in the pool formed by the dam which extends to respondents' mills.

Congress has also seen fit to enact the Federal Water Power Act, by which a Commission has been created for the purpose of preserving, enlarging and maintaining the navigable capacity of the waters of the United States over which it has jurisdiction. This Commission, acting within the power delegated to it by Congress, has made a finding that navigation would be benefited by issuing a license to petitioner, which included permission to install the flash-boards, whereby the surplus water at this government dam might be utilized for power purposes, requiring from petitioner, in exchange, that it furnish to the Government electric power for the operation, lighting, repair and upkeep of the lock; that it install, maintain, and operate, at its own expense, such lights and signals as the Secretary of War might prescribe; and that it pay to the United States an annual charge or fee of \$5,000.00 for the cost of administration of the Federal Water Power Act and for the use of the government dam and property.

The finding of the Federal Power Commission that flash-boards are an aid to navigation is conclusive and binding upon the courts and is not subject to judicial review, except in so far as it may be examined for the purpose of determining whether or not it is arbitrary or capricious, and whether or not the act permitted has a real and substantial relation to the interest of navigation. Where a state court has denied a federal right, this Court has the power to review the record and determine for itself whether there is any basis in fact for the state court's decision,—in this case that the license granted to petitioner does not result in any development and improvement of navigation. The uncontradicted evidence at the trial is that flash-boards do benefit navigation and, consequently, there is a real and substantial relation between the erection of flash-boards and the interests of navigation.

Conceding that the purpose of petitioner was confined to the creation of power, as long as its act was legal, its motive was immaterial; further, the courts may not inquire into the motives of Congress when its activity is confined within the limits of its constitutional authority; and it is, therefore, of no concern to the courts what may have prompted Congress in authorizing the Commission to grant the license to petitioner.

The petitioner has done only what the Federal Government itself could do legally and the courts may not interfere with an act for which Congress has provided, in the exercise of its lawful authority to improve navigable waters. For the courts so to interfere extends beyond their judicial powers and is an attempted usurpation of the legislative function which the Constitution has reposed in Congress alone.

There is nothing in the Federal Water Power Act which creates a cause of action in favor of the respondents; and the Fifth Amendment to the Constitution does not afford a basis for the judgment, because there has been no "taking," but only a consequential damage, and because respondents have not been deprived of "private property," inasmuch as their riparian rights are subject to the paramount right of the Government to make improvements for navigation purposes.

Messrs. George E. O'Connor, Thomas O'Connor, and Gerald W. O'Connor were on the brief for respondents.

Respondents' ownership of the water-power, the dam, and the riparian rights is stipulated and conceded.

Under the law of New York the respondents have the right to have the water leave their property at its natural level free from the effect of down-stream obstructions; and the backing of water upon the water-power or lands or buildings of respondents is an invasion of real property rights and constitutes a continuing trespass against which the injured party is entitled to injunctive relief.

These flash-boards were installed by petitioner for its own private purposes and the plea that it was acting as the agent of the Federal Government in the improvement of navigation for the benefit of interstate and foreign commerce is a mere subterfuge.

The license was issued, not for a navigation improvement, but for a water-power project for the development of surplus water-power at a government dam.

The finding of the trial court that no navigation purpose is served by the flash-boards is amply supported by the evidence.

Government permission does not give immunity from liability for invasion of private property rights. It is conclusive only against persons claiming under the public right of navigation. No federal commission has the power to give the petitioner permission to take or damage the private property rights of others without responding in damages.

The correspondence regarding the flash-boards, the regulations and the license constitute a determination by the government officials (1) that the power plant and flash-boards will not interfere with navigation, and (2) of the terms upon which the petitioner shall be permitted to use the water-power owned by the Government at the dam. That is all that the government officials pretended to do in this situation.

Congress did not, by the Federal Water Power Act, assume to invest licensees with the privilege of taking or damaging the property of others with impunity. On the contrary, the Act expressly provides that compensation shall be made for the property of others which may be used or damaged; that the licensee shall be liable for all damages to the property of others, and that no vested rights in waters shall be affected or interfered with.

If the Secretary of War or the Federal Power Commission purported to invest petitioner with "the title, right,

privilege, and immunity . . . to erect and maintain said flash-boards " and thereby take a portion of respondents' water-power and convert it to its own use for private power purposes, their acts are clearly void.

The Federal Government has not the right, without making compensation, to take from the respondents water-power concededly owned by them and transfer the same to the possession and use either of itself or of its licensee, even though the transaction be characterized as a navigation improvement. *United States v. Cress*, 243 U. S. 316; *American Woolen Co. v. New York*, 195 App. Div. 698.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on writ of certiorari to review a determination of the Court of Appeals of New York, 249 N. Y. 495, upon which a judgment was entered in the state Supreme Court, awarding damages and an injunction restraining petitioner from maintaining flashboards on the crest of the "Federal Dam," constructed in the Hudson River near Troy, New York, under acts of Congress. Act of June 25, 1910, 36 Stat. 630, c. 382, March 4, 1913, 37 Stat. 801, c. 144.

Respondents, it is stipulated, are riparian owners on the Mohawk River, above its confluence with the Hudson, where at a point about three miles above the Federal Dam they own a dam and water power which they maintain for the development of power for use in their factories on adjacent land. The petitioner, a private business corporation, has procured from the Federal Power Commission a license for a hydro-electric power project, purporting to be granted under the Federal Water Power Act of June 10, 1920, 41 Stat. 1063 (U. S. C., Title 16, c. 12). The license granted permission to use surplus water from the Federal Dam for the development of power at a plant to be constructed and maintained by petitioner for that purpose, on government land. As the license also per-

mits, but does not require, petitioner has placed flashboards on the crest of the dam which, under normal conditions, raise the level of the water in the pool above the dam approximately two feet. Electric power developed by the project is used in the business of an affiliated private manufacturing corporation. The maintenance of the water at the new level has resulted in materially raising the water at the tail-races of respondents' power plants, with a corresponding reduction of the head of water and of the power developed at their dam.

As the court below held, the acts complained of constitute, under local law, an actionable wrong, entitling respondents to an injunction and to damages. *Hammond v. Fuller*, 1 Paige (N. Y.) 197; *Brown v. Bowen*, 30 N. Y. 519; *Hall v. Augsbury*, 46 N. Y. 622, 625, 626; *Rothery v. New York Rubber Co.*, 24 Hun. 172, aff'd 90 N. Y. 30; *American Woolen Co. v. State*, 195 App. Div. (N. Y.) 698, 705. To avoid this liability petitioner relies on the federal right or immunity specially set up by its answer, that the Hudson and Mohawk are navigable rivers; that all of the acts complained of were done under the license and authority of the Federal Power Commission and under regulations of the Secretary of War, authorized by the Water Power Act; that the license and the acts of petitioner authorized by it were found by the Commission to be desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the Federal government, in the exercise of its power to regulate commerce and navigation.

It is contended that the navigable capacity of the Hudson and the Mohawk is subject to the regulation and control of Congress, under Clause 3 of § 8, Art. I, of the Constitution, *Gibbons v. Ogden*, 9 Wheat. 1; *Gilman v. Philadelphia*, 3 Wall. 713, 724; *United States v. Chandler-*

Dunbar Co., 229 U. S. 53, 63; *New Jersey v. Sargent*, 269 U. S. 328, 337, which may constitutionally be delegated to the Power Commission; cf. *Wisconsin v. Illinois*, 278 U. S. 367, 415; that even if the finding of the Commission that the licensed project is in aid of commerce and navigation is not conclusive, as petitioner asserts it is, and even though some of the power developed by petitioner is used for private purposes, the raising of the level of the water by the use of flashboards is shown by the evidence to be beneficial to navigation, and it was therefore within the competency of the Commission to determine whether the project should be authorized. It appears that the petitioner is required by the license and its acceptance of it to supply from the licensed project, power in specified amounts for the lighting and operation of the existing government lock and a second projected lock at the Federal Dam, which are instrumentalities of navigation.

It is argued that Congress, by the Federal Water Power Act, has authorized the Commission to develop navigation and for that purpose to establish obstructions in navigable waters and, subject only to the constitutional requirement of compensation for property taken, its power when so exercised is supreme; that the present exercise of that power does not amount to a taking of the respondents' property for the reason that it does not appear that the obstruction has so raised the water as to flood the respondents' land, and any right of theirs recognized by the state and asserted here, to have the river flow in its natural manner without obstruction, is subordinate to the power of the national government exerted by the Commission through its licensee, whose action so far as it affects respondents' water power, is *damnum absque injuria*. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Gibson v. United States*, 166 U. S. 269, 271; *Scranton v. Wheeler*, 179 U. S. 141, 162, 163; *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82; see *Fox River*

Paper Co. v. Railroad Commission, 274 U. S. 651; *Chase-Hibbard Co. v. City of Elmira*, 207 N. Y. 460; compare *United States v. Cress*, 243 U. S. 316.

The respondents insist, as the court below found, that the Federal Dam was designed to be sufficient for purposes of navigation without the flashboards and it was unnecessary to use them for purposes of navigation; that the petitioner had installed them for the development of power for its own private use; that the effect upon navigation of the power plant and flashboards is negligible, hence the licensed project was not one authorized under the Federal Water Power Act. In any case, it is urged that the injury and damage complained of amount to a taking of respondents' property without compensation and, further, that the Federal Water Power Act, by its terms, does not authorize the granting of licenses which would enable the licensee to destroy or affect the rights of riparian owners.

But, in the view we take of the application of the Federal Water Power Act to the present case, it is unnecessary to decide all the issues thus sharply raised. Whether the Commission acted within or without its jurisdiction in granting the license, and even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation. Even though not immune from such destruction they are, nevertheless, an appropriate subject for legislative protection. See *United States v. Realty Co.*, 163 U. S. 427; *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 535; *Joslin Co. v. Providence*, 262 U. S. 668, 675, 676; *Otis v. Ludlow Co.*, 201 U. S. 140, 152; *Oswego & Syracuse R. Co. v. State*, 226 N. Y. 351, 356. Especially is there reason for such protection where, as here, their sacrifice may be involved

in the grant of a valuable privilege to a licensee. We think that the provisions of the Act are quite sufficient in themselves to save respondents from any such appropriation of their water power.

Section 10(c) (U. S. C., Title 16, § 803(c)) provides that licensees "shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation" of the licensed project and by § 27 (U. S. C., Title 16, § 821) it is provided, "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." By § 21 (U. S. C., Title 16, § 814), licensees are given the power of eminent domain and authorized to conduct condemnation proceedings in district or state courts for the acquisition "of the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam . . . [or] . . . diversion structure . . ." in connection with an authorized project which they are unable to acquire by contract. By § 6 (U. S. C., Title 16, § 799), all licenses are required to be "conditioned upon acceptance by the licensee of all the terms and conditions of this Act."

While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by

the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by § 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner, by acceptance of the license under the provisions of § 6, must be deemed to have agreed to recognize and protect. Whether § 21, giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us.

Affirmed.

OHIO EX REL. POPOVICI, VICE-CONSUL OF ROUMANIA, *v.* AGLER ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 35. Argued January 7, 8, 1930.—Decided January 20, 1930.

1. The provisions of Article III, § 2, of the Constitution extending the judicial power to all cases affecting ambassadors, other public ministers and consuls, and investing this Court with original jurisdiction of such cases, do not, of themselves and without more, exclude jurisdiction in the courts of a State over a suit against a vice-consul for divorce and alimony. P. 382.
2. The provisions of the Judicial Code, § 24, par. Eighteenth; § 256, par. Eighth, giving the District Court original jurisdiction, exclusive of the courts of the several States, over all suits against consuls and vice-consuls, should not be construed as granting to the District Court or denying to the state courts, jurisdiction over suits for divorce and alimony. P. 383.

119 Ohio St. 484, affirmed.

CERTIORARI, 279 U. S. 828, to review a judgment of the Supreme Court of Ohio denying a writ of prohibition, which was sought by the petitioner for the purpose of restraining a proceeding for divorce and alimony in the Court of Common Pleas.