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CASES ADJUDICATED

THE SUPREME COURT

OF THE UNITED STATES

IN THE YEAR 188

AND THE FIRST TERM

188

FRANK J. MURPHY

EDITOR



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ERRATUM

P. 279, line 9, correct "Coleman Co." to "Colman Co."

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JUSTICES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS ¹

CHARLES EVANS HUGHES, CHIEF JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.
LOUIS D. BRANDEIS, ASSOCIATE JUSTICE.
GEORGE SUTHERLAND, ASSOCIATE JUSTICE.
PIERCE BUTLER, ASSOCIATE JUSTICE.
HARLAN FISKE STONE, ASSOCIATE JUSTICE.
OWEN J. ROBERTS, ASSOCIATE JUSTICE.

WILLIAM D. MITCHELL, ATTORNEY GENERAL.
THOMAS D. THACHER, SOLICITOR GENERAL.
CHARLES ELMORE CROPLEY, CLERK.
FRANK KEY GREEN, MARSHAL.

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

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

For the First Circuit, OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.

For the Second Circuit, HARLAN FISKE 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, LOUIS DEMBITZ BRANDEIS, ASSOCIATE JUSTICE.

For the Sixth Circuit, JAMES C. McREYNOLDS, ASSOCIATE JUSTICE.

For the Seventh Circuit, WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.

For the Eighth Circuit, PIERCE BUTLER, ASSOCIATE JUSTICE.

For the Ninth Circuit, GEORGE SUTHERLAND, ASSOCIATE JUSTICE.

For the Tenth Circuit, WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.

June 2, 1930.

IN MEMORIAM

Proceedings in memory of two lately departed members of the Court, Mr. Chief Justice Taft and Mr. Justice Sanford, were conducted by the Bar and the officers of the Court, in the court room, on December 13, 1930. Resolutions there adopted were, on June 1, 1931, presented to the Court by the Attorney General, with eulogies, to which Mr. Chief Justice Hughes responded. An appropriate account of these matters will appear in Volume 284 U. S.

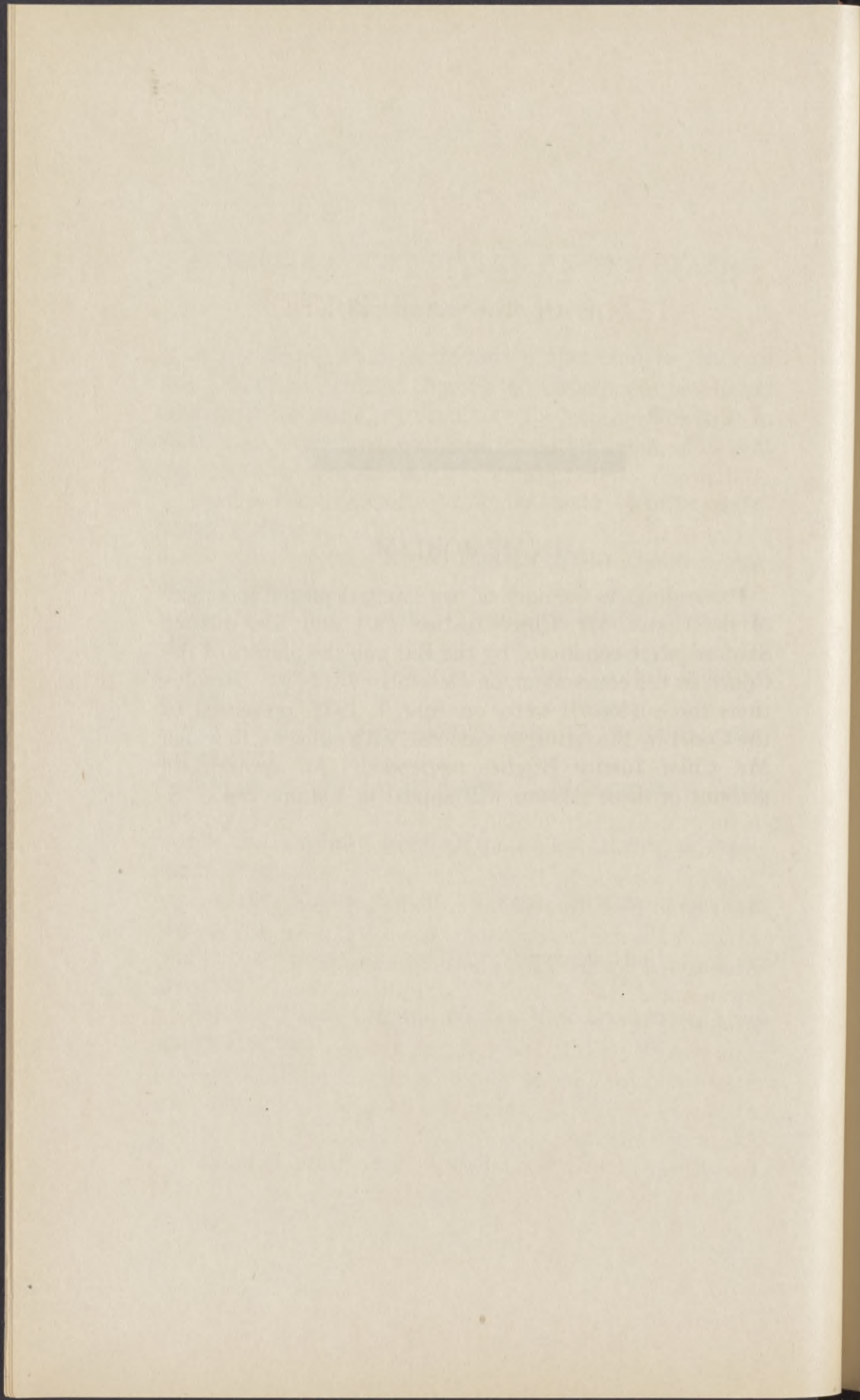


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1870

SUPREME COURT OF THE UNITED STATES

1870

STATE OF NEW YORK

IN SENATE

REPORT

OF THE

COMMISSIONERS

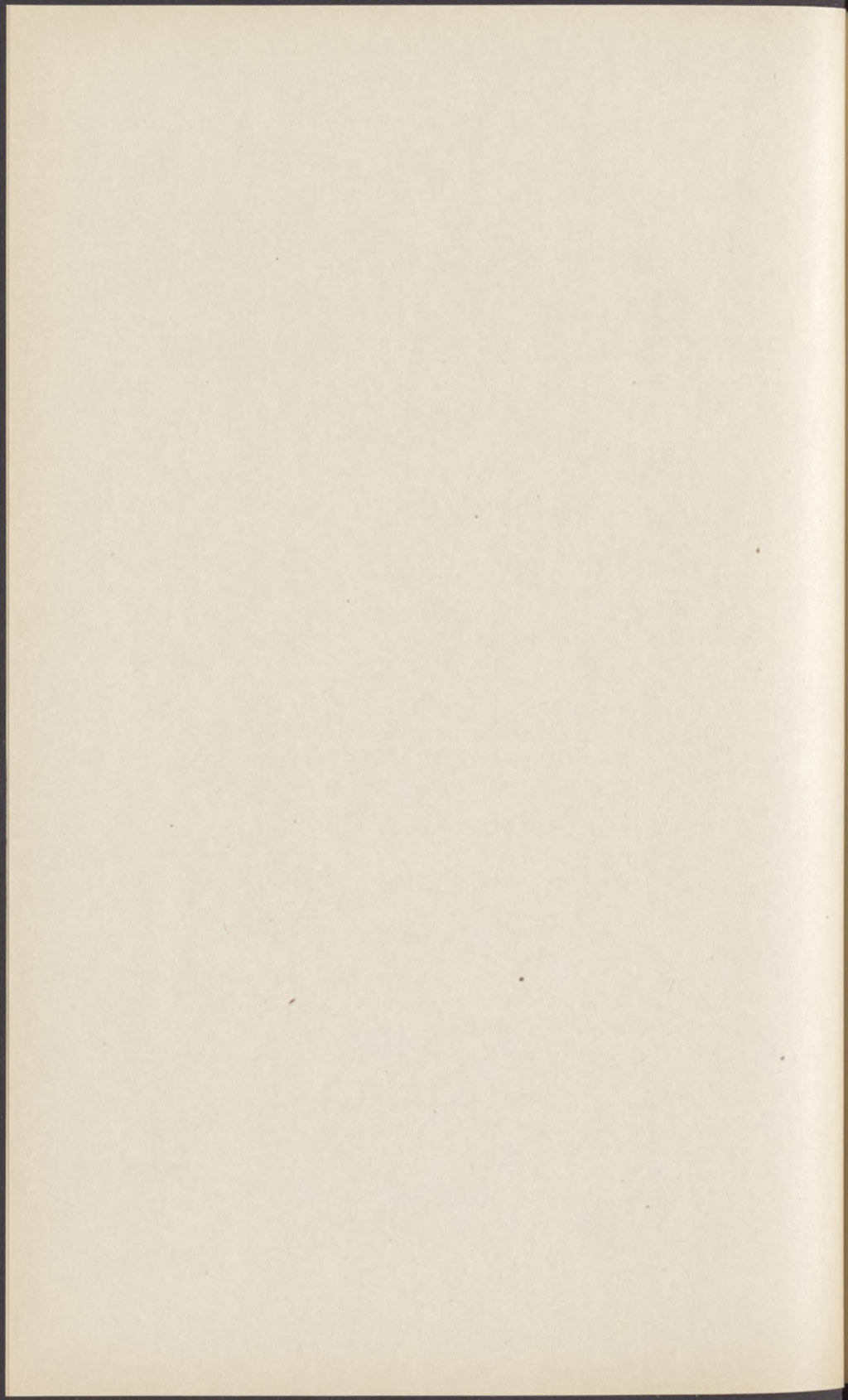
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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES

AT
OCTOBER TERM, 1930

AMERICAN FRUIT GROWERS, INCORPORATED,
v. BROGDEN CO.

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

No. 48. Argued January 9, 12, 1931.—Decided March 2, 1931.

1. Patent 1,529,461, to Brogden and Trowbridge, claiming a new and improved process of preparing fresh fruit for market by subjecting it to the action of a solution of borax, and thus, through the fungicidal properties of that chemical, rendering it resistant to the decay caused by blue mold, and also claiming, as a product, fresh citrus fruit of which the rind carries borax of small amount but sufficient to render the fruit resistant to such decay,—is invalid because the process was anticipated and the product is not within the patent law. Pp. 11, 13.
 2. The claim of a patent must be explained by and read in connection with the specification. P. 6.
 3. An orange, the rind of which has become impregnated with borax, through immersion in a solution, and thereby rendered resistant to blue mold decay, is not a "manufacture" or manufactured article, within the meaning of the patent law, U. S. C., Title 35, § 31. P. 11.
 4. A patent claim is not novel if it would be infringed by following a process described in an earlier patent or if the substance of the thing claimed by the later patent was disclosed by the earlier one. P. 14.
- 35 F. (2d) 106, reversed.

CERTIORARI, 281 U. S. 709, to review a decree which affirmed the District Court, 21 F. (2d) 110, in adjudging that the patent of the present respondent was valid and was infringed by the petitioner.

Messrs. W. Brown Morton and R. T. M. McCready, with whom *Mr. George E. Middleton* was on the brief, for petitioner.

Mr. Charles Neave, with whom *Messrs. Melville Church, Roy F. Steward, and Mitford C. Massie* were on the brief, for respondent.

These patentees have made a real invention of most substantial importance. The experts of the Department of Agriculture and also the practical citrus industry, working energetically over a period of more than two decades in the effort to minimize the losses due to blue mold decay, found and taught, in reiterated statements, two things: First, the only solution of the difficulty was to use careful handling; and that did not solve the problem. Second, chemicals were worse than useless.

It was not until after the invention of these patentees became known, that any other persons in the art worked with a view to finding inhibiting rather than killing substances, this being a different line of attack from those previously used.

The patentees found that borax was the best such substance; and it is the one which everybody now wants to use.

That this is not an obvious substance for this purpose is clear from the evidence. Its action is not yet thoroughly understood; it is only a mild disinfectant but it seems to have some influence not entirely understood on the rind of the fruit which enables the solution to prevent the development of decay.

Even after the invention was announced and demonstrated by the patentees, the experts did not say "of

course, that will work." Instead, they made elaborate and extended tests of their own and were, at first, cautious in their endorsement of the process, taking it up in a hesitant and tentative manner. Certainly that means that it was not an obvious solution of the problem. Such a situation is often cited as an indication of invention. *Eibel Co. v. Minnesota & O. Paper Co.*, 261 U. S. 45, 55; *Pyrene Mfg. Co. v. Boyce*, 292 Fed. 480, 484; *Westinghouse Air Brake Co. v. N. Y. Air Brake Co.*, 59 Fed. 581, 593; *Gandy v. Main Belting Co.*, 143 U. S. 587, 594.

The importance of the invention is widely recognized. It solved a problem of long standing and supplied a long felt want. There is, therefore, a strong presumption that what has been done amounts to patentable invention. *McClurg v. Kingsland*, 1 How. 202; *Gandy v. Main Belting Co.*, *supra*; *Eibel Co. v. Minnesota & O. Paper Co.*, *supra*; *Mowry v. Whitney*, 14 Wall. 620; *Heller Bros. Co. v. Crucible Steel Co.*, 297 Fed. 39; *United Verde Copper Co. v. Peirce-Smith Converter Co.*, 7 F. (2d) 13; *Trane Co. v. Nash Engineering Co.*, 25 F. (2d) 267.

The patent properly covers the invention. The process is covered by certain of the claims. It emphasizes the effective impregnation of the exposed rind or skin tissues (*i. e.*, exposed by the inevitable, though often slight, mechanical injuries) with the borax solution, the fluidity, strength and temperature of the solution, and the duration of treatment, being such as to bring this about. Also, the borax, having impregnated the wounds in the skin, is not to be washed off, but is to remain there in effective quantity until the fruit is consumed. It is to continue to be present and continue to act to prevent the growth of the spores.

By the manufacturing process an article has been produced which never before existed—fruit, the rind of which carries borax. That article does not grow; it is made by using, as a part of the complete article, something which

has grown—much as one uses wood or other products of nature as a part of manufactured articles. This is a “manufacture.” *Riter-Conley Mfg. Co. v. Aiken*, 203 Fed. 699, 703; *Armstrong Seatag Corp. v. Smith’s Island Oyster Co.*, 254 Fed. 821.

The tariff cases cited by petitioner are not applicable to narrow the definition of an article of manufacture as contemplated by the patent statute. This is because the question of what is and what is not an article of manufacture under the highly technical provisions of tariff schedules is determined by the courts, in any given instance, upon a rule or underlying principle obviously very different from that controlling the question in patent law. *Hartranft v. Wiegmann*, 121 U. S. 609; *Anheuser-Busch v. United States*, 207 U. S. 556.

The patent to Bishop describes a procedure in which sealing or encasing fruit or other article of food in an air-excluding gelatin covering is the object sought, the article of food being initially washed with a boric acid solution to kill germs. The patent does not mention fresh fruit, or blue mold decay; nor does it deal in any way with the conditions to be met and the problems to be overcome in preventing blue mold or kindred decay in the commercial handling of fresh fruit to be marketed as such.

Moreover, as the testimony of defendant’s experts conclusively establishes, if it be attempted to treat fresh fruit, following the directions given in that patent, the fruit is not only rendered commercially worthless because of its appearance and other physical characteristics, but is caused to spoil. The Bishop air-tight covering, which causes the spoilage, is a wholly different thing from the optionally applied film coating of paraffin, described in the patent in suit, which is not air-tight but permits the fruit to breathe.

The very volume of the prior art set up by the defendant serves to emphasize the patentable character of what

Brogden and Trowbridge did. *Carnegie v. Cambria*, 185 U. S. 403, 445; *American Stainless Steel Co. v. Ludlum Steel Co.*, 290 Fed. 103, 105, 106; *Westinghouse Air-Brake Co. v. Great Northern Ry. Co.*, 88 Fed. 258, 263; *Fleischman Yeast Co. v. Federal Yeast Corp.*, 8 F. (2d) 186, 197.

The defendant's theory seems to be that any prior patent or publication mentioning borax or boric acid as being used, or attempted or suggested to be used, as a preservative, is pertinent. What Brogden and Trowbridge did was to ascertain that borax was a particularly good inhibiting agent for their purposes, namely, controlling blue mold decay in the commercial large-scale handling of fresh fruit, when applied in their manner; and what they have patented is a process for applying it and the product resulting from such application.

The prior patents and publications show nothing of that. They disclose, what we fully admit, that borax and boric acid had, many years ago, been proposed as preservatives in canning and pickling processes—even before any problems had arisen in connection with the decay caused by blue mold on fresh citrus fruits, and also in subsequent years. But they do not disclose any process by which the results of the invention in issue could be attained.

The burden of proof is strongly on the defendant in attempting to prove prior use or prior invention, and every reasonable doubt should be resolved against him.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The Brogdex Company, present owner of United States Letters Patent No. 1,529,461, relating to "certain new and useful improvements in the art of preparing fresh fruit for market," applied for August 13, 1923, and issued to Brogden and Trowbridge March 10, 1925, presented its bill of complaint to the District Court for Delaware April 15, 1926, wherein it charged that the defendant (peti-

tioner here), the American Fruit Growers, Inc., had infringed, and asked an injunction, accounting, damages, etc. It relied upon Claims Nos. 1, 2, 3, 4, 5, 6, 7, 9, 14, 15, 16, 17 and 18, which describe the process of treatment, also Nos. 23, 24, 25 and 26, which concern the product.

Both courts below held all of these claims valid and infringed; and directed that petitioner be enjoined from using any process therein specified, also from manufacturing, selling, or using "treated fruit embodying and containing the invention described in said letters patent and secured by any of said [product] claims."

Of the process claims, the following is characteristic—

"3. In the preparation of fresh fruit for market, the process which comprises subjecting fruit to the action of an aqueous solution of borax, the fluidity, strength and temperature of the treating solution, and the duration of the treatment, being such that exposed rind or skin tissues of the fruit are effectively impregnated with borax and rendered resistant to blue mold decay, while at the same time the fruit is not scalded nor is its freshness or edibility otherwise substantially impaired."

The following is typical of the product claims—

"26. Fresh citrus fruit of which the rind or skin carries borax in amount that is very small but sufficient to render the fruit resistant to blue mold decay."

"The claim of a patent must always be explained by and read in connection with the specification." *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 432.

The specification in respect of the patent states—

"This invention relates to art of preparing fresh fruit for market; and in particular it relates to processes for the treatment of citrus and other fruits in such manner that the development of molds and the like upon the fruit, and especially the development of blue mold and infection by blue mold spores, is prevented or arrested either wholly or to such large extent as greatly to pro-

long the marketable life of the fruit beyond what has been possible heretofore; the complete treatment most desirably also including a step of providing the fruit with a very thin film-like coating of protective material comprising a waxy substance such as paraffin; all as will more fully hereinafter appear.

“The greatest present utility of the invention is in the treatment of citrus fruits such as oranges, grapefruit, lemons, tangerines, etc.; also apples and other fruits that are attacked by blue mold or the like. The invention is broad, however, and the term fruit as herein employed is to be understood as not necessarily restricted to fruit in the sense in which the word is usually employed, but is to be understood broadly as including not only fruit proper but also vegetables, such as tomatoes or the like, that can be treated to advantage in accordance with the principles of the invention to be hereinafter set forth.

“For the sake of a concrete example whereby the principles of the invention may be illustrated and explained, reference will be made hereinafter more particularly to the treatment of citrus fruit, especially oranges and lemons, which are especially subject to attack and destruction by blue mold. It is a well-known fact that a large part of the losses from decay in the marketing of various fruits, such as citrus fruits and apples, is attributable directly to the action of blue mold. The problem of how to suppress or control blue mold development on fruits has been the subject of extensive and careful investigation, but admittedly no thoroughly satisfactory solution of the problem has heretofore been offered. In spite of elaborate precautions taken in the handling and transportation of fruits to market, it is not uncommon for shipments of oranges and the like to arrive at marketing points showing in some cases as much as 30 to 40 per cent decay directly attributable to blue mold. The various investigations of the subject have shown that while blue mold

does not ordinarily attack perfectly sound fruit that is free from bruises, cuts, thorn-pricks or punctures, the slightest surface cut or scratch affords a point of attack by providing lodgment for blue mold spores which develop with great rapidity and soon bring about complete destruction of the infected fruit. . . .

“The present applicants have discovered that by proper treatment of the fruit in the packing house it is possible to greatly reduce, and often to absolutely prevent, the growth or development of blue mold on fruit for long periods of time, and thus to materially lessen or even eliminate the heretofore unavoidable losses from decay. Moreover, it is possible to achieve these results without upsetting or greatly changing present practice so far as concerns the mechanical handling of fruit in packing houses of the modern type. Thorough practical tests of the novel processes have demonstrated conclusively that, by proceeding in accordance with the invention, blue mold development can be arrested, and fruit can be rendered immune to attack by blue mold spores, in a simple and effective manner without affecting the freshness and flavor of the fruit, the marketable life of the fruit being thus prolonged far beyond that of untreated fruit. In view of the well known persistent activity of blue mold spores even under conditions fatal to the parent mold, the importance of this achievement is obvious. In general, the process of the invention involves applying to the fruit a mold-inhibiting reagent comprising the boric acid radical, said compound being most desirably alkaline in reaction and being employed in concentration effective to render the surface of the fruit unfavorable as a medium for blue mold development. Ordinary borax ($\text{Na}_2\text{B}_4\text{O}_7 + 10\text{H}_2\text{O}$) has been found after extensive investigation, to be especially potent in its retarding and inhibiting action in this connection, and this substance is considered at present to be the most desirable to employ

in practicing the invention. A water solution of borax is alkaline in reaction, but is without corrosive or other deteriorating action upon fruit to which it is applied. Boric acid is not so effective as a mold-retarder as is borax; but compounds of boron, whether acid or alkaline, appear to have a specific inhibiting action upon blue mold; and hence it is not desired to limit the invention, so far as concerns compounds of boron, to the employment of an alkaline treating solution.

“The method of applying the treating solution to the fruit may assume various specifically different forms, the precise details of procedure being not essential to the invention in its broader aspects. However, where it is desirable, as may often be the case, to carry out the process without changing prior practice any more than is strictly necessary, the application of the mold-retarding agent may be effected as a part of or in conjunction with the usual washing operation to which the fruit is initially subjected in its handling according to modern packing house methods, especially as most of the mold-retarding agents herein contemplated also have excellent cleansing or detergent properties. Accordingly, in the practice of the invention, the mold-retarding agent, borax in a specific instance, may be added in proper mold-inhibiting quantity directly to the wash water in the usual soaking tank into which the fruit is dumped from the field boxes as it comes from the groves. . . .

“From this point on, the handling of the fruit in further preparation for boxing and shipment may or may not involve additional preservative treatment in accordance with the principles of the invention. This depends upon whether or not the fruit is to receive an application of protective coating material for the purpose of preventing or reducing shrinkage and withering and of ensuring conservation of the original freshness and flavor of the fruit for prolonged periods of time. Generally this further

treatment is highly desirable, and if the benefits of the invention are to be realized to the fullest extent, this further treatment should be carried out. It consists in applying to the fruit a normally solid protective material, especially paraffin or like waxy material, in such condition that it can be spread all over the surface of the fruit to produce an extremely thin protective film which is not noticeable except by the expert eye and does not interfere with the so-called breathing or transpiration of the fruit to an undesirable extent, but which is effective to conserve the original plumpness and freshness of the fruit as above stated. . . .

“In the foregoing disclosure of the principles of the invention, reference has been made more particularly to blue mold as a source or cause of decay. Such reference to blue mold is to be taken, not as restrictive, but as generic and as intended, both in the specification and in the claims, to cover not only blue mold but all kindred rot and decay organisms and diseases generally amenable to treatment in accordance with the invention, to which fruit is or may be susceptible and by which it may be damaged under the conditions prevailing in packing and marketing. . . .”

Petitioner admits ownership of plants which pack and sell citrus fruits and that when preparing these for market it caused them to be dipped in a borax solution in order to prevent or retard decay incident to growth of blue mold. Under the treatment applied the raw fruit is immersed in a cold or warm solution of borax or boric acid, permitted to remain until thoroughly wet, then rinsed, dried and brushed. Infringement is admitted, if the patent is valid.

In defense petitioner maintains that the product claims of the patent fail to describe an article of manufacture within the meaning of the statute. Also that the process

claims are invalid for various reasons, among them anticipation by United States Letters Patent No. 683,899, issued October 8, 1901, upon application of Simeon Bishop.

Is an orange, the rind of which has become impregnated with borax, through immersion in a solution, and thereby rendered resistant to blue mold decay, a "manufacture," or manufactured article, within the meaning of § 31, Title 35, U. S. Code?

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented . . . may . . . obtain a patent therefor."

Answering affirmatively, the Circuit Court of Appeals said: "The product claims define an article of manufacture, since the fruit is the result of a process which is defined and described and not a natural product. The product is a combination of the natural fruit and a boric compound carried by the rind or skin in an amount sufficient to render the fruit resistant to decay. The complete article is not found in nature and is thus an article of manufacture. *Riter-Conley Mfg. Co. v. Aiken, et al.*, 203 Fed. 609."

This position, we think, is not tenable.

"Manufacture," as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery." Also "anything made for use from raw or prepared materials."

Addition of borax to the rind of natural fruit does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article

against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.

In *Hartranft v. Wiegmann*, 121 U. S. 609, 613, 615, this Court considered the meaning of the words "manufactures of shells" and held that "cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer," did not convert it into a manufacture. "The shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton."

And in *Anheuser-Busch Assn. v. United States*, 207 U. S. 556, 562, where it was claimed that corks for bottles which had undergone special treatment after importation thereby became articles manufactured in the United States, this Court said: "Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S.

609. There must be transformation; a new and different article must emerge 'having a distinctive name, character or use.' "

If it be assumed that the process claims under consideration cover an invention, we think this lacked novelty when application was made for the patent, August 13, 1923. The underlying conception had been adequately revealed in Bishop's Patent of 1901.

He claimed—

" 1. The method of treating articles of food to preserve and enhance their value, which consists in washing them with a solution of boracic acid and then applying a coating of gelatin, substantially as described.

" 2. The method of treating articles of food to preserve and enhance their value, which consists in washing them with a solution of boracic acid and then applying a coating of gelatin, and finally wrapping the article in tissue paper which has been impregnated with a solution of boracic acid, substantially as specified."

And in the specification he affirmed—

" This invention aims to prolong the period of usefulness of fruit, vegetables, eggs, and the like as articles of food and prevent their usual rapid decay and deterioration, thereby benefiting the grower, the shipper, the merchant, and the consumer.

" The invention consists in subjecting the article of food to an antiseptic bath to purify, cleanse, and kill all germs, then treating it to a coat of air-excluding material. This process not only preserves the articles of food, but enhances its value. . . .

" The application of boracic acid is advantageous in that it prevents decay and adds to the appearance of the article and is perfectly harmless to the human system. The gelatin, besides excluding the air, also adds to the appearance of the article. . . ."

That boracic (boric) acid—a weak acid—and borax, with an alkaline reaction, inhibit the rapid development of blue mold has long been known. Both are compounds of boron and contain the “boric acid radical.” Their antiseptic quality is due to the presence of that element. For present purposes, the two must be regarded as equivalents, and the mere substitution of one for the other would not involve invention or avoid infringement. Walker on Patents, 6th ed., § 426.

Read together, the claims and specification of the Bishop patent show that he intended it should have wide application and cover treatment of citrus, as well as other, fruits. He distinctly states the application of boracic acid prevents the usual rapid decay, and upon this basic fact respondent endeavors to support the patent in suit.

True, Bishop proposed as a secondary step the application of gelatine, which he averred would exclude the air and enhance the appearance of the article. But Brogden and Trowbridge also said in their specification that “if the benefits of the invention are to be realized to the fullest extent,” the fruit after being soaked should receive an application of protective coating material, such as paraffin, or like waxy material. If the claims of the patent in suit are valid, one operating under the process described by Bishop would infringe—and considering the circumstances here disclosed, that is enough to show invalidity of the later patent. *Knapp v. Morss*, 150 U. S. 221, 228. It lacks novelty. The substance of its disclosures had been revealed by Bishop twenty years earlier. *Sewall v. Jones*, 91 U. S. 171, 182, *et seq.*

Reversed.

Argument for Petitioners.

MILLIKEN *ET AL.*, EXECUTORS, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 87. Argued January 29, 1931.—Decided March 2, 1931.

1. A finding by the Commissioner of Internal Revenue, in assessing an estate tax, that a gift made by the decedent in his lifetime was made in contemplation of death, is controlling when the tax is called in question, if not challenged by any fact appearing of record. P. 19.
 2. The Revenue Act of 1918, § 402, applies to gifts in contemplation of death made before its passage. P. 19.
 3. The inclusion of gifts made in contemplation of death in a single class with decedents' estates to secure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation. P. 20.
 4. A tax is not necessarily and certainly arbitrary because retroactively applied, but may be justified and upheld in such application because of the particular circumstances. P. 21.
 5. A gift in contemplation of death was made while the 1916 Revenue Act was in force; the donor died after the effective date of the Act of 1918; in assessing his estate for transfer tax the value of the gift at the time of his death was included; and the tax on the whole was levied at the rates of the 1918 Act, which were higher than those of the Act of 1916. *Held* that the application of the later rates, as respects the gift, was not unreasonable or unconstitutional, in view of the relations of such gifts to transfers by death and the legislative policy of both Acts concerning them, established before the gift was made. P. 20.
 6. The application of the higher rate of the 1918 Act to gifts made in contemplation of death while the 1916 Act was in force, does not destroy the character of the tax as one on privileges, and so render it unconstitutional as an unapportioned direct tax. P. 24.
- 69 Ct. Cls. 231; 38 F. (2d) 381, affirmed.

CERTIORARI, 282 U. S. 817, to review a judgment denying recovery of a tax.

Mr. D. A. Embury, with whom *Mr. Hugo Kohlmann* was on the brief, for petitioners.

Section 402 (c) of the Revenue Act of 1918 construed in the light of recent decisions does not apply to the transaction here at issue.

If construed to tax a transfer made before the passage of the Act, the section is unconstitutional. *Nichols v. Coolidge*, 274 U. S. 531.

The retroactive application of § 402 (c) cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents.

In any event, the provisions of the Act fixing the measure of the tax on transfers under § 402 (c) are so arbitrary and capricious as to violate the Fifth Amendment. The tax thus retroactively applied was imposed at a rate approximately two and one-half times as great as that provided by the 1916 Act in effect at the time the gift was made, and, moreover, was imposed upon the property not at its value at the time of the gift nor at any time when it was in the possession of the decedent, but at its value at the time of his death, over three years after he had parted with all interest therein. The tax is thus imposed upon one entity, the estate of the decedent, in respect of property belonging to an entirely different entity, the donee of the antecedent gift, and on the basis of a value bearing no relation to any value of the property at any time while owned by the decedent.

The retroactive application amounts to an unapportioned direct tax forbidden by §§ 2 and 9 of Art. I of the Constitution.

A tax imposed upon the estate of a decedent, measured by the value of property which he has long since disposed of, is a direct tax and cannot properly be considered an excise upon the transfer of property by death, where the transfer was made prior to the passage of the Act purporting to impose the tax. 37 Harv. L. R. 694, 695; 26 Col. L. R. 852, 858.

The outstanding feature of a direct tax, as distinguished from duties, imposts, and excises, is that of an absolute and unavoidable demand. See *Thomas v. United States*, 192 U. S. 363, 371; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 151-152; *South Carolina v. United States*, 39 Ct. Cls. 257, affirmed, 199 U. S. 437. This absolute and unavoidable demand clearly exists when an attempt is made to tax a transfer effected prior to the adoption of the taxing statute. *Levy v. Wardell*, 258 U. S. 542.

The determination of the nature of the tax must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized. *Kansas City Ry. v. Kansas*, 240 U. S. 227, 231, and many other cases.

The applicability of the principles in *Nichols v. Coolidge*, *supra*, is not affected by the fact that the transfer in the present case was made subsequently to the passage of the 1916 Act.

The saving clause contained in § 1400 (b) of the 1918 Act does not operate to impose a tax upon the transaction here in question.

The repeal of the Revenue Acts of 1916 and 1917, coupled with the enactment of the 1918 Act, containing analogous taxing provisions, but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, *Fred K. Dyar*, *Bradley B. Gilman*, and *Erwin N. Griswold* were on the brief, for the United States.

The language of the statute leaves no doubt but that Congress intended to tax a transfer in contemplation of death, whether the transfer was made before or after the

passage of the Act. The petitioners' argument as to the construction of this section was not raised in the court below and is not open for argument in this Court.

The due process clause of the Fifth Amendment does not invalidate the application of § 402 of the Revenue Act of 1918 in this case. The transfer was in contemplation of death. The tax, if levied upon a transfer made after the date of the enactment of the statute, is constitutional. The tax is upon the testamentary disposition of the decedent's property. A gift in contemplation of death is a part of this disposition.

The fact that the transfer was made before the enactment of the statute does not render it arbitrary. The statute was a continuance of similar provisions in the Revenue Act of 1916 which was in force when the transfer was made. No tax was placed upon an act non-taxable when done. That the transferor could not calculate the exact rate of the tax when he made the gift does not make the tax unconstitutional.

In any case, the property transferred is taxable at the lower rate prescribed by the Revenue Act of 1916. Congress intended the estate tax provisions of the 1916 Act to remain in force in every case until the provisions of the 1918 Act applied to the estate in that case.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted, 282 U. S. 817, to review a judgment of the Court of Claims denying to petitioners recovery of a tax alleged to have been illegally exacted under the decedents' estates provisions of the Revenue Act of 1918. 38 F. (2d) 381; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, 1149, 1150.

In December, 1916, while the Revenue Act of that year was in force (Act of Sept. 8, 1916, c. 463, 39 Stat. 756, 777), petitioners' decedent gave to his children certain shares of corporate stock. The donor died March 5, 1920,

after the effective date of the 1918 Act. The Commissioner included the shares of stock in the decedent's estate as a gift made in contemplation of death, § 402 (c) of the 1918 Act, and assessed and collected the tax now in suit, which was computed on the basis of the value of the stock at the time of decedent's death, and at the rates in the 1918 Act, which were higher than those fixed by the corresponding provisions of the Act of 1916.

Section 401 of the 1918 Act imposed taxes at specified rates upon transfers of estates by decedents. Under § 403, the taxable estate was the "gross estate" less enumerated deductions. Section 402 provided for the inclusion in the gross estate of the value of property "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) . . ." The Act of 1916, §§ 201, 202 (b), which had contained similar provisions for the taxing of decedents' estates, including gifts in contemplation of death, but at lower rates, was repealed, with provisos not now material, by § 1400 of the 1918 Act.

The finding of the Commissioner that the present gift was in contemplation of death is not questioned by petitioners, and is controlling here since it is not challenged by any facts appearing of record. *Niles Bement Pond Co. v. United States*, 281 U. S. 357, 361; *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359. Although antedating the enactment of § 402, the gift is embraced within its provisions, which are in terms applicable to gifts in contemplation of death made before the passage of the Act.

Petitioners' argument that § 402 does not apply is not supported by their citations of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and *May v. Heiner*, 281 U. S. 238. In

those cases the gifts *inter vivos* were not "in contemplation of death," and the only relevant question was one of construction, whether some of them were of the class intended by Congress to be taxable under § 402 (c) as transfers "intended to take effect in possession or enjoyment at or after death." It was held that they were not. But those gifts were not of the class now involved, gifts in contemplation of death, made before the passage of the Act, which are expressly named by § 402 (c) as subject to its provisions.

This Court has not passed directly on the constitutionality of the federal taxation of gifts made in contemplation of death. But taxation of transfers at death has been upheld, *Knowlton v. Moore*, 178 U. S. 41, as has, more recently, the taxation of gifts *inter vivos*, *Bromley v. McCaughn*, 280 U. S. 124; and we hold, as this Court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to secure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation. See *Nichols v. Coolidge*, 274 U. S. 531, 542; *Tyler v. United States*, 281 U. S. 497, 505; *Corliss v. Bowers*, 281 U. S. 376, 378; *Taft v. Bowers*, 278 U. S. 470, 482; cf. *Schlesinger v. Wisconsin*, 270 U. S. 230, 239.

The objection to the tax chiefly urged in brief and argument, is that the taxing statute, as applied, is a denial of due process of law because retroactive. It is said that the statute is invalid not alone because it reaches a gift made before its enactment, but because it measures the tax by rates not in force when the gift was made, applied to the value of the property not when given, but at the uncertain later time of the death of the donor.

This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and un-

reasonable as to infringe the due process clause. *Nichols v. Coolidge, supra; Untermeyer v. Anderson*, 276 U. S. 440; *Coolidge v. Long*, 282 U. S. 582.¹ In *Nichols v. Coolidge* it was held that § 402 of the 1918 Act could not constitutionally be applied to a gift *inter vivos*, not in contemplation of death, and made long before the adoption of any congressional legislation imposing an estate tax or taxing gifts to take effect in possession or enjoyment at or after death. In *Untermeyer v. Anderson, supra*, it was held that the retroactive provision of the novel gift tax of the Revenue Act of 1924 was invalid as applied to gifts antedating the Act. In both the point was stressed, as the basis of decision, that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax. See *Nichols v. Coolidge, supra*, p. 542; *Untermeyer v. Anderson, supra*, p. 445. Upon similar grounds, in *Coolidge v. Long, supra*, a state tax on successions was held invalid as applied to the gift to the donor's children involved in *Nichols v. Coolidge, supra*, because deemed to be a tax on a succession to a gift completely vested before the enactment of the taxing act or of any other law taxing successions by lineal descendants of the donor.

But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court. See *Stockdale v. Insurance Companies*, 20 Wall. 323, 331; *Railroad Co. v. Rose*, 95 U. S. 78, 80; *Railroad Co. v. United States*, 101 U. S. 543, 549; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Billings v. United States*, 232 U. S. 261, 282; *Brushaber v. Union Pacific R. Co.*,

¹ In *Blodgett v. Holden*, 275 U. S. 142, four of the justices thought the taxing statute inapplicable; and four that it applied, but was unconstitutional because retroactive.

240 U. S. 1, 20; *Lynch v. Hornby*, 247 U. S. 339, 343; *Hecht v. Malley*, 265 U. S. 144, 164; *Cooper v. United States*, 280 U. S. 409. See *Taft v. Bowers*, *supra*; *United States v. Heinszen*, 206 U. S. 370; *Graham v. Goodcell*, 282 U. S. 409.

Hence, in challenging the present tax it does not suffice to say that the gift antedated the statute. It is necessary to consider the nature of the tax and of the decedent's gift. When the gift was made it was subject to the provisions of the 1916 Revenue Act. By it, Congress had adopted the well understood system of taxation of transfers of property at death, already in force in forty-two states. Report No. 793, Senate Committee on Finance; Report No. 922, House Committee on Ways and Means; both on H. R. No. 16763, Sixty-fourth Congress. A characteristic feature of the system was that incorporated in §§ 202 (b) of the 1916 Act and 402 (c) of the 1918 Act, both of which imposed a tax on gifts made in contemplation of death, computed at the same value and rate as though the property given had been a part of the donor's estate passing at death.²

While we need not attempt at this time to define with precision gifts in contemplation of death, their characteristic features have been sufficiently indicated by the various treasury regulations dealing with the subject. Regu-

² In 1916, twenty-nine states and one territory imposed taxes on gifts in contemplation of death at the same rate as on estates passing at death. They were Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, Wyoming, and Hawaii. Most of these provided for appraisal of the value of the property as of the date of decedent's death; but a few (Indiana, Kansas, and Wisconsin) provided for valuation as of the date of transfer. The statutes are collected in Gleason and Otis, *Inheritance Taxation* (1st ed.).

lation 37 under the 1918 Act (Revised Aug. 8, 1919) is typical. It provides (Art. 23): "The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty."

It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death. Decedent's gift as a substitute for a testamentary disposition was thus brought within the operation of the 1916 Act taxing such gifts on the same basis, with respect to rate and valuation, as transfers of property at death. Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them.

The reasonableness of the present application of the increased rate of tax of the 1918 Act must be determined in the light of the legislative policy which the 1916 Act had established before the gift was made. Obviously that

policy would be set at naught if gifts made in contemplation of death, after the 1916 Act, were to be taxed more favorably than transfers from the donor occurring at and by reason of his death. As was apparent when the 1916 Act was adopted, that policy could be made effective only if gifts made in contemplation of death, while that Act was in force, were to be subject at the donor's death to such rate as might at the time of that event be applicable to the transfer of the donor's estate. The decedent, when he made his gift, was as well warned that it might be taxed on that basis as he was that it would be so taxed if on that day he had made the same disposition of it by will. A change in the rate applicable to transfers at death necessitates a corresponding change in the rate applicable to gifts made in contemplation of death, else the purpose in taxing the latter would not be attained. That purpose, as already indicated, was to put such gifts on the same plane as testamentary disposals.

Only a word need be said of the suggestion that the application of § 402 (c) to gifts made while the 1916 Act was in force destroys the character of the tax as one on privileges, and so renders it invalid as an unapportioned direct tax forbidden by §§ 2 and 9 of Article I of the Constitution. See *Levy v. Wardell*, 258 U. S. 542, 545. The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character. See *Hecht v. Malley*, *supra*, p. 164. Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death. See *Purity Extract Co. v. Lynch*, 226

U. S. 192; *Jacob Ruppert v. Caffey*, 251 U. S. 264; *Lambert v. Yellowley*, 272 U. S. 581. *Affirmed.*

McBOYLE *v.* UNITED STATES.

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

No. 552. Argued February 26, 27, 1931.—Decided March 9, 1931.

The National Motor Vehicle Theft Act, U. S. C., Title 18, § 408, which punishes whoever transports, or causes to be transported, in interstate or foreign commerce a motor vehicle knowing it to have been stolen, and which defines "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails," does not apply to aircraft. P. 26.

43 F. (2d) 273, reversed.

CERTIORARI, 282 U. S. 835, to review a judgment affirming a conviction under the Motor Vehicle Theft Act.

Mr. Harry F. Brown for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Dodds* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of \$2,000. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit. 43 F. (2d) 273. A writ of certiorari was granted by this Court on the question whether the National Motor Vehicle Theft Act applies to aircraft.

Act of October 29, 1919, c. 89, 41 Stat. 324; U. S. Code, Title 18, § 408. That Act provides: "Sec. 2. That when used in this Act: (a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; . . . Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both."

Section 2 defines the motor vehicles of which the transportation in interstate commerce is punished in § 3. The question is the meaning of the word 'vehicle' in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act, September 22, 1922, c. 356, § 401 (b), 42 Stat. 858, 948. But in everyday speech 'vehicle' calls up the picture of a thing moving on land. Thus in Rev. Stats. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land." And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 997, § 401 (b); 46 Stat. 590, 708. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress.

It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class. The counsel for the petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, Title 6, c. 9, § 242, none of which can be supposed to leave the earth.

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *United States v. Thind*, 261 U. S. 204, 209.

Judgment reversed.

CARBICE CORPORATION OF AMERICA v. AMERICAN PATENTS DEVELOPMENT CORPORATION ET AL.

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

No. 54. Argued January 16, 1931.—Decided March 9, 1931.

1. A patentee can not lawfully exact, as the condition of a license, that unpatented materials used in connection with the invention shall be purchased only from himself. P. 31.

2. One who supplies unpatented materials to the licensee to be used in disregard of such a condition is not liable to the patentee as a contributory infringer. P. 31.

38 F. (2d) 62, reversed.

CERTIORARI, 281 U. S. 711, to review a decree sustaining the patent of the present respondent and adjudging infringement. The District Court had dismissed the bill upon the ground that no infringement had been shown. 25 F. (2d) 730.

A petition for further consideration was granted in this case, April 13, 1931, limited to the question of the validity of the patent. After reargument, the patent was held void. See *post*, p. 420.

Mr. Samuel E. Darby, Jr., for petitioner.

Mr. Charles Neave, with whom *Messrs. George C. Dean* and *Clarence D. Kerr* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The American Patents Development Corporation, as owner of United States Patent No. 1,595,426, and the Dry Ice Corporation, as exclusive licensee, brought this suit in the federal court for eastern New York to enjoin contributory infringement by the Carbice Company, for an accounting of profits, and for damages. The defendant denied both the validity of the patent and the alleged infringement. The District Court, without passing upon validity, dismissed the bill on the ground that infringement had not been shown, 25 F. (2d) 730. The Circuit Court of Appeals held the patent valid and infringed, 38 F. (2d) 62. A writ of certiorari was granted, 281 U. S. 711.

Solid carbon dioxide has a temperature of about 110° below zero. When it "melts," it passes directly into a dry, gaseous state—the gas having a like temperature and

being in volume about 500 times that of the solid. These properties make the solid dioxide an excellent dry refrigerant for foodstuffs, particularly for the shipment of ice cream. The refrigerating transportation package, which is the subject of the patent in suit, is made up in this way: Near the middle of the outer box or carton in which the ice cream or other foodstuff is to be shipped, there is placed, in a small container, a quantity of solid carbon dioxide. So placed, this refrigerant is relatively enduring because it is doubly protected from the exterior heat by the ice cream which surrounds it and by the evaporating gas which excludes air and moisture from the shipping case. The ice cream is kept frozen by both the solid and the gaseous dioxide. Although the cost of solid dioxide is about ten times that of water ice, such use is said to have revolutionized the transportation of ice cream, as in this way shipping and handling charges are greatly reduced and the messiness incident to the employment of water ice is eliminated.

The patent in suit is not for solid carbon dioxide. That article and its properties as a refrigerant have been long known to the public. The patent is not for a machine for making solid carbon dioxide. Nor is it for a process for making or using that substance. The Patent Office rejected an application for a process patent. The patent is said to be for a manufacture. The specifications outline the method of construction and use; and a typical claim (6) is for a "transportation package consisting of a protective casing of insulating material having packed therein a quantity of frozen carbon dioxide in an insulating container and a quantity of freezable product in freezing proximity to said frozen carbon dioxide and the gas evaporated therefrom, arranged so that said frozen carbon dioxide is less accessible for exterior heat than said freezable products."

The sole business of the Dry Ice Corporation is the manufacture of solid carbon dioxide which it sells under

the name of "DryIce." It does not make or sell transportation packages in which solid carbon dioxide is used as a refrigerant. It does not issue to other concerns licenses to make such packages upon payment of a stipulated royalty. It does not formally license buyers of its dry ice to use the invention in suit. But each invoice for solid dioxide sold by it bears this notice: "The merchandise herein described is shipped upon the following condition: That DryIce shall not be used except in DryIce Cabinets or other containers or apparatus provided or approved by the DryIce Corporation of America; and that DryIce Cabinets or other containers or apparatus provided or approved by the DryIce Corporation of America shall be refrigerated or used only with DryIce. These uses of DryIce are fully covered by our Basic Method and Apparatus Patent No. 1,511,306. Granted October 14th, 1924, and other Patents Pending." The patent in suit, No. 1,595,426, issued August 10, 1926, is not named in the invoice; but it has been assumed that thereby the Dry Ice Corporation extends to each of its customers, buyers of solid carbon dioxide, a license to use the invention without the payment of royalty. The restrictions as to the purchase of cartons set forth in the invoices of the corporation appear not to have been insisted upon by it.

The Carbice Corporation also manufactures solid carbon dioxide. It is charged with contributory infringement because it sells its product to customers of the Dry Ice Corporation with knowledge that the dioxide is to be used by the purchaser in transportation packages like those described in the patent. The Carbice Corporation challenges the validity of the patent and denies infringement. Whether the transportation package described is a patentable invention we need not determine. For even if it is, no relief can be granted.

The invention claimed is for a particular kind of package employing solid carbon dioxide in a new combination.

If the patent is valid the owner can, of course, prohibit entirely the manufacture, sale, or use of such packages, *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405. Or it can grant licenses upon terms consistent with the limited scope of the patent monopoly, *United States v. General Electric Co.*, 272 U. S. 476, 489. It may charge a royalty or license fee. But it may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor; and if it does so, relief against one who supplies such unpatented materials will be denied.¹ The limited monopoly to make, use, and vend an article may not be "expanded by limitations as to materials and supplies necessary to the operation of it." *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 515. Compare *United Shoe Machinery Corp. v. United States*, 258 U. S. 451, 462; *United States v. General Electric Co.*, 272 U. S. 476, 492.

The relief here sought is indistinguishable from that denied in the *Motion Picture* case. There, it was held that to permit the patent-owner "to derive its profit, not

¹In England the insertion of such a requirement in any license agreement is a complete defense to any defendant charged with infringement. See Patents and Designs Act (1907) 7 Edw. VII, c. 29, § 38, as amended by (1919) 9 & 10 Geo. V, c. 80, § 20, Sched. 38; *Sarason v. Frénay* [1914] 2 Ch. 474; *Huntoon Co. v. Kolynos, Inc.*, [1930] 1 Ch. Div. 528, 535, 547, 553, 562. The need for such legislative measures to prevent abuse of the patent monopoly has now been recognized by the International Convention for the Protection of Industrial Property. See Actes de la Conférence de La Haye de 1925 (Berne, 1926) pp. 433-34, 606; Ladas, International Protection of Industrial Property, pp. 337-40, 817. In this country the patent statutes similarly provide that an unreasonable delay in formally disavowing patent claims held invalid, and the consequent maintenance of a broader monopoly than warranted, is a complete defense to all infringers, even as to remaining valid claims. Rev. Stat. §§ 4917, 4922; 35 U. S. C. §§ 65, 71. See *Ensten v. Simon, Ascher & Co., Inc.*, 282 U. S. 445.

from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used," is "wholly without the scope of the patent monopoly." P. 517. If a monopoly could be so expanded, the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture. The owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation. The owner of a patent for a process might secure a partial monopoly on the unpatented material employed in it. The owner of the patent in suit might conceivably secure a limited monopoly for the supplying not only of solid carbon dioxide, but also of the ice cream and other foods, as well as of the cartons in which they are shipped.² The attempt to limit the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of a patentee to fix the price at which the patented article may be resold. *Bauer & Cie v. O'Donnell*, 229 U. S. 1; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490; *Boston Store v. American Graphophone Co.*, 246 U. S. 8. Compare *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339. In both classes of cases, courts deny relief against those who disregard the limitations sought to be imposed by the patentee beyond the legitimate scope of its monopoly.³

² See, also, the examples given by Chief Justice White, dissenting in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 55. "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price. . . ." Vaughan, *Economics of Our Patent System*, pp. 125-127.

³ The patent grant is inherently limited in other respects. A patent covering an essential instrumentality does not enable a patentee or its licensee thereby to abridge its obligations as a public utility; the exclusive right to license use of the invention cannot be so exercised. *Missouri ex rel. Baltimore & O. Tel. Co. v. Bell Tel. Co.*, 23 Fed. 539,

Plaintiffs seek to distinguish the *Motion Picture* case from that at bar, by pointing out that there, as in *Henry v. A. B. Dick Co.*, 224 U. S. 1, the unpatented supplies, over which the licensor sought to extend its monopoly, were merely used in the patented machines, whereas here the unpatented refrigerant is one of the necessary elements of the patented product. And to distinguish the case at bar from *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, it is pointed out that the Carbice Corporation is furnishing not a passive element in the combination, like the paper in the *Morgan Envelope* fixture, but the dynamic element which produces refrigeration. These distinctions are without legal significance. Infringement, whether direct or contributory, is essentially a tort, and implies invasion of some right of the patentee. Compare *Moore v. Marsh*, 7 Wall. 515, 520; *Root v. Railway Co.*, 105 U. S. 189, 214. The Dry Ice Corporation has no right to be free from competition in the sale of solid carbon dioxide. Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used. Relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited

appeal dismissed, 127 U. S. 780; *State ex rel. Postal Tel. Cable Co. v. Delaware & A. Tel. & Tel. Co.*, 47 Fed. 633, affirmed, 50 Fed. 677. Nor does the grant of a United States patent exempt the patented product from limitations imposed by state police statutes. *Patterson v. Kentucky*, 97 U. S. 501; *Allen v. Riley*, 203 U. S. 347; *John Woods & Sons v. Carl*, 203 U. S. 358; *Ozan Lumber Co. v. Union County National Bank*, 207 U. S. 251. Compare *Webber v. Virginia*, 103 U. S. 344, 347. See note 1, *supra*. Nor can a patent be made the basis of an unconscionable contract. *Pope Mfg. Co. v. Gormally*, 144 U. S. 224.

monopoly of unpatented material used in applying the invention. The present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law, in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20.⁴

The case at bar is wholly unlike *Leeds & Catlin v. Victor Talking Machine Co.*, 213 U. S. 325, 333, on which plaintiffs rely. That was an ordinary case of contributory infringement. The Victor Company sold machines embodying a patent for a combination. Leeds & Catlin were held to be infringers because the intended incorporation in the Victor machines of the article which they sold, did not constitute a repair of the machine and hence was not within the license implied on sale. *Heyer v. Duplicator Mfg. Co.*, 263 U. S. 100. There was no suggestion that the Victor Company, which itself manufactured and sold the patented product, sought "to derive its profits, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used." In the case at bar the plaintiffs neither sell nor license others to sell complete transportation packages. They supply merely one of the several materials entering into the combination; and on that

⁴In such cases, the attempt to use the patent unreasonably to restrain commerce is not only beyond the scope of the grant, but also a direct violation of the Anti-Trust Acts. Compare § 3 of the Clayton Act, October 15, 1914, c. 323, 38 Stat. 730, 731, which prohibits any lease, sale, contract, or agreement tending to create a monopoly in any line of commerce, and is applicable to all "goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented. . . ." See *United Shoe Mach. Co. v. United States*, 258 U. S. 451, 460; *Lord v. Radio Corp. of America*, 24 F. (2d) 565, 566-67, affirmed, 28 F. (2d) 257, certiorari denied, 278 U. S. 648, decree entered, 35 F. (2d) 962, affirmed, 47 F. (2d) 606. Compare, as to trade secrets, *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 401.

commodity they have not been granted a monopoly. Their attempt to secure one cannot be sanctioned.⁵

Reversed.

CHESAPEAKE & OHIO RAILWAY COMPANY v.
UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 73. Argued January 26, 27, 1931.—Decided March 9, 1931.

1. Facts stated in a report of the Interstate Commerce Commission held sustained by findings and sufficient to support an order authorizing new railroad construction, under § 1, (18), (20), of the Transportation Act. P. 38.
2. The Commission, in reaching a determination that proposed extensions of lines of railroad are required by the public interest, may properly consider the desirability of preserving competition between rival railroad systems. P. 41.

35 F. (2d) 769, affirmed.

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

Mr. Robert B. Tunstall, with whom *Messers. Herbert Fitzpatrick* and *Thomas L. Preston* were on the brief, for appellant.

Mr. Nelson Thomas, with whom *Solicitor General Thacher* and *Mr. Daniel W. Knowlton* were on the brief,

⁵ Restrictions on the manner of use, essential to prevent unwarranted extension, are inherent in other limited monopolies. Thus, a trademark may not be used as a means of misrepresentation. *Worden v. California Fig Syrup Co.*, 187 U. S. 516; *Mulhens & Kropff, Inc., v. Ferd. Muelhens, Inc.*, 43 F. (2d) 937; *Leather Cloth Co., Ltd., v. American Leather Cloth Co., Ltd.*, 4 De G. J. & S. 137, affirmed, 11 H. L. C. 523. Nor a tradename as a means of deception. *Memphis Keeley Institute v. Keeley Co.*, 155 Fed. 964; *Royal Baking Powder Co. v. Federal Trade Commission*, 281 Fed. 744; *Federal Trade Commission v. Bradley*, 31 F. (2d) 569.

for the United States and Interstate Commerce Commission.

Mr. John H. Holt, with whom *Messrs. Robert E. McCabe, D. Lynch Younger, and Theodore W. Reath* were on the brief, for the Guyandot & Tug River Railroad Co. and the Norfolk & Western Railway Co.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by the appellant, for brevity called the Chesapeake, under the Urgent Deficiencies Act, 28 U. S. C., § 47, against the United States, the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company. The former is a subsidiary of the latter and both may be called the Norfolk. The Interstate Commerce Commission appeared as a defendant. 28 U. S. C., § 45a. The purpose of the suit was to set aside and annul so much of an order and certificate of the Commission entered and issued July 23, 1928 (145 I. C. C. 167, 188, 193) and so much of subsequent orders in the same proceeding, as authorize the Norfolk to construct and operate a line of railroad in West Virginia from Gilbert about 10½ miles to Wharnclyffe. The case was tried before three judges. A condensed statement of the evidence and exhibits before the Commission was submitted to the court. After hearing argument for the respective parties, the court entered its decree denying plaintiff any relief and dismissing the bill. 35 F. (2d) 769.

May 7, 1925, the Chesapeake filed its application for a certificate that the present and future public convenience and necessity require the construction by it of an extension of its Logan subdivision from Gilbert easterly 47.3 miles to Mullens and an extension of its Winding Gulf line from Stone Coal westerly 8.2 miles to Mullens. On October 29,

1925, the Guyandot company filed its application for a similar certificate for the construction of a line of railroad extending from a connection with the Virginian Railway at Elmore westerly 53 miles to Wharncliffe. The Norfolk and the Virginian joined in this application. An amended application was filed December 24, 1925, by the Guyandot which was joined in by the Norfolk alone. January 21, 1927, the Virginian and Western Railway, a subsidiary of the Virginian Railway Company—both may be referred to as the Virginian—filed its application for a like certificate for the construction of a line extending from a connection with the Guyandot branch of the Virginian at Ittman down that river 40.6 miles to a connection with the Chesapeake at Gilbert. This application was joined in by the Virginian Railway Company.

The locations of all the proposed lines between Gilbert and Mullens, Elmore or Ittman were in the narrow valley traversed by the Guyandot river. Authority to build the line between Gilbert and Wharncliffe was sought only by the Norfolk. The three applications were considered at the same hearing. The Virginian supported the Norfolk's application for the Gilbert-Wharncliffe connection. The Chesapeake opposed. All the applications were disposed of by the same report and order.

The Commission granted to the Virginian permission to construct its line in the Guyandot valley from Ittman to Gilbert and to the Norfolk leave to build between Gilbert and Wharncliffe. It denied the rest of the application of the Norfolk and that of the Chesapeake *in toto*.

The appellant seeks reversal upon the claim that neither the findings of the Commission nor the evidence affords any support for the order and that the record shows the construction of the proposed line between Gilbert and Wharncliffe to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law. It says that the only finding of the Com-

mission that supports the order is that the construction of the line will enable the Norfolk to compete with the Chesapeake for westbound traffic moving over the Virginian from the Guyandot valley and will assure the coal operators on the Virginian competitive service to the west. And it maintains that the Commission is not authorized by the Act to grant a certificate of public convenience and necessity for new construction upon a naked finding that competition between carriers and competitive service to shippers will result.

The situation, as disclosed by the report and the undisputed evidence, is as follows:

That part of West Virginia which is south of the Kanawha and New rivers contains vast deposits of coal and has many mines in operation. The Chesapeake, the Norfolk and the Virginian are the only railroads of importance in the district. The eastern terminus of the Chesapeake is at Newport News. It serves mines immediately south of these rivers. It has lines extending to the west where it has connections at Cincinnati, Columbus, Chicago and elsewhere on the Great Lakes. The eastern termini of the other carriers are at Norfolk. The lines of the Norfolk through the coal district are in the valleys of the Tug and Big Sandy considerably to the south of the lines of the Chesapeake and separated from them by a range of mountains extending from near Matoaka 150 miles or more northwesterly where it ends not far from Huntington on the Ohio. The Norfolk's main line crosses that of the Chesapeake at Kenova on the south side of the Ohio some distance below Huntington and extends to the west where it has connections at Cincinnati and Columbus. The Virginian has main and branch lines in the easterly part of these coal fields but it has no line to the west. It connects with the Chesapeake at Deepwater, a station on the Kanawha, and with the Norfolk at Matoaka which is a little over the divide south of the valley of the Guyandot.

These railroads have long been competing carriers of coal from that district. The tonnage controlled by the Virginian is about one-seventh of that of the Norfolk and that of the latter is about 60 per cent. of that of the Chesapeake. In 1927, 47 coal mines were served by the Virginian alone. These are called local mines. And 55 were served by it and also by the Chesapeake. These are called joint mines. Such local and joint mines during the first nine months of that year produced and shipped coal via the Virginian at the rate of more than 12,000,000 tons per annum. And in that period the Virginian handed over to the Chesapeake at Deepwater and to the Norfolk at Matoaka coal for transportation to the west at the rate of more than 4,270,000 tons per annum, 80 per cent. of which moved via Matoaka.

Some years prior to the Virginian's application to build the proposed line the Commission required it to establish joint rates and through routes to the west via Deepwater, the Chesapeake and its connections, and also via Matoaka, the Norfolk and its connections.* The orders in that case covered only rates from a few specific origins on the Virginian. But the Chesapeake and the Virginian voluntarily established joint rates via Deepwater from all local mines on the Virginian and from such of the joint mines as were located between destinations and a local mine. The Chesapeake refused to establish rates from joint mines which were not intermediate because that would operate to short-haul itself. Similar joint rates were voluntarily established by the Virginian and Norfolk via Matoaka from all local and joint mines served by the Virginian.

The Chesapeake and the Norfolk are active competitors for transportation of coal originating on the Virginian and destined to the west. The line of the Virginian between its principal coal territory and Deepwater crosses three

* Wyoming Coal Co. v. Virginian Ry. Co., 96 I. C. C. 359. 98 I. C. C. 488. *Virginian Railway Co. v. United States*, 272 U. S. 658.

summits with heavy adverse grades against the loaded movement and heavier ones against the return movement. The Virginian's line to Matoaka has heavier adverse grades against the loaded movement than on its line to Deepwater. And on that route difficult grades are encountered on the Norfolk.

The line to be built by the Virginian down the Guyandot will have substantially no grades adverse to western movement. The Logan subdivision of the Chesapeake is a well-located low grade line along the lower stretches of that river, and it has capacity to handle efficiently all the west-bound traffic originating on the Virginian. The route to the west down the river to Gilbert and over the divide to Wharncliffe is 41 miles shorter than the route via Matoaka. The line to be built across the divide will have an adverse grade that will require doubling. But both of the proposed new routes will be better than either of the existing ones. The Chesapeake estimates that the cost per ton of handling coal over the new route via Gilbert and its Logan subdivision will be 1.69 cents per ton less than the cost via the Gilbert-Wharncliffe route. The Norfolk estimates that cost via the latter will be 14 cents per ton less than via the present Matoaka route. The Norfolk through a subsidiary controls large deposits of coal in the valley tributary to the new line of the Virginian. And there is a considerable deposit of coal that may be made tributary to the proposed Gilbert-Wharncliffe line.

There is need for a line to connect the railways on the upper Guyandot with the Logan subdivision of the Chesapeake in the lower valley. Its main functions will be to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and the Chesapeake in the upper valley and to carry the large tonnage of coal and lumber that may be developed tributary to the new line. The construction of the Gilbert-Wharn-

cliffe line will enable the Norfolk to compete with the Chesapeake for westbound traffic originating on the Virginian and will give the latter greater independence in respect of such shipments.

The construction of the line of the Virginian from the upper Guyandot to a connection with the Chesapeake at Gilbert would immensely improve the position of the latter in respect of the westbound movement of coal originating on the Virginian. It is also plain, indeed so obvious as scarcely to require statement, that the construction of the Gilbert-Wharneliffe connection is necessary in order to enable the Norfolk to continue, on conditions that are tolerable, to compete with the Chesapeake for that traffic. The construction of that connection cannot reasonably be regarded as an intrusion by the Norfolk into territory already being well-served by the Chesapeake. On the contrary the Norfolk already hauls about four-fifths of the Virginian's westbound coal. By this relatively short connection, it will be able to give a better outlet for that traffic, to make substantial saving in the cost of handling, and to remain in position, at relatively slight disadvantage, to compete for traffic in which it long has had a large share. And shippers will have the benefit of such competitive service.

But the Chesapeake insists that under the Transportation Act the Commission may not authorize new construction for the purpose of continuing such competition.

The Act cannot reasonably be so construed.

Section 1 (18) provides (Tit. 49, U. S. C.):

"No carrier by railroad . . . shall undertake the extension of its line of railroad, or the construction of a new 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 and operation, of such additional or extended line of railroad. . . ."

Section 1 (20) provides:

"The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion . . . of a line of railroad, or extension thereof, described in the application . . . and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. . . ."

There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry.*, 270 U. S. 266, 273.

Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. Indeed § 5 (4) of the Act, authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provides: "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained." And the Commission has recognized the advantages of competitive service to shippers especially in respect of a

diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. Construction of Lines in Eastern Oregon, 111 I. C. C. 3, 37. Construction of Line by Wenatchee Southern Ry., 90 I. C. C. 237, 257.

The facts stated in the report are sustained by the evidence and, under the Act, they are plainly sufficient to support the order.

Judgment affirmed.

UNITED STATES *v.* MUNSON STEAMSHIP LINE.

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

No. 85. Argued March 2, 1931.—Decided March 23, 1931.

1. A carrier by water need not file with the Interstate Commerce Commission its tariffs on interstate shipments initiated by rail if the rail and water carriage, though practically continuous, is not under a common control or management, or pursuant to a common arrangement between the rail and water carriers. Interstate Commerce Act, § 6 (1) (a). P. 46.
2. A common arrangement is not to be inferred from circumstances which are consistent with the independence permitted water carriers by the statute. P. 47.
3. A "common arrangement" did not exist in this case, where the water carrier, although it advised rail carriers of the sailings of its ships, of the place where goods would be received and of its charges for water transportation, and although it paid the rail charges on goods received and collected them, with its own charges, from ultimate consignees, nevertheless maintained the independence of its own transportation by having its separate rates, its separate contracts for transportation, and its direct instructions from shippers. *Id.*

4. The water carrier did not bring about a "common arrangement" with connecting rail carriers by publishing to railroads and shippers the method and terms of its services. P. 48.
37 F. (2d) 681, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court refusing a writ of mandamus sought by the Government at the request of the Interstate Commerce Commission to compel the Steamship Company to file schedules of rates.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston*, Special Assistant to the Attorney General, and *Erwin N. Griswold* were on the brief, for the United States.

The successive receipt and forwarding of freight in interstate commerce by two or more connecting carriers, under any arrangement by which they mutually facilitate continuous shipments over their lines in the same way as freight is transported on through bills of lading, is evidence of a common arrangement within the meaning of the statute. This view is supported by *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, and *Baer Bros. v. Denver & R. G. R. Co.*, 233 U. S. 479.

Mr. W. Calvin Chesnut, with whom *Messrs. Frank Lyon* and *Irving L. Evans* were on the brief, for respondent.

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

The Government instituted this proceeding, at the request of the Interstate Commerce Commission, under § 20, subdivision (9), of the Interstate Commerce Act,¹ for a mandamus to compel the Munson Steamship Line

¹ U. S. Code, Tit. 49, § 20 (9).

to file schedules covering rates and charges for transportation of goods by water from Baltimore, Maryland, to ports in Florida, upon the ground that the property was being transported partly by rail and partly by water under a common arrangement for continuous carriage and shipment from interior points to the Florida ports. The respondent's answer alleged that the transportation on its part consisted of an independent water movement with respect to which the filing of tariffs was not required. On a trial before the court and a jury, the District Judge directed a verdict for the respondent, 33 F. (2d) 211, and the judgment entered accordingly was affirmed by the Circuit Court of Appeals. 37 F. (2d) 681. The Government was granted a writ of certiorari.

The facts, as found by the courts below upon evidence substantially undisputed, may be summarized as follows: The respondent operates a line of steamers from Baltimore, Maryland, to Jacksonville and Miami, Florida. It accepts from rail carriers at Baltimore goods which have been transported from inland points and carries them to the Florida ports. The transportation is not covered by through bills of lading or by through or joint rates, and there is no agreement for the division, and no customary division, of rates between the respondent and the rail carriers. The goods are shipped by rail to Baltimore in care of, or with direction to notify, the respondent, and the name of the ultimate consignee in Florida is noted on the rail bill of lading. That bill shows Baltimore as the destination of the shipment. The shipper sends the rail bill of lading to the respondent with instructions as to the ultimate consignee. Upon the arrival of the goods at Baltimore, the rail carrier sends an arrival notice to the respondent; the latter advises the rail carrier of the ship which will transport the goods to Florida, and the goods are delivered to the respondent. The rail bill of lading is surrendered to the rail carrier, the charges of that carrier, unless they have been prepaid, are paid by the respond-

ent, which then issues its own bill of lading to the shipper, specifying its freight rate for the transportation of the goods by water from Baltimore to the point of destination in accordance with the separate advice which the respondent has received from the shipper. Upon delivery of the goods in Florida, the respondent collects from the consignee its own charges and also the rail charges which it has advanced, but the latter are collected, not as agent for or under any agreement with, the rail carrier, but because they have been advanced as an incident to the carrying out of the contract between the respondent and the shipper.

The question relates solely to the application of § 6 (1) of the Interstate Commerce Act providing for the filing of tariffs with the Interstate Commerce Commission. The requirement of the Shipping Act,² with which the respondent is said to have complied, as to filing tariffs with the United States Shipping Board, is not involved. Nor is any question presented under § 6 (13)³ of the Interstate Commerce Act, added by the Panama Canal Act.⁴ The provision of § 6 (1) of the Interstate Commerce Act applies to common carriers as these are described in § 1 of that Act, and the particular description with which we are here concerned is found in subdivision (1) (a) of that section relating to common carriers engaged in

“(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.”⁵

² U. S. Code, Tit. 46, § 817.

³ U. S. Code, Tit. 49, § 6 (13).

⁴ Act of August 24, 1912, c. 390, 37 Stat. 560, 568. See *Chicago, Rock Island & Pacific Ry. Co. v. United States*, 274 U. S. 29, 36; *United States v. New York Central R. Co.*, 272 U. S. 457, 462.

⁵ U. S. Code, Tit. 49, § 1 (1) (a). Compare Act of February 4, 1887, c. 104, § 1, 24 Stat. 379; Act of June 29, 1906, c. 3591, § 1, 34

The Government concedes that the respondent was not required to file tariffs with the Commission "unless it was engaged in continuous interstate rail and water shipments pursuant to a common control, management, or arrangement" and that "there was no common control or management between respondent and the connecting railroads." The question is thus the narrow one whether there was a "common arrangement" for the rail and water shipment within the meaning of the statute.

It is apparent that a mere practical continuity in the transportation is not enough, as the question under the statute is not simply whether there was a continuous carriage or shipment, but whether that carriage or shipment was pursuant to a common arrangement.⁶ The provision of the statute, expressing a distinction in the policy of the Congress with respect to water transportation, clearly indicates that it is permissible for a water carrier, receiving at its port a shipment which has been carried by rail from an interior point, to keep its own carriage distinct and independent. While a common arrangement may exist without the issue of a through bill of lading or any particular formality,⁷ it is not to be inferred from circumstances which are entirely consistent with the independence which the statute recognizes. In this instance, the facts show that the respondent undertook to maintain its own carriage as distinct and independent by having its separate contract, its independent rate, its direct instructions from the shipper as to its own transportation. The fact that the respondent advised the rail carrier of the

Stat. 584; Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544, 545; Transportation Act, 1920, § 400, 41 Stat. 456, 474.

⁶ See *Ex parte Koehler*, 30 Fed. 867, 869, 870; *Mutual Transit Co. v. United States*, 178 Fed. (C. C. A. 2d) 664, 666, 667.

⁷ *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 193; *Baer Brothers Mercantile Co. v. Denver & Rio Grande R. Co.*, 233 U. S. 479, 491.

sailings of its ships, the place where goods would be received, and the amount of its charges for the water transportation, manifestly did not constitute a common arrangement with the railroad for that transportation. The respondent could take delivery and pay the rail charges upon delivery without sacrificing its right to make, as it did make, its own separate contract directly with the shipper pursuant to which the goods were received and the payment made. The Government stresses the fact that circulars were issued by the railroads as to the respondent's method of shipping and that shippers were generally informed as to the way in which shipments from interior points destined to Florida ports would be handled. But this information merely gave the facts and did not alter the transaction. The respondent did not forfeit its independence merely by making its service convenient, still less by advising both the railroads and shippers of the terms of its service.

Judgment affirmed.

PHILIPPIDES *v.* DAY, COMMISSIONER OF IMMIGRATION.

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

No. 92. Argued March 2, 1931.—Decided March 23, 1931.

An alien who arrived in this country as a seaman after the effective date of the Immigration Act of 1924, and deserted, and who remained here longer than permitted by the regulations under that Act, may be deported after, as well as within, the three years after entry. P. 50.

37 F. (2d) 1015, affirmed.

CERTIORARI, 281 U. S. 716, to review a judgment refusing petitioner's discharge on habeas corpus.

Messrs. Thomas A. Kane and George C. Vournas submitted the cause for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner was arrested in New York on December 19, 1928, and after a hearing was ordered to be deported to Greece, on the ground that he had remained in the United States for a longer time than permitted under the Immigration Act of 1924 or the regulations made under it. He is a native of Greece; shipped from that country as a seaman and arrived at New York on September 10, 1925, when he deserted, and has remained in this country ever since, that is, for more than three years before the arrest. He sued out a writ of habeas corpus, setting up the Immigration Act of February 5, 1917, c. 29, § 34, 39 Stat. 874, 896, as a statute of limitation entitling him to remain. The writ was ordered to be dismissed by the District Court and the order was affirmed by the Circuit Court of Appeals for the Second Circuit. 37 F. (2d) 1015, citing *United States ex rel. Piccolella v. Commissioner of Immigration*, 36 F. (2d) 1022, which in turn cites *United States ex rel. Rios v. Day*, 24 F. (2d) 654. A contrary decision was reached by the Circuit Court for the Ninth Circuit in *Carr, Director of Immigration, v. Zaja*, 37 F. (2d) 1016, and writs of certiorari were granted by this Court.

Section 34 of the Act of 1917 provides that "any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, at any time

within three years thereafter, . . . be taken into custody" and upon the conditions there stated shall be deported. It may be assumed that under this statute the time within which a seaman can be arrested for deportation is limited to three years from the date of entry. But by the Immigration Act of May 26, 1924, c. 190, § 14, 43 Stat. 153, 162, "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act, or regulations made thereunder," is to be deported in the same manner as provided for in §§ 19, 20, of the Immigration Act of 1917. It is argued elaborately for the petitioner, and is conceded by the Government, that § 34 of the earlier Act is not repealed by the later one. See § 25 of the latter. For the purposes of this case we may assume this to be true, and that, in accordance with this § 25, the earlier Act § 34 is in force if not inapplicable. But we cannot accept the conclusion that deserting alien seamen are thereby made a favored class to be retained in this country when other aliens would be compelled to leave. "Any alien" in § 14 of the Act of 1924 includes alien seamen on its face and by the definition in § 28, *ibid.* It is obvious that the petitioner, whether he entered rightfully or wrongfully, remained in the United States longer than he was permitted to by the law. He deserted after the Act of 1924 was in effect. The regulations under §§ 15 and 19 allowed only sixty days to alien seamen permitted to enter. If he entered without permission he was not entitled to more. It seems to us too clear to need argument that the limitation of three years in § 34 of the Act of 1917 does not override or qualify the clear and definite terms of § 14 of the Act of 1924. Those terms must prevail. *Zurbrick v. Trinkoff*, 38 F. (2d) 811. *United States ex rel. Cateches v. Day*, 45 F. (2d) 142.

Judgment affirmed.

Opinion of the Court.

UNITED STATES EX REL. CATECHES *v.* DAY,
COMMISSIONER OF IMMIGRATION.

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

No. 336. Argued March 2, 1931.—Decided March 23, 1931.

Decided upon the authority of *Philippides v. Day*, *ante*, p. 48.
45 F. (2d) 142, affirmed.

CERTIORARI, 282 U. S. 817, to review a judgment affirming an order dismissing a writ of habeas corpus.

Mr. Harold Van Riper for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Dodds*, and *Messrs. Harry S. Ridgely*, and *Paul D. Miller* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case also arose in the Second Circuit, upon facts similar to those in No. 92, *ante*, p. 48. The petitioner arrived in this country in October, 1925, upon an Italian ship, deserted at once and since has been engaged in land employment. He was arrested May 8, 1929, and after hearing was ordered to be deported on the same ground as the petitioner in No. 92. A writ of habeas corpus was applied for alleging that the arrest was not made within three years from the date of entry. The writ was dismissed by the District Court and the order was affirmed by the Circuit Court of Appeals. A writ of certiorari was granted by this Court.

Judgment affirmed.

CARR, DIRECTOR OF IMMIGRATION, *v.* ZAJA.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 125. Argued March 2, 1931.—Decided March 23, 1931.

1. Alien *held* liable to deportation, on the authority of *Philippides v. Day*, *ante*, p. 48.
 2. Jurisdiction of this Court to review a judgment of the Circuit Court of Appeals is not defeated by the fact that the mandate of that court was issued and spread upon the records of the District Court.
- 37 F. (2d) 1016, reversed.

CERTIORARI, 282 U. S. 816, to review a judgment sustaining an order discharging Zaja on habeas corpus.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell*, *Assistant Attorney General Dodds*, *Messrs. Albert E. Reitzel* and *B. W. Butler*, Assistant Solicitors, Department of Labor, *Harry S. Ridgely*, and *Erwin N. Griswold* were on the brief, for petitioner.

Mr. Erwin I. Feldman, with whom *Mr. J. Edward Keating* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case raises the same question as No. 92, *ante*, p. 48, but, as stated in No. 92, was decided the other way by the Circuit Court of Appeals for the Ninth Circuit. Zaja is a Dalmatian, citizen of Jugo-Slavia. He shipped as a seaman upon an Italian ship and on its arrival at San Pedro, California, deserted the ship on January 25, 1925. He was arrested on October 4, 1928, more than three years after his entry, and after a hearing was ordered to be deported on the same ground as in No. 92. He obtained a

writ of habeas corpus and was ordered to be discharged from custody. 37 F. (2d) 1016. The judgment must be reversed for the reasons given in No. 92. It is objected that the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court and spread upon its records and that therefore the case is finished. But that does not defeat the jurisdiction of this Court. *The Conqueror*, 166 U. S. 110, 113. *Louisville & Nashville R. Co. v. Behlmer*, 169 U. S. 644, 648. Rule 45.

Judgment reversed.

FLYNN, EXECUTOR, *v.* NEW YORK, NEW HAVEN,
& HARTFORD RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF
CONNECTICUT.

No. 235. Argued March 12, 1931.—Decided March 23, 1931.

The Employers' Liability Act gives a right of action to the employee, or, in case of his death, to his personal representative for the benefit of the widow and children, and provides that no action shall be maintained unless commenced within two years from the day the cause of action accrued. *Held* that the right of the representative is derivative and depends upon the continuance of a right in the injured employee at the time of his death, so that where the right of the employee was extinguished before he died, by the lapse of the prescribed period, there was no right in his executor, on behalf of his widow and children. P. 56.

111 Conn. 196; 149 Atl. 682, affirmed.

CERTIORARI, 282 U. S. 821, to review a judgment in favor of the Railroad Company in an action under the Federal Employers' Liability Act.

Mr. William F. Geenty, with whom *Messrs. Thomas R. Fitzsimmons* and *William A. Bree* were on the brief, for petitioner.

The statute of limitations begins to run at the time of death. It is then, and not until then, that the cause of

action "accrues." *Reading Co. v. Koons*, 271 U. S. 58; *Chicago, B. & Q. R. Co. v. Wells-Dickey Tr. Co.*, 275 U. S. 161.

The Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies. It intends that in all cases there shall be but one recovery for the wrongful act, and that the dependents' right shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts. *Mellon v. Goodyear*, 277 U. S. 335, distinguished.

True, at the time of his death, the decedent had no right of action; but this was not due to an affirmative extinguishment of his right, but to lapse of time, affecting his right of action alone. *Seaboard Air Line Ry. Co. v. Oliver*, 261 Fed. 1.

The Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury, and based upon altogether different principles. The cause of action created for the benefit of the dependents of an employee who dies as a result of his injuries is not a representative right, but a separate and distinct right which is vested in certain designated dependents. It includes no damages which the employee might have recovered in an action brought by him during his lifetime. It is for the loss and damage sustained by the relatives dependent upon the decedent. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59; *St. Louis & I. M. Ry. Co. v. Craft*, 237 U. S. 648; *Mellon v. Goodyear*, 277 U. S. 335; *Robinson v. Canadian Pac. Ry.*, [1892] A. C. 481.

Mr. Edward R. Brumley, with whom *Mr. Fleming James, Jr.*, was on the brief, for respondent.

No right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident,

accrues to the personal representative of his estate. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 68; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 321; *Baltimore & O. S. W. R. Co. v. Carroll*, 280 U. S. 491, 494, 495; *Mellon v. Goodyear*, 277 U. S. 335; *Seaboard Air Line Ry. Co. v. Oliver*, 261 Fed. 1; *Northern Pac. Ry. Co. v. Adams*, 192 U. S. 440; *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S. 1; *Engel v. Davenport*, 271 U. S. 33; *Louisville & St. L. R. Co. v. Clarke*, 152 U. S. 230; *American Railroad v. Didricksen*, 227 U. S. 145, 149; *Reading Co. v. Koons*, 271 U. S. 58; *British Columbia E. Ry. v. Turner*, 49 Can. S. C. R. 470, 496; *British Elec. Ry. Co. v. Gentile*, [1914] A. C. 1034, 1042; *Chicago, B. & Q. R. Co. v. Wells-Dickey Tr. Co.*, 275 U. S. 161; *Littlewood v. Mayor*, 89 N. Y. 24; *Williams v. Alabama G. S. Ry. Co.*, 158 Ala. 396; *Green v. British Col. Elec. Ry. Co.*, 12 British Col. Rep. 199; *Rodgers v. Pennsylvania R. Co.*, 19 F. (2d) 522; *Roberts'*, *Federal Liabilities of Carriers*, 2d. ed., §§ 900 and 957; *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U. S. 648; *Tiffany*, *Death by Wrongful Act*, 2d ed., § 24; *Williams v. Mersey D. & H. Board*, [1905] 1 K. B. 804; *Kelliher v. New York Cent. & H. R. R. Co.*, 212 N. Y. 207; *Seaboard Air Line Ry. Co. v. Allen*, 192 Fed. 480, certiorari denied, 226 U. S. 612; *Western Union v. Preston*, 254 Fed. 229, certiorari denied, 248 U. S. 585; s. c. 246 Fed. 543, 250 Fed. 480.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit under the Employers' Liability Act for negligently causing the death of Edward L. Flynn, brought on May 15, 1929, by Flynn's executor for the benefit of Flynn's dependent widow and children. It is alleged that the injury was suffered on December 4, 1923, and that it caused Flynn's death on September 1, 1928.

The defendant, respondent here, demurred to the declaration on the ground that, more than two years having elapsed since the date when Flynn's cause of action accrued, his right to sue was barred, and that therefore the suit could not be maintained. Act of April 22, 1908, c. 149, §§1, 6, 35 Stat. 65, 66. Act of April 5, 1910, c. 143, § 1, 36 Stat. 291. Code, Tit. 45, §§ 51, 56. The demurrer, and judgment for the defendant, were sustained by the Supreme Court of Connecticut. 111 Conn. 196; 149 Atl. 682. A writ of certiorari was granted by this Court. 282 U. S. 821.

The Act of 1908 gives a right of action to the employee or, in case of his death, to his personal representative for the benefit of the widow and children, and provides that no action shall be maintained "unless commenced within two years from the day the cause of action accrued." § 6. Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 70. On this ground an effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U. S. 335, 344. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U. S. 33, 38, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this Court.

Judgment affirmed.

Argument for Appellant.

STORAASLI v. MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 393. Submitted February 25, 1931.—Decided March 23, 1931.

1. When the question is involved in a claim of right under the Federal Constitution, this Court must decide for itself whether a state tax is a property or a privilege tax. P. 62.
2. A Minnesota statute requiring registration of motor vehicles, display of number plates, etc., provides that the vehicles shall be privileged to use the public streets and highways upon payment of specified annual rates, which are in lieu of all other taxes thereon except wheelage taxes by municipalities, and which are measured generally by cost of vehicle less allowance for depreciation, a minimum, however, being fixed for cars of certain weights. *Held* that the tax is a privilege tax. P. 62.
3. As applied to an army officer, claiming to be a nonresident of the State, who resides on a federal military reservation in Minnesota and has registered his car and acquired a license and license plates therefor under and pursuant to regulations enforced on the reservation by its commandant, the tax does not violate the equal protection clause either (a) because the statute exempts residents from payment of property taxes on their cars or (b) because it allows residents of other States or countries, whose cars have been registered at home and bear the home license plates, to operate them on Minnesota highways for a time without paying the tax. P. 62.

180 Minn. 241; 230 N. W. 572, affirmed.

APPEAL from a judgment sustaining a motor vehicle tax. The proceeding was begun by a notice of the tax with demand for payment. Judgment was entered on this and the taxpayer's answer.

Messrs. Charles Bunn and Pierce Butler, Jr., were on the brief for appellant.

The automobile in question is not subject to be taxed as property, yet the tax is a property tax. *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346; *Quaker City Cab Co. v.*

Pennsylvania, 277 U. S. 389; *Hanover Ins. Co. v. Harding*, 272 U. S. 494; *Surplus Trading Co. v. Cook*, 281 U. S. 647; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525; *Arlington Hotel Co. v. Fant*, 278 U. S. 439. Distinguishing: *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160.

Even regarded as a privilege tax, the tax denies to the appellant the equal protection of the laws by imposing on him a greater burden than is imposed on residents of Minnesota. *Walling v. Michigan*, 116 U. S. 446; *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60; *Bethlehem Motors Corp. v. Flynt*, 256 U. S. 421; *Hanover Ins. Co. v. Harding*, 272 U. S. 494; *Terral v. Burke Const. Co.*, 257 U. S. 529.

It is well settled by the state decisions that as to residents this tax is in part at least a property tax. *State v. Peterson*, 159 Minn. 269; *State v. Oligney*, 162 Minn. 302; *Raymond v. Holm*, 165 Minn. 215; *American Ry. Ex. Co. v. Holm*, 173 Minn. 72.

Regarded as a privilege tax, it denies to appellant the equal protection of the laws by imposing on him a greater burden than is imposed on residents of neighboring States. A resident of the Reservation who so much as runs his car across the boundary line into Minnesota and back again must pay the total tax. The discrimination against appellant is clear and is not justified by differences of fact. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Kansas City So. Ry. v. Road Imp. Dist.*, 256 U. S. 658; *Air Way Corp. v. Day*, 266 U. S. 71; *Hopkins v. Southern Cal. Tel. Co.*, 275 U. S. 393; *Louisville Gas Co. v. Coleman*, 277 U. S. 32; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389.

Messrs. Henry N. Benson, Attorney General of Minnesota, *James E. Markham*, Deputy Attorney General, and *W. K. Montague*, Assistant Attorney General, were on the brief for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

By chapter 57 of the General Laws of Minnesota of 1889, that State ceded to the United States jurisdiction of the territory constituting the Fort Snelling Military Reservation, which lies entirely within the boundaries of Minnesota, immediately adjacent to the city limits of Minneapolis and St. Paul. Its greatest length from north to south is three and three-quarters miles, and from east to west two miles. The cession was upon condition that the public highways across the reservation be kept open for public traffic. Concurrent jurisdiction to serve process, civil and criminal, of the State, and to arrest persons charged with offenses against the laws of the State, was retained. There was no other limitation.

The reservation is occupied by the military forces of the United States, and, save as above noted, jurisdiction therein is exercised by the Federal Government to the exclusion of the State.

The Constitution of Minnesota provides¹ that a member of the military forces of the United States shall not be deemed a resident of the State as a consequence of being stationed within its borders. It also grants² to the legislature power to tax motor vehicles using the public streets and highways of the State on a more onerous basis than other personal property, such tax to be in lieu of all other taxes thereon, except wheelage taxes, so called, which may be imposed by any borough, city or village. Any such law may, in the discretion of the legislature, provide for the exemption from taxation of any motor vehicle owned by a nonresident transiently or temporarily using the streets and highways of the State. The proceeds of such tax are to be paid into the Trunk Highway Sinking Fund.

¹Art. 7, § 4.

²Art. 16, § 3.

By virtue of this constitutional authority, the legislature enacted a law providing for the imposition of a motor vehicle registration tax.³ Pursuant to the statute, the Secretary of State filed in the office of the clerk of the district court of Ramsey County a list of motor vehicles on which the tax and penalty for 1929 appeared delinquent. The appellant's automobile was included in the list. Appellant filed answer to the notice, denying that any tax or penalty was due the State; alleging that he was the sole owner of the vehicle, was a nonresident of the State of Minnesota, a member of the military forces of the United States quartered and resident upon the Fort Snelling Reservation, that the vehicle had not been operated for hire, nor been present within the jurisdiction of Minnesota upon its roads, highways or streets for any period of ten days, and was never operated thereon, except as a visitor for brief periods.

After averring that the reservation is solely under the control of the United States and that all governmental functions, including police power, traffic control, and maintenance of highways, are vested in and exercised by the commanding officer under the laws of the United States, to the total exclusion of control by the State, and that the reservation is no part of the State of Minnesota, the answer states that the commanding officer has created and maintains, pursuant to his powers, a complete system of automobile registration, with rules and regulations, and that the vehicle in question is duly registered under such laws and regulations and has license plates and a registration certificate issued by federal authority, which has at all times been carried. It asserts appellant's willingness and ability to comply with all the laws of Minnesota applicable to nonresidents who have occasion to use its roads and streets, and that he has so notified the state officials,

³ Mason's Minn. Stat. 1927, §§ 2672-2704, incl., as amended S. L. 1929, c. 335.

and has complied with all the traffic laws and regulations of the State when operating upon its highways.

On appellee's motion, judgment was entered on the pleadings for the tax and penalty. Upon appeal, the Supreme Court of Minnesota affirmed the judgment.⁴ The appellant brought the case to this Court, having at all stages in the courts below asserted rights under the Fourteenth Amendment, which were passed on and determined adversely to his contentions. He claims that the tax in question is a property tax, and that the State may not tax property located on the Fort Snelling Reservation. In the alternative he says, if the act levies a privilege tax, as applied to him, it deprives him of equal protection of the laws by imposing upon him a greater burden than that laid on residents of Minnesota, or residents of neighboring States.

The argument that the tax is one on property is founded on the fact that it is measured by the cost of the motor car (less certain annual allowances for depreciation), and that it is in lieu of all other taxes thereon except wheelage taxes levied by municipalities.⁵ It is to be remarked, however, that a minimum tax is prescribed for cars of certain weights, irrespective of value; that the act levies the tax on vehicles "using the public streets or highways in the State"; and provides that they "shall be privileged to use the public streets and highways on the basis and at the rates for each calendar year as follows . . ."⁶

The state court held that "the tax is both a property tax and a privilege tax. It is a property tax in the sense that it exempts the vehicle licensed from other taxation as property. It is in lieu of other taxes. But it is equally clear that it is a privilege tax. . . . The character of a privilege tax extends to the whole of the tax."

⁴ 180 Minn. 241; 230 N. W. 572.

⁵ Mason's Minn. Stat. 1927, § 2674.

⁶ *Ibid.*

This Court, while bound by the state court's decision as to the meaning and application of the law, decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights. We think it plain that the levy is an excise for the privilege of using the highways.

It is denominated a privilege tax. The car cannot use the highways unless it is paid. The statute contains the usual provisions for registration, issuance and display of number plates, &c.⁷ Residents of other States who desire to use the highways for more than the period specified in certain sections extending the privilege, must register their vehicles and pay the same tax as residents of Minnesota.⁸ The claim that the State is attempting to tax appellant's property situate without its jurisdiction cannot be sustained.

Viewed as imposing a privilege tax, the statute is alleged to discriminate against appellant in favor of residents, because it exempts vehicles licensed under it from payment of property taxes. But the exemption is a proper and lawful one, and appellant cannot make out a discrimination against him from the mere fact that he is not in a position to claim it. Doubtless in the case of every taxing act which creates exemptions there are those who cannot bring themselves within the exempt class, but this does not deprive them of the equal protection of the law.

Finally, appellant says the act accords certain privileges to residents of neighboring States, which are denied to him, and hence the law operates unequally as against him. The section of the statute to which he refers provides that vehicles owned by nonresidents, properly registered in the country or State of the owner, and carrying license number plates of such State, are authorized to use Minnesota

⁷ *Ibid.*, § 2675.

⁸ Mason's Minn. Stat. 1927, § 2684.

highways for ten days without registration or tax, and upon making proper filing with the Registrar of Motor Vehicles within the ten-day period, are authorized to use the highways of the State for a total period of ninety days without any payment whatever.⁹ Appellant says that, as he is a nonresident of Minnesota, has registered his car in the Fort Snelling Reservation, as required by the authorities thereof, carries license number plates issued by such authorities, and has offered to make proper filing in Minnesota, to refuse him the privilege accorded to other nonresidents deprives him of the equal protection of the law.

But, as was pointed out in *Kane v. New Jersey*, 242 U. S. 160, the absence of any such provision in favor of nonresidents, would not render the law discriminatory. A resident of the State who desires to operate his car for a single day is liable for the entire year's tax. If the State determines to extend a privilege to nonresidents, it may with propriety limit the concession to those who have duly registered their vehicles in another State or country. The mere fact that appellant has not so registered his car and cannot, therefore, bring himself within the class benefited by the exemption, does not create a discrimination against him. The State was not bound to make a classification with respect to exemptions for him and those similarly situated. Nothing said in *Hendrick v. Maryland*, 235 U. S. 610, establishes any such principle. Nor are the authorities which forbid a difference in the method of calculating the amount of the tax itself depending solely on the fact of residence within or without the State relevant to the issue in this case.¹⁰ We

⁹ *Ibid.*

¹⁰ *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60; *Bethlehem Motors Corp. v. Flynt*, 256 U. S. 421; *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494.

find no improper classification or discrimination. The judgment is

Affirmed.

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

UNITED STATES *v.* UTAH.

No. 14, original. Argued February 25, 26, 1931.—Decided April 13, 1931.

1. The United States sued the State of Utah to quiet title to land forming the beds of certain sections of the Colorado River and tributaries thereof within the State. Utah claimed title upon the ground that the streams, at the places in question, are navigable waters of the State. *Held:*

(1) In accordance with the constitutional principle of the equality of States, the title to the beds of rivers in Utah passed to that State when it was admitted to the Union, January 4, 1896, if the rivers were then navigable; and, if they were not then navigable, it remained in the United States. P. 75.

(2) The question of navigability is a federal question. *Id.*

(3) This is so, although it is undisputed that the portions of the rivers under consideration are not navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah. *Id.*

(4) In view of the physical characteristics of the rivers in question, findings and conclusions as to navigability are properly confined to the particular sections to which the controversy relates. P. 77.

(5) The crucial question—a question of fact—is whether these stretches of river in their ordinary condition and at the time of the admission of the State, were susceptible of use as highways of commerce. P. 82.

(6) To this question, evidence of actual navigation, after as well as before the admission of the State, is relevant. *Id.*

(7) But where the actual navigation of a stream has been infrequent and of limited nature, and this is explained by conditions

of exploration and settlement, its navigable capacity may be shown by its physical characteristics and by experimentation, as well as by the uses to which it has been put. P. 82.

(8) The State is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of its admission, either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. P. 83.

(9) The evidence sustains the master's conclusion that certain sections of the Grand, Green and Colorado Rivers, despite impediments such as sand-bars, floods, driftwood, etc., are navigable; and his conclusion that another section of the Colorado River is non-navigable, is likewise sustained, except as to a small part of that section, which is shown to be navigable. Pp. 84, 89.

2. The inclusion of part of the Colorado River in Utah within the boundaries of an Indian reservation by an Executive Order which was made, and *pro tanto* revoked, before the admission of the State, is not proof that the river there was non-navigable. P. 88.
3. Where a decree in a suit to quiet title brought by the United States against a State adjudges that certain stretches of river are navigable and that their beds belong to the State, and that other stretches are non-navigable and that their beds belong to the United States, it is proper, though not necessary, to insert a proviso that the United States shall in no wise be prevented from taking any such action in relation to said rivers or any of them as may be necessary to protect and preserve the navigability of any navigable waters of the United States. P. 90.

THIS was an original suit by the United States to quiet title to land constituting the beds of described portions of the Colorado River and its tributaries the San Juan, Green and Grand Rivers, where they flow in Utah. The hearing was upon exceptions to the findings of the Special Master with respect to the Green, Grand and Colorado. His finding that the San Juan is non-navigable, as claimed by the Government, was not challenged here by the State. Another finding of non-navigability, covering a stretch of

the Colorado below the union of the Grand and Green, was also acquiesced in by the State save for a length of 4.35 miles immediately below that confluence. (The Grand River has been re-designated, as the Colorado, by Congress.)

Mr. Charles M. Blackmar, with whom *Solicitor General Thacher* and *Messrs. Randolph S. Collins* and *Samuel H. Moyer* were on the brief, for the United States.

The State of Utah was admitted into the Union on January 4, 1896. If the rivers were not then navigable, the title to the beds remained in the United States.

The question whether the rivers were navigable is federal.

In determining the issue of navigability, the history of a river as to early use by fur traders, emigrants, merchants, etc., is entitled to great weight. The San Juan, Green, and Colorado Rivers, in Utah, were not used by the pioneers as highways. Such lack of use in the days of difficult overland travel is weighty evidence of non-navigability. The head of navigation of the Colorado was far below Lees Ferry, Arizona. For the legal tests of navigability, see *The Daniel Ball*, 10 Wall. 557-563; *The Montello*, 11 Wall. 411-414; s. c., 20 Wall. 430, 441-442; *Packer v. Bird*, 137 U. S. 601; *United States v. Cress*, 243 U. S. 316; *St. Anthony Falls W. P. Co. v. Board of Commissioners*, 168 U. S. 349; *Economy Light & Power Co. v. United States*, 256 U. S. 113; *United States v. Holt State Bank*, 270 U. S. 49; *United States v. Rio Grande D. & I. Co.*, 174 U. S. 690; *Leovy v. United States*, 177 U. S. 621; *Donnelly v. United States*, 228 U. S. 708; s. c., 228 U. S. 243; *Harrison v. Fite*, 148 Fed. 781, 784; *North American Dredging Co. v. Mintzer*, 245 Fed. 297; *Mintzer v. North American Dredging Co.*, 242 Fed. 553; *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 Fed. 680;

Gulf & I. Ry. Co. v. Davis, 26 F. (2d) 930, affirmed, 31 F. (2d) 109; *Oklahoma v. Texas*, 258 U. S. 574; *Brewer-Elliott Oil Co. v. United States*, 260 U. S. 77.

The rule of navigability for rivers is the same whether the question is one of navigable waters of the United States, or one of title. This Court has cited the cases interchangeably, without distinction when the issue was navigability.

No lake or stream has been declared navigable by this Court unless it appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce. The outstanding thought in all of these cases was the use of the stream or lake as a highway of commerce.

In all such cases before this Court there was evidence of varying degrees of actual operation of boats both privately and for profit. This Court has never held that the mere operation of small boats, although commercially in some cases, was sufficient evidence to constitute a river a highway of commerce. So of decisions of the lower federal courts.

Physical characteristics of a river are given great weight and must be considered in determining its navigability. These rivers can not be used as highways of commerce in Utah. During most months of the year their stream-flow changes greatly from day to day; they carry a large amount of sand and silt which form sand bars; and the tortuous courses of the rivers, and their changing velocity and volume, cause the bars to change in size and shape from day to day. Because of these and other conditions, these streams are not navigable within the State.

The words "commerce" and "useful commerce," as used in cases where navigability was the issue, must be interpreted as meaning the exchange and transportation of goods and a use of travel by the general public for com-

mercial purposes. Personal use without the commercial element does not satisfy the test. The test can only be met by showing navigation of such proportions that the river may be truly said to be a highway of commerce.

Cases arising under the commerce clause of the Constitution and statutes passed pursuant thereto are not helpful in understanding the word "commerce" when used as a test of navigability. The shipment of goods from one State to another partly by use of an impracticable river may be interstate commerce, but considering the difficulties under which it is accomplished, it may not be "useful commerce," when navigability is the issue.

Distinguishing: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *United States v. Hill*, 248 U. S. 420, 423; *Thornton v. United States*, 271 U. S. 414, 424; *Federal Trade Comm. v. Pacific States Paper Assn.*, 273 U. S. 52.

On the rivers in question the uses have been more of a private nature than of a public commercial one.

Cases decided by this Court, holding rivers to be navigable, may be summarized with the statement that in no case has a river been held navigable where commercial navigation by the public upon a substantial scale was not shown.

On the other hand, no decision suggests or intimates that proof of navigability may rest upon evidence that the river was used for floatage for noncommercial purposes, or for pleasure boats, or by a limited use of small boats commercially or semi-commercially. In every one of the cases where the courts have held the streams or lakes to be non-navigable there has been proof of noncommercial navigation, and in many of them proof of a limited commercial navigation.

The evidence amply establishes that the commercial experiments upon the river have resulted in failure and abandonment. Commerce in boats can hardly be said to

be "practical," "useful," or of "any service," unless attended with some degree of profit. A river can not become a "highway of commerce," unless those who operate boats can accomplish trips with sufficient profit to themselves to warrant continuance; and this is especially true when the rivers possess characteristics which will in the future interfere with river traffic as much as they have in the past.

This Court did not speculate on future commerce in *Oklahoma v. Texas, supra*; or in *Brewer-Elliott Oil Co. v. United States, supra*. And see *Gulf & I. Ry. Co. v. Davis*, 26 F. (2d) 930, 933, affirmed, 31 F. (2d) 109; *United States v. Holt State Bank*, 270 U. S. 49, 55; *Mintzer v. North American Dredging Co.*, 242 Fed. 553, 560, 561.

Mr. P. T. Farnsworth, Jr., with whom *Messrs. George P. Parker*, Attorney General of Utah, *Waldemar Van Cott*, *George D. Parkinson*, and *William A. Hilton* were on the brief, for the State of Utah.

The United States seeks to avoid the clear and unambiguous statement of the law in *The Daniel Ball*, 10 Wall. 557, and in succeeding cases by construing cases like *United States v. Rio Grande D. & I. Co.*, 174 U. S. 690, and *Oklahoma v. Texas*, 258 U. S. 574, as in effect holding that, in order that a river may be navigable, its actual use in commerce must be frequent—that if navigation is only occasional, it is not navigable. Those cases stand for no such proposition. As construed by the United States, the words "or susceptible of being used," which are always found in this Court's definition of navigability, are surplusage. An analysis of any decision rendered by this Court, wherein a river has been declared non-navigable because of the nature of its use in commerce, will reveal that the conclusion was based upon the fact that the river's susceptibility to such use was "exceptional" or only "occasional."

The evidence conclusively establishes the navigability in fact and in law of all stretches of river flowing over the

beds here in controversy outside Cataract Canyon. The witnesses have testified without contradiction that they navigated these streams at all seasons of the year, at flood and at normal stage, at high and at low water. Some describe difficulties encountered, but they reached their destination. Women and children have successfully and without mishap piloted boats along stretches of the rivers where some of the plaintiff's witnesses say they encountered most trouble in navigating.

The Red, Arkansas and Rio Grande were held to be non-navigable because, and only because, the periods during which they were susceptible to navigation were exceptional, temporary periods of high water.

We find no language in any decision of this Court intimating that the only "public" use of a stream is that by one engaged in transportation for hire, or that the only commerce on a stream is from a use of the stream which directly involves barter and sale. Cf. *Railroad Co. v. Fuller*, 17 Wall. 560.

The fact that they constitute a present or potential highway for the "public" gives to them their public status. The farmer, artisan, fisherman, lumberman, etc., have navigation rights equal to those of one engaged in barter and sale. No single trade has a monopoly of the use of navigable waters, nor is it necessary that people engaged in any particular trade use such waters, in order to make them navigable in law. *The Montello*, 20 Wall. 430; *The Nymph*, 18 Fed. Cas. 506; *Beall v. Beck*, 2 Fed. Cas. 111.

The most important industry of "trade" in Utah is and has been mining. In the case at bar we have uncontradicted evidence of the actual use of all three of the rivers in question in mining, beginning at a time long prior to statehood, and thereafter. There is uncontradicted evidence of like use of the rivers by trappers engaged in the fur trade. There is evidence of use of certain

sections in the lumber, oil and other trades. Others have engaged in the trade or vocation of hauling freight and passengers for compensation. From the viewpoint of those living in this sparsely settled section, the use of these rivers in trade and travel has been very considerable.

Obviously each of the various uses to which these rivers have been put, is "commerce." We can think of no lawful commerce that is not "useful commerce."

Even if it appeared from the evidence that the stretches of river here involved had never been navigated at any point during all of their history, we submit that those sections would be navigable in law and the beds thereof would belong to the State of Utah.

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

The United States brought this suit to quiet its title to certain portions of the beds of the Green, Colorado and San Juan Rivers within the State of Utah, as follows:

The Green River, from a point where the river crosses the line between townships 23 and 24 South, Range 17 East, Salt Lake Base and Meridian (approximately the mouth of the San Rafael River) down to the confluence of the Green River with the Colorado River, 95 miles;

The Colorado River from the mouth of Castle Creek (about 14 miles above the town of Moab) to the boundary line between Utah and Arizona, 296 miles (including the portion of the Colorado River above the mouth of the Green River which had formerly been known as the Grand River);

The San Juan River from the mouth of Chinle Creek (5 miles below the town of Bluff) to its confluence with the Colorado River, 133 miles.

The complaint alleges that by the Guadalupe-Hidalgo Treaty of February 2, 1848,¹ the United States acquired

¹9 Stat. 922.

from the Republic of Mexico the title to all the lands riparian to these rivers, together with the river beds, within the State of Utah, and that the United States remains the owner of these lands, with certain stated exceptions of lands granted by it; that the Green, Colorado and San Juan Rivers throughout their entire length within the State of Utah are not and never have been navigable, and that they have not been used, nor are they susceptible of being used, in their natural and ordinary condition as permanent highways or channels for useful commerce within the State of Utah or between States or with any foreign nation; that the United States, as proprietor, has executed and delivered numerous prospecting permits covering portions of the river beds in question, giving to the permittees the exclusive right of prospecting for petroleum, oil and gas minerals, and that the permittees have entered upon development work; that the State of Utah claims title adverse to the United States in these river beds, asserting that the rivers always have been and are navigable and that title to the river beds vested in the State when it was admitted to the Union; and that Utah, without the consent or authority of the United States, has executed and delivered numerous oil and gas leases covering portions of these river beds and purporting to give exclusive rights and privileges. The United States asks that the claim of Utah to any right, title, or interest in the river beds in question be adjudged to be null and void, that it be determined that the United States has full and exclusive title thereto, and that injunction issue accordingly.

By its answer, Utah denies ownership by the United States of the river beds described in the complaint and sets up title in the State, alleging the navigability of the rivers.

The Court referred the case to Charles Warren as Special Master to take the evidence and to report it with his findings of fact, conclusions of law, and recommendations for decree. Hearings have been had before the Master, voluminous evidence has been received, and the Master

has filed his report. The report gives a comprehensive statement of the facts adduced with respect to the topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce.

A distinction in descriptive terms should be noted. When Utah became a State, the Grand River, rising in Colorado and flowing through that State and within Utah to the junction with the Green River, was designated on all government maps and reports as separate from the Colorado River, and the name Colorado River was applied only to the river formed by the confluence of the Green River and the Grand River. The Congress, by the Act of July 25, 1921,² provided that the river theretofore known as the Grand River, from its source in Colorado to the point where it joined the Green River in Utah and formed the Colorado River, should thereafter be designated as the Colorado River. Considering that this Act had no retroactive effect, and as it expressly provided that the change in name should not affect the rights of Colorado and Utah, the Master has followed in his report the earlier designations and thus has dealt with four rivers, the beds of which are in question instead of three; that is, the Green River, the Grand River, the Colorado River (below the junction of the Green and Grand) and the San Juan River.

The Master has made his findings as to navigability as of January 4, 1896, the date of the admission of Utah to the Union.³ The Master finds that at that time the following streams in question were navigable waters of Utah: the Green River, from a point where the river crossed the township line between townships 23 and 24 South, Range 17 East, Salt Lake Base and Meridian down to its confluence with the Grand River (about 95 miles); the Grand River, from the mouth of Castle Creek down to the confluence of the Grand River with the Green

² 42 Stat. 146.

³ 29 Stat. 876.

River (about 79 miles); and the Colorado River, from Mile 176 above Lees Ferry south to the Utah-Arizona boundary (about 150 miles); and that the following streams were non-navigable waters of Utah: the Colorado River, south from the confluence of the Green and the Grand Rivers down to the end of Cataract Canyon at Mile 176 above Lees Ferry (about 40 miles); and the San Juan River from the mouth of Chinle Creek at Mile 133 above the confluence of the San Juan River and the Colorado River down to the mouth of San Juan River.

On these findings, the Master has concluded that the title to the beds of the rivers, where the rivers were found to be navigable, as above stated, was in the State of Utah, and, where the rivers were found to be non-navigable, was in the United States. Accordingly, the Master has recommended that the Court enter a decree dismissing the complaint so far as it relates to the bed of the Green River, to that portion of the bed of the Colorado River which in 1896 constituted the Grand River, and to that portion of the bed of the Colorado River from Mile 176 above Lees Ferry south to the Utah-Arizona boundary; and that the Court decree that the title to the bed of the Colorado River, from the confluence of the Green River with the Grand River down to the end of Cataract Canyon at Mile 176 above Lees Ferry, and to the bed of the San Juan River, was vested in the United States on January 4, 1896 (except so far as theretofore granted by the United States), and that Utah be enjoined from asserting title or interest therein.

Both parties have filed exceptions to the Master's report.

Neither party excepts to the finding and conclusion with respect to the non-navigability of the San Juan River, or of the Colorado River from the first rapid or cataract at Mile 212.15 above Lees Ferry down to the end of Cataract Canyon at Mile 176 above Lees Ferry.

The United States has a large number of exceptions to the findings and conclusions of the Master as to the navi-

gability of the Green River, and of the Grand River down to its junction with the Green River, and of the Colorado River from Mile 176 above Lees Ferry to the Utah-Arizona boundary.

Utah excepts to the findings and conclusion of the Master as to the non-navigability of the Colorado River from the confluence of the Green River and the Grand River at Mile 216.5 above Lees Ferry down to the first rapid or cataract at Mile 212.15 above Lees Ferry.

The controversy is with respect to certain facts, and the sufficiency of the basis of fact for a finding of navigability, rather than in relation to the general principles of law that are applicable. In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States.⁴ The question of navigability is thus determinative of the controversy, and that is a federal question. This is so, although it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah.⁵ State laws⁶ cannot affect titles vested in the United States.⁷

⁴ *Shively v. Bowlby*, 152 U. S. 1, 26, 27; *Scott v. Lattig*, 227 U. S. 229, 242, 243; *Donnelly v. United States*, 228 U. S. 243, 260; *Oklahoma v. Texas*, 258 U. S. 574, 583; *United States v. Holt State Bank*, 270 U. S. 49, 55; *Massachusetts v. New York*, 271 U. S. 65, 89.

⁵ See *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 11 Wall. 411, 415.

⁶ In 1927, the Utah legislature passed an act declaring "the Colorado River in Utah and the Green River in Utah" to be navigable streams. Laws of Utah, 1927, p. 8.

⁷ *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 87; *United States v. Holt State Bank*, 270 U. S. 49, 55, 56.

The test of navigability has frequently been stated by this Court. In *The Daniel Ball*, 10 Wall. 557, 563, the Court said: "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." In *The Montello*, 20 Wall. 430, 441, 442, it was pointed out that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation," and that "it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway." The principles thus laid down have recently been restated in *United States v. Holt State Bank*, 270 U. S. 49, 56, where the Court said:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and 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 further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flat-boats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."⁸

⁸ See also *Packer v. Bird*, 137 U. S. 661, 667; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S.

In the present instance, the controversy relates only to the sections of the rivers which are described in the complaint, and the Master has limited his findings and conclusions as to navigability accordingly. The propriety of this course, in view of the physical characteristics of the streams, is apparent. Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends.⁹ The question here is not with respect to a short interruption of navigability in a stream otherwise navigable,¹⁰ or of a negligible part, which boats may use, of a stream otherwise non-navigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability, which the Master's report fully describes.

The Green River has its source in the mountains of western Wyoming and has a total length of about 700 miles. After passing through a series of canyons, the rock walls of which are of great height, it enters the Green River valley in which the town of Green River, Utah, is situated, about 117 miles above the river's mouth. The drop in elevation between the town of Green River, Wyoming, and Green River, Utah, is from 6067 to 4046 feet,—2021 feet in 387 miles, causing many difficult and dangerous rapids. For the first 23 miles below the town of Green River, Utah, to the point where the San Rafael River enters from the west, the country is more or less open. From

690, 698; *Leovy v. United States*, 177 U. S. 621, 627; *Donnelly v. United States*, 228 U. S. 243, 260, 708, 709; *United States v. Cress*, 243 U. S. 316, 321; *Economy Light & Power Co. v. United States*, 256 U. S. 113, 122, 123; *Oklahoma v. Texas*, *supra*; *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*.

⁹ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 698.

¹⁰ *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, *supra*; *Economy Light & Power Co. v. United States*, *supra*.

the mouth of the San Rafael River (approximately the beginning of the section to which the controversy relates) to the junction of the Green and Grand Rivers, there is a very gradual slope, there being a drop of 111 feet in the 94 miles. In this section the river flows through Labyrinth and Stillwater Canyons, the rock walls of which in many places rise almost vertically from the water's edge, and in other places are over a thousand feet apart, with heights of 600 to 1300 feet. The average width of the river is from 500 to 700 feet. In four or five places there are bottom lands along the side in the Canyons. The course of the river is tortuous, the distance (in this section) in a straight line being less than one-half that by the river. The Government maintains gauging stations to measure the depth, the velocity and the amount of discharge of water. On the Green River the gauge was located at or near the town of Green River, Utah. From these measurements the Master finds that the depth of the Green River ranged from between $1\frac{1}{2}$ and 3 feet for 53 days in the year to between 7 and 12 feet for 60 days, and that for 312 days in the year there was a depth of 3 feet or over. For 290 days in the year there was a discharge of over 2000 cubic feet per second, and, for 149 days, of over 4200 cubic feet per second.

The Grand River rises in north-central Colorado and flows to its junction with the Green River in Utah, approximately about 423 miles. Its course is through a succession of long, narrow, fertile valleys, alternating with deep canyons, with walls, in places, of over 2,000 feet in height. There are many difficult and dangerous rapids. The total drop from Grand Junction, Colorado, to Castle Creek, Utah (where the section in controversy begins) is from 4,552 feet in elevation to 3,993 feet, a drop of 559 feet in 94 miles. From Castle Creek to the town of Moab, 14 miles, the slope averages 3.5 feet per mile, and there are slight rapids or riffles and rocks in the stream. At

Moab there is an open valley, leaving which the Grand River flows 65½ miles largely through rock canyons having walls 600 to 2,100 feet in height. The course of the Grand River in this section is slightly more tortuous than that of the Green River; the width of the river averages about 500 feet and the slope below Moab is only a little over 1 foot per mile. The Government's gauge was located at Cisco, about 17 miles above Castle Creek. From readings at that point the Master finds that the depths of the river vary from 2.9 to 3 feet for 16 days in the year to over 7 feet for 61 days, and that for 349 days in the year there is a depth of 3 feet or over. There is a discharge of over 2,000 cubic feet per second for 351 days in the year, and for 169 days of over 4,200 cubic feet per second.

The Master finds that on the Grand River, in the 79 miles between Castle Creek and the junction with the Green River, there is a stretch of about three miles out of the first fourteen miles between Castle Creek and Moab Bridge in which there are three small rapids, and that, in this stretch, the river is less susceptible of practical navigation for commercial purposes than in the remainder of the river. But the Master finds that, even in this three mile stretch, the river is susceptible of being used for the transportation of lumber rafts and that there has been in the past considerable use of the river for that purpose.

The Colorado River, that is, treating the river as beginning at the junction of the Green and Grand Rivers, flows southwesterly and finally reaches the Gulf of California. The distance from the confluence of the Green and Grand Rivers in Utah to the Utah-Arizona boundary, is about 189 miles, the boundary being about 27 miles above the point known as Lees Ferry in Arizona. The table of distances gives the junction of the Green and the Grand Rivers as being 216.5 miles above Lees Ferry. The Master finds that the Colorado River is non-navigable from this junction down to the end of Cataract Canyon at Mile

176 above Lees Ferry. The State of Utah contests the finding of the Master with respect to the first 4.35 miles of this stretch of the river, that is, to a point 212.15 miles above Lees Ferry (a question to which we shall return in dealing with Utah's exceptions), where it is said that the first rapid or cataract of Cataract Canyon begins. But there is no controversy as to the non-navigability of the stream from this point through Cataract Canyon down to Mile 176 above Lees Ferry. Through this canyon, with rock walls from 1500 to 2700 feet in height, the river has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long series of high and dangerous rapids.

The Master's finding of navigability relates to the section of the river from Cataract Canyon to the Utah-Arizona boundary. At the end of Cataract Canyon (the end of the portion of it known as Dark Canyon), the country becomes more open, the river somewhat wider, and the canyon walls not over 600 feet in height, this stretch being known as Glen Canyon. Two rivers enter from the west, the Fremont and the Escalante, and one from the east, the San Juan. As the Colorado River approaches the Utah-Arizona boundary, the canyon walls increase in height and average 1300 to 1600 feet. There are various points at which bottom lands are cultivated in the river beds. The width of the river averages from 600 to 700 feet. Its slope through this section is gentle, being less than 2 feet per mile. As to the 90 miles of Glen Canyon, that is, from Mile 176 above Lees Ferry to the mouth of the San Juan River, the Master states that there are no gauging station figures of any discharge, flow and depth which are applicable, but the Master finds that as the waters of the Green and the Grand Rivers join and form the Colorado River, there must be a discharge of water in the Glen Canyon stretch equal to the combined discharge of the other two rivers and hence at

all times sufficient water for navigation so far as discharge alone is concerned. As to depth, the Master finds that the Colorado River in this stretch should have a depth at least equal to that of the Green or the Grand River. Between the mouth of the San Juan River and the Utah-Arizona boundary, figures were obtained from the Lees Ferry gauging station from which it appears that the average depths range from between 3 and 4 feet for 17 days in the year to over 8 feet for 124 days in the year, and that the discharge varies from less than 4000 cubic feet per second for 13 days in the year to over 6000 feet per second for 352 days in the year.

The question thus comes to the use, and the susceptibility to use, for commerce of the sections of these rivers which the Master has found to be navigable.

The United States, in support of its exceptions, stresses the absence of historical data showing the early navigation of these waters by Indians, fur traders, and early explorers, that is, uses of the sort to which this Court has had occasion to refer in considering the navigability of certain other streams.¹¹ The Master has made an elaborate review of the history of the rivers from the year 1540 to 1869, and reaches the conclusion that neither "the limited historical facts put in evidence by the Government [nor] the more comprehensive investigation into the history of these regions" tend to support the contention that the non-use of these rivers in this historical period "is weighty evidence that they were non-navigable in 1896 in fact and in law." The Master points out that the non-settlement of eastern Utah in these years, the fact that none of the trails to western Utah or to California were usable to advantage in connection with these rivers, and many other facts, are to be considered in connection with that of non-use.

¹¹ E. g., *The Montello*, *supra*; *Economy Light & Power Co. v. United States*, *supra*.

Coming to the later period, that is, since 1869, the Master has set forth with much detail the actual navigation of the rivers with full description of the size and character of boats, and the circumstances of use. It appears that navigation began in 1869 with the expedition of Major John W. Powell down the Green and the Colorado Rivers, and this was followed by his second trip in 1871. It is said that there were no further attempts at navigation for seventeen years. There was a survey by Robert Brewster Stanton in 1889, and in the succeeding years there were a large number of enterprises, with boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations. Much of this evidence as to actual navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the Master as being relevant upon the issue of the susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union.

The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the Court said, in *Packer v. Bird*, 137 U. S. 661, 667: "It

is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership either of the waters or soils under them." In *Economy Light & Power Co. v. United States*, 256 U. S. 113, 122, 123, the Court quoted with approval the statement in *The Montello*, *supra*, that "the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

It is true that the region through which the rivers flow is sparsely settled. The towns of Green River and Moab are small, and otherwise the country in the vicinity of the streams has but few inhabitants. In view of past conditions, the Government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a State depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

The controversy as to navigability is largely with respect to impediments to navigation in the portions of the rivers found by the Master to be navigable, and as to these impediments there is much testimony and a sharp conflict in inferences and argument. The Government describes these impediments as being logs and debris, ice, floods, rapids and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers produce a succession of shifting sand bars, shallow depths, and instability of channel.

The Master states that while there is testimony that in floods and periods of high water these rivers carry a considerable quantity of logs and driftwood, the evidence as to actual trips made by witnesses discloses little danger thereby incurred except in the case of paddle-wheel boats. The Master's finding, which the evidence supports, is that this condition does not constitute a serious obstacle to navigation. With respect to ice, it is sufficient to say, as the Master finds, that ice periods on these rivers do not prevail in every winter and that they are shorter than on most of the rivers in the northern and northeastern States of the country. As to floods, it appears that there are months of extreme high water caused by the melting of snows in the mountains and also local floods of short duration caused by rain-storms. From the testimony of the witnesses who have actually boated on these rivers, the Master is unable to find that this element of variation in flow, or of rapidity of variation, has constituted any marked impediment to the operation of boats except possibly in one or two instances. In relation to rapids, riffles, rapid water and velocity of current, the Master uses the classifications of an engineer presented by the Government and finds that in the portions of the Green River involved in this suit there are no rapids, riffles or rapid water, and that the slope of the bed is only a little over

one foot per mile; that there is a stretch on the Grand River (above Moab Bridge) where there are three small rapids, already mentioned, and also two and one-half miles of rapid water, but that this is a stretch of only six miles in all and is not characteristic of the whole section of the Grand River here in controversy. It appears that neither the current nor the velocity of the Green and Grand Rivers impedes navigation to any great extent except in the days of extreme or sudden flood, and that motor boats of proper construction, power and draft can navigate upstream without trouble, so far as current or velocity alone is concerned. The slope of the section of the Colorado River which the Master has found to be navigable is for the most part slight, as already stated; there are four drops in elevation which may be called small rapids, but it appears that these do not ordinarily make necessary any portage of boat or cargo.

The principal impediment to navigation is found in shifting sandbars. As the rivers carry large amounts of fine silt, sandbars of various types are formed. The Master's report deals with this matter at length. Referring to the Green and the Grand Rivers, the Master states that the most constant type of sandbar forms on the sides of the rivers on the convex curves or inside of the bends; that changes in discharge and in velocity, and floods caused by sudden heavy rains, may affect the size, shape and height of these side sandbars, but, in general, after the spring high-water has receded, these sandbars have constant and fixed locations. There is a second type of bar which forms at the mouth of tributary streams, creeks or washes, usually at times of sudden floods caused by heavy summer rains, and these generally are of short duration. A third type consists of what is termed "crossing bars" which are formed below the places where the rivers cross from one side to the other in following the curves or bends; wherever these crossing bars occur there

is generally more or less difficulty in ascertaining the course of the channel, as the stream may divide into several channels, or it may distribute itself over the full length of the bar so as greatly to lessen the depth of the water from that prevailing in the well-defined channels which follow the bends. There are frequent and sudden variations in these bars resulting in changes in the course of the channel. The bed of the Colorado River above the mouth of the San Juan is found to be more gravelly than that of the Green and Grand Rivers. There are, however, long high side-bars of sand and gravel on which placer mining has been done and also a few sandbars or bottoms which have been cultivated. Crossing bars occur, but not as frequently as on the Green and Grand Rivers, and they cause less trouble. After the recession of the water at the end of the high water season, the channel remains more or less stable during the rest of the year, although there are temporary changes. In general the channel is less shifting than on the Green and Grand Rivers, and the river is less tortuous.

Recognizing the difficulties which are thus created, the Master is plainly right in his conclusion that the mere fact of the presence of such sandbars causing impediments to navigation does not make a river non-navigable. It is sufficient to refer to the well-known conditions on the Missouri River and the Mississippi River. The presence of sandbars must be taken in connection with other factors making for navigability. In *The Montello, supra*, the Court said [p. 443]: "Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficul-

ties by reason of natural barriers such as rapids and sandbars.”

The Government invites a comparison with the conditions found to exist on the Rio Grande in New Mexico, and the Red River and the Arkansas River, above the mouth of the Grand River, in Oklahoma, which were held to be non-navigable, but the comparison does not aid the Government's contention. Each determination as to navigability must stand on its own facts. In each of the cases to which the Government refers it was found that the use of the stream for purposes of transportation was exceptional, being practicable only in times of temporary highwater.¹² In the present instance, with respect to each of the sections of the rivers found to be navigable, the Master has determined upon adequate evidence that “its susceptibility of use as a highway for commerce was not confined to exceptional conditions or short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use as a highway for commerce.”

¹² In the case of the Rio Grande in New Mexico, the Court said (*United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 699): “Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream in its ordinary condition susceptible of use for general navigation purposes.” In *Oklahoma v. Texas*, 258 U. S. 574, 587, the Court, describing the Red River in the western part of Oklahoma, said that “Only for short intervals, when the rain-fall is running off, are the volume and depth of the water such that even very small boats could be operated therein. . . . The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in the year”; and, in relation to the eastern part of the river, it was found (*id.* p. 591)

The Government invokes an Executive Order of May 17, 1884, withdrawing lands from sale and settlement in order to provide a reservation for Indian purposes in Utah, in which the boundary of the reservation was described as running "up and along the middle of the channel" of the Colorado and San Juan Rivers. This is said to have included the Colorado River from the Utah-Arizona boundary to the mouth of the San Juan River. This Executive Order was revoked by another Executive Order of November 19, 1892, so far as it affected lands west of the 110th degree of west longitude and within the Territory of Utah, thus excluding the lands in question along the Colorado River. The earlier Executive Order did not constitute a grant such as that which was under consideration in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 80, 85, and it does not appear that the question of the navigability of the rivers was considered when that order was made. The Government also refers to proceedings since Utah became a State, with respect to governmental investigations, operations under placer claims, and withdrawals for power and reservoir sites. It is not necessary to review these transactions in detail, as nothing that has been done alters the essential facts with respect to the navigability of the streams, and the United States could

that "Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary highwater." In *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86, the Court accepted the findings of the two courts below as to the non-navigability of the Arkansas River above the mouth of the Grand River in Oklahoma, and the District Court, to whose findings the Circuit Court of Appeals referred, had said that "The use of that portion of the river for transportation boats has been exceptional and necessarily on high water, was found impractical and was abandoned. The rafting of logs or freight has been attended with difficulties precluding utility. There was no practical susceptibility to use as a highway of trade or travel." 249 Fed. 609, 623; 270 Fed. 100, 103.

not, without the consent of Utah, divest that State of title to the beds of the rivers which the State had acquired. Nor has Utah taken any action which could be deemed to estop the State from asserting title.

We conclude that the findings of the Master, so far as they relate to the sections of the Green, the Grand, and the Colorado Rivers, found by him to be navigable, are justified by the evidence and that the title to the beds of these sections of the rivers vested in Utah when that State was admitted to the Union. The exceptions of the Government are overruled.

The State of Utah excepts to the finding of the Master as to non-navigability so far as it relates to the first 4.35 miles of the stretch of the Colorado River south from the confluence of the Green River with the Grand River. In the Master's report, this short stretch is included, without separate or particular characterization, in the section of the Colorado River found to be non-navigable through Cataract Canyon to Mile 176 above Lees Ferry. Utah contends that the portion of the Colorado River immediately below the junction of the Green and the Grand Rivers, at Mile 216.5 above Lees Ferry, does not differ in its characteristics, with respect to navigability, from these streams as they reach the point of confluence, save that there is more water and a slightly increased gradient, and that no difficulties in navigation appear until the first rapid in Cataract Canyon is reached at Mile 212.15 above Lees Ferry. In the classification made by the government engineer with respect to rapids and rapid water, to which reference has been made, 4.2 miles of this stretch (to Mile 212.3 above Lees Ferry) are described as quiet water, and the Government has not called our attention to any facts which would substantially differentiate this portion of the Colorado River, immediately below the confluence of the Green and Grand Rivers, from those parts of these rivers found by the Master to be navigable.

On the assumption that there is no basis for such a differentiation as to navigability in fact, the exception of Utah in this respect should be sustained. In this view, however, the exact point at which navigability may be deemed to end, in the approach to Cataract Canyon, should be determined precisely. This determination may be left, for the present, to the agreement of the parties and, if they are unable to agree, they may submit their views in connection with the settlement of the decree.

Utah also excepts to the recommendation of the Master that the decree contain a proviso that the United States "shall in no wise be prevented from taking any such action in relation to said rivers or any of them as may be necessary to protect and preserve the navigability of any navigable waters of the United States." While a statement to that effect is not necessary, as the United States would have this authority in any event, the provision is not inappropriate in a decree determining the right, title or interest of the United States and of Utah, respectively, in relation to the beds of the rivers in question, and its inclusion may avoid misapprehension of the effect of the decree. This exception and the remaining exception of Utah, which does not require separate examination, are overruled.

Decree will be entered dismissing the complaint of the United States so far as it relates to the beds of the portions of the Green, Grand and Colorado Rivers found to be navigable, as above stated, and adjudging that title to such beds was vested in Utah on January 4, 1896, except so far as the United States may theretofore have made grants thereof; and also adjudging that, on that date, (except as to lands theretofore granted) title to the beds of the portion of the Colorado River and of the San Juan River, where these rivers are found to be non-navigable, was vested in the United States. The decree shall also contain the proviso above mentioned. Each party will

pay its own costs, one-half of the expenses incurred by the Master, and one-half of the amount to be fixed by the Court as his compensation.

The Government will prepare a form of decree in accordance with this decision, and furnish a copy to the State of Utah within fifteen days; and within ten days after such submission, the draft decree, together with suggestions on behalf of the State of Utah, if any, will be submitted to the Court.

HERRON *v.* SOUTHERN PACIFIC COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 131. Submitted March 2, 1931.—Decided April 13, 1931.

1. The provision of the constitution of Arizona (Art. 18, § 5) that "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury," is not binding on the federal court sitting in that State. P. 92.

So *held* in an ordinary common law action for personal injuries suffered in a railway crossing accident.

2. The function of the trial judge in a federal court is not a local matter, and state statutes or constitutional provisions which would interfere with the appropriate exercise of that function are not binding, either under the Conformity Act or the Rules of Decision Act, U. S. C., Title 28, §§ 724, 725. P. 94.

ANSWERS to questions certified by the court below upon an appeal from a judgment on a directed verdict, in a personal injury case.

Messrs. P. H. Hayes, M. J. Dougherty, and J. A. Walsh were on the brief for Herron.

Messrs. Charles H. Bates, Alexander B. Baker, and Louis B. Whitney were on the brief for the Southern Pacific Co.

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

This action was brought in the District Court of the United States for the District of Arizona to recover damages for personal injuries resulting from a collision between the plaintiff's automobile and the defendant's train. The accident occurred in Phoenix, Arizona. At the close of the testimony on the part of the plaintiff, the court directed a verdict for the defendant, upon the ground that the plaintiff was guilty of contributory negligence. The plaintiff appealed to the Circuit Court of Appeals. That court states that, if the court below was at liberty to follow the settled rule in the courts of the United States that "whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered, the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court" (*Barrett v. Virginian Railway Co.*, 250 U. S. 473, 476), the action of the trial court was justified. But section 5, article 18, of the constitution of Arizona provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

In view of this requirement, the Circuit Court of Appeals has certified the following questions of law for the decision of this Court:

"First. Is the above provision of the constitution of the State of Arizona binding and controlling upon a Federal court sitting in that State? Or, putting the question in another form:

"Second. May a Federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contribu-

tory negligence, notwithstanding the state constitutional provision to the contrary?"

Construing the constitutional provision, the Supreme Court of Arizona in *Inspiration Consolidated Copper Co. v. Conwell*, 21 Ariz. 480, 486, 487; 190 Pac. 88, 90, 91, said: "The language of the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by its terms, transferred from the court to the jury. . . . We think that the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or non-existence of contributory negligence or assumption of risk in all actions for personal injuries."¹

It does not appear to be insisted by the appellant, and it could not be maintained, that this constitutional provision must be followed by the federal courts by virtue of the Conformity Act. U. S. C., Tit. 28, § 724. The State, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (*Chicago, Rock Island & Pacific Ry. Co. v. Cole*, 251 U. S. 54, 56), but in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a "form" or "mode of proceeding." The provision "cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts." *Atchison, Topeka & Santa Fé Ry. Co. v. Spencer*, 20 F. (2d) 714, 716. Even with respect to the burden of proof as to contributory negligence, this Court has said: "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter

¹See, also, *Davis v. Boggs*, 22 Ariz. 497; 199 Pac. 116; *Wiser v. Copeland*, 23 Ariz. 325; 203 Pac. 565; *Varela v. Reid*, 23 Ariz. 414; 204 Pac. 1017; *Morenci Southern Ry. Co. v. Monsour*, 24 Ariz. 49; 206 Pac. 589; Cf. *Southern Pacific Co. v. Fisher*, 35 Ariz. 87; 274 Pac. 779.

of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. . . . But the United States courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle, even in trials in States which hold that the burden is on the plaintiff." *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 512. See, also, *Beutler v. Grand Trunk Junction Ry. Co.*, 224 U. S. 85, 88.

Nor is the provision applicable, which the appellant invokes, that "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." U. S. C. Tit. 28, § 725. The controlling principle governing the decision of the present question is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the "rules of decision" Act. Thus, a federal court is not subject to state regulations, whether found in constitutional provisions or in statutes, providing that the court shall not give an instruction to the jury unless reduced to writing, or that written instructions shall be taken by the jury in their retirement (*Nudd v. Burrows*, 91 U. S. 426, 441, 442; *Lincoln v. Power*, 151 U. S. 436, 442); or that the court shall require the jury to answer special interrogatories in addition to their general verdict (*Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291, 300); or that the court shall not express any opinion upon the facts (*Vicksburg & Meridian R. Co. v. Putnam*, 118 U. S. 545, 553), or charge the jury with regard to matters of fact (*St. Louis*,

Iron Mountain & Southern Ry. Co. v. Vickers, 122 U. S. 360, 363); or shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside (*Barrett v. Virginian Railway Co.*, *supra*).

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in *United States v. Battiste*, 2 Sumner, 240, 243: "It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court."

"Trial by jury," said the court in *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 14, "in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." See, also, *United States v. Philadelphia & Reading R. Co.*, 123 U. S. 113, 114; *Patton v. United States*, 281 U. S. 276, 288, 289.

Where, in an action in a federal court to recover damages for personal injuries, contributory negligence or assumption of risk constitutes a defense,² and, by reason of

² Under the Federal Employers Liability Act (U. S. C., Tit. 45, § 53) contributory negligence is not a defense but only goes in mitigation of damages. *Chicago, Rock Island & Pacific Ry. Co. v. Ward*, 252 U. S. 18, 21, 23; *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 49. As to the defense of assumption of risk under that Act, see

the facts being undisputed and of the absence of conflicting inferences, the evidence of contributory negligence or assumption of risk is conclusive and the question is one of law, the judge has the right and duty to direct a verdict for the defendant. *Railroad Company v. Houston*, 95 U. S. 697, 702; *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379, 384; *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 418, 419; *Baltimore & Ohio R. Co. v. Goodman*. 275 U. S. 66, 69, 70.

The first question is answered, "No"; the second, "Yes."

COLUMBUS & GREENVILLE RAILWAY COMPANY
ET AL. *v.* MILLER, STATE TAX COLLECTOR,
FOR THE USE OF THE MISSISSIPPI LEVEE
DISTRICT.

APPEAL FROM AND CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI.

No. 195. Argued March 6, 9, 1931.—Decided April 13, 1931.

1. The protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights, or through the discriminations, which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws. P. 99.

So held where a state official, suing a railway company in the state court to collect a tax, which had been reduced by an amendatory law relied on by the company, attacked the amendment upon the ground that the bill therefor had not been published as required by the state constitution, and where the state supreme court, ignoring that contention, adjudged the amendment invalid under the Fourteenth Amendment to the Federal Constitution.

Seaboard Air Line Ry. v. Horton, 233 U. S. 492; *Jacobs v. Southern Railway Co.*, 241 U. S. 229, 235; *Chicago, Rock Island & Pacific Ry. Co. v. Ward*, *supra*. See, also, *Longshoremen's & Harbor Workers' Compensation Act* (U. S. C., Tit. 33, § 905); *Nogueira v. New York, New Haven & Hartford R. Co.*, 281 U. S. 128, 131, 137.

2. In taxing railroads within a levee district upon the mileage basis, it is not necessarily arbitrary and contrary to the Fourteenth Amendment to fix a lower rate per mile for those having less than twenty-five miles of main line within the district than for those that have more. P. 100.

127 So. 784, reversed.

APPEAL and certiorari, 282 U. S. 825, to review a judgment recovered by the present respondent in his suit to collect a tax. See also, 154 Miss. 317; 122 So. 366.

Messrs. Wm. H. Watkins and R. C. Stovall, with whom *Messrs. A. F. Gardner, Sr., A. F. Gardner, Jr., and H. T. Odom* were on the brief, for appellants.

Mr. Simon Rosenthal, with whom *Messrs. George Butler, J. Ed. Franklin, Lamar F. Easterling, and C. B. Snow* were on the brief, for appellee.

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

On behalf of the Mississippi Levee District, the State Tax Collector of Mississippi sued the Columbus & Greenville Railway Company to collect a tax for the years 1926 and 1927, under chapter 282 of the Laws of Mississippi of 1914, at the rate of \$350 a mile on its main line within the District. The Railway Company had paid the tax at the rate of \$50 a mile, pursuant to the provisions of an amending act, chapter 259 of the Laws of 1926, which fixed the tax at that rate for a railroad having less than twenty-five miles of main line within the district. The Railway Company fell within the amendment, as its main line in the district was only 18.41 miles in length. The Collector alleged in his declaration that the Act of 1926 was unconstitutional and void because the bill providing therefor had not been published, in advance of introduction, as required by section 234 of the state constitution. Demurrer to the declaration was sustained by the Circuit Court

of Montgomery County, but its judgment was reversed by the Supreme Court of the State upon the ground that the classification by the Act of 1926 was "arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution." 154 Miss. 317; 122 So. 366.

The Railway Company then pleaded that it was not indebted, and gave notice that it would undertake to show that the classification of the Act of 1926 was valid, and, further, that the statute laying the tax demanded by the plaintiff, that is, the Act of 1914, was itself unreasonable and violated the Fourteenth Amendment. Upon the trial, evidence offered by the defendant in support of these allegations was received subject to objection which the Circuit Court finally sustained, and judgment was entered for the amount of the tax on the basis of \$350 a mile. This judgment was affirmed by the Supreme Court of the State in the view that the case was ruled by its previous opinion and that the excluded evidence, if competent, could not have changed the result. 127 So. 784.

An appeal was taken to this Court and a motion to dismiss or affirm was postponed to the hearing on the merits. At the same time, this Court granted a writ of certiorari. 282 U. S. 825.

That part of the State of Mississippi, known as the Mississippi Delta, is divided into two districts, the Mississippi Levee District and the Yazoo-Mississippi Delta Levee District, to the end that each district may maintain the levees necessary to protect the lands within it. The Mississippi Levee District, created in 1865, comprises the southern part of the Delta. It is said that four methods of taxation are used to maintain this district, an acreage tax, a cotton tax, an *ad valorem* tax on property generally, and a mileage tax on railroad companies which it appears is in lieu of the *ad valorem* tax. *Miller v. Yazoo & Mississippi Valley R. Co.*, 160 Miss. —; 132 So. 597.

Prior legislation providing for the mileage tax on railroads was amended by chapter 282 of the Laws of 1914 so as to impose a tax of \$350 a mile on the main line of standard gauge railroads within the district, \$87.50 a mile on narrow gauge railroads, and \$210 a mile on standard gauge branch lines. Chapter 259 of the Laws of 1926 added to the statute the following proviso: "provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi Levee District shall be \$50 per annum." The Supreme Court of the State, holding that this proviso was invalid under the Fourteenth Amendment, did not deem it necessary to decide whether this ruling invalidated merely the proviso or the entire Act of 1926, as in either event the tax to be paid would be the same.

We are not concerned with any question of the State's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the Act of 1926 is raised only by the State Tax Collector in his official capacity, as one acting solely under the authority of the legislature whose requirement he contests. The only person taxed by the statute whose rights are before the Court is the petitioner, which seeks to uphold the state legislation which defines its liability and with which it has complied. The questions which the Collector sought to raise under the state constitution have not been passed upon by the state court. While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the State the constitutional validity of a state statute is a local question,¹ this fact does not alter the fundamental principle, governing the determination of the federal question by this Court, that the protec-

¹ *Smith v. Indiana*, 191 U. S. 133, 148; *Huntington v. Worthen*, 120 U. S. 97, 101; *Stewart v. Kansas City*, 239 U. S. 14, 16.

tion of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids.² The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws.³

Apart from this consideration, the only question presented is whether the Act of 1926 with its proviso, or the proviso alone, is invalid upon its face. The evidence offered to support the classification was excluded, and was treated as being in any event without effect, and the case thus stood before the state court upon the bare terms of the statute. If the facts shown by the evidence, thus excluded, were treated as established (*Fairmont Creamery Company v. Minnesota*, 274 U. S. 1, 5), they would have no tendency to invalidate the statute, but rather to sustain it. It appears that there are only two main lines of railroad within the district, that of the Yazoo & Mississippi Valley Railroad Company, extending north and south through the entire levee district parallel with the Mississippi River, and that of the petitioner running east from the Mississippi River. The petitioner sought to show not only the difference in location but that the condition of its road and its equipment was inferior to that of the other railroad. The petitioner also offered to prove, and the fact was stipulated subject to objection, that the State Tax Commission had assessed for *ad va-*

² *Clark v. Kansas City*, 176 U. S. 114, 118; *Standard Stock Co. v. Wright*, 225 U. S. 540, 550; *Massachusetts v. Mellon*, 262 U. S. 447, 488; *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, 54, 55; *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S. 71, 88.

³ *Smith v. Indiana*, *supra*; *Braxton County Court v. West Virginia*, 208 U. S. 192, 197, 198; *Marshall v. Dye*, 231 U. S. 250, 257; *Stewart v. Kansas City*, *supra*.

lorem taxes the railroad of the petitioner within the levee district at \$1,000 a mile, and that of the other railroad at \$32,000 a mile and, further, that in the classification of railroads by the State Railroad Commission for the purpose of levying a privilege tax, the petitioner was placed with respect to its main line in class three and the other railroad in class one.

Without attempting to appraise the excluded evidence with respect to the asserted differences between the two railroads, it is sufficient to say that, if this evidence be disregarded, the record shows no factual basis for holding the classification of the statute invalid other than the simple fact that the classification is according to mileage. But the mere selection by the state legislature, in the exercise of its broad discretion in the imposition of taxes,⁴ of a mileage basis, and the establishment of a particular class of railroads having less than twenty-five miles of main line within the district, cannot be regarded, in the absence of any further showing, as arbitrary and as constituting a violation of the Federal Constitution. On the contrary, a classification of this sort has frequently been sustained. In *Dow v. Beidelman*, 125 U. S. 680, 691, a statute classifying railroads according to mileage, with respect to the passenger fares to be charged, was sustained. The Court said: "Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature." To the same effect is *Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S. 513. Similar rulings have been made in upholding other regulatory statutes; *e. g.* a statute relating to the heating of passenger cars but not applying to railroads less than

⁴ *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159.

fifty miles in length (*New York, New Haven & Hartford R. Co. v. New York*, 165 U. S. 628, 633, 634), and statutes requiring a minimum number of men in train crews but not applying to railroads of less than a stated mileage. (*Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U. S. 453; *St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas*, 240 U. S. 518.) See, also, *Wilson v. New*, 243 U. S. 332, 354.

As we find no ground for holding the Act of 1926 to be invalid under the Federal Constitution, it is unnecessary to consider the questions discussed in relation to the Act of 1914.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

UNITED STATES *v.* WELLS ET AL., EXECUTORS.

CERTIORARI TO THE COURT OF CLAIMS.

No. 252. Argued March 13, 1931.—Decided April 13, 1931.

1. Whether a gift *inter vivos* was made "in contemplation of death" within the meaning of the Revenue Act of 1918, depends upon the donor's motive, to be determined in each case from the circumstances, including his bodily and mental condition. Pp. 115, 119.
2. A gift is made "in contemplation of death" when the motive inducing it is of the sort that leads to testamentary disposition, but not when the motive is merely to attain an object desirable to the donor in his life, as where the immediate and moving cause of transfers was the carrying out of a policy, long followed by the decedent in dealing with his children, of making liberal gifts to them during his lifetime. Pp. 117, 119.
3. A transfer may be "in contemplation of death" though not induced by a fear that death is near at hand. Pp. 113, 119.
4. Upon review of a judgment of the Court of Claims, the findings of fact are to be treated like the verdict of a jury and cannot be added to or modified by reference to that court's opinion. P. 120.

5. But absence of a finding of an ultimate fact does not require a reversal, if the circumstantial facts as found are such that the ultimate fact follows from them by necessary inference. Pp. 111, 120.

So *held* where the opinion of the Court of Claims showed clearly the inference that it drew from its findings.

69 Ct. Cls. 485; 39 F. (2d) 998, affirmed.

CERTIORARI, 282 U. S. 822, to review a judgment recovered in the Court of Claims on a claim for repayment of an estate tax.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. H. Brian Holland* and *Erwin N. Griswold* were on the brief, for the United States.

There has been a tendency on the part of the legislatures and the courts to broaden the meaning of the words "in contemplation of death" in order that the tax may be made effective. Early decisions construed these words as referring only to gifts *causa mortis*, but this definition has been abandoned in favor of constructions which, although at variance with each other, are becoming increasingly liberal. This Court has not had occasion to pass upon the meaning of the phrase as used in the federal estate tax laws.

It is clear that the words "in contemplation of death" mean neither that knowledge which all men have that ultimate death is inevitable, nor such an expectancy of death as is required in a gift *causa mortis*. Congress intended to tax certain gifts *inter vivos* which are made in lieu of those usually effected by will or by the operation of the intestacy laws. The character of such gifts is determined by the state of mind of the donor at the time they are made. If his purpose is to attain some object desirable to him during his life as distinguished from the distribution of his estate as at death, the gift is not of the character declared to be taxable.

If the apparent approaching probability of death subordinates the normal desire to retain one's property, so that the gift is not caused by normal generosity, but is

motivated by the same considerations that lead to testamentary dispositions, and is made as a substitute for them, then that gift is made in contemplation of death.

The Act provides that all gifts made within two years of death are presumed to have been made in contemplation of death unless the contrary is shown. Various types of evidence are available to the taxpayer for the purpose of rebutting this presumption. Of these the fact that the donor was in good health is only one, and is not sufficient to overcome the presumption if the donor was so far advanced in years that death could not, in the nature of things, be far away.

The presumption may be overcome only by proof that the decedent in making the gift was actuated by an affirmative desire to achieve some purpose desirable to him in his lifetime. If the existence of such a purpose does not appear, the gift is presumed to have been testamentary in character and is therefore taxable.

In the present case, the gifts were made when the donor was over seventy years of age. The lower court did not find as a fact that the gifts were not made in contemplation of death. Nor did it find as a fact that they were made to fulfill some living purpose of the donor. At the time of the second and third transfers, he was recovering from a severe illness, of the same nature as that which eventually caused his death. The decision of the Court of Claims was founded on an erroneous interpretation of the Act, placing undue emphasis on the decedent's physical condition as distinguished from his state of mind, which alone established the character of the gift.

Mr. W. W. Spalding for respondents.

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

John W. Wells, a resident of Menominee, Michigan, died on August 17, 1921. The Commissioner of Internal Revenue assessed additional estate taxes, upon the ground

that certain transfers by the decedent within two years prior to his death, were made in contemplation of death and should be included in the taxable estate under the provisions of § 402 (c) of the Revenue Act of 1918, 40 Stat. 1057, 1097. The amount of the additional tax was paid by the executors and claim for refund was filed. The claim having been rejected, the executors brought this suit in the Court of Claims to recover the amount paid. The Court of Claims decided in favor of the executors, 69 Ct. Cls. 485; 39 F. (2d) 998, and this Court granted a writ of certiorari.

The substance of the findings of the Court of Claims with respect to the circumstances of the transfers may be stated as follows:

The decedent died at the age of seventy-three years; his wife and five children, three sons and two daughters, survived him. When a young man he became interested in the business of acquiring and selling timber lands and of manufacturing lumber. He continued in that business to the time of his death.

As early as the year 1901, decedent began the making of advancements of money and other property to his children. He kept a set of books on which he charged to his children some, but not all, of the amounts transferred to them. The decedent believed that the appropriate course for a man of wealth was to give to his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He informed one of his friends: "I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance."¹

¹Speaking of a less liberal policy of a former business associate, who died in or about the year 1918, decedent frequently expressed his opinion that his friend "had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said 'that is not my policy.'"

In 1918, decedent advanced to three of his children, Ralph W. Wells, Mrs. Edna Walsh, and Mrs. Florence Law, shares of stock in the Dunbar & Wausaukee Railway Company for which he charged each of them, in the equalization hereafter mentioned, the sum of \$25,460. Neither this transfer, nor any of the earlier transfers, is in controversy.

In December, 1919, decedent transferred to his son Artemus C. Wells, 343 shares, and to his son Daniel Wells, 73 shares, of the stock of the J. W. Wells Lumber Company. He charged Artemus with \$89,180, and Daniel with \$18,890, on account of these transfers.

On January 1, 1921, after carefully examining his accounts in preparing for the final equalization of the prior advancements, decedent transferred to his children 68,985 shares of the stock of the Girard Lumber Company. His summaries of accounts with each of his children showed debit balances, on which he had computed interest, as follows: Daniel Wells, \$266,530; Artemus C. Wells, \$231,651; Ralph W. Wells, \$214,008; Mrs. Florence Law, \$216,445; and Mrs. Edna Walsh, \$180,662. The decedent endorsed each of these statements with the words "Account with _____" "this account is canceled and ledger balanced to date as a gift to _____" (the name of the son or daughter being inserted), or with other words to the same effect.

In this process of equalization decedent charged his children with a total of 3458 shares of the capital stock of the Lloyd Manufacturing Company. These shares were not delivered at that time, as decedent had agreed to exchange them for a like number of shares in a new company to result from an expected merger. On January 26, 1921, decedent transferred to Marshall B. Lloyd, as trustee for the benefit of his wife and five children, 3713 shares of the stock of the Lloyd Manufacturing Company with authority to exchange these shares for shares of the stock of the new corporation, on the issue of which the trustee

was to assign the shares to decedent's wife and children, respectively, in designated amounts, or, in the event that the exchange was not consummated before December 1, 1921, to distribute to them the shares of the Lloyd company.² On April 6, 1921, Lloyd, the trustee, distributed the certificates for the shares in the new company, but the finding states that the decedent had divested himself of all interest in the 3713 shares of the Lloyd stock when they were transferred in trust.

The transfers which the Commissioner deemed to be subject to the additional estate tax are these:

That of December, 1919, to his sons Daniel and Artemus, of 416 shares of the stock of the J. W. Wells Lumber

² On the day that this trust agreement was made, decedent wrote to his son Ralph (then in England): "I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5103 Lloyd stock, \$100 per share. Income \$35,721. I am going to even up my gifts to all now, and the following is the way they stand before the evening up" (inserting statement). "I have charged all of you interest on your accounts at 5% and I have charged you and Art \$50,000 apiece for motor loss and credit you for W. P. L. Co. stock charged you. I am mighty busy getting ready for the West, so good-bye."

On February 3, 1921, on leaving for California, decedent wrote to his daughter, Mrs. Edna Walsh: "I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had and how I equalized your a/cs by giving stock to even. Your Lloyd stock will be delivered as soon as the deal is closed, which will be very soon. Your Lloyd stock is worth \$108,600 and the Girard stock is worth \$252,000, so you need not take in washing for support unless you throw it away on copper or other junk. In making out these accounts, the thing that seems most important is how interest runs up. Good safe bonds are the best investment for a person who does not understand business. Well, my dear girl, take good care of this, remember the poor and needy, and you will receive your reward. Good-bye."

Company, increased by a subsequent stock dividend to 1280 shares at the date of the decedent's death;

That of January 1, 1921, to his children, of 68,985 shares of the stock of the Girard Lumber Company;

That of January 26, 1921, in trust for his wife and children, of 3713 shares of the stock of the Lloyd Manufacturing Company.

The aggregate value at the time of the decedent's death of all the property embraced in these transfers was \$782,903. Excluding this property, the value of decedent's estate at the time of his death was \$881,314.61, on which the decedent's annual income was approximately \$50,000 a year.

The Court of Claims made detailed findings as to the state of decedent's health. It appeared that for some time prior to the year 1919, he had suffered from attacks of asthma. In May of that year he went to a hospital in Chicago for treatment and remained eleven days. About the middle of April, 1920, decedent began to be afflicted with ulcerative colitis, a condition in which the large intestine becomes inflamed. The finding states: "It is a curable disease. About eighty to eighty-five per cent. of the cases are cured." In June, 1920, decedent was advised by physicians in California that he was suffering from cancer of the intestines. In the following July, decedent again entered the hospital in Chicago and, on an examination by a specialist in diseases of the bowels, the case was diagnosed as ulcerative colitis. Between July and September, 1920, decedent was informed in detail of his condition. His physician told him that "he would get well."

While at the hospital, following an inquiry by his business associate, Marshall B. Lloyd, whether decedent had made any agreement with his second wife, Katherine Wells, with reference to a division of property after his death, decedent made such an agreement. Reciting his

illness, it provided that his wife "should have \$100,000 in money and certain other property in lieu of her statutory and dower rights." Mrs. Wells ratified all gifts theretofore made by the decedent to his children and all gifts which might be made to his children thereafter "and before his death whether any of such gifts be made in contemplation of his death, or otherwise." Pursuant to the agreement, decedent made his will on August 18, 1920, the provisions of which differed only slightly from those of an earlier will. After providing for the payment of \$100,000 to his widow and making other bequests, decedent devised his residuary estate to his five children, with the proviso: "Provided, however, that the amount shown to be due me from each of my children severally in accordance with my books at the time of my death, shall be considered advancement made by me to them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares."

On September 14, 1920, decedent wrote to his son Ralph: "The doctors say that I will be absolutely cured if I am careful for two or three months after leaving and I certainly will be careful after this."³

On September 22, 1920, decedent was discharged from the hospital in an improved condition. His medical adviser stated that decedent's condition was "excellent,"—"he had not fully at that time recovered but he did within the next two or three months." "His appearance was normal; he had gained an appreciable amount of weight" and "he was in a very fair state of health." On his return to Menominee, decedent said to his son, who had been in charge of his affairs during his absence, that

³ At about this time, the hospital physician found marked evidence of an inflammation of the ethmoid cells which are connected with the nasal cavity, and concluded that there was very likely a close relation between the ethmoiditis and the asthma.

"he was completely cured of the trouble that he had had and he felt good." Decedent then resumed his normal business activities.⁴

Decedent was again admitted to the hospital in Chicago, on November 30, 1920, for the purpose of an operation to relieve his asthma. His physician stated that at that time "he found him to be in good general condition."⁵ On December 9, 1920, decedent was discharged from the hospital and returned to his home. He went back to the hospital on January 10, 1921, for the completion of the nasal operation.⁶ At the time of his discharge on January 14, 1921, the medical examination showed "'a very greatly improved condition' and that in respect to the ulcerative colitis it was '90 per cent. normal.'"

On January 26, 1921, the date of the trust agreement (constituting the last of the transfers in question) decedent wrote to his son Ralph: "The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped." On February 3, 1921, he left for California, where he was accustomed to spend the winter months. His physician stated that decedent at that time "considered himself well, and I told him that he need have no anxiety whatever about his state of health;

⁴ Writing to his son Ralph on October 30, 1920, decedent said: "I am around about the same as usual. . . . I feel as well as ever, and bowels seem normal, but doctor says I must diet and take bismuth medicine for a while and be careful. Gained six pounds since I came home."

⁵ The physician said that decedent "came to the hospital for treatment of the asthma, not for the bowel trouble. In fact, it was by arrangement when he left the hospital in September that he came back at this time, in November, to have the operative work done on the nose that was designed to clear up the asthma."

⁶ His physician then made the following entry in the hospital record with respect to decedent's condition: "In general feels very well. Gained six pounds in weight. Asthma has been somewhat troublesome at times. Has had very good bowel function. No pain. Returns for completion of nasal operation."

that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis.”⁷

But in April, 1921, while still in California, decedent had such a recurrence. He consulted a specialist of reputation who after examination informed him that he might have a cancer, and advised an operation. In June, 1921, decedent reentered the hospital in Chicago. His condition proved to be due to a virulent form of infection that failed to yield to treatment. Returning to his home, he continued to lose ground and he died on August 17, 1921. An autopsy disclosed a severe and extensive inflammation of the large intestine, with ulceration of the bowel. No trace of cancer was found. The death certificate signed by his physician set forth the cause of decedent's death as “suppurative colitis” and its “duration one year.”

The Court of Claims did not find, in terms, that the transfers in question were not made in contemplation of death, but it is evident that the court considered that its findings of fact amounted to that in substance, in view

⁷ In February, 1921, friends of the decedent, visiting him in California, were taken by him on extended motor trips. “Decedent drove the car himself through the congested portion of the city (Los Angeles), as well as around or over the mountains near that city. At places on these mountain roads the automobile party driven by the decedent traversed roads that ran along a precipice where there is a sheer fall of six or seven thousand feet without any apparent concern or distress on the part of the decedent.” His friends “did not see any difference in his appearance. He seemed to be just as spry as he ever was, and handled the car in pretty good shape.” He was thought to be “very cheerful.”

In a letter dated February 21, 1921, written to his children, decedent said: “I am about free of my bowel trouble, but have my old complaint, asthma, but I have taken treatment at Batch Creek Treatment Rooms here the last two years and they have cleared it up and they are now treating me and it is clearing up.”

of the conclusion of law, based upon these findings, that the executors were entitled to recover the additional tax. This is also manifest from the reasoning of the court's opinion. The court said [p. 513]:

"The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers.

"After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly \$900,000, from which he drew an annual income of approximately \$50,000. At the time the transfers were made, decedent had no reason to believe otherwise than [that], aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show

that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness.

“The presumption created by the statute that the transfers in question were made in contemplation of death can not stand against ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent’s health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent’s state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers.”⁸

The Government contests the decision of the Court of Claims upon the ground that the conclusion was reached by an erroneous construction of the words “in contemplation of death” as used in the statute. The court held that “‘contemplation of death’ does not mean that general knowledge of all men that they must die, but that

⁸ Referring to the agreement made in the summer of 1920 with the decedent’s wife as to her share of his property, and to the making of his will, the court said: “While these transactions are entitled to consideration in connection with all the other facts and circumstances shown, we do not regard them as having a great deal of weight in determining the question as to the decedent’s state of mind and the motives actuating him in making transfers of property, four months later. No transfers of property were made to the children at the time of the execution of the property agreement with his wife, and the provisions made for their benefit in the will executed at that time were identical with the provisions of a former will. Whatever apprehensions the decedent entertained at the time of the making of the property agreement with his wife as to the chances of recovery from the illness from which he was suffering at that time, had ceased to exist before the transfer of the Girard Lumber Company stock on January 1, 1921, and the Lloyd Manufacturing Company stock on January 26, 1921.”

there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer.”⁹ The Government insists that this definition is too narrow; that transfers in contemplation of death are not limited to those induced by a condition causing expectation of death in the near future; that the character of such gifts is determined by the state of mind of the donor at the time they are made, and that the statutory presumption may be overcome only by proof that the decedent’s purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death.

⁹ In support of this view, the court cited *Spreckels v. State*, 30 Cal. App. 363; 158 Pac. 549; *Shwab v. Doyle*, 269 Fed. 321; *Meyer v. United States*, 60 Ct. Cls. 474; *Rea v. Heiner*, 6 F. (2d) 389; and *Starck, Executor*, 3 B. T. A. 514. See, also, *Phillips, Executor*, 7 B. T. A. 1054; *Stein, et al., Executors*, 9 B. T. A. 486; *Gimbel et al., Executors*, 11 B. T. A. 214; *George A. Wheelock’s Estate*, 13 B. T. A. 831; *Commonwealth v. Fenley*, 189 Ky. 480; 225 S. W. 154; *State v. Pabst*, 139 Wis. 561; 121 N. W. 351; *State v. Thompson*, 154 Wis. 320; 142 N. W. 647; *Gaither v. Miles*, 268 Fed. 692; *Vaughan v. Riordan*, 280 Fed. 742; *Flannery v. Willcuts*, 25 F. (2d) 951; *Beeler v. Motter*, 33 F. (2d) 788; *Rosenthal v. People*, 211 Ill. 306; 71 N. E. 1121; *People v. Burkhalter*, 247 Ill. 600; 93 N. E. 379; *People v. Carpenter*, 264 Ill. 400; 106 N. E. 302; *People v. Northern Trust Co.*, 324 Ill. 625; 155 N. E. 768; *Matter of Baker*, 83 App. Div. (N. Y.) 530; 82 N. Y. S. 390; affirmed 178 N. Y. 575; 70 N. E. 1094; *Matter of Palmer*, 117 App. Div. (N. Y.) 361; 102 N. Y. S. 236; *Matter of Baird*, 219 App. Div. (N. Y.) 418; 219 N. Y. S. 158. But, compare *Estate of Reynolds*, 169 Cal. 600; 147 Pac. 268; *Estate of Pauson*, 186 Cal. 358; 199 Pac. 331; *Chambers v. Larronde*, 196 Cal. 100; 235 Pac. 1024; *Armstrong v. Indiana*, 72 Ind. App. 303; 120 N. E. 717; *Matter of Crary*, 31 Misc. (N. Y.) 72; 64 N. Y. S. 566; *Matter of Price*, 62 Misc. (N. Y.) 149; 116 N. Y. S. 283; *Tax Commission v. Parker*, 117 Ohio St. 215; 158 N. E. 89; *Rengstorff v. McLaughlin*, 21 F. (2d) 177.

The phrase "in contemplation of death," previously found in state statutes, was first used by the Congress in the Revenue Act of 1916, imposing an estate tax. It was coupled with a clause creating a statutory presumption in case of gifts within two years before death.¹⁰ The provision was continued in the Revenue Act of 1918,¹¹ which governs the present case, and in later legislation. While the interpretation of the phrase has not been uniform, there has been agreement upon certain fundamental considerations. It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive.¹² The provision is not confined to gifts *causa mortis*,

¹⁰ 39 Stat. 756, 777, 778.

¹¹ 40 Stat. 1057, 1097. Section 402 (c) provides: "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; "

¹² Article 23 of Regulations 37, under the Revenue Act of 1918, contained the following:

"Art. 23. Nature of Transfer.—The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession of the property. Transfers

which are made in anticipation of impending death, are revocable, and are defeated if the donor survives the apprehended peril. *Basket v. Hassell*, 107 U. S. 602, 609, 610.¹³ The statutory description embraces gifts *inter vivos*, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant

made within two years of a decedent's death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. . . . All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death."

¹³ In *Matter of Seaman*, 147 N. Y. 69, 76; 41 N. E. 401, the court, referring to the words "in contemplation of death" in the Inheritance Tax Law of New York, said that the clause "evidently referred to grants or gifts *causa mortis*." See also *Matter of Edgerton*, 35 App. Div. (N. Y.) 125; 54 N. Y. S. 700; affirmed 158 N. Y. 671; 52 N. E. 1124; *Matter of Spaulding*, 49 App. Div. (N. Y.) 541; 63 N. Y. S. 694; affirmed 163 N. Y. 607; 57 N. E. 1124; *Matter of Baker*, 83 App. Div. (N. Y.) 530; 82 N. Y. S. 390; affirmed 178 N. Y. 575; 70 N. E. 1094. But compare *Matter of Palmer*, 117 App. Div. (N. Y.) 361, 366, 367, 368; 102 N. Y. S. 236; *Matter of Crary*, 31 Misc. (N. Y.) 72, 75; 64 N. Y. S. 566; *Matter of Price*, 62 Misc. (N. Y.) 149, 151, 152; 116 N. Y. S. 283; *Matter of Dee*, 148 N. Y. Supp. 423; affirmed 161 App. Div. (N. Y.) 881; 145 N. Y. S. 1120; affirmed 210 N. Y. 625; 140 N. E. 1128; *Matter of Hodges*, 215 N. Y. 447; 109 N. E. 559.

purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols v. Coolidge*, 274 U. S. 531, 542; *Milliken v. United States*, *ante*, p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death, is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor.

As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age

may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand."

If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed.¹⁴ As illustrating transfers found to be related to purposes associated with life, rather than with the distribution of property in anticipation of death, the Government mentions transfers made "for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision." The illustrations are useful but not exhaustive. The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular

¹⁴ Revenue Act of 1924, §§ 319-324, 43 Stat. 253, 313, as amended by Revenue Act of 1926, § 324, 44 Stat. 9, 86. *Bromley v. McCaughn*, 280 U. S. 124. Revenue Act of 1926, § 1200 (a), 44 Stat. 9, 125, 126.

consideration of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in "contemplation of death," as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus give effect to the manifest purpose of the statute.

We think that the Government is right in its criticism of the narrowness of the rule laid down by the Court of Claims, in requiring that there be a condition "creating a reasonable fear that death is *near at hand*," and that "*such* reasonable fear or apprehension" must be "the only cause of the transfer." It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near. But it does not appear that the decision of the court rests upon the limitation thus expressed. The court did not rely merely upon the fact that at the time of the transfers decedent considered that he had recovered from his former illness and believed the assurances given him by his physician that he need have no fear of its recurrence or any "anxiety whatever about his state of health." That fact was manifestly important, but, in addition to that, the court held that "the immediate and moving cause of the transfers was the carrying out of a policy, long followed by decedent in dealing with his children, of making liberal gifts to them during his lifetime." The court regarded the transfers in question as "a continuation and final consummation of such policy," saying "that this was the motive

which actuated the decedent in making these transfers seems unquestioned." In the view of the court as thus explicitly stated, not only was there no fear at the time of the transfers that death was near at hand, but the motive for the transfers brought them within the category of those which, as described by the Government, are intended by the donor "to accomplish some purpose desirable to him if he continues to live." In the presence of such a motive, appropriately found, and of the underlying facts which have been expressly found, there would be no ground for a reversal of the judgment merely because of an inaccuracy in the general statement as to the meaning of the statutory phrase.

The only difficulty presented by the record is that this statement with respect to the motive of decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings. The findings of fact of the Court of Claims are to be treated like the verdict of a jury.¹⁵ We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference.¹⁶

It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers

¹⁵ *Stone v. United States*, 164 U. S. 380, 382, 383; *Crocker v. United States*, 240 U. S. 74, 78; *Brothers v. United States*, 250 U. S. 88, 93.

¹⁶ *United States v. Pugh*, 99 U. S. 265, 269, 270; *Botany Mills v. United States*, 278 U. S. 282, 290.

was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this Court,¹⁷ the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that, in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained.¹⁸

Judgment affirmed.

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

SMITH, ADMINISTRATRIX, *v.* SPRINGDALE
AMUSEMENT PARK, LIMITED, ET AL.

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

No. 315. Argued March 17, 1931.—Decided April 13, 1931.

1. Of patents Nos. 1,379,224 and 1,507,440, granted to Smith and relating to devices used in dog races, the former is held not infringed and the latter void, on the authority of *Smith v. Magic City Kennel Club*, 282 U. S. 784. P. 122.
 2. Patent No. 1,507,439, to Smith, for an improvement in starting cages for racing dogs, is void for want of invention. P. 123.
- 40 F. (2d) 173, affirmed.

CERTIORARI, 282 U. S. 823, to review a decree affirming dismissal of the bill in a suit for infringement of patents. See 39 F. (2d) 92.

Mr. Myer I. Goldberg argued the cause, and *Messrs. John E. Sater* and *E. Howard M'Caleb* filed a brief for petitioner.

Mr. Paul Bakewell for respondents.

¹⁷Rule 41.

¹⁸Act of February 26, 1919, c. 48, 40 Stat. 1181; U. S. C., Tit. 28, § 391.

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

This is a suit for the infringement of letters patent No. 1,379,224, No. 1,507,440, and No. 1,507,439, relating to devices for dog races. Judgment in the District Court dismissing the complaint was affirmed by the Circuit Court of Appeals. 39 F. (2d) 92; 40 F. (2d) 173. This Court granted a writ of certiorari because of conflict with a decision of the Circuit Court of Appeals for the Fifth Circuit. *American Electric Rabbit Assn. v. New Orleans Kennel Club*, 26 F. (2d) 1016.

Patent No. 1,379,224 was before this Court in *Smith v. Magic City Kennel Club*, 282 U. S. 784. Referring to the prior art, the Court found that the patentee's improvement was in a limited field. There was no invention in a combination consisting of a covered rail track, conveyor car and an arm projecting over the course and connected with a mechanical lure carried before racing dogs. The patent could be sustained only by virtue of the distinctive feature of the arm employed. This was described in claim 1 as "an arm extending through the longitudinal opening of the casing in a projecting position over the track and adapted to carry a lure, and a wheel rotatably mounted on and supporting the arm at the projecting end thereof," and, in claim 2, as "a horizontally extending arm hinged to said car extending midway of said course, a wheel rotatably mounted near the end of said arm, and resting upon the ground, a platform supported by said arm and a lure or quarry mounted upon said platform for attracting the dogs." The Court reached the conclusion that a rigid, horizontal arm, without hinge or wheel, was not the subject of either claim. In this view, the device of the defendant does not infringe.

Patent No. 1,507,440, relating to "housing for conveyor cars and tracks," we have held to be invalid for want of invention. *Smith v. Magic City Kennel Club, supra*.

Patent No. 1,507,439 is for an improvement in starting cages for racing dogs. The single claim is as follows:

"In a starting cage for racing dogs, a frame comprising a box-like structure divided into a plurality of compartments and comprising walls formed of wire mesh partially covered with fabric, individual rear doors for each of the compartments and a single front door hinged at its upper end to the top walls of the frame, divergent inclined members secured to the top of the said frame and extending upwardly and outwardly beyond the face of the front door and having their outer ends in the plane of the side walls of the box-like structure, springs secured to the outer ends of said inclined members and to the door and lying in the plane of the hinges, and a latch at the bottom of the cage for coaction with the lower edge of the front door to hold the front door normally closed against the tension of said springs, said springs adapted to raise the front door upon release of the latch."

In the light of the proceedings in the Patent Office upon the rejection of earlier claims, the claim can have but a narrow application. We agree with the Circuit Court of Appeals that the particular sort of spring support and the wire mesh partitions partially covered with fabric, as well as the other elements, are but forms of construction within the range of ordinary mechanical skill. There was an utter absence of invention justifying the issue of this patent.

Decree affirmed.

HANS REES' SONS, INCORPORATED, v. NORTH CAROLINA EX REL. MAXWELL, COMMISSIONER OF REVENUE.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 334. Argued March 18, 1931.—Decided April 13, 1931.

1. The State Supreme Court approved a ruling striking out evidence offered to prove a tax unconstitutional, but adjudged that even if the evidence were deemed competent the tax was valid. *Held* that

the case may be viewed as though the evidence had been received and held to have no bearing on the validity of the taxing statute. P. 126.

2. The method of allocating, for taxation, to a State that part of the net income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within that State bears to the value of all its tangible property, works an unconstitutional result if, in the particular case, the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. Pp. 129, 135.

So held in the case of a North Carolina tax on income of a New York corporation, which bought leather, manufactured it in North Carolina, and sold its products at wholesale and retail in New York. *Underwood Typewriter Co. v. Chamberlin*, 254 U. S. 113; *Bass, Ratcliff & Gretton v. Tax Commission*, 266 U. S. 271, and *National Leather Co. v. Massachusetts*, 277 U. S. 413, distinguished.

3. The fact that a corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State. P. 133.
4. When there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no sense attributable to transactions within its jurisdiction. P. 134.

199 N. C. 42; 153 S. E. 850, reversed.

APPEAL from a judgment sustaining the dismissal of proceedings for readjustment of a state income tax assessment.

Mr. Louis H. Porter, with whom *Messrs. F. Carroll Taylor* and *Kingsland Van Winkle* were on the brief, for appellant.

Mr. Dennis G. Brummitt, Attorney General of North Carolina, with whom *Mr. Frank Nash*, Assistant Attorney General, was on the brief, for appellee.

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

The appellant, Hans Rees' Sons, Inc., a corporation organized under the laws of New York, began this action by an application to the Commissioner of Revenue of the State of North Carolina for the readjustment of the income tax assessed against the appellant by that State. The assessment was for the years 1923, 1924, 1925 and 1926, in accordance with the applicable state laws,¹ and the controversy related to the proper allocation of income to the State of North Carolina. The Commissioner of Revenue made his findings of fact and conclusions of law, the appellant's exceptions were overruled and the prayer for revision of the taxes was disallowed. Appeal, waiving a jury, was taken to the Superior Court of Buncombe County, North Carolina. On the trial in that court, evidence was introduced by the appellant with respect to the course of business and the amount and sources of income for the years in question. The appellant admitted that "(a) in assessing the tax the Commissioner of Revenue followed the statutory method . . . ; (b) that the valuation of the real estate and tangible property of the taxpayer 'both within and without the State' is correct; (c) that the total net income used as a basis for the calculation of the tax is correct; (d) that the allocation of the net income for purposes of taxation was in full accord with the statute." The contention of the appellant was that the income tax statute as applied to the appellant, upon the facts disclosed, was arbitrary

¹ Laws of 1923, c. 4, § 201; 1925, c. 101, § 201; 1927, c. 80, § 311.

and unreasonable, and was repugnant to the commerce clause and to section 1 of the Fourteenth Amendment of the Federal Constitution. The Superior Court struck out the testimony offered by the appellant, as being immaterial, and held that the statute, as applied did not violate constitutional rights. The judgment dismissing the action was affirmed by the Supreme Court of the State, 199 N. C. 42, 153 S. E. 850. The case comes here on appeal.

As to the portions of the taxes for the years in question, which had been paid by the appellant voluntarily and as to which recovery was denied upon that ground, no question is raised here.

The Supreme Court of the State sustained the ruling of the trial court in striking out the evidence offered by the appellant, but held that, if the evidence were deemed to be competent, it would not change the result. The case may therefore be viewed as though the evidence had been received and held to have no bearing on the validity of the statute. *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 5. The evidence was thus summarized by the state court:

“This evidence tended to show that the petitioner” (the appellant here) “was incorporated in the State of New York in 1901 and is engaged in the business of tanning, manufacturing and selling belting and other heavy leathers. Many years prior to 1923 it located a manufacturing plant at Asheville, North Carolina, and after this plant was in full operation dismantled and abandoned all plants which it had heretofore operated in different states of the union. The business is conducted upon both wholesale and retail plans. The wholesale part of the business consists in selling certain portions of the hide to shoe manufacturers and others in carload lots. The retail part of the business consists in cutting the hide into innumerable pieces, finishing it in various ways and man-

ners and selling it in less than carload lots. In order to facilitate sales a warehouse is maintained in New York from which shipments are made of stock on hand to various customers. The tannery at Asheville is used as a manufacturing plant and a supply house, and when the quantity or quality of merchandise required by a customer is not on hand in the New York warehouse a requisition is sent to the plant at Asheville to ship to the New York warehouse or direct to the customer. The sales office is located in New York and the salesmen report to that office. Sales are made throughout this country and in Canada and Continental Europe. Some sales are also made in North Carolina. Certain finishing work is done in New York. The evidence further tended to show that 'between forty and fifty per cent of the output of the plant in Asheville is shipped from the Asheville tannery to New York. The other sixty per cent is shipped direct on orders from New York. . . . Shipment is made direct from Asheville to the customer.'

"The petitioner also offered evidence to the effect that the income from the business was derived from three sources, to-wit: (1) buying profit; (2) manufacturing profit; (3) selling profit. It contends that buying profit resulted from unusual skill and efficiency in taking advantage of fluctuations of the hide market; that manufacturing profit was based upon the difference between the cost of tanning done by contract and the actual cost thereof when done by the petitioner at its own plant in Asheville, and that selling profit resulted from the method of cutting the leather into small parts so as to meet the needs of a given customer.

"Without burdening this opinion with detailed compilations set out in the record, the evidence offered by the petitioner tends to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent."

According to the assessments in question, as revised by the Commissioner of Revenue and sustained, there was allocated to the State of North Carolina, pursuant to the prescribed statutory method, for the year 1923, 83+ per cent. of the appellant's income; for 1924, 85+ per cent; for 1925, 66+ per cent; and for 1926, 85+ per cent.

The applicable statutory provisions, as set forth by the state court, are as follows:

"Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:

"(a) In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership, sale or rental of real estate or from the manufacture, purchase, sale of, trading in, or use of tangible property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

"(b) In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State.

"(c) The words 'tangible personal property' shall be taken to mean corporeal personal property, such as ma-

chinery, tools, implements, goods, wares and merchandise and shall not be taken to mean money deposits in bank, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt."

Relying upon the decisions of this Court with respect to statutes of a similar sort enacted by other States, the Supreme Court of the State held that the statute of North Carolina was not invalid upon its face. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 120, 121; *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission*, 266 U. S. 271, 280-283; *National Leather Co. v. Massachusetts*, 277 U. S. 413, 423. In *Underwood Typewriter Co. v. Chamberlain*, *supra*, a statute of Connecticut imposed upon foreign corporations doing business partly within and partly without the State, an annual tax of two per cent. upon the net income earned during the preceding year on business carried on within the State, ascertained by taking such proportion of the whole net income on which the corporation was required to pay a tax to the United States as the value of its real and tangible personal property within the State bore to the value of all its real and tangible personal property. All the manufacturing by the corporation was done in Connecticut, but the greater part of its sales were made from branch offices in other States. It was contended that the tax was an unconstitutional burden upon interstate commerce and that it violated the Fourteenth Amendment in that it imposed a tax on income arising from business conducted without the State. In support of the latter objection, the corporation showed that while 47 per cent. of its real estate and tangible personal property was located in Connecticut, almost all its net profits were received in other States. This Court said: "But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of trans-

actions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of saying that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result." In this view, the validity of the Connecticut statute was sustained.

In the case of *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, supra*, the State of New York imposed an annual franchise tax at the rate of three per cent. upon the net income of the corporation. The Court, describing the statute, said that "if the entire business of the corporation is not transacted within the State, the tax is to be based upon the portion of such ascertained net income determined by the proportion which the aggregate value of specified classes of the assets of the corporation within the State bears to the aggregate value of all such classes of

assets wherever located." The corporation in that case was British, engaged in brewing and selling Bass' ale. Its brewing was done, and a large part of its sales were made, in England, but it had imported a portion of its product into the United States which it sold in branch offices located in New York and Chicago. The Court regarded the question of the constitutional validity of the New York tax as controlled in its essential aspect by the decision in *Underwood Typewriter Co. v. Chamberlain*, *supra*. And, referring to the facts of that case, the Court said: "So in the present case we are of opinion that, as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business. . . . Nor do we find that the method of apportioning the net income on the basis of the ratio of the segregated assets located in New York and elsewhere, was inherently arbitrary or a mere effort to reach profits earned elsewhere, under the guise of legitimate taxation. . . . It is not shown in the present case, any more than in the *Underwood* case, that this application of the statutory method of apportionment has produced an unreasonable result."

In the instant case, the state court, having considered these decisions and held that the Statute of North Carolina was valid upon its face, sought to justify its view that the evidence offered by the appellant was without effect, upon the following grounds:

"The fallacy of this conclusion" (that is, the appellant's contention that the application of the statute had been shown to be unreasonable and arbitrary, and hence

repugnant to the Federal Constitution) "lies in the fact that the petitioner undertakes to split into independent sources, income which the record discloses was created and produced by a single business enterprise. Hides were bought for the purpose of being tanned and manufactured into leather at Asheville, North Carolina, and this product was to be shipped from the plant and sold and distributed from New York to the customer. The petitioner was not exclusively a hide dealer or a mere tanner of leather or a leather salesman. It was a manufacturer and seller of leather goods, involving the purchase of raw material and the working up of that raw material into acceptable commercial forms, for the ultimate purpose of selling the finished product for a profit. Therefore, the buying, manufacturing and selling were component parts of a single unit. The property in North Carolina is the hub from which the spokes of the entire wheel radiate to the outer rim." And, in its final conclusion, the state court said that, if it were conceded that the evidence offered by the appellant was competent, still, as it showed that the appellant "was conducting a unitary business as contemplated and defined by the courts of final jurisdiction," it was "not permissible to lop off certain elements of the business constituting a single unit, in order to place the income beyond the taxing jurisdiction of this State."

We are unable to agree with this view. Evidence which was found to be lacking in the *Underwood* and *Bass* cases is present here. These decisions are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State. In the *Underwood* case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the *Bass* case,

that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the *Underwood* case, "for all that appears in the record, reached, and was meant to reach, only the profits earned within the State." The difficulty with the evidence offered in the *Underwood* case was that it failed to establish that the amount of net income with which the corporation was charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that State; and in the *Bass* case the court found a similar defect in proof with respect to the transactions in New York.

Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the State has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State. As was said in the *Bass* case with regard to "the unitary business of manufacturing and selling ale" which began with manufacturing in England and ended in sales in New York, that State "was justified in attributing to New York its proportion of the profits earned by the Company from such unitary business."

And the principle that was recognized in *National Leather Co. v. Massachusetts, supra*, was that a tax could lawfully be imposed upon a foreign corporation with respect to "the proportionate part of its total net income which is attributable to the business carried on within the State." When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.

Nor can the evidence be put aside in the view that it merely discloses such negligible criticisms in allocation of income as are inseparable from the practical administration of a taxing system in which apportionment with mathematical exactness is impossible. The evidence in this instance, as the state court puts it, "tends to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent.," while under the assessments in question, there was allocated to the State of North Carolina approximately eighty per cent. of the appellant's income.

An analysis has been submitted by the appellant for the purpose of showing that the percentage of its income attributable to North Carolina, for the years in question, did not in any event exceed 21.7 per cent. As pointed out by the state court, the appellant's evidence was to the effect that the income from its business was derived from three sources, buying profit, manufacturing profit, and selling profit. The appellant states that its sales were both wholesale and retail; that the profits from the wholesale business were in part attributable to the manufacturing in Asheville and in part to the selling in New York,

but that the appellant's accountants made no attempt to separate this, and that the entire wholesale profit was credited to manufacturing and allocated to North Carolina. Similarly, it is said that no attempt was made to separate profits from manufacturing in New York from profits derived from manufacturing in Asheville, and that all manufacturing profits were allocated to North Carolina. It is insisted that, in the retail part of the business, the leather is cut into small pieces and finished in particular ways and supplied in small lots to meet the particular needs of individual customers, and that this part of the business is essential to the retail merchandising business conducted from the New York office. The so-called "buying profit" is said to result from the skill with which hides are bought and the contention is that these buying operations were not conducted in North Carolina. If as to the last, it be said that the buying of raw material for the manufacturing plant should be regarded as incident to the manufacturing business, and as reflected in the value at wholesale of the manufactured product as turned out at the factory, still it is apparent that the amount of the asserted buying profit is not enough to affect the result so far as the constitutional question is concerned.

For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view,

the taxes as laid were beyond the State's authority. *Shaffer v. Carter*, 252 U. S. 37, 52, 53, 57.

For this reason the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

SOUTHERN RAILWAY COMPANY v. HUSSEY.

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

No. 342. Argued March 18, 19, 1931.—Decided April 13, 1931.

1. Evidence offered by a litigant and excluded, but preserved in the record, may be considered upon review in determining his liability. P. 138.
2. Under an arrangement between two railroad companies a section of the main line of one was used by coal trains of the other by means of a switch connection. Due to a defect in the mechanism for turning the switch signal-light, which could have been discovered by due care, the switch was left open by men operating a train of the second company at night, leaving the green light showing the main line clear, with the result that a passenger train of that line was deflected and a passenger injured. *Held* that the company owning the main line was responsible to the passenger for the condition of the signal and liable for his injuries. P. 139. 42 F. (2d) 70, affirmed.

Certiorari, 282 U. S. 826, to review a judgment of the Circuit Court of Appeals, affirming a recovery in an action for personal injuries, which was removed from a state court on the ground of diversity of citizenship.

Mr. Charles A. Houts, with whom *Messrs. Samuel B. McPheeters* and *H. N. Quigley* were on the brief, for petitioner.

Mr. William H. Allen, with whom *Messrs. Jesse W. Barrett*, *Ellison A. Poulton*, and *Mark D. Eagleton* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover for personal injuries suffered by the plaintiff, the respondent here, a passenger upon a train of the petitioner and on the petitioner's road, in consequence of a collision with a train of the Evansville, Indianapolis and Terre Haute Railway Company, a corporation of Indiana. The petitioner, to meet the plaintiff's prima facie case, relied upon the following facts. The collision happened in Indiana on September 2, 1927. A statute of that State authorized Indiana railroads to cross and unite with any other railroad before constructed, and required the intersected road to unite with the new one in forming such intersections and connections and to grant specified facilities. 3 Burns, Ann. Stat., 1926, § 12931. Other sections authorized and ratified contracts for running trains of one road over the tracks of another, and made the railroad so running its trains over the tracks of another liable to the same extent as if it owned the tracks.

In January, 1922, the petitioner made a contract with the Evansville road providing for a connection with the petitioner's line to enable the Evansville Company to carry coal from mines near Francisco, where the lines connected, to Oakland City, a distance of about seven miles. The Evansville Company was to reimburse the petitioner for the 150-foot connection and was to maintain it at its own cost in all respects in accordance with the requirements of the petitioner. The petitioner was to have control of operations on this section of the main track, to provide for the movement of the Evansville trains over the section, and to furnish the necessary operators, signal men, &c. The Evansville crews and employees while in the section were to be governed by the petitioner's rules and amenable to orders of the petitioner's superintendent. We think it unnecessary to quote further in order

to show the relation in which the petitioner stood to this portion of its own road. This contract was offered in evidence by the defendant but was excluded subject to its exception. It is before us in the record, but as it does not change the petitioner's liability in this case it does not matter whether it is let in or kept out. See *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 5.

The two roads are connected of course by a switch. The lever by which the switch was opened and shut was connected with a signal device so arranged that when the switch was closed and it was safe to go ahead on the main line a green light was shown. If the switch was open a red light meant stop. Just before the collision an Evansville train was waiting on the sidetrack to go to Oakland City. The switch had been opened in expectation of going on, but the conductor, learning that there was not time before the probable arrival of a Southern train, ordered it to be closed. A man started to do it but, seeing the green light displayed, supposed that it had been closed already and did nothing. In fact, owing to a defect in the switch, the green light had failed to give way to the red as it should have done, and when the Southern train arrived its engineer was led to think that the way over the main track was clear. The train went ahead but was turned on to the sidetrack and ran into the waiting Evansville train, causing disaster and death.

The Court instructed the jury that if the plaintiff was injured as a direct result of the negligence of either company, or of both, they should find for the plaintiff. There was a verdict and judgment for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 42 F. (2d) 70. A writ of certiorari was granted by this Court.

The petitioner states the question as being whether it is liable for an injury to a passenger caused by the negligence of the employees of the other company in failing to

close the switch that connected the two roads, which was installed, owned and operated exclusively by and for the benefit of the Evansville Company; was so constructed, maintained and operated under the compulsion of a statute of Indiana, and was so constructed and operated under a contract expressly authorized by the statutes of Indiana. But this statement needs a good deal of qualification. It is doubtful whether the statute in the word 'unite' contemplates more than intersection. It certainly did not require the contract that the petitioner made. The terms of that contract were of the petitioner's own choosing and they gave the paramount authority to the Southern road. As was to be expected, the main track remained its own and subject to its control. There is no dispute that the collision was caused by an interruption of the course of the main line through the misplacement of a switch in consequence of a defect in the signal. The Southern road had not abdicated its control over its main line or its ultimate authority over the switch. If, as the jury must have found under the instructions, the defect in the light was not due to a sudden inevitable accident but could have been avoided by care, the Southern road owed that care to the plaintiff, and therefore, whether the men immediately in contact with the switch were employees of the Evansville or the Southern Company the Southern was responsible for this condition to the passengers in its train. *Railroad Co. v. Barron*, 5 Wall. 90. *McElroy v. Nashua & Lowell R. R. Corp.*, 4 Cush. 400. This case is not of the class concerning the liability of a lessor for injuries immediately attributable to the lessee, but concerns a responsibility for the condition of its road from which the petitioner did not divest itself, even if it could.

Judgment affirmed.

ECKERT v. BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 351. Argued March 19, 1931.—Decided April 13, 1931.

One who, being liable as endorser of the note of an insolvent maker, takes up the note by substituting one of his own and marks the old note paid, is not thereby entitled, under Revenue Act of 1924, § 214 (a)(7), in returning his income on a cash basis for the tax year in which the transaction occurred, to deduct the amount of the old note as a debt "ascertained to be worthless and charged off within the taxable year." P. 141.

42 F. (2d) 158, affirmed.

Certiorari, 282 U. S. 826, to review a judgment which affirmed a decision of the Board of Tax Appeals, 17 B. T. A. 263, sustaining the disallowance of a deduction from income.

Mr. Henry T. Dorrance, with whom *Mr. C. R. Dewey* was on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Youngquist* and *Messrs. Sewall Key, J. Louis Monarch*, and *John G. Remey*, Special Assistants to the Attorney General, and *Erwin N. Griswold* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The Commissioner of Internal Revenue determined that there was a deficit of \$3,378.89 in the petitioner's income tax for the year 1925 under the Revenue Act of 1924. The petitioner claimed a deduction from income of \$22,400 as a bad debt. The deduction was disallowed by the Commissioner, by the Board of Tax Appeals and, in

review, by the Circuit Court of Appeals for the Second Circuit. 42 F. (2d) 158. A writ of certiorari was allowed by this Court.

The petitioner's tax return was on the cash basis. The facts of the transaction concerned were that the petitioner and his partner were joint endorsers of notes issued by a corporation that they had formed. There remained due upon these notes \$44,800, that the corporation was unable to pay. In 1925 the petitioner and his partner in settlement of their liability made a joint note for that sum to the bank that held the corporation's paper, received the old notes, marked paid, and destroyed them. The petitioner claims the right to deduct half that sum as a debt "ascertained to be worthless and charged off within the taxable year," under the Revenue Act of 1926, c. 27, § 214 (a) (7); 44 Stat. 9, 27.

It seems to us that the Circuit Court of Appeals sufficiently answered this contention by remarking that the debt was worthless when acquired. There was nothing to charge off. The petitioner treats the case as one of an investment that later turns out to be bad. But in fact it was the satisfaction of an existing obligation of the petitioner, having, it may be, the consequence of a momentary transfer of the old notes to the petitioner in order that they might be destroyed. It is very plain we think that the words of the statute cannot be taken to include a case of that kind. We do not perceive that the case is bettered by the fact that some of the original notes years before were given for property turned over to the corporation by the partnership that formed it. For the purpose of a return upon a cash basis, there was no loss in 1925. As happily stated by the Board of Tax Appeals, the petitioner "merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or property having a cash value." A deduction may be per-

missible in the taxable year in which the petitioner pays cash. The petitioner says that it was definitely ascertained in 1925 that the petitioner would sustain the losses in question. So it was, if the petitioner ultimately pays his note. So was the tax considered in *United States v. Mitchell*, 271 U. S. 9, 12, but it could not be deducted until it was paid.

Judgment affirmed.

FIRST NATIONAL BANK OF CHICAGO *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 124. Argued March 4, 1931.—Decided April 13, 1931.

1. The Federal Farm Loan Act (§§ 16 and 13), in empowering joint stock land banks to invest their funds in the "purchase" of qualified first mortgages on farm lands, means that they may lend on such security. The loans so made are "securities issued under the provisions of" that Act, within the meaning of § 213, Title II, of the Revenue Act of 1921, and the interest upon them is exempt from taxation under that Title. P. 145.
 2. A national bank, in making a consolidated income and profits tax return for the year 1922, sought to deduct from gross income the interest paid on bonds of its affiliated joint stock land banks the principal of which was lent by the land banks on farm mortgages pursuant to the Farm Loan Act. *Held* that the deduction was properly disallowed, since the mortgages are "obligations or securities . . . the interest upon which is wholly exempt from taxation under this title," within the meaning of § 234, Title II, of the Revenue Act of 1921, and by that section interest on indebtedness incurred or continued to purchase or carry tax-exempt obligations or securities is not deductible from gross income. Pp. 143, 147.
- 69 Ct. Cls. 312; 38 F. (2d) 925, affirmed.

CERTIORARI, 281 U. S. 719, to review a judgment of the Court of Claims disallowing a deduction in an income and profits tax return.

Mr. Harold V. Amberg for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. H. Brian Holland, Erwin N. Griswold, and Bradley B. Gilman* were on the brief, for the United States.

Mr. John E. McClure, by special leave of Court, filed a brief as *amicus curiae*.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The First National Bank of Chicago made a consolidated corporation income and profits tax return for the year 1922, which, among other things, disclosed results from operations of two affiliated corporations, the First Trust Joint Stock Land Banks of Chicago and Dallas, organized under the Federal Farm Loan Act of 1916. It claimed the right to deduct from total receipts the amounts paid (or accrued) during the year by the Land Banks for interest upon their outstanding bonds. The Commissioner refused to allow the deductions. Payment as demanded was followed by suit to recover in the Court of Claims. Judgment went against the Bank and the matter is here upon certiorari.

From the findings, based upon a stipulation of facts, it appears—

“The First Trust Joint Stock Land Bank of Chicago and the First Trust Joint Stock [Land] Bank of Dallas, which were organized under the Federal farm loan act of July 17, 1916, issued to and/or had outstanding in the hands of the public in the year 1922 their joint-stock land bank bonds, respectively, on which interest was paid and/or accrued in the year 1922, in the aggregate sum of \$78,807.80, part of which was the intercompany transaction in the amount of \$5,810.25, leaving a balance paid or

accrued of \$72,997.55. As security for the payment of said joint-stock land bank bonds said joint-stock land banks, as provided in the Federal farm loan act, deposited with the proper farm loan registrars farmers' promissory notes evidencing loans to said farmers, which in turn were secured as to payment by said farmers' first mortgages on their farms.

"The proceeds coming into the hands of said joint-stock land banks from the issuance and sale of said joint-stock land bank bonds were used by said joint-stock land banks to make new additional loans to farmers, which new loans made from the proceeds of said joint-stock land bank bonds issued and/or outstanding in 1922, were made in each instance in consideration of the making and delivery by the borrowing farmers, respectively, of their promissory notes secured as to payment by first mortgages on their farms. All of said loans, respectively, and the farmers' notes and mortgages, respectively, evidencing said loans, were designed to be and were of such a nature as to comply with (1) all the terms, conditions, restrictions, limitations, and requirements specified in the Federal farm loan act, as requisite to qualify said loans, notes, and mortgages, as 'first mortgages' in contemplation of said act, so as to make them available as collateral security against the issue of joint-stock land bank bonds; and (2) all terms, conditions, restrictions, limitations, and requirements, statutory or otherwise, specified in the laws of the State in which the farm which was the subject of the particular loan was located (to wit, the States of Illinois, Iowa, Texas, and Oklahoma, respectively), as requisite to qualify said loans, notes, and mortgages as valid and subsisting first mortgages, in contemplation of such laws. Said notes and mortgages contain an agreement providing for the repayment of the loan on the amortization plan, as provided in section 12, second, of the Federal farm loan act,

and such agreement in respect of each note and/or mortgage was such that the respective note and/or mortgage was not [to be] extinguished within a period of less than thirty-three years, except, of course, at the option of the borrower.

“The interest received by the plaintiff on such farmers’ notes and mortgages was not taxable as income to the plaintiff and was not so taxed in respect of plaintiff’s return for the year 1922.”

Decision of the cause must turn upon the construction of pertinent portions, Revenue Act 1921, Title II, c. 136, 42 Stat. 227, 237, 238, 252, 254.

Section 213 provides that the term “gross income” does not include interest upon “securities issued under the provisions of the Federal Farm Loan Act of July 17, 1916.”

Section 230 imposes a tax at specified rates upon the net income of every corporation.

Section 234 provides—“(a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: . . . (2) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;”

The Federal Farm Loan Act 1916, c. 245, 39 Stat. 360, 372, 374, 380, provides (§ 16) for the formation of joint stock land banks “for carrying on the business of lending on farm mortgage security and issuing farm loan bonds,” which “shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal Land Banks by this Act, so far as such restrictions and conditions are applicable . . .” Section 13 authorizes Federal

Land Banks: "First. To issue, subject to the approval of the Federal Farm Loan Board, and to sell farm loan bonds of the kinds authorized in this Act, to buy the same for its own account, and to retire the same at or before maturity. Second. To invest such funds as may be in its possession in the purchase of qualified first mortgages on farm lands situated within the Federal land bank district within which it is organized or for which it is acting." Section 26: "That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and 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 Federal, State, municipal, and local taxation."

As pointed out by the court below, "Joint-stock land banks, not being permitted to engage in any business, except that of making loans to farmers and issuing their bonds to procure the necessary funds therefor, do not ordinarily have income subject to taxation, and so long as such banks operate as individual and separate institutions, it can not make the slightest difference whether they have or do not have the right to deduct the interest paid on their bonds. Their income is tax-exempt, and consequently the right to make deductions therefrom means nothing. When, as in the instant case, joint-stock land banks are affiliated with banking corporations that do

have taxable incomes, the question assumes importance, as the interest deduction, if allowed, reduces the tax liability of the affiliated group—even then, however, it in no way affects the joint-stock land banks included in such consolidation. They have no taxable income and they pay no taxes.”

Considering the circumstances, we find no reason to conclude that Congress intended to permit any ordinary commercial bank, with income subject to taxation, to secure partial relief therefrom through affiliation with a Joint Stock Land Bank. That result would follow approval of the petitioner’s position.

In *Denman v. Slayton*, 282 U. S. 514, we said—“The manifest purpose of the exception in paragraph 2, § 214 (a), was to prevent the escape from taxation of income properly subject thereto by the purchase of exempt securities with borrowed money.”

The Federal Farm Loan Act (§§ 16 and 13) empowers Joint Stock Land Banks to invest their funds “in the purchase of qualified first mortgages on farm lands.” The obvious meaning is that loans might be made on such security. Loans, so made, become “securities issued under the provisions of the” Act and interest upon them is wholly exempt from taxation under Title II, Revenue Act of 1921.

Interpreting the language of the exception in § 234 in view of the legislative purpose, we think that the farm mortgages owned by the affiliated Joint Stock Land Banks must be regarded as “obligations or securities . . . the interest upon which is wholly exempt from taxation under this title,” and that the bonds issued by them constituted indebtedness incurred to purchase or carry such obligations.

Affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* WHITEHOUSE.

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

No. 129. Argued March 11, 1931.—Decided April 13, 1931.

1. Where an annuity is bequeathed as a definite sum payable annually and at all events during the donee's life and charged upon the testator's whole estate, the payments received by the donee, whether taken from the income or the corpus of the estate, are not part of the donee's gross income under the Revenue Act of 1921, but by § 213 (b) (3) are excepted from gross income as property acquired by gift or bequest. *Irwin v. Gavit*, 268 U. S. 161, distinguished. P. 151.
2. Section 219 of the Revenue Act of 1921, which declares that the tax imposed by §§ 210, 211, shall apply to the income of estates, including income which is to be distributed to the beneficiaries periodically, applies only to income paid as such to the beneficiary. *Id.*
3. The plain exemption of § 213 should not be destroyed by any strained construction of general language in § 219. *Id.*
38 F. (2d) 162, affirmed.

CERTIORARI, 282 U. S. 818, to review a judgment affirming a decision of the Board of Tax Appeals, 7 B. T. A. 600, which overruled a demand made by the Commissioner of Internal Revenue for payment of an income tax on receipts from an annuity.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key, J. Louis Monarch*, and *Miss Helen R. Carlross*, Special Assistants to the Attorney General, *Erwin N. Griswold*, *Clarence M. Charest*, General Counsel, and *Stanley Suydam*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. Marion N. Fisher argued the cause, and *Messrs. John W. Davis, Spotswood D. Bowers, and Marsden B. Candler* filed a brief, for respondents.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 233, 237, 246, provides—

“Sec. 210. That . . . there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income.

“Sec. 211. That . . . in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual . . . a surtax . . .

“Sec. 212. (a) That in the case of an individual the term ‘net income’ means the gross income as defined in section 213, less the deductions allowed by section 214. . . .

“Sec. 213. That for the purposes of this title . . . the term ‘gross income’—(a) Includes gains, profits, and income derived . . . (b) Does not include the following items, which shall be exempt from taxation under this title: . . . (3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); . . .”

James Gordon Bennett died May 24, 1918. His will provided for payment of twenty or more annuities. Among other items, it contained the following:

Item “Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.”

Item “Twenty-eight. . . . All annuities hereby given shall commence at the time of my death and be payable

in equal parts half-yearly, except as hereinabove specifically mentioned."

Item Twenty-nine directed the executors to establish a Memorial Home and to that end gave them the residue of the estate.

Item "Thirtieth. . . . I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

The annuity for Mrs. Whitehouse was satisfied from the corpus of the estate prior to November 14, 1920; afterwards, out of income derived therefrom. December 30, 1920, the executors permanently set aside for the Memorial Home a large amount of interest-bearing securities "but subject to taxes, annuities, and other charges."

The Commissioner of Internal Revenue demanded of Mrs. Whitehouse income tax for the year 1921 on the semi-annual payments received during that period. She petitioned the Board of Tax Appeals for relief. It held that the bequest to her was within paragraph (b), item (3), § 213, Revenue Act of 1921, and therefore exempt. The Circuit Court of Appeals, First Circuit, approved that conclusion. 38 F. (2d) 162.

The most plausible argument submitted for the Commissioner is this: An annuity given by will is payable primarily out of the income from the estate. The residuary estate of Bennett produced enough during 1921 to meet all bequeathed annuities. The payments received by Mrs. Whitehouse during that year were, in fact, made from such income. Consequently, it cannot be said that the bequest was one of corpus; and the payments were taxable under *Irwin v. Gavit*, 268 U. S. 161.

As held below, the bequest to Mrs. Whitehouse was not one to be paid from income but of a sum certain, payable at all events during each year so long as she should live. It would be an anomaly to tax the receipts for one year and exempt them for another simply because executors paid the first from income received and the second out of the corpus. The will directed payment without reference to the existence or absence of income.

Irwin v. Gavit is not applicable. The bequest to Gavit was to be paid out of income from a definite fund. If that yielded nothing, he got nothing. This Court concluded that the gift was of money to be derived from income and to be paid and received as income by the donee. Here the gift did not depend upon income but was a charge upon the whole estate during the life of the legatee to be satisfied like any ordinary bequest.

An attempt is made to strengthen the position of the Commissioner by reference to § 219, Act of 1921, which declares that the tax imposed by §§ 210 and 211 shall apply to the income of estates, including—"Income which is to be distributed to the beneficiaries periodically, . . ." But clearly enough, we think, this section applies only to income paid as such to a beneficiary. And, as above shown, the sums received by Mrs. Whitehouse were not gifts to be derived from and paid out of income, nor were they received as such by her.

The exemption in § 213 is plain and should not be destroyed by any strained construction of general language found in § 219.

The judgment of the court below must be

Affirmed.

FARBWERKE VORMALS MEISTER LUCIUS &
BRUNING ET AL. v. CHEMICAL FOUNDATION,
INCORPORATED, ET AL.

FARBWERKE VORMALS MEISTER LUCIUS &
BRUNING v. E. I. DU PONT DE NEMOURS &
COMPANY ET AL.

DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT
v. SAME.

BADISCHE-ANILIN & SODA FABRIK v. SAME.

WOODS, TREASURER OF THE UNITED STATES, v.
CHEMICAL FOUNDATION, INCORPORATED,
ET AL.

SUTHERLAND, ALIEN PROPERTY CUSTODIAN, v.
FARBWERKE VORMALS MEISTER LUCIUS &
BRUNING ET AL.

SAME v. DEUTSCHE GOLD & SILBER SCHEIDE
ANSTALT ET AL.

SAME v. BADISCHE-ANILIN & SODA FABRIK.

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

Nos. 179, 180, 181, 182, 271, 272, 273, and 274. Argued March 6,
1931.—Decided April 13, 1931.

1. Where use of enemy-owned patents was licensed under § 10 of the original Trading with the Enemy Act, of October 6, 1917, and the Alien Property Custodian, after the amendments of March 28 and November 4, 1918, seized the patents "and every right, title and interest with respect thereto," subject to the rights of the licensee, and assigned to the Chemical Foundation (see *United States v. Chemical Foundation*, 272 U. S. 1,) all right and title which he thus acquired, *Held* that the terms of the seizure should be construed with regard for the general purpose of the legislation

to weaken the enemy, and were broad enough to include the right left in the enemy owners by the original Act to recover for the use of the patents under the license. P. 160.

2. Although § 10 of the Act of November 4, 1918, amending the Trading with the Enemy Act, declares that any requirement under it, when filed or recorded, shall "have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian" and although it be assumed that a mere transfer of a patent by voluntary conveyance does not pass the right to recover accrued royalties from a licensee, the effect of a seizure of patent rights by the Alien Property Custodian "with every right, title and interest with respect thereto," is to take over such royalties as well as the patents. P. 161.
3. Subsection 10 (f) of the original Trading with the Enemy Act provided for licensing the use of enemy-owned patents, and gave the owner of the patent one year after the termination of the war within which to sue the licensee for compensation. An amendment of this subsection by the Settlement of War Claims Act, March 10, 1928, provides that, in case of any patent seized and sold by the Alien Property Custodian, any suit, within the time limited, for royalties for the period prior to the sale, shall be considered as brought by the "owner" if brought either by the Custodian or by the person who was the owner of the patent immediately prior to the seizure.

Held, (since a construction which may render a statute unconstitutional must be avoided if possible,) that the amendment was not intended to apply retroactively so as to confer upon a former enemy owner, in a suit brought in time under the original Act, the right to recover royalties either as against a corporation to which the patent, with the right to the royalties, had been transferred by the Custodian during the war, or as against the licensee. P. 162.

39 F. (2d) 366, affirmed.

CERTIORARI, 282 U. S. 819, 820, to review a decree affirming a decree of the District Court, 29 F. (2d) 597, by which it was adjudged that the right to recover royalties, accrued under a war-time license of enemy-owned patents, was not in the former German owners of the patents, but had passed to the Chemical Foundation, in virtue of a seizure and transfer of the patents and royalty rights by the Alien Property Custodian.

Mr. Frederick H. Wood, with whom *Messrs. Bruce Bromley* and *Charles F. Curley* were on the brief, for Farbwerke.

Mr. Almuth C. Vandiver for Badische-Anilin & Soda-Fabrik and Deutsche Gold & Silber Scheide Anstalt.

Mr. G. Carroll Todd, with whom *Mr. W. S. Gregg* was on the brief, for E. I. du Pont de Nemours & Company.

Mr. Joseph H. Choate, Jr., with whom *Messrs. Wm. G. Mahaffy*, *Seiforde M. Stellwagen*, and *James Garretson* were on the brief, for The Chemical Foundation, Incorporated.

Solicitor General Thacher and *Messrs. Thomas E. Rhodes*, Special Assistant to the Attorney General, and *J. Frank Staley* submitted the cause for Woods, Treasurer, and Sutherland, Alien Property Custodian.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The writs in the eight above-entitled causes were granted upon the petitions of parties to four suits instituted to recover compensation for use by E. I. du Pont de Nemours and Co. of three patents, formerly owned by three of them (the German corporations), under licenses issued as provided by the Trading with the Enemy Act, approved October 6, 1917. 40 Stat. 411, 420, 421, 459, 460, 1020, 1021.

April 6, 1917, the United States declared war with Germany; July 1, 1921, Congress declared it at an end.

The Trading with the Enemy Act authorized the President to appoint an Alien Property Custodian; also to license domestic corporations to make, use and vend articles covered by enemy-owned patents, upon agreed terms, payments therefor to be deposited with the United

States Treasury in trust for the owners. And it declared—§ 10—that such a license should be a complete defense to any suit by the owner for damages on account of anything done thereunder, except as provided by subsection (f), which follows:

“The owner of any patent . . . under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee . . . for recovery from the said licensee for all use and enjoyment of the said patented invention, . . . The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; . . .”

License No. 19, granted January 21, 1918, by the Federal Trade Commission, acting under designation by the President, authorized E. I. du Pont de Nemours and Co. to make, use and vend the inventions covered by United States Letters Patent Nos. 680,395, 868,294, and 718,340, severally owned by German corporations, petitioners in causes Nos. 180, 181 and 182. Substantial payments by the licensee were deposited in the Treasury. The license terminated September 1, 1920.

The Act of March 28, 1918, 40 Stat. 459, 460, amended § 12, Trading with the Enemy Act, to provide—“The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto . . . shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become

appurtenant thereto or to the owner thereof . . .” And the Act of November 4, 1918, 40 Stat. 1020, 1021, amended subsection (c) of § 7 to read—

“If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

“Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.”

By three separate, similar written instruments, issued one February 3 and two March 22, 1919, the Alien Property Custodian declared concerning each of the letters patent numbered as above stated—“I do seize said letters patent and every right, title and interest with respect

thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof, subject to the rights of E. I. du Pont de Nemours & Company, Wilmington, Delaware." And by an instrument dated April 10, 1919, he declared—"I do sell, assign, transfer and set over unto the said the Chemical Foundation (Inc.), its successors and assigns, the whole right, title, and interest acquired by me and by said A. Mitchell Palmer [former Custodian], each as said Alien Property Custodian" in and to the same letters patent.

June 23, 1922, the Chemical Foundation, Inc., brought suit against E. I. du Pont de Nemours and Co. and Frank White, Treasurer of the United States. It alleged the grant of the license to the defendant Company January 21, 1918, to make, use and vend the inventions described and operation thereunder, but declared complainant was not informed whether any moneys were "paid or are payable by said defendant to the Alien Property Custodian, as required by the terms of said license, nor as to what moneys, if any, are now held by the defendant Treasurer of the United States by virtue thereof." Further, that subsequent to the license the Alien Property Custodian seized and sold to complainant all of the specified letters patent, together with every right, title and interest with respect thereto. The prayer asked discovery and accounting, also that the court determine reasonable compensation for use of the letters patent after complainant acquired them. And further for judgment to be satisfied from funds on deposit in the Treasury, if sufficient, otherwise by the du Pont Company. The reason for limiting the prayer to compensation after date of acquisition is not disclosed.

June 30, 1922, petitioners in causes Nos. 180, 181 and 182 brought separate suits against the same defendants.

Each alleged ownership of one of the letters patent, described in the license to the du Pont Company, and asked recovery for the use thereof, the judgment to be paid out of funds in the Treasury, if sufficient, otherwise, by that Company.

Answering the bill of the Chemical Foundation, the du Pont Company admitted use of the letters patent under the license; alleged payment of \$61,884.98, as reasonable compensation, to the Alien Property Custodian for deposit in the Treasury, termination of the license September 1, 1920; etc.

October 6, 1927, the District Court ordered consolidation of the four causes "to the extent of the issues therein relating to Federal Trade Commission License No. 19."

November 9, 1927, Frank White, Treasurer, moved to dismiss the bill of the Chemical Foundation because it was not owner of the patents within intendment of § 10, Trading with the Enemy Act, also because no adequate ground for relief had been shown. He also answered; admitted assignment of the letters patent to the Foundation; denied that it was the "owner" within § 10; admitted the payment into the Treasury of \$61,884.98. On the same date he answered the bills in causes Nos. 180, 181 and 182; demanded proof of the allegations, etc.

January 16, 1928, the du Pont Company moved to dismiss the bills in causes Nos. 180, 181 and 182 because the complainants were not owners of the letters patent within § 10, and because the facts alleged were insufficient to justify relief. It also answered; denied that the complainants had owned any interest in the letters patent since April 10, 1919; admitted that it had been licensed to make, use and vend the inventions covered by the letters patent, and had paid the agreed royalty; denied the right of the complainants to recover anything for such use, etc.

April 28, 1928, in each of the causes Nos. 180, 181 and 182 the Alien Property Custodian moved that he be substituted for the complainant. He alleged that under the seizures of February 3 and March 22, 1919, his predecessor became owner of the letters patent and that he alone was authorized to sue within one year after the war ended, under § 10 (f), Trading with the Enemy Act, to recover the reasonable royalty; also that under § 19, Act of March 10, 1928 (Settlement of War Claims Act), 45 Stat. 254, 277, he should be substituted.

The District Court denied the Treasurer's motions to dismiss, also those of the Alien Property Custodian for substitution as complainant. It held the German corporations were not "owners" of the accrued royalties; that the Chemical Foundation, by assignment from the Alien Property Custodian April 10, 1919, became the owner of the patents, together with accrued royalties, and was entitled to an accounting to ascertain the reasonable compensation for their use and enjoyment during the period between April 10, 1919, and September 1, 1920; and when determined, this should be satisfied from funds in the Treasury derived from payments by the licensee, if sufficient, and if not, by the du Pont Company.

Except the Chemical Foundation and the du Pont Company, all parties appealed to the Circuit Court of Appeals. That court, 39 F. (2d) 366, affirmed the action of the District Court, 29 F. (2d) 597.

Joint and several petitions for certiorari by the three German corporations were granted in causes Nos. 179, 180, 181 and 182.

Writs were also allowed upon the petitions of Woods, Treasurer of the United States, and Sutherland, Alien Property Custodian, in Nos. 271, 272, 273 and 274. These petitioners do not now seek affirmative relief. They brought the causes here in order to save possible rights.

The Chemical Foundation limits its demand to compensation for the period between April 10, 1919, and September 1, 1920. This demand was sustained below and is not now opposed.

The German corporations—former owners—limit their demands to compensation for the period between January 21, 1918, and April 10, 1919. These demands were denied below. They are the subjects of the only substantial controversy before us; and its solution depends upon whether the Alien Property Custodian acquired the rights of the owners to collect for their previous use under License No. 19 when he seized the patents, February 3 and March 22, 1919. Both courts below decided against the German corporations, and properly so we think.

The Trading with the Enemy Act, as amended, in very definite terms authorized seizure of the patents in question; also "rights and claims of every character and description owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy . . ." This Court has said—"At the time of the passage of the act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their property should be taken over and that trade with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid." *Miller v. Robertson*, 266 U. S. 243, 248. "There is nothing to support a strict construction of the Act in respect of the seizure and disposition of enemy property. On the other hand, contemporaneous conditions and war legislation indicate a purpose to employ all legitimate means effectively to prosecute the war. The law should be liberally construed to give effect to the purposes it was enacted to subserve. *United States v. Chemical Foundation*, 272 U. S. 1, 10.

The Alien Property Custodian declared: "I do seize said letters patent and every right, title and interest with respect thereto," subject to the rights of the du Pont Company. Considering the general purpose of Congress to weaken the enemy, this language certainly is broad enough to include the right of the owners of the seized patents to recover for their use under the outstanding license. We can discover no reason for thinking that the custodian intended to seize the patents but to leave with enemies a right to sue for compensation on account of their use during earlier months of the war.

The validity of the seizure by the Alien Property Custodian and of the subsequent sale and transfer to the Chemical Foundation was affirmed in *United States v. Chemical Foundation*, 272 U. S. 1.

The most plausible argument against the conclusion below rests upon § 7, Trading with the Enemy Act, as amended November 4, 1918. This provides that any requirement under the Act may be filed for registration and "if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded."

It is said that a mere transfer of letters patent by voluntary conveyance would not pass the right to recover accrued compensation for use by a licensee; and that under the statute this rule must be applied to the seizure. Answering this the court below well said—

"Accepting this law in the abstract, it is pertinent to note that we are not here concerned with an assignment of a patent or of royalties by the German owners to the Alien Property Custodian. We are concerned with their capture—an act of war. We are not dealing with an assignment of patents where there is a question of what was in the minds of the contracting parties as to royalties and as

to what passed and what was retained under the terms of an instrument they had drawn and signed. We are dealing with an act of seizure and have to determine wholly outside the law of assignments whether by the terms of the symbol of seizure the royalties in question were included. Having in mind the purpose of the law and observing that the Custodian manifestly attempted to seize the German patents and everything 'in respect' to them and to their ownership, we are of opinion that he accomplished what he attempted by words that embrace the royalties in question, and that, in consequence, the German plaintiffs were owners of neither the patents nor the royalties at the time they instituted their suits . . ."

The Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, 277, provides—

"Sec. 19. Subsection (f) of section 10 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following new paragraph:

"'In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright, was seized or otherwise acquired by the Alien Property Custodian.'"

Counsel suggests that, although this enactment came long after transfer of the patents and rights incident thereto to the Chemical Foundation, and years after the present suits began, it authorized the German claimants

to recover as if owners according to the terms of the original act and the license to the du Pont Company. Manifestly, such an interpretation would give rise to a grave constitutional objection—deprivation of the Chemical Foundation of property without due process. Moreover, the licensee accepted the grant under the provision that any suit for compensation should be brought by the owner within one year after termination of the war, “for all use and enjoyment of the said patented invention,” and if not, “then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian.” In the circumstances the act cannot be interpreted and applied as suggested.

The decree below must be

Affirmed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration or decision of these cases.

STANDARD OIL COMPANY (INDIANA) ET AL. v.
UNITED STATES.

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

No. 378. Argued January 13, 14, 15, 1931.—Decided April 13, 1931.

1. Agreements for interchange of licenses under patents covering processes for the manufacture of an article sold in interstate commerce, may be illegal under the Sherman Act if part of a larger plan to control interstate markets or if their necessary effect is to suppress or unduly to restrict competition. They should therefore be closely scrutinized. P. 168.
2. An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation; and if the available advantages are open on reasonable terms to all manufacturers desiring to par-

ticipate, such interchange may promote rather than restrain competition. P. 170.

3. Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce. P. 172.
4. Three corporations, in the business of producing gasoline and owning patents for "cracking" processes by which the yield of gasoline from crude petroleum is greatly increased, joined with another corporation owning a similar patent, in agreements for exchanges of patent rights and division of royalties, which were challenged by the Government as obnoxious to the Sherman Act, chiefly upon the ground that they enabled the corporations to maintain existing royalties and thereby to restrain interstate commerce. *Held:*
 - (1) That the evidence must be examined to ascertain the operation and effect of the agreements. P. 173.
 - (2) Since no monopoly, or restriction of competition, either (a) in the business of licensing patented cracking processes, or (b) in the production of either ordinary or cracked gasoline, or (c) in the sale of gasoline, has been effected, either by means of the agreements or otherwise, it is not shown that, by agreeing upon royalty rates, the patentees could control either the price or the supply. Therefore, agreement upon such rates is not a ground for injunction. P. 175.
 - (3) To warrant an injunction which would invalidate the contracts here in question, and require either new arrangements by the patent owners or settlement of their conflicting claims by litigation, there must be a definite factual showing of illegality. P. 179.
5. Failure of the Government to take a cross-appeal from the decree of the District Court granting part of the relief sought in this case, makes unnecessary a review of findings adverse to the Government's contention that the patents were invalid and the cross-licensing agreements made in bad faith. P. 180.
6. In a suit for an injunction under the Sherman Act, questions raised by the Government as to validity of agreements between defendants become moot when the agreements are canceled by the defendants at the request of the District Court before entry of the decree. P. 181.

33 F. (2d) 617, reversed.

APPEAL from a decree granting part of the relief sought by the Government in a bill charging an illegal combina-

tion to monopolize and restrain interstate commerce by controlling that part of the supply of gasoline which is produced by the process of "cracking."

Messrs. Charles Neave and C. B. Ames, with whom Messrs. L. L. Stephens, Russell Wiles, John W. Davis, Chester O. Swain, William R. Carlisle, Drury W. Cooper, Harry T. Klein, John B. Marsh, and Ramsay Hoguet were on the brief, for the Standard Oil Co. (Indiana) et al., appellants.

Mr. G. H. Dorr, with whom Messrs. James J. Cosgrove, Frank L. Crawford, Oscar J. Dorwin, Richard E. Dwight, Earle W. Evans, Francis I. Fallon, W. H. Francis, George V. Holton, Albert L. Hopkins, James P. Kem, Walter G. Kirkbride, Charles A. Kreps, R. E. Lamberton, William A. McAfee, Charles G. Middleton, S. A. Mitchell, Burton W. Musser, G. J. Neuner, Peter M. Speer, Oscar Sutro, C. A. Thompson, J. Merrill Wright, Merritt Starr, H. O. Bentley, Donald J. De Wolfe, and Edgar E. Townes were on the brief, for the Beacon Oil Co. et al., appellants.

Solicitor General Thacher, with whom Assistant to the Attorney General O'Brian and Mr. Charles H. Weston, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought by the United States in June, 1924, in the federal court for northern Illinois, to enjoin further violation of § 1 and § 2 of the Sherman Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209. The violation charged is an illegal combination to create a monopoly and to restrain interstate commerce by controlling that part of the supply of gasoline which is produced by the process of cracking. Control is alleged to be exerted by

means of seventy-nine contracts concerning patents relating to the cracking art. The parties to the several contracts are named as defendants. Four of them own patents covering their respective cracking processes, and are called the primary defendants. Three of these, the Standard Oil Company of Indiana, the Texas Company, and the Standard Oil Company of New Jersey, are themselves large producers of cracked gasoline. The fourth, Gasoline Products Company, is merely a licensing concern. The remaining forty-six defendants manufacture cracked gasoline under licenses from one or more of the primary defendants. They are called secondary defendants.

Upon the filing of the answers, which denied the violation charged, the case was referred to a special master to take and report the evidence to the court, together with his findings of fact and conclusions of law. Although the Attorney General had filed an expediting certificate¹ on February 24, 1925, it was not until January 20, 1930, that the District Court entered its final decree. The hearings before the master extended over nearly three years. The evidence, including 327 exhibits, fills more than 4300 pages of the printed record. The master's report, which occupies 240 pages, is devoted largely to a discussion of the seventy-three patents and seventy-nine license contracts. The master found that the primary defendants had not pooled their patents relating to cracking processes; that they had not monopolized or attempted to monopolize any part of the trade or commerce in gasoline; and that none of the defendants had entered into any combination in restraint of trade. He recommended that the bill be dismissed for want of equity. After a hearing, on 273 exceptions filed by the Government, the District Court granted some of the relief asked. 33 F. (2d) 617.

¹ Pursuant to the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by Act of June 25, 1910, c. 428, 36 Stat. 854.

The primary defendants and twenty-five of the secondary defendants appealed to this Court. An order of severance was entered, and the injunction was stayed.

The issues to which most of the evidence was addressed have been eliminated. The violation of the Sherman Act now complained of rests substantially on the making and effect of three contracts entered into by the primary defendants. The history of these agreements may be briefly stated. For about half a century before 1910, gasoline had been manufactured from crude oil exclusively by distillation and condensation at atmospheric pressure. When the demand for gasoline grew rapidly with the widespread use of the automobile, methods for increasing the yield of gasoline from the available crude oil were sought. It had long been known that, from a given quantity of crude, additional oils of high volatility could be produced by "cracking"; that is, by applying heat and pressure to the residuum after ordinary distillation. But a commercially profitable cracking method and apparatus for manufacturing additional gasoline had not yet been developed. The first such process was perfected by the Indiana Company in 1913; and for more than seven years this was the only one practiced in America. During that period the Indiana Company not only manufactured cracked gasoline on a large scale, but also had licensed fifteen independent concerns to use its process and had collected, prior to January 1, 1921, royalties aggregating \$15,057,432.46.

Meanwhile, since the phenomenon of cracking was not controlled by any fundamental patent, other concerns had been working independently to develop commercial processes of their own. Most prominent among these were the three other primary defendants, the Texas Company, the New Jersey Company, and the Gasoline Products Company. Each of these secured numerous patents covering its particular cracking process. Beginning in

1920, conflict developed among the four companies concerning the validity, scope, and ownership of issued patents. One infringement suit was begun; cross-notice of infringement, antecedent to other suits, were given; and interferences were declared on pending applications in the Patent Office. The primary defendants assert that it was these difficulties which led to their executing the three principal agreements which the United States attacks; and that their sole object was to avoid litigation and losses incident to conflicting patents.

The first contract was executed by the Indiana Company and the Texas Company on August 26, 1921; the second by the Texas Company and Gasoline Products Company on January 26, 1923; the third by the Indiana Company, the Texas Company, and the New Jersey Company, on September 28, 1923. The three agreements differ from one another only slightly in scope and terms. Each primary defendant was released thereby from liability for any past infringement of patents of the others. Each acquired the right to use these patents thereafter in its own process. Each was empowered to extend to independent concerns, licensed under its process, releases from past, and immunity from future claims of infringement of patents controlled by the other primary defendants. And each was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were definitely fixed in the first contract; and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the second and third. These royalty provisions, and others, will be detailed later.

First. The defendants contend that the agreements assailed relate solely to the issuance of licenses under their respective patents; that the granting of such licenses, like the writing of insurance, *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, is not interstate commerce; and that the Sherman Act is therefore inapplicable. This

contention is unsound. Any agreement between competitors may be illegal if part of a larger plan to control interstate markets. *Montague & Co. v. Lowry*, 193 U. S. 38; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423. Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances, or whether their effect is to suppress or unduly restrict competition. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 43. Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. *Swift & Co. v. United States*, 196 U. S. 375, 397; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310; *United States v. Trenton Potteries Co.*, 273 U. S. 392. And pooling arrangements may obviously result in restricting competition. Compare *Northern Securities Co. v. United States*, 193 U. S. 197, 326. The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act and supplementary legislation. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8. Compare *United Shoe Machinery Co. v. United States*, 258 U. S. 451; *United States v. General Electric Co.*, 272 U. S. 476.² Hence the necessary

² Historically, patent grants were only narrow exceptions to the general public policy against monopolies which developed from the Case of Monopolies, Moore 671, 11 Co. 84, and culminated in the Statute of Monopolies, 21 Jac. I, c. 3, §§ V-VI. See Price, *The English Patents of Monopoly*, cc. 1-3. Compare the debates on the Sherman Act, 21 Cong. Rec., Pt. III, 51st Cong., 1st Sess., pp. 2455-62. Even apart from the limitations of the Anti-Trust laws, the monopoly granted by the patent statute is not unrestricted in scope. Compare *Carbice Corp. v. American Patents Development Corp.*, ante, p. 27.

effect of patent interchange agreements, and the operations under them, must be carefully examined in order to determine whether violations of the Act result. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20.³

Second. The Government contends that the three agreements constitute a pooling by the primary defendants of the royalties from their several patents; that thereby competition between them in the commercial exercise of their respective rights to issue licenses is eliminated; that this tends to maintain or increase the royalty charged secondary defendants and hence to increase the manufacturing cost of cracked gasoline; that thus the primary defendants exclude from interstate commerce gasoline which would, under lower competitive royalty rates, be produced; and that interstate commerce is thereby unlawfully restrained. There is no provision in any of the agreements which restricts the freedom of the primary defendants individually to issue licenses under their own patents alone or under the patents of all the others; and no contract between any of them, and no license agreement with a secondary defendant executed pursuant thereto, now imposes any restriction upon the quantity of gasoline to be produced, or upon the price, terms, or conditions of sale, or upon the territory in which sales may be made.⁴ The only restraint thus charged is that necessarily arising out of the making and effect of the provisions for cross-licensing and for division of royalties.

The Government concedes that it is not illegal for the primary defendants to cross-license each other and the respective licensees; and that adequate consideration can legally be demanded for such grants. But it contends

³ Similarly, agreements relating to other limited statutory monopolies, such as copyrights, are within the Act. *Straus v. American Publishers' Assn.*, 231 U. S. 222. Compare *Ingersoll & Bro. v. McColl*, 204 Fed. 147.

⁴ Restrictive provisions in the first contract and in certain licenses issued pursuant thereto were eliminated before the entry of the decree below. See *infra*, p. 181.

that the insertion of certain additional provisions in these agreements renders them illegal. It urges, first, that the mere inclusion of the provisions for the division of royalties, constitutes an unlawful combination under the Sherman Act because it evidences an intent to obtain a monopoly. This contention is unsound. Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. Compare *Virtue v. Creamery Package Co.*, 227 U. S. 8, 33. An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation.⁵ If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.⁶ Compare *American Column & Lumber Co. v. United States*, 257 U. S. 377, 414-15; *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563, 578.

⁵ This is often the case where patents covering improvements of a basic process, owned by one manufacturer, are granted to another. A patent may be rendered quite useless, or "blocked," by another unexpired patent which covers a vitally related feature of the manufacturing process. Unless some agreement can be reached, the parties are hampered and exposed to litigation. And, frequently, the cost of litigation to a patentee is greater than the value of a patent for a minor improvement. See *Interchange of Patent Rights*, National Economic Conference Board, *Trade Associations—Their Economic Significance and Legal Status* (1925) c. IX; Fenning, *Interest of Trade Associations in Patents and Trade-Marks*, 3 *Harvard Business Rev.* 81, 82.

⁶ Such agreements, varying in purpose, scope, and validity, are not uncommon. See *Rep. Atty. Gen.* (1924) p. 16; *id.* (1925) p. 20. Conflict of patents in the automobile industry, and the early difficulties encountered with an alleged basic patent (see *Electric Vehicle Co. v. Winton Motor-Carriage Co.*, 104 Fed. 814, 172 Fed. 923,

Third. The Government next contends that the agreements to maintain royalties violate the Sherman Law because the fees charged are onerous. The argument is that the competitive advantage which the three primary defendants enjoy of manufacturing cracked gasoline free of royalty, while licensees must pay to them a heavy tribute in fees, enables these primary defendants to exclude from interstate commerce cracked gasoline which would, under lower competitive royalty rates, be produced by possible rivals. This argument ignores the privileges incident to ownership of patents. Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce. Compare *Bement v. National Harrow Co.*, 186 U. S. 70; *United States v. General Electric Co.*, 272 U. S. 476, 490. The allegation that the royalties charged are onerous is, standing alone, without legal significance;⁷ and, as will

reversed, 184 Fed. 893), led to an agreement in 1915 by which the members of the National Automobile Chamber of Commerce cross-licensed each other without royalty for the use of all patent improvements. This agreement was renewed as to existing patents in 1925. See Epstein, *The Automobile Industry*, pp. 227-239, 361. Interchange of basic aviation patents was made during the world war, at the suggestion of the National Advisory Committee for Aeronautics; and this agreement, providing for fixed royalties, was approved by the Attorney-General. See 31 Op. Atty. Gen. 166. In 1928 the arrangement was modified and renewed. See 26 *Aviation* (1929), pp. 728-29; Report of Select Committee of Inquiry into Operations of the United States Air Services, H. Rep. No. 1653, 68th Cong., 2d Sess., pp. 10-14. Various patent exchanges existing in the radio industry are detailed in the Report of the Federal Trade Commission on the Radio Industry (1923), c. II, Appendices. See also Ann. Rep. Federal Trade Comm. 1924, pp. 19-20; *Federal Trade Comm. v. General Electric Co.*, F. T. C. Docket No. 1115, dismissed December 19, 1928. For early patent interchanges and combinations in other industries, see Vaughan, *Economics of Our Patent System*, pp. 34-104.

⁷ The Government introduced no evidence in support of the allegation that the royalty rates charged are onerous; and, as will be

be shown, neither the alleged domination, nor restraint of commerce has been proved.

Fourth. The main contention of the Government is that even if the exchange of patent rights and division of royalties are not necessarily improper and the royalties are not oppressive, the three contracts are still obnoxious to the Sherman Act because specific clauses enable the primary defendants to maintain existing royalties and thereby to restrain interstate commerce. The provisions which constitute the basis for this charge are these. The first contract specifies that the Texas Company shall get from the Indiana Company one-fourth of all royalties thereafter collected under the latter's existing license agreements; and that all royalties received under licenses thereafter issued by either company shall be equally divided. Licenses granting rights under the patents of both are to be issued at a fixed royalty—approximately that charged by the Indiana Company when its process was alone in the field. By the second contract, the Texas Company is entitled to receive one-half of the royalties thereafter collected by the Gasoline Products Company from its existing licensees, and a minimum sum per barrel for all oil cracked by its future licensees. The third contract gives to the Indiana Company one-half of all royalties thereafter paid by existing licensees of the New Jersey Company, and a similar minimum sum for each barrel treated by its future licensees,—subject in the latter case to reduction if the royalties charged by the Indiana and Texas companies for their processes should be reduced.⁸

detailed later, the continued operations of the licensees, their increasing production, and the absence of complaint on their part tend to disprove the charge. Compare Notes 11, 17, *infra*.

⁸ Payments received by the Texas and Indiana companies under the second and third contracts are divided equally by these companies pursuant to the terms of the first. That contract further provides that all royalties received after January 1, 1937, even from existing licensees, are to be divided equally between the two companies.

The alleged effect of these provisions is to enable the primary defendants, because of their monopoly of patented cracking processes, to maintain royalty rates at the level established originally for the Indiana process.

The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices.⁹ *National Harrow Co. v. Hench*, 76 Fed. 667; affirmed, 83 Fed. 36, see also 84 Fed. 226; *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555. Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product, is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. New Departure Mfg. Co.*, 204 Fed. 107; *United States v. Motion Picture Patents Co.*, 225 Fed. 800, appeal dismissed, 247 U. S. 524. Compare *United States v. Kellogg Toasted Corn Flakes Co.*, 222 Fed. 725; *United*

⁹ Where the royalty demanded is a fixed percentage of the gross sales price, this relationship is clear. A combination of patent-owning manufacturers, which required royalty payments on this basis and which appeared to dominate the automobile bumper industry, was dissolved by a consent decree entered in the District Court for Southern New York in December, 1917. See *United States v. Discher*, unreported, noted in *Federal Antitrust Laws and Decisions* (Department of Justice) 1928, pp. 147-48. See also National Economic Conference Board, *op. cit. supra* note 5, pp. 139-40; *United States v. Discher*, 255 Fed. 719. Moreover, the monopoly granted by the patent does not include the right to fix the resale price of the patent product. *Bauer & Cie v. O'Donnell*, 229 U. S. 1; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490; *Boston Store v. American Graphophone Co.*, 246 U. S. 8.

States v. Eastman Kodak Co., 226 Fed. 62, appeal dismissed, 255 U. S. 578.¹⁰ But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce. Compare *Bement v. National Harrow Co.*, 186 U. S. 70; *Cement Manufacturers Protective Assn. v. United States*, 268 U. S. 588, 604; *United States v. General Electric Co.*, 272 U. S. 476, 490; *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397. In the case at bar, the primary defendants own competing patented processes for manufacturing an unpatented product which is sold in interstate commerce; and agreements concerning such processes are likely to engender the evils to which the Sherman Act was directed. Compare *United States v. International Harvester Co.*, 214 Fed. 987, appeal dismissed, 248 U. S. 587. We must, therefore, examine the evidence to ascertain the operation and effect of the challenged contracts.

Fifth. No monopoly, or restriction of competition, in the business of licensing patented cracking processes resulted from the execution of these agreements. Up to 1920 all cracking plants in the United States were either owned by the Indiana Company alone, or were operated under licenses from it. In 1924 and 1925, after the cross-licensing arrangements were in effect, the four primary defendants owned or licensed, in the aggregate, only 55% of the total cracking capacity, and the remainder was distributed among twenty-one independently owned cracking processes. This development and commercial expansion

¹⁰ Such agreements, though involving patent rights, have also been held to be in violation of state anti-trust laws. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Pac. 581; *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 435; 126 N. W. 126. Cf. *United Shoe Machinery Co. v. La Chapelle*, 212 Mass. 467, 479; 99 N. E. 289.

of competing processes is clear evidence that the contracts did not concentrate in the hands of the four primary defendants the licensing of patented processes for the production of cracked gasoline.¹¹ Moreover, the record does not show that after the execution of the agreements there was a decrease of competition among them in licensing other refiners to use their respective processes.¹²

No monopoly, or restriction of competition, in the production of either ordinary or cracked gasoline has been proved. The output of cracked gasoline in the years in question¹³ was about 26% of the total gasoline production. Ordinary or straight run gasoline is indistinguishable from cracked gasoline and the two are either mixed or sold interchangeably. Under these circumstances the primary defendants could not effectively control the sup-

¹¹ There is no evidence in the record showing the ratio of defendants' processes to those of other companies after 1925. Ratios since then are indicated in the official Bureau of Mines surveys of cracking plants, which, beginning in 1929, report the distribution of the various cracking processes. See Petroleum Refining Statistics, 1928, Department of Commerce, Bureau of Mines, Bull. 318, pp. 122-23; *id.*, Survey of Cracking Plants, January 1, 1930, Information Circular No. 6305, p. 6.

¹² Between the execution of the respective contracts and the bringing of this suit, the Indiana Company issued two new licenses, the Texas Company two, and Gasoline Products ten. Between the filing of the bill and May, 1925, the Gasoline Products Company appears to have issued ten additional new licenses. There is no evidence concerning the licensing operations of the other three primary defendants in this period.

¹³ The estimates of the production of cracked gasoline, and other evidence upon which the injunction was issued in January, 1930, cover only the period to 1925. Much of this evidence, including statements of the production of two of the three producing primary defendants, relates to operations no later than 1924. Although frequently given in terms of barrels, production figures, where used in this opinion, have been uniformly converted into gallons.

ply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking processes, unless they could control, through some means, the remainder of the total gasoline production from all sources.¹⁴ Proof of such control is lacking. Evidence of the total gasoline production, by all methods, of each of the primary defendants and their licensees is either missing or unsatisfactory in character.¹⁵ The record does not accurately

¹⁴ In addition to straight run and cracked gasoline, which are refined from crude oil, a third kind, known as natural-gas or casing-head gasoline, is produced from natural gas. In 1925 this method accounted for 7.6% of the total gasoline production. Petroleum Refining Statistics, 1926, Department of Commerce, Bureau of Mines, Bull. No. 289, pp. 57-58. Because of its great volatility, natural-gas gasoline is now mainly used for blending with other types. See American Petroleum Institute, Petroleum Facts and Figures (2d ed., 1929) pp. 152-54. Thus it increases the total amount of gasoline refined, and, to this extent, control of production of natural-gas gasoline might be necessary to secure complete domination of the gasoline refining industry. There is, however, no evidence as to the production or purchase of this type of gasoline by any of the primary defendants except the New Jersey Company and its subsidiaries, which in 1925 manufactured about one-fifth of all the natural-gas gasoline recovered.

¹⁵ In 1924 the total gasoline production in gallons was 8,959,680,198; in 1925 it was 10,886,127,000. The New Jersey Company and its subsidiaries, as to which complete estimates alone are given in the record, produced by all methods 1,445,273,195 gallons, or about 16% of the total in 1924; and 1,581,314,145 gallons, or about 14.5% in 1925. The Texas Company estimated its total production, exclusive of its licensees, for the year 1924 at 602,918,348 gallons, or about 6.6% of the total. These are the only estimates as to the total production of all kinds of gasoline. In the absence of definite figures as to such total gasoline production by all methods, domination of the refining industry by the three primary defendants cannot be shown. Compare Federal Trade Commission, Prices, Profits, and Competition in the Petroleum Industry, Sen. Doc. No. 61, 70th Cong., 1st Sess., pp. 157 *et seq.*

show even the total amount of cracked gasoline produced,¹⁶ or the production of each of the licensees, or competing refiners. Widely variant estimates of such production figures have been submitted. These were not accepted by the master and there is no evidence which would justify our doing so.¹⁷

No monopoly, or restriction of competition, in the sale of gasoline has been proved. On the basis of testimony relating to the marketing of both cracked and ordinary gasoline, the master found that the defendants were in active competition among themselves and with other refiners; that both kinds of gasoline were refined and sold in large quantities by other companies; and that the primary defendants and their licensees neither individually nor collectively controlled the market price or supply of any gasoline moving in interstate commerce. There is ample evidence to support these findings.

¹⁶ No Bureau of Mines statistics on the production of gasoline, distributed according to method of refining, exist for the period prior to January, 1925. See Petroleum Refining Statistics, 1916-25, Department of Commerce, Bureau of Mines, Bull. No. 280, p. 125. Hence all the statistics presented as to the total amount of cracked gasoline produced theretofore are only estimates.

¹⁷ The Government estimated that in 1924 the total production of cracked gasoline amounted to 1,443,036,000 gallons. The New Jersey Company estimated that the total production in that year was 1,680,000,000 gallons; and an estimate based on a Bureau of Mines statement that cracked gasoline was 20% of the total, comes to 1,791,938,400 gallons. If the New Jersey figure is accepted as a base, it appears that in 1924, the Indiana Company produced 444,307,600 gallons of cracked gasoline, or 26.5% of the total; the Texas Company, 316,552,110 gallons, or 18.8%; and the New Jersey Company and its subsidiaries, 350,491,190 gallons, or 20.8%. Thus, on this basis, these three primary defendants manufactured 66.1% of the total cracked gasoline in 1924. In reliance on its own estimated total production, which was the lowest submitted, the Government alleged that they manufactured 81.04% in the same year. The inaccuracy of all of these estimates of total production of cracked

Thus it appears that no monopoly of any kind, or restraint of interstate commerce, has been effected either by means of the contracts or in some other way. In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition. By virtue of their patents they had individually the right to determine who should use their respective processes or inventions and what the royalties for such use should be. To warrant an injunction which would invalidate the contracts here in question, and require either new arrangements or settlement of the conflicting claims by litigation, there must be a definite factual showing of illegality. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

gasoline is aptly illustrated by the first official Bureau of Mines figures for the next year, 1925. See Note 16, *supra*. For that year the total cracked gasoline production is reported at 2,880,486,000 gallons—or over a billion gallons more than the highest estimate for 1924. Compare Bull. 280, *loc. cit. supra*, Note 16.

Moreover, to determine the total production of both primary and secondary defendants, the Government calculated the production of each licensee by dividing its royalty payments by varying estimates of the amount of royalty per gallon. Adding these amounts to its estimated production of the three producing primary defendants, it submitted that in 1921 the primary defendants and their licensees refined about 86% of the total cracked gasoline produced, and in 1924 about 94%. But in most cases royalties were paid by the secondary licensees on the basis of the amount of "charging stock" or residual oil treated. To determine a licensee's production from its royalty payments, it was thus first necessary to estimate the rate of conversion into finished cracked gasoline. Sufficient data for doing so accurately for each licensee was lacking. The rate of conversion differs with the type of installation, composition of stock treated, and plant efficiency, and the estimated conversion rates relied upon by the Government varied from 25% to 31%.

Sixth. In the District Court, the Government undertook to prove the violation charged by showing that the three agreements challenged were made by the primary defendants in bad faith. The bulk of the testimony introduced by it, is directed to this issue and relates to the validity and scope of twenty-three jointly-used patents which were selected by it for attack.¹⁸ This evidence was admitted, over objection, for the purpose of showing that these patents were either invalid or narrow in scope; that there was no substantial foundation for the alleged conflicts and threatened infringement suits; that these were a pretext; and that the patents had been secured, and their infringement was being asserted, merely as a means of lending color of legality to the making of the contracts by which competition would inevitably be suppressed.¹⁹ The master found, after an elaborate review of the entire art, that the presumption of validity attaching to the patents had not been negatived in any way; that they merited a broad interpretation; that they had been acquired in

¹⁸ Prior to trial the United States propounded eighty-one interrogatories to each of the primary defendants, concerning the use of some seventy-three patents. These interrogatories were answered in detail with the reservation that the admissions of use were merely opinions of counsel, but that nevertheless each defendant believed adversely held patents to constitute a basis for suit. The Government selected twenty-three patents for attack. One hundred and thirty-one of the 273 exceptions filed by it to the master's report concern these patents. The evidence relating to them comprises five volumes of the present record.

¹⁹ After the first hearing the master certified the question whether this evidence was admissible. The District Court held that it was. Nevertheless, in his final report the master stated that he was of the opinion that examination of the prior art could be made only for the purpose of determining whether the patents were useful, of adequate scope, and reasonably related to the contracts. He also ruled that it was not necessary to determine whether any of the competing process patents actually infringed another. These rulings were not disturbed by the court.

good faith; and that the scope of the several groups of patents overlapped sufficiently to justify the threats and fear of litigation. The District Court stated that the particular claims should be interpreted narrowly, and that the respective inventions might be practised without infringement of adversely owned patents. But it confirmed the finding of presumptive validity and did not question the finding of good faith. It held that the patents were adequate consideration for the cross-licensing agreements and that the violation charged could not be predicated on patent invalidity. Inasmuch as the Government did not appeal from these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents; and we accept the finding that they were acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts.²⁰

Seventh. The remaining issues in the case have become moot. The Government objected to a number of early Indiana Company licenses which contained certain territorial restrictions on the production of cracked gasoline; and also to a provision in the first contract between primary defendants, and in licenses thereunder, by which the Indiana Company secured an option to purchase a portion of the cracked gasoline manufactured in, or shipped into, its sales territory. At the hearing before the District Court it appeared that these provisions had never been enforced. Upon the court's request the objectionable clauses were voluntarily canceled some months before the entry of the decree. Similarly, the propriety

²⁰ The District Court also dismissed, upon the master's findings and recommendation, a supplementary petition against two additional defendants, which charged that certain patents had been secured by fraud and that a conspiracy had been entered into to injure the owner of a competing cracking process. The United States did not appeal from this order.

of certain blanket acknowledgments of patent validity in the first contract, and in a number of licenses under later contracts, was questioned by the lower court. At its suggestion, these provisions also were formally canceled by the parties. As the relief here sought is an injunction, and hence relates only to the future, *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, the alleged validity of such provisions has become moot. *Berry v. Davis*, 242 U. S. 468; *Commercial Cable Co. v. Burleson*, 250 U. S. 360; *Alejandro v. Quezon*, 271 U. S. 528; *United States v. Anchor Coal Co.*, 279 U. S. 812.

Eighth. The District Court accepted the Government's estimates of cracked gasoline production; found that the primary defendants were able to control both supply and price by virtue of their control of the cracking patents; held that although these patents were valid consideration for the cross-licenses, the agreement to maintain royalties was in effect a method for fixing the price of cracked gasoline; and concluded that a monopoly existed as a result of such agreements. This appears to be the only basis for the relief granted. But the widely varying estimates, relied upon to establish dominant control of the production of cracked gasoline were insufficient for that purpose.²¹ And the court entirely disregarded not only the fact that the manufacture of the cracked is only a part of the total gasoline production, but also the evidence showing active competition among the defendants themselves and with

²¹ The court apparently accepted, as accurate, the Government's estimates of cracked gasoline production, and stated: "It is the actual production rather than 'cracking capacity' that is significant. To ascertain whether a monopoly exists we must look to the production rather than the capacity percentages." 33 F. (2d) 617, 625. But the estimates of total cracked gasoline production cannot be accepted, and there was no adequate showing of the proportion actually manufactured by these defendants. See Note 17, *supra*.

others. Its findings are without adequate support in the evidence. The bill should have been dismissed.

The Government now seeks no relief against the secondary defendants. It concedes that fifty-three of the seventy-nine contracts, originally set out in the petition, are wholly beyond attack, because they are licenses issued to secondary defendants prior to the execution by their licensors of the three main agreements challenged. As to the remaining contracts between primary and secondary defendants, the Government on this appeal agreed that the decree should be modified to declare such contracts voidable at the option of the licensees. This modification was assented to at the bar by counsel for the primary defendants. But as we are of the opinion that the decree should be reversed and the bill dismissed, we see no occasion for interfering with the present license arrangements.

Reversed.

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

INTERSTATE TRANSIT, INCORPORATED, v.
LINDSEY, COUNTY COURT CLERK.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 358. Argued March 19, 1931.—Decided April 13, 1931.

1. A state tax upon the operation of motor vehicles engaged exclusively in interstate commerce, being a direct burden on that commerce, can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways in the State or to defray the expense of regulating motor traffic. P. 185.
2. Tennessee Act of 1927, c. 89, § 4, imposed upon concerns operating interstate motor buses on the highways of the State a privilege tax graduated according to carrying capacity. It is part of a general revenue act which deals with practically all of the taxes laid by the State, except those which admittedly provide for defraying

the cost of constructing and maintaining highways and regulating traffic thereon; and the revenue derived from it, unlike that arising from the highway statutes, goes not to the highway fund but to the general funds of the State. *Held* a privilege tax on the carrying on of interstate business, and repugnant to the commerce clause. P. 186.

161 Tenn. 56; 29 S. W. (2d) 257, reversed.

APPEAL from a judgment reversing a judgment for the Transit Company in a lower state court, in its action to recover money collected from it as a tax.

Messrs. J. Carlton Loser and Thomas L. Tallentire, with whom *Messrs. H. Lynne Barber and J. G. Lackey* were on the brief, for appellant.

Mr. William F. Barry, Jr., argued the cause, and *Messrs. L. D. Smith*, Attorney General of Tennessee, and *Roy H. Beeler*, Solicitor General, submitted a brief for appellee.

A State may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of construction and maintenance of the public highways. *Sprout v. South Bend*, 277 U. S. 170; *Hendrick v. Maryland*, 235 U. S. 610, 622; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; *Clark v. Poor*, 274 U. S. 557; *Morris v. Duby*, 274 U. S. 135; *Buck v. Kuykendall*, 267 U. S. 307; *Northern Kentucky Transp. Co. v. Bellevue*, 285 S. W. 241; *Red Ball Transit Co. v. Marshall*, 8 F. (2d) 635; *Gundling v. Chicago*, 177 U. S. 183.

Since the highways over which appellant operates are properly maintained by the State out of adequate funds made available for that purpose, the appellant cannot complain that the tax is not levied for the specific benefit of the state highway system.

The exaction is reasonable in amount and not incommensurate with the use to which the appellant puts the highways.

That the tax appears in the "Revenue Bill" does not make it unlawful. *Macallen Co. v. Massachusetts*, 279 U. S. 625.

In the absence of statutory enactment by the Federal Government to regulate and tax interstate motor carriers operating for hire, each State may tax and regulate such operations. *Morris v. Duby*, 274 U. S. 135.

There is no discrimination in the statute against interstate operators in favor of intrastate operators.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Tennessee Act of 1927, c. 89, § 4, imposes upon concerns operating interstate motor busses on the highways of the State a privilege tax graduated according to carrying capacity. It is \$500 a year for each vehicle seating more than twenty and less than thirty passengers. The tax for eight such busses was demanded of Interstate Transit, Inc., an Ohio corporation which operates, exclusively in interstate commerce, a line from Cincinnati, Ohio, to Atlanta, Georgia. The company made a quarterly payment under protest and brought this suit to recover the amount paid, on the ground that the statute as applied violates the commerce clause of the Federal Constitution. The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the State. 161 Tenn. 56; 29 S. W. (2d) 257. The case is here on appeal.

While a State may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane v. New Jersey*, 242 U. S. 160, 168-169; *Clark v. Poor*, 274 U. S.

554; *Sprout v. South Bend, supra*, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor, supra*,¹ or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick v. Maryland*, 235 U. S. 610, 612; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250-252. Compare *Interstate Busses Corp. v. Holyoke Street Ry.*, 273 U. S. 45, 51. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.

A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed not as compensation for the use of the highways but for the privilege of doing the interstate bus business. Chapter 89 of the Acts of 1927 deals with practically all of the taxes laid by the State, except those relating to highways. It is entitled "An Act to provide for General Revenue for the State of Tennessee and the counties and municipalities thereof, to be known as the General Revenue Bill." The scope of this statute conforms to the title. It consists of twenty-one sections.

¹ The Ohio statute there involved declared that the taxes were laid, and were to be used only for, the maintenance and repair of highways and for the regulation of motor traffic. Ohio General Code, § 614-94, § 614-96. The "other purposes," referred to in the opinion, 274 U. S. at p. 557, were the general expenses of the state motor vehicle department as distinguished from expenditures specifically upon the highways.

The first three impose general property, inheritance, and merchants' capital taxes. Section 4, under which the tax challenged is laid, declares "That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxes on such privileges shall be as hereinafter fixed." Then follows a schedule occupying 53 pages, in which 160 businesses are arranged, in the main, alphabetically, and in which the several motor bus businesses have their appropriate places. This is followed by six additional sections which deal exclusively with similar privilege taxes. The remaining sections relate to enforcement.

The tax on interstate busses is of the same character as the tax laid for the privilege of engaging in every other line of business. The taxes for the several businesses range from \$2.50 to \$5000; and since they differ widely in amount even for the same business, appear to be graduated according to the assumed earning capacity. In most, the amount demanded increases with the population of the city, town, or district in which the business is carried on. For some a different basis of gauging probable earning power is adopted. On warehouses the tax is graduated according to storage capacity. On theatres it is graduated according to seating capacity. On the business of operating busses it likewise varies according to seating capacity. The latter tax is specified separately for interstate busses, for intrastate busses operating in more than one county, and for those operating in a single county. But this separation appears to be made solely because of the allocation of the proceeds of the tax.² For the rate of taxation is the same for each, and varies solely with the carrying capacity of the bus; there being steep

² Where an intrastate bus operates for more than half of its total mileage on a county maintained road the Act provides that one-half of the tax shall be retained by the county for road purposes. But taxes collected from interstate busses are not so allocated.

increases from \$50 a year for one carrying not more than five passengers to \$750 for one carrying over thirty.³

The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting § 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds "shall go and belong exclusively to the General Funds of the State." On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915.⁴ At the same session, the legislature created a State Highway Commission with power to construct and maintain highways.⁵ In

³ Four intermediate classifications are provided: \$100 for busses carrying between five and ten passengers; \$200 for one carrying between ten and fifteen; \$350 for one carrying between fifteen and twenty; and the tax in suit, \$500 for a bus carrying between twenty and thirty passengers.

⁴ In 1915 an annual registration fee based upon seating capacity was required of all automobile owners. Pub. Acts 1915, c. 8, §§ 1, 5. In 1917 the fee was made dependent upon rated horsepower, and the use of the proceeds was limited to administrative expenses of the motor vehicle department and maintenance of the highways. Pub. Acts 1917, c. 73, §§ 2, 7. Formal amendments were made in Pub. Acts 1919, c. 149, § 15; Pub. Acts 1921, c. 131; Pub. Acts 1923, c. 10, § 1; c. 108, § 1; Pub. Acts 1929, c. 14, § 1. A very early Act had provided for the registration of all motor vehicles at a nominal fee of two dollars, and had established speed limits. Pub. Acts 1905, c. 173, § 1.

⁵ Pub. Acts 1915, c. 100, §§ 1-11. This same statute first established a State Highway Fund to be accrued from registration fees and penalties, and to include federal aid grants. This fund was to be used

these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles,⁶ imposing gasoline taxes,⁷ laying a one mill road tax,⁸ and authorizing the issue of bonds for the construction of highways and bridges,⁹—the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in § 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.

solely for the maintenance of state highways. *Id.*, §§ 12, 14. See also Pub. Acts 1917, c. 16, § 2, c. 58, and c. 74, § 1, the last establishing a separate State Aid Road Fund; Pub. Acts 1919, c. 149, §§ 1-14, 26, reorganizing the State Highway Commission and repealing the 1915 Act; Pub. Acts 1923, c. 7, §§ 1, 33-35, reorganizing all State Departments and repealing the 1919 Act.

⁶ See Note 4, *supra*.

⁷ Pub. Acts 1923, c. 58, §§ 1, 12; as amended by Pub. Acts 1925, cc. 4, 13, 19, 20; Pub. Acts 1929, c. 11, §§ 1, 2, c. 27, § 1, c. 124, § 1; Pub. Acts 1929, Extraordinary Sess., c. 28. See also Pub. Acts 1927, c. 22, establishing a Division of Motors and Motor Fuels and levying an additional tax on gasoline dealers to defray its expenses. Compare *Williams v. Standard Oil Co.*, 278 U. S. 235. One-tenth of one per cent. per gallon of the State Gasoline tax was, however, set aside as a Sinking Fund for the retirement of the Tennessee Great Smoky Mountain Park Bonds. Pub. Acts 1927, c. 54, § 15.

⁸ Pub. Acts 1917, c. 74, §§ 1, 2; as amended by Pub. Acts 1919, c. 188; tax repealed, Pub. Acts 1923, c. 62.

⁹ *E. g.*, Pub. Acts 1925, c. 72, § 1; Pub. Acts 1927, c. 1, § 5; *id.*, c. 6, § 4; *id.*, c. 37, §§ 6-7; *id.*, c. 83, §§ 1-2; Pub. Acts 1929, c. 5, § 6; *id.*, c. 36, §§ 1-2; *id.*, c. 104, §§ 4, 6-7; *id.*, c. 112, §§ 4, 6-7; Pub. Acts 1929, Extraordinary Sess., c. 33.

It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce.¹⁰ Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare *Gundling v. Chicago*, 177 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. *Clark v. Poor, supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity.¹¹ The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory. *Reversed.*

¹⁰ See Motor Vehicle Conference Committee, State Regulation of Motor Vehicle Common Carrier Business (1930).

¹¹ Compare *id.*, State Restrictions on Motor Vehicle Sizes, Weights, and Speeds (1931); Public Roads, Vol. 6, No. 8 (1925), pp. 165-68.

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

BUCK ET AL. *v.* JEWELL-LASALLE REALTY
COMPANY.

SAME *v.* SAME.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

Nos. 138 and 139. Argued March 3, 4, 1931.—Decided April 13, 1931.

The acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of § 1 (e) of the Copyright Act of March 4, 1909. P. 196, *et seq.*

QUESTION certified by the Circuit Court of Appeals upon appeals from decrees of the District Court, 32 F. (2d) 366, which dismissed suits to enjoin infringement of copyright and for damages.

Mr. Thomas G. Haight, with whom *Messrs. Nathan Burkan, Louis D. Frohlich, E. S. Hartman, and Maurice J. O'Sullivan* were on the brief, for Buck et al.

Mr. Charles M. Blackmar, with whom *Mr. Kenneth E. Midgley* was on the brief, for Jewell-LaSalle Realty Company.

Radio receiving cannot be held to be performing. That would prohibit the operation of receiving sets in public places; it would grant to every copyright owner autocratic power to exact tribute from every person operating a receiving set in public regardless of the merit of the copyrighted work and regardless of whether the composition was in fact ever broadcast.

That the mere act of receiving is not performing by the one operating the receiving set, see *Buck v. Duncan*, 32 F. (2d) 366; *Buck v. DeBaum*, 40 F. (2d) 734; *Dunbar v. Spratt-Snyder Co.*, 226 N. W. 22. See Davis, *Law of Radio Communication*, p. 116. *Messenger v. British Broadcasting Co., Ltd.*, 137 L. T. Rep. 810; (1927) 2 K. B. 543.

Plaintiffs' rights are limited by the copyright statute, which is construed to protect the public against financial loss and damage unexpectedly and unwittingly incurred. As the one operating a receiving set has no control over the performance heard through the set, it is not necessary that copyright owners have control of the use of receiving sets; and the rights claimed by plaintiffs are, therefore, not granted by the statute. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346; *Remick & Co. v. Automobile Acc. Co.*, 5 F. (2d) 411; *Fromont v. Aeolian Co.*, 254 Fed. 592, 594; *Scribner v. Straus*, 210 U. S. 352, 355; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 148; *Holy Trinity Church v. United States*, 143 U. S. 457, 459.

The scientific theory of radio telephoning demonstrates with mathematical certainty that the operator of a receiving set is in no sense the performer of the compositions the set picks up. There is no analogy between this and playing a phonograph record.

No "profit" was received by the defendant by reason of the hearing of the copyrighted composition over its receiving set, therefore there was no performance within the meaning of the Act.

The broadcaster is held to be a performer only when he actually performs the selections he broadcasts. It is begging the question to argue that receiving is performing because broadcasting is performing. *Witmark & Sons v. Bamberger*, 291 Fed. 776; *Remick v. Automobile Acc. Co.*, 5 F. (2d) 411; *Messenger v. British Broadcasting Co., Ltd.*, 137 L. T. Rep. 810; (1927) 2 K. B. 543; *Chappell & Co.*,

Ltd., v. *Associated Radio Cos.*, 50 Victoria App. Law Rep. 350; *Remick & Co. v. General Elec. Co.*, 4 F. (2d) 160; 16 F. (2d) 829.

Defendant is not chargeable, on any theory of agency, with the broadcaster's infringing actions; and cannot be held liable as a contributory infringer, because its acts in installing and maintaining a receiving set cannot be held to be a proximate, direct, or legal cause of or contribution to the infringing performance.

Messrs. Louis G. Caldwell and Philip G. Loucks, by special leave of Court, filed a brief on behalf of the National Association of Broadcasters, Inc., as *amicus curiae*.

The proper construction of the word "perform," with reference to the operation of a receiving set, depends on the physical acts constituting the alleged performance, and is independent of whether the receiving set is operated in public or in private, and of whether the broadcasting station is, or is not, licensed by the copyright owner.

The broadcasting of a musical composition involves only one actual performance of that composition, i. e., the performance by the musician; the apparatus constituting a broadcasting station and the apparatus constituting a receiving set, like a telephone system, merely serve to communicate the musician's performance to listeners.

The consequences, viewed either practically or from the standpoint of the orderly development of the law, require that radio reception be held not to constitute performance.

Adoption of the multiple performance theory will necessarily effect some reduction in the radio audience by making hazardous the operation of receiving sets in hotel lobbies and hotel rooms, restaurants, retail radio stores, railroad club cars, dance halls, theaters, moving picture houses, hospitals and other public places. The copyright owners will be given power to impose burdensome, arbitrary, and discriminatory license fees on persons operating receiving sets in such places.

The receiving set owner has no control over what will be broadcast by the many broadcasters to whose stations he may tune, and cannot be expected to ascertain each broadcaster's program in detail in advance. The broadcaster himself frequently does not know what musical compositions will be performed before his microphone, as in the case of a college band during a football game.

If the operation of a receiving set is a performance, so also is the operation of an amplifier in a public hall, or one connected with a public hall and located in other rooms in the same building. Under the "multiple performance" theory, if in a large auditorium there are twenty amplifiers, twenty performances of the musical composition will take place in addition to that of the musician, and the proprietor will be liable for at least twenty-one times the minimum statutory damages.

Broadcasting frequently involves much more complicated processes than those where the broadcaster transmits the musician's performance directly from his studio to receiving sets. The three important situations are those of remote control broadcasting; network or chain broadcasting; international or relay broadcasting.

If the copyright owner is to be given rights against those who merely communicate a performance, let it be done not by a strained judicial construction of the word "perform," but by legislation in which to "communicate" a copyrighted work is specifically made an infringement.

If appellant's theory is correct, every person operating a receiving set "performs," the only audience consists of persons listening to loud speaker performances, and therefore the broadcaster's "performance" is not public.

If the analogy between broadcasting and phonograph record is correct, then it is clear that the broadcaster does not publicly perform the musical composition; he merely manufactures a fleeting record by modulating radio waves.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These suits were brought in the federal court for western Missouri by the American Society of Composers, Authors and Publishers, and one of its members, against the Jewell-LaSalle Realty Company, which operates the LaSalle Hotel at Kansas City. The hotel maintains a master radio receiving set which is wired to each of the public and private rooms. As part of the service offered to its guests, loud-speakers or head-phones are provided so that a program received on the master set can, if desired, be simultaneously heard throughout the building. Among the programs received are those transmitted by Wilson Duncan who operates a duly licensed commercial broadcasting station in the same city. Duncan selects his own programs and broadcasts them for profit. There is no arrangement of any kind between him and the hotel. Both were notified by the plaintiff society of the existence of its copyrights and were advised that unless a license were obtained, performance of any copyrighted musical composition owned by its members was forbidden. Thereafter, a copyrighted popular song, owned by the plaintiffs, was repeatedly broadcast by Duncan and was received by the hotel company and made available to its guests. Suits were brought for an injunction and damages for the alleged infringements.¹ After a hearing on stipulated facts, relief against the hotel company was denied on the ground that its acts did not constitute a "performance" within the Copyright Act. *Buck v. Duncan*, 32 F. (2d) 366. Plaintiffs appealed to the Circuit Court of Appeals which certified the following question:

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio re-

¹ In No. 138, Duncan was joined as a defendant and a decree *pro confesso* for failure to answer was entered against him. In No. 139, the hotel company was the only defendant. See also No. 140, *post*, p. 202.

ceiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?”

The provision referred to is § 1 of the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, which provides that: “Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit.”

The parties agree that the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. For even if this be deemed a performance, it is neither public nor for profit. Compare *Herbert v. Shanley Co.*, 242 U. S. 591. The contention that what the hotel company does is not a performance within the meaning of the Copyright Act is urged on three grounds.

First. The defendant contends that the Copyright Act may not reasonably be construed as applicable to one who merely receives a composition which is being broadcast. Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed are wholly unlike any then in use,² it is not denied that such

² Station KDKA, erected in Pittsburgh in 1920, was the pioneer commercial broadcasting station in the world. The Radio Industry, Harvard Graduate School of Business Administration Lectures, 1927-28, pp. 195-209. The latest amendment of the Copyright Act which added new classes of copyrights was that of August 24, 1912, c. 356, 37 Stat. 488.

broadcasting may be within the scope of the Act.³ Compare *Kalem Co. v. Harper Bros.*, 222 U. S. 55; *Gambart v. Ball*, 14 C. B. (N. S.) 306, 319. The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies (including records) and that of giving public performances for profit (including mechanical performances from a record); and that a monopoly of the reception, for commercial purposes, of this same rendition is not warranted by the Act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill v. Straus*, 210 U. S. 339. This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the Act,⁴ but a monopoly is expressly granted of all public performances for profit.

The defendant next urges that it did not perform, because there can be but one actual performance each time

³ See *M. Witmark & Sons v. L. Bamberger Co.*, 291 Fed. 776; *Remick & Co. v. American Automobile Accessories Co.*, 5 F. (2d) 411; *Remick & Co. v. General Electric Co.*, 16 F. (2d) 829. See also *Messenger v. British Broadcasting Co., Ltd.*, [1927] 2 K. B. 543, reversed [1928] 1 K. B. 660, affirmed, [1929] A. C. 151; *Chappell & Co., Ltd., v. Associated Radio Co. of Australia, Ltd.*, [1925] Viet. L. R. 350.

⁴ The rule of the *Bobbs-Merrill* case was enacted into the Copyright Act of March 4, 1909, c. 320, § 41, 35 Stat. 1075, 1084. See H. Rep. No. 2222, 60th Cong., 2d Sess., February 22, 1909, p. 19. It is applicable only where there is no relation between the manufacturer of the copy and the purchaser which might make the latter liable as a contributory infringer. Compare *Scribner v. Straus*, 210 U. S. 352, 355. In the case at bar, the stipulated facts show that there was no relation whatever between the broadcaster and the hotel company so that even if the broadcasting constituted an infringement, there would be no question of contributory infringement.

a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. Compare *Kalem Company v. Harper Bros.*, 222 U. S. 55, 63. No reason is suggested why there may not be more than one liability. And since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee.

The defendant contends further that the acts of the hotel company were not a performance because no detailed choice of selections was given to it. In support of this contention it is pointed out that the operator of a radio receiving set cannot render at will a performance of any composition but must accept whatever program is transmitted during the broadcasting period. Intention to infringe is not essential under the Act. Compare *Hein v. Harris*, 175 Fed. 875, affirmed, 183 Fed. 107; *Stern v. Remick & Co.*, 175 Fed. 282; *Haas v. Leo Feist, Inc.*, 234 Fed. 105; *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412, 414. And knowledge of the particular selection to be played or received is immaterial. One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the

risk that in so doing he may infringe the performing rights of another. Compare *Harms v. Cohen*, 279 Fed. 276, 278; *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470, 475, affirmed, 2 F. (2d) 1020; *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412, 413. It may be that proper control over broadcasting programs would automatically secure to the copyright owner sufficient protection from unauthorized public performances by use of a radio receiving set,⁵ and that this might justify legislation denying relief against those who in using the receiving set innocently invade the copyright,⁶ but the existing statute makes no such exception.

Second. The defendant contends that there was no performance because the reception of a radio broadcast is no different from listening to a distant rendition of the same program.⁷ We are satisfied that the reception of a

⁵ If the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare *Buck v. Debaum*, 40 F. (2d) 734. But Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.

⁶ See the so-called Vestal Copyright bill, which failed of passage in the Seventy-first Congress. H. R. 12549, 71st Cong., 2d Sess., § 15 (d). Compare Note 10, *infra*. See also arguments concerning the broadcasting of copyrighted selections as set forth in Joint Hearings before the Committees on Patents, on S. 2328 and H. R. 10353, 69th Cong., 1st Sess., April 5-9, 1926; Hearings before the Senate Committee on Patents, on H. R. 12549, 71st Cong., 3d Sess., January 28-29, 1931, pp. 52, *et seq.*; Sen. Rep. No. 1732, *id.*, February 17, 1931, p. 29.

⁷ This argument is based upon an elaborate discussion of the theory of radio transmission and reception. Defendant's hypothesis is that the energy which actuates the receiving apparatus—that is, which varies the currents in the receiver to produce audible sound—is part of the original energy exerted upon the air by the performer. Hence it is urged that the radio receiving set is no more than a mechanical or electrical ear-trumpet for the better audition of a distant performance.

radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the "ether." These radio waves are not audible.⁸ In the receiving set they are rectified; that is, converted into direct currents which actuate the loudspeaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus.⁹ The transmitted radio waves require a receiving set for their detection and trans-

⁸ Sound waves, which can pass through air, water, or solids, and radio or other electromagnetic waves, which operate in the "ether," behave similarly in many respects. Yet not only are the latter inaudible but they travel at relatively tremendous speeds. Sound waves travel, at ordinary temperatures, approximately 1100 feet a second, electromagnetic waves with the speed of light, or about 186,000 miles per second. This velocity is dependent solely upon the particular medium through which the various kinds of waves travel. See Morecroft, Principles of Radio Communication, c. IV. Thus, broadcast time-signals can be heard practically simultaneously on receiving sets hundreds of miles apart; ordinary sound signals cannot. Compare as to the general theory of radio communication, *Radio Corp. of America v. Twentieth Century Radio Corp.*, 19 F. (2d) 290, 291; *Chappell & Co., Ltd., v. Associated Radio Co.* (1925), 50 Victoria Law Reports 350, 357-8.

⁹ The impressions on the phonograph disc are of course permanent, whereas the modulations of the carrier radio waves, continually emitted by the sending station, are ephemeral. But in both cases the

lation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance. Compare *Buck v. Heretis*, 24 F. (2d) 876; *Irving Berlin, Inc., v. Daigle*, 31 F. (2d) 832, 833. In addition, the ordinary receiving set, and the distributing apparatus here employed by the hotel company, are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control.¹⁰

means used to transmit the selection being played are wholly different from the musical sounds themselves, and require an additional mechanism, not under the control of the performer, for the re-creation of the original music.

¹⁰ At the present time there are renewed proposals for the revision of the Copyright Act in the light of new conditions. See summaries in the Annual Report of the Register of Copyrights (1928), pp. 6-13; *id.* (1929), pp. 16-24; *id.* (1930), pp. 8-13. See also the so-called Vestal Bill, the most recent of these, introduced in the Seventy-first Congress on May 22, 1930. H. R. 12549, 71st Cong., 2d Sess., § 1 (d), (g); Sen. Rep. No. 1732, *id.*, 3d Sess., Feb. 17, 1931, pp. 4-5, 29. Compare Hearings before the Senate Committee on Patents on H. R. 12549, *id.*, January 28-29, 1931, pp. 25, *passim*. This measure was debated at length in the Senate, but was not reached on the final calendar. See 74 Cong. Rec., Pt. IV, pp. 6213-6849; *id.*, Pt. V, p. 33.

Third. The defendant contends that there was no performance within the meaning of the Act because it is not shown that the hotel operated the receiving set and loudspeakers for profit. Unless such acts were carried on for profit, there can, of course, be no liability. But whether there was a performance does not depend upon the existence of the profit motive. The question submitted does not call for a determination whether the acts of the hotel company recited in the certificate constitute operation for profit.

The question certified is answered: Yes.

JEWELL-LASALLE REALTY COMPANY *v.* BUCK
ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 140. Argued March 3, 4, 1931.—Decided April 13, 1931.

1. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, the court is bound by the minimum amount of \$250 set out in the so-called "no other case" clause of § 25 (b) of the Copyright Act, reading, "and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty." P. 203.
2. Where more than twenty-five infringing performances of a copyrighted musical composition have been proved and there is no showing of actual damages, the court must allow the statutory minimum of \$250 and may, in its sound discretion, employ the rate of ten dollars a performance, which is scheduled in subdivision "Fourth" of § 25 (b), as a basis for assessing additional damages. P. 208.

QUESTIONS certified by the Circuit Court of Appeals upon an appeal from a decree of the District Court, 32 F. (2d) 366, 368, enjoining an infringement of copyright and awarding damages.

Mr. Charles M. Blackmar, with whom *Mr. Kenneth E. Midgley* was on the brief, for Jewell-LaSalle Realty Company.

Mr. Thomas G. Haight, with whom *Messrs. Nathan Burkan, Louis D. Frohlich, E. S. Hartman, and Maurice J. O'Sullivan* were on the brief, for Buck et al.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The American Society of Composers, Authors and Publishers, and one of its members sued the Jewell-LaSalle Realty Company in the federal court for Western Missouri for an unauthorized orchestral performance of a musical composition for which they held the exclusive non-dramatic performing rights. The infringement was proved, but there was no showing of actual damages. The defendant contended that the plaintiffs were entitled to only \$10 statutory damages; the plaintiffs that \$250 was the minimum allowable under the Copyright Act of 1909. The court granted an injunction and awarded \$250 damages, 32 F. (2d) 366, 368. The defendant appealed; and the Circuit Court of Appeals certified questions numbered II, III and IV relating to the subject of damages.¹

Question II. "In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of \$250 set out in the so-called 'no other case' clause of Section 25 (b) of the Copyright Act (17 U. S. C., Sec. 25), reading, 'and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?'"

¹ The relief for the infringement was sought in the seventh count of the bill referred to in No. 139, *ante*, p. 191. The question here discussed was raised by a cross-appeal. The several questions presented by Nos. 138, 139 and 140 were embraced in a single certificate, but separate briefs were filed.

The provision referred to is § 25 of the Act of March 4, 1909, c. 320, 35 Stat. 1075, 1081, as amended by the Act of August 24, 1912, 37 Stat. 488, 489, which provides:

“ That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

“(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but [here follow limitations applicable specifically to newspaper reproductions of photographs, and certain motion picture infringements of undramatized or nondramatic work and of copyrighted dramatic or dramatico-musical work], and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served on him.”

Then follows the so-called schedule, of which the “ Fourth ” item is:

“ In the case of dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance.”

The Copyright Act confers two monopolies—that of making copies and that of giving public performances for profit. It was settled in *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, which dealt with the infringe-

ment by a newspaper of the monopoly of copying, that for each publication \$250 is the minimum damages. An unbroken line of decisions in the lower courts has since held that the rule declared in the *Westermann* case is applicable also to infringement of the monopoly of giving public performances. It is now contended that, as applied to performances, the rule is burdensome and unreasonable; that it was followed unwillingly² by the lower courts in the mistaken belief that the *Westermann* case required them to do so; that the legislative history of § 25, when considered in the light of earlier copyright acts, indicates that the fourth subdivision, relating to musical compositions, was not intended to be controlled by the maximum and minimum provisions of the so-called "no other case" clause; and that the decision in the *Westermann* case is not decisive of the question certified.

The argument is that § 25 was a codification of § 4965 and § 4966 of the Revised Statutes, which embodied a distinction recognized in earlier Acts between the imposition of penalties for copying and the awarding of damages for performing; that there is no language in § 25 indicating an intention to apply the maximum and minimum provisions theretofore contained in the penal § 4965, which dealt with unauthorized copying, to cases falling

² Defendant relies upon statements in several cases in which the courts have commented upon the ambiguity or severity of the Act. See *Waterson, Berlin & Snyder Co. v. Tollefson*, 253 Fed. 859; *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 471, 481; *Buck v. Jarvis*, unreported, E. D. Va., decided March 23, 1927; *Dreamland Ball Room, Inc., v. Shapiro, Bernstein & Co.*, 36 F. (2d) 354, 355. Compare *Irving Berlin, Inc., v. Daigle*, 31 F. (2d) 832, 835. But in all of these cases the *Westermann* decision was followed. Occasionally, where the statutory measure appeared burdensome under the circumstances, courts have reduced or refused to allow counsel fees. *Fred Fisher, Inc., v. Dillingham*, 298 Fed. 145, 152; *Cravens v. Retail Credit Mens' Assn.*, 26 F. (2d) 833, 836. But see *M. Witmark & Sons v. Calloway*, 22 F. (2) 412, 415.

within the former remedial § 4966, which gave damages for unauthorized performing; and that a contrary intention appears from the House Report of the 1909 Act.³ This argument overlooks the fact that the primary purpose of § 25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages where actual proof was lacking. It is true that the second subdivision, involved in the *Westermann* case, had been part of the old penal § 4965 of the Revised Statutes. But there is nothing to show an intention to exclude the infringements mentioned in the other subdivisions from the operation of the maximum and minimum clause. The history of the section as revealed in the extended hearings which preceded the Act of 1909, makes the contrary clear.⁴ We are of opinion that the maximum and minimum provisions were intended to be applicable alike to all types of

³ See H. Rep. No. 2222, 60th Cong., 2d Sess., February 22, 1909, p. 15. The statement relied upon is: "The provision that in lieu of actual damages and profit such damages shall be awarded as shall appear to the court just, not exceeding the sum of \$5,000, is a modification of existing law, decreasing instead of increasing the amount which may be obtained in this way." Defendant contends that this sentence indicates an intention to continue the distinction between scheduled damages for unauthorized performances, and penalties for copying, the latter having been limited by the Act of March 2, 1895, c. 194, 28 Stat. 965, to \$10,000. Compare *infra*, Note 4.

⁴ The suggested consolidation of Rev. Stat. § 4965 and § 4966 was repeatedly attacked throughout the hearings, which lasted three years. See Arguments before the Committee on Patents, on S. 6330 and H. R. 19853, 59th Cong., 1st Sess., June 6-9, 1906, pp. 124, 137, 177; *id.*, December 7-11, 1906, pp. 36, 144, 176; compare *id.*, March 26-28, 1908, pp. 21, 362. This section was, however, retained in the bill. See H. Rep. No. 2222, *supra* Note 3, pp. 15-16; Sen. Rep. No. 1108, 60th Cong., 2d Sess., p. 15. In commenting on the bill, which was the result of a series of conferences called by the Librarian of Congress, the latter said, concerning the remedies for infringements: "One inconvenience is that they [the existing statutes] provide a different class of remedies and recoveries for different subject-matter; another

infringement except those for which the section makes other specific provision.

It is urged, however, that under such interpretation the suggested measure of ten dollars a performance, scheduled in the fourth subdivision of § 25, would not be applicable unless more than twenty-five infringing performances were proved. This appears to be the meaning of the section, read as a whole, particularly since the amounts in the scheduled subdivisions appear to have been inserted merely as an aid to the court in awarding such damages as "shall appear to be just."⁵ The definite specification of a maximum and minimum in every case is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. See *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 106, 109. If, as

is that they confuse the duty of the Government to punish a deliberate infringement . . . with the right of the copyright proprietor for compensation for his particular loss. The bill attempts to provide uniform remedies, and it divorces the civil action from the criminal." Arguments before the Committees on Patents, *supra*, June 6-9, 1906, p. 13. Compare Ann. Rep. of Register of Copyrights (1929), pp. 12-14. The provision to which reference was made was Rev. Stat. § 4965, as amended by the Act of March 2, 1895, c. 194, 28 Stat. 965, which provided that one-half of all penalties collected should accrue to the United States. This section was repealed by § 63 (35 Stat. 1088) of the 1909 Act.

⁵ As originally proposed in June, 1906, the present Act provided for a maximum and minimum applicable to all types of infringement, and, in the then appended schedule, for an additional minimum in the case of "a dramatic or musical composition, [of] not less than one hundred dollars for the first and fifty dollars for every subsequent infringing performance." Thus where more than four infringing performances were proved, this original schedule may have imposed a higher minimum in such cases than the main clause. See § 23, S. 6330, 59th Cong., 1st Sess., in Arguments before the Committees on Patents, *supra* Note 4, p. ix. As finally enacted, it furnished merely a guide for the court's discretion.

applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.⁶ Question II is answered in the affirmative.

Question III. "Is Section 25 (b) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the Court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?"

This question has in part been necessarily answered by our discussion of Question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of \$250 must be made. Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 106. Subject to this limitation, Question III is answered in the affirmative.

Question IV. "In Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, 'nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant,' confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25 (b)?"

⁶ The *Westermann* case was decided in 1919. Since that time there have been repeated proposals to amend and/or completely revise the Copyright Act. See Ann. Rep. Register of Copyrights (1928), pp. 6-11; *id.* (1929), pp. 16-24; *id.* (1930), pp. 8-13. No suggested elimination of the minimum provision has been found. Compare H. R. 11852, 71st Cong., 2d Sess., § 10; H. R. 12549, § 14 (c) and (d), in H. Rep. No. 1732, 71st Cong., 2d Sess., pp. 8-9; Sen. Rep. 1732, *id.*, on H. R. 12549, § 14 (c) and (e) as amended.

Inasmuch as the plaintiffs did not ask for more than the minimum statutory damages of \$250, and did not appeal from the decree awarding only this sum, the question whether the court might have awarded more than the maximum of \$5,000 is not properly raised upon the facts presented in this certificate. We have no occasion to consider it. *Dillon v. Strathearn S. S. Co.*, 248 U. S. 182, 184; *Reinecke v. Gardner*, 277 U. S. 239, 245; *White v. Johnson*, 282 U. S. 367, 371.

As to Question IV, the certificate is dismissed.

Question II, Yes.

Question III, Yes.

Question IV, not answered.

CHESAPEAKE & OHIO RAILWAY COMPANY v.
MARTIN ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 155. Argued March 4, 1931.—Decided April 13, 1931.

1. The question whether a provision in an interstate bill of lading limiting the time for filing claim for loss of property has been complied with is a federal question, to be determined by the application of federal law. P. 212.
2. Where a bill of lading for an interstate shipment provides that claim, in case of failure to make delivery, must be made in writing to the carrier within six months after a reasonable time for delivery has elapsed, the reasonable time meant is such time as is necessary to transport and make delivery of the shipment in the ordinary course of business, in the circumstances and conditions of the transaction. P. 213.
3. A demurrer to the evidence must be tested by the same rules that apply in respect of a motion to direct a verdict. In ruling, the court must resolve all conflicts in the evidence against the defendant; but is bound to sustain the demurrer whenever the facts established and the conclusions which they reasonably justify are legally insufficient to justify a verdict for the plaintiff. P. 213.

4. In ruling on a demurrer to the evidence, the court can not disregard the testimony of a witness merely because he is an employee of the defendant. P. 214.
5. The general rule that the credibility of witnesses is a question for the jury alone, does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. P. 216.
6. The fact that the carrier, through misunderstanding or negligence, made delivery of an interstate shipment contrary to instructions can not estop it from enforcing a stipulation in the bill of lading requiring the shipper to make claim within a stated period after a reasonable time for delivery had elapsed. *Georgia, F. & A. Ry. v. Blish Co.*, 241 U. S. 190. P. 220.
154 Va. 1; 143 S. E. 629; 152 S. E. 335, reversed.

CERTIORARI, 282 U. S. 819, to review a judgment sustaining recovery of damages resulting from failure of the Railway Company to deliver a shipment of potatoes.

Mr. Meade T. Spicer, Jr., with whom *Mr. Walter Leake* was on the brief, for petitioner.

No appearance for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by the respondents against petitioner in a state court to recover damages for the "misdelivery" of a carload of potatoes transported on a through bill of lading in interstate commerce. On November 6, 1925, the shipment was initiated in Michigan by another carrier, and transferred to the petitioner for final transportation to, and delivery in, Richmond, Virginia. Respondents had arranged for the storage of potatoes with the Bowman Transfer Company in Richmond, and petitioner had been notified that all potatoes billed to respondents were to be delivered at the warehouse of that company. The potatoes arrived at petitioner's yards in

Richmond six days after shipment from Michigan, and four days later (November 16th) were inspected by respondents, who thereupon paid all freight and demurrage charges and became entitled to delivery. To make delivery to the Bowman warehouse it first was necessary to transfer the car of potatoes to the Southern Railway; and the usual time required for the entire movement was not more than forty-eight hours. Petitioner, on November 17th, transferred the car to the Southern Railway, but by mistake directed that delivery be made to the warehouse of D. S. Harwood, where the car was unloaded and the potatoes were stored in the belief that they belonged to a customer of Harwood. The same day the Bowman Company mailed to respondents a warehouse receipt acknowledging the receipt and storage of the potatoes in the warehouse of that company; but a month later advised respondents by letter that the receipt had been issued in error, and that the car had been taken to the warehouse of D. S. Harwood. Notwithstanding this letter, respondents visited the Bowman warehouse and upon inquiry concluded that the potatoes were there. They made no inquiry of the petitioner or at the Harwood warehouse. Harwood did not know the respondents or suspect that they were the owners of the potatoes, until May 10, 1926, at which time he informed them that he had the car. The respondents then identified the potatoes, found them in a spoiled condition, sold them for a small sum, and brought this action. No notice of loss was given or claim for damages made until May 26, 1926, a period of six months and twenty days after the shipment from Michigan.

The bill of lading contains the following provision:

“Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or

in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Petitioner's freight agent testified that a reasonable time after shipment for delivery of the potatoes to the consignee in Richmond would be about eight days, and that if any longer time were taken it would be considered a delayed movement. There was no evidence to the contrary.

At the conclusion of respondents' case in rebuttal, petitioner demurred to the evidence upon the ground that the action was barred by the provision of the bill of lading requiring claims for loss or damage in case of failure to make delivery to be made "within six months after a reasonable time for delivery has elapsed." The demurrer was overruled and judgment entered against petitioner upon verdict for the sum of \$1684.39. The trial court said that the testimony of the freight agent was no part of the plaintiffs' case; that the misdelivery was made through his office; that although unimpeached the jury would not be bound to accept the evidence of the agent as conclusive; and, consequently, that the court was obliged to disregard it and overrule the demurrer to the evidence. The judgment was affirmed on appeal. 143 S. E. 629; 154 Va. 1; 152 S. E. 335.

The provision of the bill of lading that claim for loss in case of failure to deliver must be made within six months after the lapse of a reasonable time for delivery is authorized by federal statute* and is valid and appli-

* Transportation Act, 1920, c. 91, 41 Stat. 456, 494; U. S. C., Title 49, § 20(11).

cable, *Georgia, Fla. & Ala. Ry. v. Blish Co.*, 241 U. S. 190, 197; and, since it was issued in respect of an interstate shipment pursuant to an act of Congress, the bill of lading is an instrumentality of such commerce, and the question whether its provisions have been complied with is a federal question to be determined by the application of federal law. *Southern Express Co. v. Byers*, 240 U. S. 612, 614; *Southern Ry. v. Prescott*, 240 U. S. 632, 635-636; *Georgia, Fla. & Ala. Ry. v. Blish Co.*, *supra*, p. 195; *St. Louis, I. Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 595.

The State Court of Appeals affirmed the judgment on the grounds that the evidence was sufficient to show compliance on the part of respondents with the requirement of the bill of lading in respect of the time for making claim; and that, in any event, the petitioner was estopped from asserting noncompliance with that requirement. We are of opinion that neither ground is tenable.

First. Since the claim for loss was not made until the expiration of six months and twenty days after the shipment, the first ground resolves itself into the question whether twenty days was a reasonable time for the delivery of the car to the consignee. What constitutes a reasonable time depends upon the circumstances of the particular case. As applied to a case like this, it means such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and conditions surrounding the transaction. *Hazzard Co. v. Railroad Co.*, 121 Me. 199, 202-203; 116 Atl. 258. Compare *First Nat. Bank v. Pipe & Contractors' Supply Co.*, 273 Fed. 105, 107-108.

A demurrer to the evidence must be tested by the same rules that apply in respect of a motion to direct a verdict. *Schuchardt v. Allens*, 1 Wall. 359, 369-370; *Merrick's Executor v. Giddings*, 115 U. S. 300, 305. In ruling upon either, the court must resolve all conflicts in the evidence against the defendant; but is bound to sustain the demur-

rer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are legally insufficient to serve as the foundation for a verdict in favor of the plaintiff. *Ibid.*; *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524, and cases cited; *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, 476-478. And, in the consideration of the question, the court, as will be shown, is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable. The agent at petitioner's freight office in Richmond, shown by twenty years' experience to be qualified to speak, testified, in part, as follows:

"Q. Mr. Neiss, the bill of lading issued covering this car shows it was consigned from Wyman, Michigan, on November 6th, and the yard records at Fulton show it arrived there on November 12th. Are you in a position to say whether or not that was a reasonable movement?

"A. Yes, sir.

"Q. Would you say it was a reasonable movement?

"A. Yes, sir.

"Q. Have you had occasion in the course of your experience to handle in-bound shipments?

"A. About twenty years.

"Q. During the course of that time have you become in a general way familiar with the time required for movements of like character as this?

"A. Yes, sir.

"Q. What would you say would be a reasonable time for shipment and delivery to a consignee at Richmond of a car under those circumstances from that point?

"A. About eight days.

“Q. Would anything beyond that be considered a delayed movement?”

“A. Well, yes, sir, I think it would.

“Q. Mr. Neiss, Mr. Martin has testified that freight was paid on this car the morning of November 16th, and order given for disposition to the Bowman Warehouse. Are you in a position to state how long it would take the C. & O. to have that order carried out to the extent of having the car sent to the interchange track?”

“A. Well, if we give the order to the yard any time up to 4 o'clock in the afternoon, it is usually moved up to 5:15.

“Q. The same day?”

“A. Yes, sir, same day.

“Q. Suppose the order is given after 4 o'clock or received after 4 o'clock, at Fulton yards?”

“A. It is laid over until next morning between 9 and 1 o'clock.

“Q. So that the time required for the carrying out of that order by the C. & O. would be less than 24 hours?”

“A. Yes, sir.”

It sufficiently appears that the time reasonably necessary for completion of delivery to the Bowman warehouse after the receipt of the shipment at petitioner's yards would, in no event, exceed forty-eight hours.

Not only is the estimate of the agent reasonable upon its face and in accordance with probability; and not only is it wholly unchallenged by other evidence or circumstances; but it is so completely corroborated by the undisputed facts in respect of this very shipment as to put it beyond the reach of a fair doubt. The movement of the car from the point of origin to the yards of petitioner in Richmond actually was made in six days; and if there be added full forty-eight hours thereafter for completing delivery to the Bowman warehouse, the testimony of the agent as to time stands verified by indubitable test. In

the face of this record the conclusion of the court that it was still open for the jury to say that not eight days merely, but twenty days, fell short of being a reasonable time for delivery is so clearly erroneous as to cause the ruling of the court, in effect, to rest upon nothing more substantial than the power of a jury arbitrarily to disregard established facts.

We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there

were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. *Hauss v. Lake Erie & W. R. Co.*, 105 Fed. 733; *Illinois Cent. R. Co. v. Coughlin*, 132 Fed. 801, 803; *Hull v. Littauer*, 162 N. Y. 569; 57 N. E. 102; *Second Nat. Bank v. Weston*, 172 N. Y. 250, 258; 64 N. E. 949; *Johnson v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 79, 83; 65 N. E. 946; *St. Paul Cattle Loan Co. v. Housman*, 54 S. D. 630, 632; 224 N. W. 189; *M. H. Thomas & Co. v. Hawthorne* (Texas), 245 S. W. 966, 972; *Dunlap v. Wright* (Texas), 280 S. W. 276, 279; *Still v. Stevens* (Texas), 13 S. W. (2d) 956; *Marchand v. Bellin*, 158 Wis. 184, 186; 147 N. W. 1033. Of like effect, although in a different connection, see also *Roberts v. Chicago City Ry. Co.*, 262 Ill. 228, 232; 104 N. E. 708; *Veatch v. The State*, 56 Ind. 584, 587; *Marq., Hought. & Ont. R. R. v. Kirkwood*, 45 Mich. 51, 53; 7 N. W. 209; *Berzevizy v. D., L. & W. R. R. Co.*, 19 App. Div. (N. Y.) 309, 313; 46 N. Y. S. 27; *Miller's Will*, 49 Ore. 452, 464; 90 Pac. 1002.

In *Hull v. Littauer*, *supra*, the doctrine that the question of credibility of a witness must be submitted to the jury was held to be not an inflexible one, even though such witness be a party to the action. In that case the defendants moved for direction of a verdict in their favor, which was resisted by plaintiff on the ground that the proof upon which the motion was based rested upon the evidence of interested parties. The court, nevertheless, sustained the motion. On appeal the State Court of Appeals affirmed this judgment, saying (p. 572):

"It is true that the evidence to establish the entirety of the contract was given by the defendants; but the rule which the plaintiff invokes is not applicable to such a case

as this. Generally, the credibility of a witness, who is a party to the action and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness. Though a party to an action has been enabled, since the legislation of 1857, (Ch. 353, Laws of 1857), to testify as a witness, his evidence is not to be regarded as that of a disinterested person and whether it should be accepted without question, depends upon the situation as developed by the facts and circumstances and the attitude of his adversary. In *Lomer v. Meeker*, (25 N. Y. 361), where the defense to an action upon a promissory note was usury and the indorser gave the evidence to establish it, without contradiction, it was said that 'it was the duty of the court, in such case, to dismiss the complaint, or nonsuit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. . . . The argument is, that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony.' More recently, in *Kelly v. Burroughs*,

102 N. Y. 93; 6 N. E. 109, Judge Danforth, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said 'the mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn.' "

In *Hauss v. Lake Erie & W. R. Co.*, *supra*, a direction of the trial judge to find for the defendant was sustained, although the motion rested upon the testimony of the conductor of the train. The court put aside the objection that the witness was an employee of the defendant, and had an interest to show that he had performed his duty and a motive falsely to represent that he had done so, saying (p. 735):

"The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony."

And, at p. 736:

". . . nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth."

In *M. H. Thomas & Co. v. Hawthorne*, *supra*, at p. 972, the rule is thus stated:

"A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of

giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncontradicted testimony of interested parties, when it is positive and unequivocal and there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas."

Second. The estoppel relied upon seems to be that since petitioner negligently delivered the shipment to the Harwood warehouse, instead of to the Bowman warehouse, and respondents made claim for the loss promptly after discovering the negligent misdelivery, petitioner may not be heard to complain that the claim was not made at an earlier day. The court below said [143 S. E. 629, 630]:

"Whatever may be the decisions of the courts elsewhere, we are of the opinion that the doctrine laid down in *Chesapeake & Ohio Ry. Co. v. Rebman &c.*, 120 Va. 71, should be adhered to," and then quoted from that case the following:

"If it be conceded that plaintiffs were under obligation to give notice of their demand under the circumstances of this anomalous transaction, the evidence shows that such notice was given without delay as soon as the negligence of the defendant which occasioned the loss was discovered."

But the vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the ques-

tion, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding. And it was distinctly held by this court in *Georgia, Fla. & Ala. Ry. v. Blish Co.*, *supra* (p. 197), that the parties to a contract of interstate shipment by rail, made pursuant to the Interstate Commerce Act, could not waive its terms; "nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." The provision of the bill of lading involved there was identical with that here under consideration; and there, as here, the delivery was to another in violation of instructions. The Blish Company insisted that the phrase "failure to make delivery" did not cover a case of misdelivery, but this court said (p. 195):

"The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers 'failure to make delivery.' It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee but actual delivery to another or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other

for the parties to agree upon reasonable notice of the claim as a condition of liability.”

Other state courts have correctly interpreted the decision of this court in that case as applying to a situation like the one here presented, and have followed it, although in some instances their prior decisions had been to the contrary. See, among others, *Bronstein v. Payne*, 138 Md. 116, 120; 113 Atl. 648; *Metz Co. v. Boston & Maine R. Co.*, 227 Mass. 307; 116 N. E. 475. Indeed, the Supreme Court of Appeals of Virginia itself, in *Davis v. Rodgers*, 139 Va. 618, 625; 124 S. E. 408, seems to have taken the same view.

It is held by this court that the shipper may not invoke the doctrine of estoppel against the right to collect the legal rate, because to do so would be to avoid the requirement of the law as to equal rates. *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink*, 250 U. S. 577, 582; *Louisville & N. R. Co. v. Central Iron Co.*, 265 U. S. 59, 65, and cases cited. These decisions lend support to our conclusion in respect of the matter here. Whether under any circumstances the shipper may rely upon that doctrine in avoidance of the time limitation clause of the bill of lading, we need not now determine. But the *Blish Company* case makes clear that the fact that delivery was made contrary to instructions, due to the misunderstanding or negligence of the carrier, cannot successfully be set up as an estoppel against the claim of a failure to comply with the requirement of the bill of lading here involved. To allow it would be to alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having, in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and service. Compare *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667.

Judgment reversed.

Counsel for Parties.

BURNET, COMMISSIONER OF INTERNAL
REVENUE, v. HOUSTON.

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

No. 199. Argued March 12, 1931.—Decided April 13, 1931.

1. In the reorganization of a trust company in receivership, it was agreed that directors of the company who subscribed to a fund for administering and liquidating certain collateral should have an interest in what might be realized in excess of a value guaranteed to the company. *Held*, that such an interest is "property." P. 226.
 2. Under §§214 (a) (5) and 202 (a) (1) of the Revenue Act of 1918, where a property interest acquired before March 1, 1913, in a transaction entered into for profit is sold in the taxable year at a loss, the loss deductible is limited by the value of the property on March 1, 1913, if that is less than original cost. P. 227.
 3. A taxpayer claiming such deduction must prove, by the best available evidence that the circumstances and nature of the transaction permit, the value of the property as of March 1, 1913, as well as its cost. *Id.*
 4. If proof of value as of March 1, 1913, be impossible, the claim of a deduction can not be allowed upon a consideration of the other factors of the statute. P. 228.
 5. It may not be presumed that cost of property acquired in 1906 was its value in 1913, where *non constat* that the cost was the value even at the time of acquisition. *Id.*
- 39 F. (2d) 351, reversed.

CERTIORARI, 282 U. S. 820, to review a judgment which reversed a decision of the Board of Tax Appeals, 13 B. T. A. 279, sustaining disallowance of a deduction for a loss, in an income tax return.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *A. H. Conner*, Special Assistants to the Attorney General, *Erwin N. Griswold*, and *Clarence M. Charest*, General Counsel, and *Allin H. Pierce*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. William Clarke Mason, with whom *Mr. John Russell, Jr.*, was on the brief, for respondent.

Messrs. James Craig Peacock and *Gerald Ronon*, by special leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The question in this case arises under § 214 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066, 1067, the pertinent part of which is as follows:

“Sec. 214 (a). That in computing net income there shall be allowed as deductions:

“(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, . . .”

The respondent, in making his tax return for 1920, claimed a loss incurred in a transaction entered into in the year 1906, by which he acquired certain rights of the character, and in the manner, hereafter stated. The Commissioner of Internal Revenue disallowed the claim, and his determination was sustained by the Board of Tax Appeals upon the ground that the taxpayer had failed to show the value of the rights as of March 1, 1913. 13 B. T. A. 279. Upon a petition for review the Circuit Court of Appeals upheld the claim and reversed the action of the Board of Tax Appeals. 39 F. (2d) 351.

The following are the facts: In 1906, owing to excessive loans made to Adolph Segal, the Real Estate Trust Company of Philadelphia closed its doors, and a receiver was appointed. Segal had deposited collateral, which possessed an “uncertain value” and could not readily be liquidated. A plan of reorganization was proposed by the receiver, which, among other things, contemplated the creation of a fund of \$2,500,000 to be subscribed by direc-

tors of the company to guarantee a value of \$3,000,000 for the Segal collateral—designated in the plan, “Segal matters.” The subscribers to the fund were to receive any excess over the amount of \$3,000,000 which might be realized from the administration of the “Segal matters.” No limit of time was put upon the administration, or upon the final disposition, of the assets embraced by the “Segal matters.” The plan became effective and the company resumed business on November 1, 1906; and thereafter, and until December 30, 1920, the “Segal matters” were administered under the exclusive direction of the president of the company, who theretofore had been the receiver.

The respondent, a director of the company, was a subscriber to the fund in the sum of \$305,000. At the time of the subscription respondent believed that the “Segal matters” had a potential value which could be converted into a sum sufficient to repay the subscribers the amount of their subscriptions with interest, and possibly some profit. The president, then receiver, expressed to the directors the same belief.

Included in the Segal collateral were certain bonds and shares of stock of the Pennsylvania Sugar Refining Company. At the time the subscriptions to the guarantee fund were made, there was in contemplation the bringing of a suit in behalf of that company against the American Sugar Refining Company under the Sherman Antitrust Act; and the value of the “Segal matters” depended to some extent upon the successful prosecution of this suit. In fact, two suits were brought, one in a federal district court for \$10,000,000, and another in a state court, the latter on the ground that an agent of the American Sugar Refining Company had made an agreement in restraint of trade with Segal. The litigation was compromised in January, 1910, upon the delivery to the Real Estate Trust Company by the American Sugar Refining Company of certain bonds, among which were bonds of the Pennsyl-

vania Sugar Refining Company. In 1912, the latter were converted into 7,268 shares of stock in a reorganization called Pennsylvania Sugar Company. Some question having arisen in respect of the rights of the subscribers, on May 5, 1916, a supplemental agreement was made to the effect that when the 7,268 shares of stock in the Pennsylvania Sugar Company were disposed of, the contributors to the guarantee fund should receive one-fourth of the proceeds. These shares, at that time and for a period prior thereto, constituted the principal unliquidated assets of the original "Segal matters."

In 1920, the parties concerned having concluded that the remaining Segal assets would not soon increase in value, the subscribers entered into agreements providing for complete liquidation of the "Segal matters," and, thereupon, for the distribution of one-fourth of the Pennsylvania Sugar Company stock to the subscribers in proportion respectively to the amounts of their subscriptions, in full satisfaction of all agreements relating thereto. Respondent, accordingly, received 222 shares of Pennsylvania Sugar Company stock, the fair market value of which was \$150 per share. Upon that basis, respondent, in 1920, wrote off his books a loss of \$271,700, a sum arrived at by deducting \$33,300, the value of the stock received, from \$305,000, the amount of his original subscription. In his return for 1920 the amount was deducted as a loss.

We assume, for the purposes of the case, that, within the meaning of § 214 (a) (5), the facts establish a transaction entered into for profit by the subscribers to the fund of \$2,500,000. In this view each subscriber acquired an interest in the amount which might be realized in excess of \$3,000,000 by the administration and disposition of the "Segal matters." Such an interest falls within the meaning of the term "property." See *Townsend v. Ashpoo*

Fertilizer Co., 212 Fed. 97, 101; *Samet v. Farmer's & Merchants' Nat. Bank*, 247 Fed. 669, 671; *Presbrey v. Simpson*, 290 Fed. 333, 335. Tested alone by the fact that the cost to respondent in 1906 of his portion of this interest was \$305,000, and the fact that by the final settlement of 1920 he received only the sum of \$33,300, the result was an actual loss to the extent of the sum claimed. But this is not enough. Section 202 (a) of the Revenue Act of 1918, *supra*, provides:

"That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; . . ."

Under this provision, it is necessary to consider not only the cost of the interest acquired by respondent in 1906 but also its fair market price or value as of March 1, 1913; and whichever of these is found to be the lower must be taken as the basis for determining the loss resulting from the final disposition of the property. In other words, the effect of the provision in respect of value on March 1, 1913, is to limit the deductible loss by that value if it be less than the original cost. This is the effect of the prior decisions of this court. *United States v. Flannery*, 268 U. S. 98, 103, and cases cited; *Heiner v. Tindle*, 276 U. S. 582, 587. And see *Nichols v. Smith*, 35 F. (2d) 938, 939; *Bloch v. Commissioner*, 16 B. T. A. 425, affirmed, 42 F. (2d) 1013.

The burden of proof to establish a deductible loss and the amount of it, clearly, was upon the respondent. *Reinecke v. Spalding*, 280 U. S. 227, 233; *United States v. Anderson*, 269 U. S. 422, 443. It was just as necessary under the statute for the respondent to prove value as of March 1, 1913, as it was to prove cost in 1906 and the

amount finally received by him in 1920. The court below, after a review of the facts, disposed of the matter by saying:

“To determine, in view of these variable factors, or lack of factors, its true or approximate value on a given date, as that of March 1, 1913, selected by the commissioner as the basis of the tax calculation, was a sheer impossibility. The only fixed factors in the situation were those of cost in 1906 and return in 1920. It follows that the proper basis for measuring the petitioner’s admitted loss—because the only possible basis—was that of cost and return.”

We cannot agree that the impossibility of establishing a specific fact, made essential by the statute as a prerequisite to the allowance of a loss, justifies a decision for the taxpayer based upon a consideration only of the remaining factors which the statute contemplates. The definite requirement of § 202 (a) (1) of the act is not thus easily to be put aside. The impossibility of proving a material fact upon which the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforceable claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof. Compare *Underwood v. Wing*, 4 De Gex, M. & G. 632, 660; *Newell v. Nichols*, 75 N. Y. 78, 90; *Estate of Ehle*, 73 Wis. 445, 459-460; 41 N. W. 627; 2 Chamberlayne, *Modern Law of Evidence*, § 970.

Neither can the presumption be indulged that the cost of respondent’s interest in 1906 was the value of that interest in 1913, for *non constat* that such cost was the value even in 1906.

Moreover, we think the record is far from demonstrating the impossibility of supplying evidence from which the required fact might be found. The 7,268 shares of stock in the Pennsylvania Sugar Company, the distribution of which in 1920 closed the transaction, had been received by the Real Estate Trust Company as early as 1912. This

stock, together with certain bonds, not otherwise described, constituted on March 1, 1913, the entire available assets remaining of the original "Segal matters." There seems to have been no difficulty in ascertaining the value of the stock in 1920; and it is hard to see why its value, as well as the value of the bonds, could not have been, at least approximately, determined as of March 1, 1913, and, consequently, the approximate value of the contingent interest of each of the subscribers to the fund ascertained as of that date. No reason is suggested by the record or otherwise, and none occurs to us, for not seeking light on the subject from those who had been in charge of the liquidation of the "Segal matters." We cannot assume that such an effort would have been fruitless. Respondent was bound to produce the best available evidence of value which the circumstances and nature of the transaction permitted. It does not appear that he made any attempt to do so.

Judgment reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, v. HENRY.

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

No. 202. Argued March 12, 1931.—Decided April 13, 1931.

Decided upon the authority of *Burnet v. Houston*, ante, p. 223.

39 F. (2d) 358, reversed.

CERTIORARI, 282 U. S. 820, to review a judgment which reversed a decision of the Board of Tax Appeals, 13 B. T. A. 279, sustaining disallowance of a deduction for a loss, in an income tax return.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *A.*

H. Conner, Special Assistants to the Attorney General, *Erwin N. Griswold*, and *Clarence M. Charest*, General Counsel, and *Allin H. Pierce*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. William Clarke Mason, with whom *Mr. John Russell, Jr.*, was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The question in this case is the same as that which has been determined against the respondent in *Burnet v. Houston*, *ante*, p. 223. The subscription to the fund described in our opinion in that case was not made by respondent direct, but by her brother, Samuel F. Houston, acting as her agent. Otherwise the facts are the same; and upon the authority of the *Houston* case the judgment of the court below, 39 F. (2d) 358, is

Reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PORTER ET AL., EXECUTORS.

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

No. 203. Argued March 12, 1931.—Decided April 13, 1931.

1. The Commissioner of Internal Revenue, after approving a deduction for loss in an income tax return and allowing a claim for refund of the proportional part of the tax, had authority to reopen the case later, disallow the deduction and redetermine the tax.
2. Decided, as respects proof of deductible loss, upon the authority of *Burnet v. Houston*, *ante*, p. 223.
39 F. (2d) 360, reversed.

CERTIORARI, 282 U. S. 821, to review a judgment which reversed a decision of the Board of Tax Appeals, 13 B. T. A. 279, sustaining disallowance of a deduction for a loss, in an income tax return.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *A. H. Conner*, Special Assistants to the Attorney General, *Erwin N. Griswold*, and *Clarence M. Charest*, General Counsel, and *Allin H. Pierce*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. Walter Lee Sheppard, with whom *Mr. William C. Alexander, Jr.*, was on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

William W. Porter was a subscriber in the sum of \$75,000 to the fund described in our opinion handed down this day in *Burnet v. Houston*, ante, p. 223. The facts in the present case are the same except that the Commissioner of Internal Revenue first approved the deduction and allowed a claim for refund of the proportional part of the tax, and then some time later reopened the case, disallowed the deduction and redetermined the tax. The court of appeals sustained the power of the commissioner upon the authority of *McIlhenny v. Commissioner of Internal Revenue*, 39 F. (2d) 356; and was clearly right in doing so. That court, however, upon the main point, following its decision in the *Houston* case, reversed the determination of the Board of Tax Appeals in favor of the government. 39 F. (2d) 360. This is contrary to our decision in the *Houston* case, and upon that authority the judgment is

Reversed.

KLEIN, FORMER ADMINISTRATRIX, ET AL. v.
UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 387. Argued February 27, 1931.—Decided April 13, 1931.

1. One of two habendum clauses in a deed conveyed a life estate, reserving the fee, and declaring that it should remain vested in the

grantor if the grantee died before him; by the other the grantee was to take the fee in the event that she survived the grantor, and in that case only. *Held*, a grant of a life estate and contingent remainder. P. 233.

2. The estate transfer tax of Revenue Act of 1918, § 402 (c), is constitutionally applicable to a contingent remainder, become vested by the death of the grantor, which was granted by a deed executed before the effective date of that Act but while the Act of 1916, § 202, containing the same taxing provision, was in force. P. 234. 70 Ct. Cls. 151; 42 F. (2d) 596, affirmed.

CERTIORARI, 282 U. S. 828, to review a judgment rejecting a claim for refund of money collected as part of a federal estate tax.

Messrs. Benjamin B. Pettus and H. H. Shinnick, with whom *Edward Clifford* was on the brief, for petitioners.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher and Messrs. Fred K. Dyar, Bradley B. Gilman, and Erwin N. Griswold* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The petitioners are the sole surviving heirs of Solomon Klein and distributees of his estate. He died intestate, leaving among other property, two parcels of land in Cook County, Illinois, which, some fifteen months prior to his death, he had conveyed to his wife, Etta M. Klein, by deed, the habendum clauses of which are as follows:

"First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being

hereby reserved to said grantor and excepted from this conveyance.

“Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.”

In auditing the estate tax return of the administratrix, the Commissioner of Internal Revenue included in the gross estate the value of these two parcels of land, after deducting therefrom the value of the life estate; and the tax thereto attributable was assessed against the estate. This was paid, and a claim for refund was rejected. Thereupon, petitioners sued in the Court of Claims to recover the amount. That court rendered judgment against petitioners. 42 F. (2d) 596.

The case turns upon the meaning and application of § 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, which provides that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, etc.—

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, . . . intended to take effect in possession or enjoyment at or after his death . . .”

The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. The life estate is granted with an express reservation of the fee, which is to “remain vested in said grantor” in the event that the grantee “shall die prior to the decease of said grantor.” By the second clause the grantee takes the fee in the event—“and in that case only”—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in

the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. See 2 Washburn, Real Property (4th ed.), pp. 547-548, 559, par. 1. The decisions of the Supreme Court of Illinois, the state where the deed was made and the property lies, support this conclusion. *Haward v. Peavey*, 128 Ill. 430, 439; 21 N. E. 503; *Baley v. Strahan*, 314 Ill. 213, 217; 145 N. E. 359.

It is said that we must consider the deed as a whole; that since there is nothing in the granting clause to indicate the nature of the estate granted we must go to the habendum to determine that question; that the habendum consists of two clauses, one conveying a life estate, and the other the fee; and that "the greater estate or fee naturally swallows up the lesser or life estate when created by the same instrument." The principle invoked, however, does not help the petitioners, for certainly here the estates were not merged during the life of the grantor; and the deed evinces the clear intention of the grantor that they should not be. Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler v. United States*, 281 U. S. 497.

The provision of the Revenue Act of 1918, so far as it seeks to tax the transfer in question, is assailed as unconstitutional because, it is said, the transfer was complete and irrevocable before the act was passed. In support of this view *Nichols v. Coolidge*, 274 U. S. 531, and similar decisions of this court are cited. But the deed under

review, while made before the enactment of the Revenue Act of 1918, was made after the Act of 1916, c. 463, 39 Stat. 756, 777, which, with an addition not pertinent here, contained (§ 202) exactly the same provision; and the contention, for that reason, other grounds aside, is without merit. *Milliken v. United States*, ante, p. 15, where the cases relied upon by petitioners are distinguished.

Judgment affirmed.

STANDARD OIL COMPANY (INDIANA) v. UNITED STATES ET AL.

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

No. 384. Argued March 20, 1931.—Decided April 13, 1931.

1. The jurisdiction of the District Court "to enjoin, set aside, annul, or suspend in whole or in part" orders of the Interstate Commerce Commission, U. S. C., Title 28, § 41 (27) (28), does not extend to orders purely negative in character, such as an order dismissing a shipper's claim for damages based on alleged overcharges by carriers. P. 238.
2. A determination by the Commission of the rate applicable to past shipments, which involved not merely the legal construction of the words of a rate tariff, but consideration of matters of fact, expert knowledge of technical meaning of words and a correct appreciation of a variety of incidents affecting their use, is not reviewable by the courts if within the constitutional and statutory powers of the Commission and not arbitrary or unsupported by evidence. P. 238.
3. Under § 9 of the Interstate Commerce Act, which provides that a claim for damages against a carrier may be brought before the Commission, or by action in any federal District Court of competent jurisdiction, but which denies the right to pursue both remedies and requires an election, a District Court has no jurisdiction of a suit which seeks to enforce a claim, which the Commission has rejected, by obtaining an annulment of its order followed by an adjudication of the merits of the claim and a direction that the Commission allow it and hold a further hearing, if necessary, to determine the amount to be paid. P. 240.

4. The specially constituted District Court of three judges has no jurisdiction of an action under § 9 of the Interstate Commerce Act. P. 241.

41 F. (2d) 836, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed, for want of jurisdiction, a bill against the United States, the Interstate Commerce Commission, and numerous railway carriers.

Mr. John R. Cochran, with whom *Messrs. L. L. Stephens* and *Harry I. Allen* were on the brief, for appellant.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston*, Special Assistant to the Attorney General, *Daniel W. Knowlton*, Chief Counsel, Interstate Commerce Commission, and *J. Stanley Payne*, Assistant Chief Counsel, were on the brief, for the United States and Interstate Commerce Commission.

Mr. Louis H. Strasser, with whom *Messrs. J. L. Aber*, *M. L. Bluhm*, *D. P. Connell*, *J. N. Davis*, *E. J. Halberg*, *Herbert S. Harr*, *Walter McFarland*, *G. D. Peters*, *M. B. Pierce*, *K. L. Richmond*, *E. A. Smith*, *F. H. Towner*, and *Frederic D. McKenney* were on the brief, for the Atchison, Topeka & Santa Fe Railway Company et al.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit in equity brought in the court below against the United States, the Interstate Commerce Commission, and some fifty interstate railway carriers, under the provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, abolishing the Commerce Court and transferring its jurisdiction to the several district courts of the United States. The provisions conferring jurisdiction are found in c. 309, 36 Stat. 539,

U. S. C., Title 28, § 41 (27) (28), and include the following cases:

“First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

“Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.”

Appellant sought to enjoin and annul an order of the Commission dismissing two complaints filed with that body to recover damages for numerous alleged overcharges exacted by the carriers. The petition also prayed that the Commission be directed by the court to enter an order “granting the prayer of said complaints, and finding that petitioner has been overcharged by an amount which is equal to the difference between the rates assessed by said defendant carriers and the rates lawfully applicable to said petitioner’s shipments, and ordering a further hearing, if necessary, for the purpose of determining the amount of money to be paid by the defendant carriers to petitioner by way of reparation . . .” The complaints alleged overcharges on about 2,500 shipments of petroleum products originating at Wood River, Illinois, or at points west of the Mississippi River, and carried to various eastern destinations. It is unnecessary, in view of our conclusions, to state the case at length. It is fully set out in the reports of the Commission (113 I. C. C. 597; 139 I. C. C. 297) and in the opinion of the court below.

The rates assailed before the Commission were those charged according to what is called the “Kelley tariff.” Appellant contended that there were in effect specific rates taking precedence which were lower and should have been applied. The order of the court below, constituted of three judges as required by the Urgent Deficiencies Act,

was, in effect, a dismissal of the petition for the want of jurisdiction, 41 F. (2d) 836; and with that action we agree.

First. The Commission made two reports, one following the original hearing, and the other after reargument. The order based upon these reports simply dismissed the complaints; that is to say, the Commission refused to grant any affirmative relief to the appellant. It is plain that the order is negative both in form and effect. The jurisdiction of the district courts (transferred from their predecessor, the Commerce Court), in this class of cases, embraces (1) those brought for the "enforcement" of orders of the Commission, and (2) those brought to "enjoin, set aside, annul, or suspend in whole or in part" such orders. It is obvious that this language was not intended to apply to purely negative orders. A negative order which denies relief without more compels nothing requiring enforcement, and contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annulling, or suspending the order.

The question in the present case depends upon the correct interpretation and application of the second subdivision of the act conferring jurisdiction, referred to and quoted *supra*; and necessarily the district court was without jurisdiction under the settled construction of that provision by which the authority of the court is limited to the review of affirmative orders, with "power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal." *Procter & Gamble v. United States*, 225 U. S. 282, 292-293; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 483; *Piedmont & Nor. Ry. Co. v. United States*, 280 U. S. 469, 477.

Second. The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and

the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that "both cases concern unusually complicated and technical tariff situations," the proper determination of which called for the exercise of the trained judgment of that body of experts, "appointed by law and informed by experience." *Illinois Central R. Co. v. Interstate Commerce Comm.*, 206 U. S. 441, 454. And to that body, in the interest of uniformity, the determination must be left.

In *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291-292, this court held that to determine whether a rate is reasonable for the future, or whether a shipper has been wronged by the exaction of an unreasonable or discriminatory rate in the past, preliminary resort to the Commission is required.

"It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

Then, after pointing out that resort to extrinsic evidence is sometimes necessary to establish the meaning of words appearing in a written instrument, in which case the function of construction is preceded by the determination of a matter of fact, the court said that

“ . . . where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained.”

There being nothing to suggest that the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers, *Interstate Commerce Comm. v. Union Pacific R. Co.*, 222 U. S. 541, 547, it follows that, apart from what is said in support of the ground first above stated, the order of the Commission was not susceptible of review by the courts. Compare *Interstate Commerce Comm. v. Delaware; L. & W. R. Co.*, 220 U. S. 235, 251; *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 320; *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Comm.*, 181 U. S. 1, 27.

Third. But putting the foregoing grounds entirely aside, and assuming the correctness of appellant's contentions to the contrary, nevertheless, having regard to the remedy invoked and the relief sought by the petition, we think the district court was without jurisdiction. Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C., Title 49, § 9, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants “ shall not have the right to pursue both of said remedies, and must in each case elect which one of

the two methods of procedure herein provided for he or they will adopt." Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since § 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

The order of dismissal is

Affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.*
BOWERS, EXECUTOR.

BOWERS, EXECUTOR, *v.* NEW YORK LIFE INSURANCE COMPANY.

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

Nos. 93 and 160. Argued March 2, 3, 1931.—Decided April 13, 1931.

1. Funds of a mutual life insurance company derived from excess of premiums over actual cost of insurance and entered on its books as funds available for repayment as annual and deferred dividends to its policyholders, were taxable under subsection (c) of § 1000, Revenue Act of 1918, imposing a capital stock tax on "surplus . . . maintained for the general use of the business." P. 245.
 2. Subsection (b) of § 1000, Revenue Act of 1918, which provides that "In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included," applies not to mutual but to stock insurance companies. P. 246.
 3. The capital stock tax, under § 1000 (c), Revenue Act of 1918, was payable in advance for each year commencing July 1. P. 247.
 4. This tax for the year commencing July 1, 1920, was not superseded by the Revenue Act of 1921, approved November 23, 1921. P. 248.
 5. The Revenue Act of 1921, by imposing a tax upon the net income of every insurance company for the calendar year 1921 and each taxable year thereafter, in lieu of other taxes imposed by that Act, including capital stock taxes (§ 1000); by repealing as of January 1, 1922, Title X of the Revenue Act of 1918, including § 1000 of that Act; and by providing further that "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision [of the 1918 Act] imposing such tax shall remain in force until the corresponding tax under this Act takes effect,"—operated to cancel or remit the capital stock tax on insurance companies under the 1918 Act for the fiscal year ended June 30, 1922. P. 248.
- 39 F. (2d) 556, affirmed.

CERTIORARI, 281 U. S. 718, granted on cross-petitions, to review a judgment affirming a judgment, 34 F. (2d) 60, partly favorable and partly adverse to the Insurance Company in its suit to recover money paid as taxes. The defendant's executor was substituted in this Court.

Mr. James H. McIntosh for the New York Life Insurance Company.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Sewall Key* and *John H. McEvers*, Special Assistants to the Attorney General, *Erwin N. Griswold*, *Clarence M. Charest*, General Counsel, and *Edward H. Horton*, Special Attorney, Bureau of Internal Revenue, and *Samuel C. Coleman*, Assistant United States Attorney, were on the brief, for Bowers, Executor.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The company sued the collector in the district court, southern district of New York, to recover capital stock taxes exacted under § 1000 (c) of the Revenue Act of 1918¹ for four years ending June 30, 1922. A jury was waived and the case was submitted on an agreed statement of facts. The court held the taxes for the first three years were rightly collected and as to the causes of action alleged on account of them dismissed the complaint. It held that,

¹ (c) " . . . The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to \$1 for each \$1,000 of the excess over \$5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return . . ." 40 Stat. 1126.

by reason of the Revenue Act of 1921, 42 Stat. 227, 261, the capital stock tax did not apply to the last year, and gave plaintiff judgment for the amount paid for that period. 34 F. (2d) 60. On the company's appeal (No. 93 here) and the collector's cross-appeal (No. 160) the Circuit Court of Appeals affirmed the judgment. 39 F. (2d) 556.

The company is a New York corporation without capital stock engaged in mutual life insurance on the level premium plan. It made a return for each of the years showing no tax. After auditing the returns, the Commissioner of Internal Revenue assessed the taxes in question.

By means of an accepted mortality table and an assumed rate of interest, the company calculates the amount that would be required to be paid by the insured each year in advance to cover policy claims if deaths occur as indicated by the table and if that rate of interest is realized on the investments. The amount so ascertained is called the net or mathematical premium. There is added loading to cover expenses and unforeseen contingencies such as excess mortality, diminished interest, investment losses and higher taxes. The premium so built up is named in the policy and constitutes the maximum that the company may require the insured to pay.

The amount by which the premium exceeds the company's actual cost must be returned to the policyholder. *Penn Mutual Life Ins. Co. v. Lederer*, 252 U. S. 523, 525. Some of the company's policies are on the annual dividend plan, which requires it to account for divisible surplus and to make yearly distribution to the policyholders. The other policies are on the deferred dividend plan and provide for holding the overpayments to the credit of the deferred dividend policyholders as a class, accumulating them at interest and paying to each holder of a policy in force at the time designated therein his share of the accumulated sum.

As soon as practicable after the expiration of each calendar year, the company takes an account of its business, ascertains the surplus earned that year, and determines the amount which safely may be distributed out of the surplus for that and prior years. By the laws of New York and of other States where the company does business, it is required annually to file a statement showing, among other things, income and disbursements in, and its assets and liabilities at the end of, the preceding year. Item 35 on the form used shows dividends apportioned and payable to annual dividend policyholders to and including December 31 following. Item 36 covers dividends apportioned and payable to deferred dividend policies in the same period. Item 37 shows the amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in item 36.

Section 1000 (c) imposes a tax on each mutual insurance company's "surplus or contingent reserves maintained for the general use of the business." The Commissioner based the capital stock taxes for each year on the total of items 35, 36 and 37 as disclosed by the company's annual statements filed for the years ending respectively December 31, 1917, 1918, 1919 and 1920.

1. These items represent surplus within the meaning of subdivision (c).

The sums to be paid as dividends are not a part of the insurance specified in the policies. They are derived from amounts which, from abundant caution, are included in the advance premiums over and above what is found by actual experience to be necessary to pay the cost of the insurance and the expenses of carrying on the business. They indicate a "surplus," i. e., assets in excess of what is deemed necessary to provide for the payment when due of the amounts specifically covered by the policies.

No money or property is set aside on account of such dividends. The items in question do not constitute liabilities. They are merely accounting entries to show the amounts presently available for dividends currently payable and as well the fund accumulated in respect of deferred dividends. Such entries are analogous to those in balance sheets of business corporations which show capital stock as a liability. And until actually paid out as dividends the money or securities used for that purpose properly may be deemed to be maintained for "the general use of the business."

Under the company's construction of subdivision (c) it was not liable for the tax for any year while the 1918 Act was in force. According to its returns it had no "surplus or contingent reserves." The company does not suggest and there is no reason to suppose that, in respect of assets properly so to be classed, it is not typical of mutual insurance companies generally. When regard is had to the well-known and necessary practice of mutual insurance companies to collect in advance premiums in excess of total costs and to pay dividends out of the resulting surplus it is clear that the company's construction is unreasonable. It would operate to defeat the plainly expressed purpose of Congress to impose a capital stock tax on mutual insurance companies.

2. The company contends that in any event subdivision (b) of § 1000 requires that item 37 be excluded from the amount used to measure the excise.

That provision is: "In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included." The legislative history of § 1000 goes far to make its meaning clear. Section 407 of the 1916 Act imposed upon corporations a special excise measured by the value of their capital stock.

39 Stat. 789. Its scope was not clear. At first the Treasury Department ruled that as mutual insurance companies have no capital stock the section did not apply to them. Regulations 38, Art. 2 (b). That construction was later reversed. Regulations 38 (Revised) Art. 3. And see *Lumber Fire Ins. Co. v. Malley*, 44 F. (2d) 553.

In the bill for the Revenue Act of 1918 as it passed the House, § 1000 was substantially the same as § 407 of the 1916 Act. The Senate substituted provisions to tax the incomes of insurance companies. In conference, the original § 1000 was restored, and there was added to it the provision in paragraph (c) which specifically declares that the taxes imposed by that section shall apply to mutual insurance companies. The provision added was complete in itself. It specified the rate and indicated the basis on which the tax was to be calculated; it was adequate to govern the ascertainment of the amount and there is nothing to indicate an intention that the language there used should be modified by anything in subdivision (b). It is clear that (c) was intended exclusively to govern mutual insurance companies, and that (b) applies only to stock insurance companies.

3. The company insists that § 1000 of the 1918 Act did not impose a tax for the year ending June 30, 1921.

The Treasury Department ruled that the taxes imposed by § 407 of the 1916 Act were payable in advance for the year commencing July 1 and that construction was followed while the section remained in force. Undoubtedly Congress intended that the same rule should be followed under the substitute provision, § 1000 of the 1918 Act. And the Treasury Department so construed it. The 1918 Act was not approved until February 24, 1919. The year commencing July 1, 1918, was the first for which it imposed the capital stock tax. See *Hecht v. Malley*, 265 U. S. 144, 163. And this company's annual statement for 1917 was the basis on which the Commissioner made his

calculations. The legislative history and the administrative construction make it clear that such taxes were payable in advance.²

The taxes for the third year under the 1918 Act were calculated on the insurance company's annual statement for the calendar year 1919 and were payable in advance for the fiscal year commencing July 1, 1920. There is nothing in the 1921 Act, which was not approved until November 23, to suggest that Congress intended that capital stock taxes so payable in 1920 were to be returned if already paid or canceled if delinquent. The company was rightly held for that year's tax.

4. The collector maintains that despite the 1921 Act the company is liable under § 1000 of the 1918 Act for the capital stock tax for the year ending June 30, 1922.

Section 243 of the 1921 Act imposes a tax upon the net income of every insurance company for the calendar year 1921 and each taxable year thereafter. It declares that tax to be in lieu of other taxes imposed by that Act, namely income taxes on corporations generally, § 230, capital stock taxes, § 1000, and profits taxes, Title III. Section 1400 (a) repealed, to take effect January 1, 1922, Title X of the 1918 Act, which includes § 1000. Section 1400 (b) provides: "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision [of the 1918 Act] imposing such tax shall remain in force until the corresponding tax under this Act takes effect." The income tax imposed by § 243 is declared to be in lieu of capital stock tax in § 1000 of the same Act.

² Art. 3, Regulations 38, promulgated October 19, 1916, under Revenue Act of 1916. Form 707, 20 T. D. 470. Art. 1, Regulations 38 (Revised), promulgated August 9, 1918, under Revenue Act of 1916. Art. 1, Regulations 50, promulgated April 29, 1919, under Revenue Act of 1918. Art. 1, Regulations 50 (Revised), promulgated June 21, 1920, under Revenue Act of 1918. Art. 2, Regulations 64 (1922 ed.), promulgated June 15, 1922, under Revenue Act of 1921.

And, as the latter tax was in lieu of the capital stock tax imposed by § 1000 of the 1918 Act, it reasonably may be said that the income tax imposed by § 243 was intended to be in lieu of the capital stock tax of § 1000 of the 1918 Act.

This income tax was one "corresponding" to the capital stock tax under § 1000 of the 1918 Act within the meaning of § 1400 (b). And under that provision the last mentioned tax remained in force until the former took effect. The income tax imposed by § 243 was "for the calendar year 1921." Section 1400 (b) makes it plain that there was no intention to subject insurance companies to both taxes for the same period. The 1921 Act operated to cancel or remit the capital stock tax for that year. The company is entitled to recover the amount collected for that period.

In No. 93 judgment affirmed.

In No. 160 judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* NORWOOD, ATTORNEY GENERAL OF ARKANSAS, ET AL.

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

No. 193. Argued March 10, 11, 1931.—Decided April 13, 1931.

1. Affidavits filed in support of an application for a temporary injunction can not be considered in determining whether the complaint states facts sufficient to constitute ground for relief. P. 253.
2. The complaint—attacking as unconstitutional two Arkansas statutes regulating the size of freight train and switching crews—fails to allege facts sufficient to distinguish this case from others in which this Court has sustained the same laws. *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453; *St. Louis & Iron Mt. Ry. Co. v. Arkansas*, 240 U. S. 518. P. 254.
3. A purpose to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in freight

train and switching crews will not be attributed to Congress if not clearly expressed. P. 256.

4. Congress has not prescribed, or empowered the Interstate Commerce Commission to fix, the number of men to be employed in such crews. P. 257.
 5. The Arkansas statutes in question are not in conflict with the Railway Labor Act. P. 258.
- 42 F. (2d) 765, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill to enjoin the enforcement of statutes regulating the size of freight train and switching crews.

Mr. Edward J. White, with whom *Mr. Thos. B. Pryor* was on the brief, for appellant.

Mr. Donald R. Richberg, with whom *Messrs. Hal L. Norwood*, Attorney General of Arkansas, *Joe Joiner*, *Chester Holland*, and *W. D. Jackson* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The company sued the attorney general and the prosecuting attorneys of two circuits of Arkansas to enjoin the enforcement of statutes of that State regulating freight train crews and switching crews upon the claim that they are repugnant to the Constitution and laws of the United States. On the complaint and supporting affidavits the plaintiff applied for a temporary injunction. Defendants moved to dismiss. The court, consisting of a circuit judge and two district judges, held the complaint insufficient to show any ground for relief and dismissed the case. 42 F. (2d) 765.

The statutes so assailed are Laws, 1907, Act 116, and Laws, 1913, Act 67 (§§ 8577-8579 and 8583-8586, Crawford & Moses' Digest, 1921) which so far as here material

are printed in the margin.¹ The earlier Act requires railroad carriers whose lines are not less than 50 miles in length to have not less than three brakemen in every crew of freight trains of 25 cars or more. The later Act requires not less than three helpers in switch crews in yards in cities of the first and second class operated by companies having lines of 100 miles or more.

The complaint asserts that each of these Acts violates the commerce clause of the Federal Constitution and the

¹ Arkansas Laws, 1907, Act 116, provides:

"Section 1. No railroad company . . . owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three brakemen, . . .

"Section 2. This Act shall not apply to any railroad company . . . whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five cars . . .

"Section 3. Any railroad company . . . violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. . . ."

Arkansas Laws, 1913, Act 67, provides:

"Section 1. That no railroad company . . . owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch . . . crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 3. The provisions of this Act shall only apply to cities of the first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars and each crew so illegally operated shall constitute a separate offense."

due process and equal protection clauses of the Fourteenth Amendment and is repugnant to the Interstate Commerce Act as amended in 1920² and to the Railway Labor Act.³ But they have been held valid by this court as against the claim of repugnancy to these clauses of the Constitution. See *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453, 459, 465, affirming 86 Ark. 412; 111 S. W. 456, as to the Act of 1907, and *St. Louis, I. M. & S. Ry. Co. v. Arkansas*, 240 U. S. 518, affirming 114 Ark. 486; 170 S. W. 580, as to the Act of 1913.

The first of these cases was decided in 1911. The court held that the Act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in, such commerce. It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management of interstate trains and that until it does the statutes of the State, not in their nature arbitrary, must control. The court found that, while under the evidence there was admittedly room for controversy as to whether the statute was necessary, it could not be said that it was so unreasonable as to justify the court in adjudging it an arbitrary exercise of power. And it held that, being applicable alike to all belonging to the same class, there was no basis for the contention that it denied the company equal protection of the laws. The principles governing that decision were followed in the later case, decided in 1916, which upheld the Act of 1913. Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others.

The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commis-

² U. S. C., Tit. 49.

³ U. S. C., Tit. 45, §§ 151-163.

sion and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926.

It maintains that the allegations of the complaint together with the facts set forth in the affidavits show that, when applied to operating conditions on its lines in Arkansas, these state laws are arbitrary and violative of the Federal Constitution and laws. But the affidavits filed in support of the application for a temporary injunction may not be considered in determining whether the complaint states facts sufficient to constitute ground for relief. *Leo v. Union Pac. Ry. Co.*, 17 Fed. 273. *United States v. Marine Engineers' Assn.*, 277 Fed. 830, 834. *McGregor v. Great Northern R. Co.*, 42 N. D. 269, 280; 172 N. W. 841.

The substance of the pertinent allegations of the complaint follows:

Present railroad operating conditions on plaintiff's railroad in Arkansas and elsewhere, and on railroads generally in this country, differ from those that existed in 1907 and 1913 when these laws were passed. Roads and equipment have been so improved that longer and heavier trains may be operated more safely now than much smaller trains could then be operated. It is standard practice of railroads "wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen [meaning one less than required by the 1913 Act] and extra brakemen [meaning one less than required by the 1907 Act] provided by the Arkansas laws."

Freight trains and switch engines are safely operated on lines similar to those of plaintiff "wherever the traffic

and circumstances make such operation advisable, without such extra switchmen and extra brakemen." By increasing lengths of their freight trains, the plaintiff and other railroads in States "where such extra brakemen and extra switchmen are not [by law] required" have been able to effect great economies. But by the Arkansas laws plaintiff is compelled there to employ more than the standard crew and to pay for services and time not needed or used for the operation of its freight trains.

The standard agreement between plaintiff and the Brotherhood of Railroad Trainmen provides for a switch crew consisting of a foreman and two helpers and "also provides for a . . . freight train crew, in through and irregular freight service, of a conductor and two brakemen." Other railroads have similar agreements with the Brotherhood "with the exception of the service in States with laws similar to the above laws of the State of Arkansas."

And it is alleged that, if plaintiff were permitted to operate its freight trains without the extra brakemen required by the Act of 1907, its expenses would be reduced by \$350,000 per year; and, if permitted to operate its switch engines without the extra helper required by the Act of 1913, its expenses would be reduced \$250,000 per year.

The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 43. *Southern Ry. Co. v. King*, 217 U. S. 524, 536. *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 500. The state laws are presumed valid. Moreover, in the cases here decided they were held not repugnant to the commerce clause of the Constitution or the due process or equal protection clause

of the Fourteenth Amendment. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447, and cases there cited. *N. O. Public Service v. New Orleans*, 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 88.

There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. While cost of complying with state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment, (*Lehigh Valley R. Co. v. Commissioners*, 278 U. S. 24, 34; *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 529), there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question. And the claim that "standard" crews are generally employed by the railroads of the United States is substantially impaired by the qualified form of the allegations and also by the fact,

which we judicially notice, that other States have laws somewhat similar to the Arkansas Act in question.⁴ It is clear that, so far as constitutionality is concerned, the facts alleged are not sufficient to distinguish this case from those in which this court has sustained these laws.

Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?

In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. *Reid v. Colorado*, 187 U. S. 137, 148. *Savage v. Jones*, 225 U. S. 501, 533. *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that sub-

⁴ Arizona Revised Code (1928) §§ 649-651. (Laws 1912, c. 16.)

California Laws 1915, c. 501, amending c. 49, 1911, as amended 1913, c. 168.

Maine Revised Statutes (1930), c. 64, § 60. (Laws 1842, c. 9, § 3.)

Mississippi Laws 1930, c. 219, amending c. 170, 1914.

Nebraska Compiled Statutes (1929), c. 74, §§ 519-524. (Laws 1909, p. 405, 1913, p. 157.)

Nevada Revised Laws (1919), §§ 3588-3596. (Stats. 1913, p. 62, repealing Act of March 8, 1909, and Act of February 21, 1911, as amended March 28, 1911.)

New York Consolidated Laws, c. 50, § 54a. (Laws 1913, c. 146, as amended by Laws 1921, c. 290.)

North Dakota Civil Code, §§ 4667a1-4. (Laws 1919, c. 169.)

Ohio Throckmorton's Annotated Code (1930), §§ 12553-12557 (3).

Oregon Code (1930), Tit. 62, §§ 1401-1403. (Laws 1913, c. 162.)

Texas Revised Civil Statutes (1925), Art. 6380. (Acts 1909, p. 179.)

Washington Pierce's Code (1929), §§ 5674-5678. (Laws 1911, p. 650.)

Wisconsin Statutes (1929), §§ 192.25 (1907, c. 402) and 192.26 (1913, c. 63).

ject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act ⁵ and maintains that under them the Commission is empowered to regulate the "practice" of carriers in respect of the "supply of trains" to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The Act uses the word "practice" in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. *Baltimore & O. R. Co. v. United States*, 277 U. S. 291, 300. The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such crews. And it is also clear that there is nothing in the phrase "supply of trains" or in the purpose of the Act to suggest that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the

⁵ §§ 1 (3) (10) (11) (12) (13) (14) (21), 13, 15, 15a.

prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration.

Decree affirmed.

BONWIT TELLER & COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 282. Argued March 16, 1931.—Decided April 13, 1931.

1. Section 281 (e) of the Revenue Act of 1924, as amended March 3, 1925, provides that if a taxpayer has, on or before June 15, 1925, filed a waiver of his right to have the tax due for the taxable year 1919 determined and assessed within five years after the return was filed, then refund relating to such tax shall be made if claim therefor is filed on or before April 1926. *Held* that it should be construed liberally in favor of a taxpayer as to what amounts to a claim for refund. P. 263.
2. Prior to the above amendment, the Commissioner had finally, upon full information and consideration, determined that the taxpayer had overpaid its tax in a stated amount, and he had then withheld a refund solely because the taxpayer had not complied with § 281 as it then stood. Soon after the amendment, the Commissioner notified the taxpayer that the overassessment could not be allowed unless the taxpayer filed a waiver on or before June 15, 1925, as the amendment required, and he enclosed blanks for that purpose. The taxpayer executed and returned the waiver before that date, with a letter to the Commissioner saying that the waiver was sent to him in accordance with his request. *Held* that the Commissioner was warranted in accepting the waiver and the letter transmitting it, with what went before, as amounting to the filing of a claim within the meaning of the amendment. P. 263.

3. A suit based upon a determination and certification by the Commissioner of Internal Revenue that the plaintiff is entitled to a tax refund, of specified amount, is not barred under R. S. § 3226 by the lapse of five years from the payment of the tax. P. 265. 69 Ct. Cls. 638; 39 F. (2d) 730, reversed.

CERTIORARI, 282 U. S. 823, to review a judgment dismissing a claim to recover an overpayment of income tax.

Mr. Arthur B. Hyman for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, *George H. Foster*, *Bradley B. Gilman*, and *Erwin N. Griswold* were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate, No. 990,988, issued to plaintiff May 12, 1927. The Government first filed a general traverse. But later, asserting lack of authority on the part of the Commissioner to make the determination and refund, it filed a counterclaim for the amount of a check sent plaintiff to pay the balance of the refund remaining after deducting a part to pay an additional tax assessed against it for the year ended January 31, 1917. That tax was then, as it is now conceded, barred by a statute of limitation. *Bowers v. N. Y. & Albany Lighterage Co.*, 273 U. S. 346. On special findings the court entered judgment dismissing plaintiff's complaint and the Government's counterclaim but gave the latter judgment for the cost of printing the record. 69 Ct. Cls. 638; 39 F. (2d) 730. On plaintiff's petition we granted a writ of certiorari. 282 U. S. 823.

The court found:

Plaintiff is a corporation engaged in the business of selling merchandise at retail. Its fiscal year begins February 1. July 14, 1919, it filed its return for the year ended January 31, 1919, reporting an income tax of \$57,-871.16 which was paid, one-half July 14 and the balance December 13 following. Pending audit of the return, the Commissioner fixed plaintiff's total tax liability for that year at \$225,165.75 and in April, 1924, made a jeopardy assessment for \$167,294.59, the excess over the amount returned and paid. The plaintiff promptly filed a claim for abatement of the full amount of the additional assessment.

November 19, 1924, the bureau sent plaintiff a letter containing a schedule disclosing the computation of its tax for the year ended January 31, 1919, and showing a total overassessment of \$178,161.02. From this amount there was deducted \$10,866.43 found by the Commissioner to have been erroneously included in plaintiff's return and paid. The letter stated: "Inasmuch as the provisions of section 281 of the revenue act of 1924¹ have not been complied with [in] regard to the full amount of the above

¹ Section 281, 43 Stat. 301:

"(b) Except as provided in subdivision . . . (e) . . . no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer. . . .

"(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

"(f) This section shall not . . . (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920, if such claim is filed before the expiration of five years after the date the return was due."

overassessment, a portion in the amount of \$10,866.43 cannot be allowed." In accordance with that letter, the Commissioner allowed plaintiff's claim for abatement.

May 16, 1925, the bureau wrote plaintiff that an examination of its income tax return for the year ended January 31, 1919, disclosed an apparent overassessment, and that it could not then be allowed "unless an income and profits tax waiver is filed on or before June 15, 1925, as provided by an Act of Congress dated March 3, 1925, amending § 281 (e) of the Revenue Act of 1924.² Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office." Plaintiff executed the waiver and May 22, 1925, returned it with a letter stating: "In accordance with your request, we enclose you herewith waiver." On the following day the waiver was received and accepted in writing by the Commissioner.

December 11, 1926, counsel for plaintiff sent the bureau a letter which quoted the substance, as above given, of the letters of November 19, 1924, and May 16, 1925, and, in reference to the letter of May 22, 1925, said: "Since that time we have heard nothing further from you and there has been no refund made to the taxpayer." February 5, 1927, the head of the audit division approved and recommended for allowance the certificate of overassessment No. 990,988. The record of the case was checked to determine whether the plaintiff had filed a claim for refund prior to the expiration of the applicable period of limitation. And it was determined that the documents filed, which included the audit letter of November 19, 1924, showing how the amount of the overpayment was ascertained, the

² Act of March 3, 1925, 43 Stat. 1115, added to § 281 (e):

"If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid."

letter of May 16, 1925, furnishing form of waiver, and the plaintiff's answer of May 22 following, enclosing the executed waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

Plaintiff's letter of May 22, 1925, bears an undated endorsement: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 . . . Rules and Regulations. Mulligan," and another dated April 4, 1927: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen."

February 9, 1927, the bureau wrote plaintiff's counsel: ". . . in order that the allowance of the overassessment may be made, you are requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the adjustment . . ." Accordingly, plaintiff executed the form and thereon stated that the application should be allowed for the reasons shown in the audit letter of November 19, 1924, a copy of which was attached. And February 17, 1927, plaintiff returned the form with a letter saying: ". . . we enclose herewith for filing, claim for refund in the sum of \$10,866.43 . . . on Form 843." The claim was received and filed in the bureau February 19; the Commissioner allowed the claim and on March 8 approved and scheduled to the collector the certificate of overassessment.

On the margin of the bureau's record copy appear the following certifications: "Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27." "Claim for refund filed May 23, 1925, waiver filed May 23, 1925." "This C. of O. [certificate of overassessment] approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

The collector credited \$9,846.06 against the additional tax assessed for the year ending January 31, 1917. May 12, 1927, the Commissioner caused the certificate, show-

ing the deduction made by the collector, to be delivered to plaintiff with a check for the balance of the overassessment and interest, \$1,462.99. Plaintiff objected to the application of any part of the refund against such additional assessment on the ground that the 1917 tax was barred, and declined to accept the check in full settlement but offered to apply it in partial payment of the claim.

The Government, in support of the judgment below, insists that no claim for refund was filed by plaintiff prior to April 1, 1926, the time permitted by the Act of March 3, 1925, 43 Stat. 1115, and that therefore the Commissioner was without authority to allow the claim.

The provision involved amends § 281 (e) of the Revenue Act of 1924, 43 Stat. 302. It provides that if the taxpayer has on or before June 15, 1925, filed a waiver of his right to have the tax due for the taxable year 1919 determined and assessed within five years after the return was filed, then refund relating to such tax shall be made if claim therefor is filed on or before April 1, 1926. The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide. *United States v. Merriam*, 263 U. S. 179, 187. *Bowers v. N. Y. & Albany Lighterage Co.*, *supra*, 350. *United States v. Updike*, 281 U. S. 489, 496. *United States v. Michel*, 282 U. S. 656.

Plaintiff filed its waiver within time and, in consideration of that, it admittedly secured the right to claim the refund. But it did not within the specified time formally make a claim for it. The Government's point comes down to the question whether the waiver and the letter transmitting it together with what went before amounted to the filing of a claim within the meaning of the statute.

The Commissioner, prior to that amendment, had finally determined that in 1919 plaintiff had overpaid its tax by

\$10,866.43. That finding was made upon a consideration of the plaintiff's tax return, its claim for abatement of the jeopardy assessment and, presumably, all material details of its business in the taxable year. The schedule contained in the audit letter of November 19, 1924, showed the manner in which the bureau had computed the tax. And the refund of the ascertained overpayment was withheld by the Commissioner solely because of plaintiff's lack of compliance with § 281 as it then stood.

The letter of May 16, 1925, sent soon after § 281 was amended, unmistakably referred to the overpayment that the Commissioner had found and reported. That an allowance of credit or refund was immediately intended is shown by the statement that it could not then be allowed unless waiver was filed as provided by the 1925 amendment. Plaintiff's prompt execution and return of the waiver and the bureau's acceptance of it clearly show that both considered the facts already found and reported a sufficient basis for plaintiff's claim. That such was the view of the Commissioner is fully confirmed by the notations made on the letter transmitting the waiver and upon the office record of the certificate.

The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. No statute provides for review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight. In this case he had already found that in 1919 plaintiff had overpaid its tax in the amount stated. He needed no additional information to enable him to determine whether credit or refund should then be made. There is no suggestion that the allowance was induced by or resulted from fraud or mistake. The facts found disclose that there was a reasonable or substantial compliance with the amendment.

The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim, and was fully warranted in holding that the waiver and earlier documents were sufficient. *Tucker v. Alexander*, 275 U. S. 228, 231.

The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S., § 3226, as amended. 26 U. S. C., § 156.³ It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance, because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States v. Kaufman*, 96 U. S. 567, 570. *United States v. Savings Bank*, 104 U. S. 728. *Bank of Greencastle's Case*, 15 Ct. Cls. 25. There is no merit in the contention that the suit is barred.

Judgment reversed.

³ "No suit . . . for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . shall be begun . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit . . . is begun within two years after the disallowance of the part of such claim to which such suit . . . relates. . . ."

PAGEL, ADMINISTRATOR, *v.* MacLEAN, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 176. Argued March 5, 1931.—Decided April 13, 1931.

The present value of unpaid instalments of war risk insurance was paid to the administrator of the insured. Upon an accounting by the administrator, the state supreme court directed payment of the insurance money to the mother of the insured rather than to his creditors. Pending application by the administrator for certiorari, the mother died, and, after the granting of the writ, her administrator was substituted as respondent. *Held*, that inasmuch as the death gave rise to new questions as to the distribution of the fund, which affected persons not parties and which could not be disposed of on the present record, the proper course is, not to dismiss the certiorari, but to vacate the judgment and remand for further proceedings. P. 268.

179 Minn. 402; 229 N. W. 344, reversed.

CERTIORARI, 282 U. S. 819, to review a judgment directing that the proceeds of war risk insurance be paid by the administrator of the insured (petitioner here) to the mother of the insured, in preference over creditors. The mother died while the application for certiorari was pending. Substitution of the respondent administrator was ordered after the granting of the writ.

Mr. Charles A. Swenson, with whom *Mr. Henry T. Ronning* was on the brief, for petitioner.

Messrs. Fred W. Putnam and *Orin M. Oulman* submitted for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted, 282 U. S. 819, to review a judgment of the Supreme Court of Minnesota, 179 Minn. 402; 229 N. W. 344, awarding to respondent's

intestate the proceeds of war risk insurance issued to petitioner's intestate. The insured designated, as beneficiary, his father, who survived him, but who has since died. The insured was also survived by his mother, respondent's intestate, and by brothers and sisters.

The installments of insurance, as they fell due, were paid to the father until his death, when the value of the remaining installments was paid to petitioner, in accordance with § 303 of the World War Veterans' Act of June 7, 1924, 43 Stat. 625, as amended by the Act of March 4, 1925, 43 Stat. 1310, which provides:

"If no person within the permitted class be designated as beneficiary . . . by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all . . . installments . . . there shall be paid to the estate of the insured the present value of the . . . installments thereafter payable. . . ."

Section 300 declares that it is the policy of the Act to afford to commissioned officers and enlisted men "protection for themselves and their dependents," and provides that "the insurance shall be payable only to a spouse, child, grandchild, parent, brother [or] sister . . ." Section 22 states that the "insurance . . . payable . . . shall not be subject to the claims of creditors of any person to whom an award is made . . ." The insurance certificate, in accordance with § 402 of the Act of October 6, 1917, 40 Stat. 409, under which it was issued, stipulated that, in the contingency which has arisen, the insurance should be paid to such members of the permitted class as would be entitled to the personal property of insured under the intestacy laws of the State of his residence, and that it should not be "subject to the claims of the creditors of the insured or of the beneficiaries."

The question presented on this record and decided by the state court was whether, under the provisions of the

Act and of the certificate of insurance, the administrator of the insured received the insurance as an asset of the estate subject to payment of debts and administration expenses, or as trustee for the benefit of such of the surviving members of "the permitted class" of beneficiaries as would be entitled to decedent's personal property under the laws of Minnesota, where he resided. The court held that despite the difference in language between § 303 and its earlier forms, § 402, Act of October 6, 1917, *supra*; § 15, Act of December 24, 1919, 41 Stat. 376, the members of the permitted class were to be preferred over creditors of the insured, and directed judgment for payment of the insurance to the mother, as the only person in the permitted class entitled to take the personal property of insured under the intestacy laws of the State.

Pending the application for certiorari, the mother died, and the suit was revived, after certiorari was granted, by substitution of her administrator as respondent. By reason of her decease, the question whether the mother alone of the permitted class is entitled to receive the proceeds of the insurance, in preference to the creditors of the insured, presented by the record and decided by the state court, has now become subsidiary to other questions, the determination of which is necessary to the disposition of the present suit and may render unnecessary any adjudication of the rights of the mother. Assuming, as the state court held, that the mother was entitled to the insurance in her lifetime, it does not follow that respondent, by virtue of his office as administrator, or claiming in the mother's right, is entitled to payment of the insurance under the judgment in her favor. That depends on the interpretation of § 300, directing that the insurance "shall be payable only" to members of the permitted class, and on the question whether, under the provisions of the Act and of the certificate, the insurance should now go to the estate of the mother, to the creditors of the insured, or

to the surviving brothers and sisters, if any, none of whom is a party to this suit. That question was not decided by the state court, for the review of whose judgment certiorari was granted, and is not one which can be disposed of on this record.

While, in such a situation, the writ may be dismissed, see *Kimball v. Kimball*, 174 U. S. 158, the present is not a proper case for such disposition, which might leave the judgment to be enforced by the respondent administrator without determination of his rights. In order that the state court may be free to deal adequately with the questions which must be determined in order to make appropriate distribution of the fund involved, the judgment will be vacated and the cause remanded for further proceedings not inconsistent with this opinion. *Missouri ex rel. Wabash Ry. Co. v. Public Service Commission*, 273 U. S. 126, 131; *Gulf, C. & S. F. Ry. Co. v. Dennis*, 224 U. S. 503, 509.

Reversed.

UNITED STATES *v.* FELT & TARRANT MANUFACTURING COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 116. Argued March 3, 1931.—Decided April 13, 1931.

1. Section 1318 of the Revenue Act of 1921, which makes the filing of a claim for refund a prerequisite to suit for recovery of an internal revenue tax, is not complied with by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded. P. 272.
 2. Likelihood that the claim, if filed, will be rejected, because of previous rulings of the Treasury on the question involved, does not dispense with the necessity of filing it. P. 273.
- 69 Ct. Cls. 204; 37 F. (2d) 977, reversed.

CERTIORARI, 281 U. S. 719, to review a judgment sustaining a claim for repayment of money collected as income and profits taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, *Bradley B. Gilman*, and *Ralph C. Williamson* were on the brief, for the United States.

Mr. Thomas G. Haight, with whom *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This Court granted certiorari, 281 U. S. 719, to review a judgment of the Court of Claims, allowing recovery by respondent of income and excess profits taxes alleged to have been illegally exacted for the year 1917. 69 Ct. Cls. 204; 37 F. (2d) 977. It is conceded that respondent was entitled to a deduction from gross income for that year on account of exhaustion or obsolescence of patents, under § 203 of the Revenue Act of March 3, 1917, 39 Stat. 1001; §§ 4 and 206 of the Act of October 3, 1917, 40 Stat. 302, 305; § 12 (a) of the Act of 1916, 39 Stat. 767, which, if allowed, would result in the refund demanded.

The sole objection to recovery urged by the Government is that the claim for refund filed by petitioner as a prerequisite to suit did not comply with § 1318 of the Revenue Act of 1921, 42 Stat. 314, and Article 1036 of Treasury Regulations 62, under that Act.

Section 1318 provides that "no suit . . . shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been . . . illegally . . . collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury. . . ." Article 1036, Treasury Regulations 62, provides that claim for refund shall be made on Form 843 and that "all

the facts relied upon in support of the claim should be clearly set forth under oath."

Respondent filed an application under oath for reduction of its 1917 tax liability and for a corresponding return of taxes paid, on Form 843, which it designated a claim "for refund of taxes illegally collected." But the sole ground stated for the demanded reduction of tax was that respondent had filed with the Commissioner an application for special relief from the amount of its excess profits tax under § 210 of the Act of 1917, 40 Stat. 307.¹

That section provides for a special method of assessment of excess profits taxes in any case where the Secretary of the Treasury is unable satisfactorily to determine the invested capital of the taxpayer. It has no relation to deductions from gross income on account of exhaustion or obsolescence of patents. In support of its claim, which was ultimately allowed in part, respondent prepared and filed a brief, and an oral argument was held in the office of the Commissioner; but neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed.

¹ The material part of the claim for refund is as follows:

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid.....	\$227,789.38
Less: Decrease in income taxes on account of profits taxes credit.....	13,667.37

Refund claimed.....	\$214,122.01
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"The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made."

The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. *Tucker v. Alexander*, 275 U. S. 228; *Maryland Casualty Co. v. United States*, 251 U. S. 342, 353, 354; *Kings County Savings Institution v. Blair*, 116 U. S. 200; *Nichols v. United States*, 7 Wall. 122, 130.

One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, *Nichols v. United States*, *supra*, p. 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed "to protect all possible legal rights of the taxpayer." The claim for refund, which § 1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

The Court of Claims, in allowing recovery, relied upon *Tucker v. Alexander*, *supra*, and upon the fact that, at the time when respondent filed its return and its claim for refund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in *Tucker v. Alexander* the right of the Government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The Court held that it could, and that in that case it had been waived by the stipulation of the collector

filed in court. Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and "they mark the conditions of the claimant's right." *Rock Island R. R. v. United States*, 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, *Tucker v. Alexander, supra*; but it is not within the judicial province to read out of the statute the requirement of its words. *Rand v. United States*, 249 U. S. 503, 510.

Reversed.

MAYNARD, ADMINISTRATOR, v. ELLIOTT, TRUSTEE IN BANKRUPTCY.

VARNEY v. SAME.

SMITH ET AL. v. SAME.

RUTHERFORD v. SAME.

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

Nos. 239, 240, 241, and 242. Argued March 12, 13, 1931.—Decided April 13, 1931.

The liability of a bankrupt as endorser of a promissory note which has not matured at the time of the adjudication is provable as a claim "founded . . . upon a contract express or implied." Bankruptcy Act, § 63 (a) (4). P. 275.

40 F. (2d) 17, reversed.

CERTIORARI, 282 U. S. 822, to review judgments expunging claims in bankruptcy based on endorsements of promissory notes, some of which were payable within the year after adjudication and others at later dates. The District Court had sustained the claims.

Messrs. Randolph Bias and Wells Goodykoontz for petitioners.

Mr. Stanley Reed for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The bankrupts in these cases were endorsers of promissory notes payable to petitioners, some of them within the year after adjudication, allowed by § 57 (n) of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 561) for proof of claims, others at later dates. Petitioners filed proofs of claim upon the endorsements, which were allowed. Proceedings were brought by the trustee to expunge the claims as not provable.

Upon review, the Circuit Court of Appeals for the Sixth Circuit held that as none of the notes was due at the time of the petition, and as neither presentment nor notice of dishonor had been waived, the liability with respect to each of the endorsements was not a provable claim, because contingent, and gave judgment accordingly, 40 F. (2d) 17, following its earlier decision in *First National Bank v. Elliott*, 19 F. (2d) 426. This Court granted certiorari, 282 U. S. 822, to resolve the conflict between the decision below and those of other circuit courts of appeals, in *Moch v. Market Street National Bank*, 107 Fed. 897 (C. C. A. 3rd), and in *In re Semmer Glass Co.*, 135 Fed. 77 (C. C. A. 2d), appeal dismissed, 203 U. S. 141; see *Colman Co. v. Withoft*, 195 Fed. 250, 253.

Section 63 of the Bankruptcy Act provides:

“(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evi-

denced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

“(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.”

Section 17 provides that “A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . .” with exceptions not now material, and § 1 (11) that “‘debt’ shall include any debt, demand, or claim provable in bankruptcy.” Earlier acts provided for the proof of various types of contingent liability specifically enumerated, including that of the endorser of negotiable paper, § 5, Act of August 19, 1841, c. 9, 5 Stat. 440, 445; § 19, Act of March 2, 1867, c. 176, 14 Stat. 517, 525.

Although the omission of any reference to contingent claims in § 63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed. *Williams v. U. S. Fidelity Co.*, 236 U. S. 549; *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581. The sole question now presented is whether the liability of an endorser is of that class.

The obligation of an endorser is at least a “claim,” and hence a debt so far as defined by § 1 (11); and the language of § 63, which permits proof of a claim “founded . . . upon a contract, express or implied,” is broad enough to

embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication. Within three years after the enactment of the Bankruptcy Act, the Court of Appeals for the Third Circuit, in *Moch v. Market Street National Bank*, *supra*, held that the liability of a bankrupt endorser of commercial paper, which did not mature until after the filing of the petition, was a provable claim under § 63 (a) (4). This ruling was followed by the Court of Appeals for the Second Circuit in *In re Semmer Glass Co.*, *supra*, and appears to have been accepted by the Court of Appeals for the Ninth Circuit, *Colman Co. v. Withoft*, *supra*, p. 253, and by the district courts generally. *In re O'Donnell*, 131 Fed. 150; *In re Rothenberg*, 140 Fed. 798; *In re Smith*, 146 Fed. 923; *In re Dunlap Carpet Co.*, 163 Fed. 541; *In re Caloris Mfg. Co.*, 179 Fed. 722; *In re Buzzini*, 183 Fed. 827; *In re Refining Co.*, 192 Fed. 445; *In re Keith-Gara Co.*, 203 Fed. 585; *Heyman v. Third National Bank*, 216 Fed. 685; *In re Amdur Shoe Co.*, 13 F. (2d) 147. See also *Germania Savings Bank v. Loeb*, 188 Fed. 285, 289; *Courtney v. Trust Co.*, 219 Fed. 57, 66 (both C. C. A. 6th).

The rule thus announced seems not to have been seriously challenged until the decision, twenty-six years later, of the Court of Appeals for the Sixth Circuit in *First National Bank v. Elliott*, *supra*. In *Dunbar v. Dunbar*, 190 U. S. 340, the *Moch* case was cited and distinguished from the claim involved in that case, which was dependent upon a contingency so uncertain, as the court held, that its liquidation or valuation was impossible. In the meantime, leading text writers have stated that the liability of an endorser, upon a note falling due after the petition, is provable under § 63 (a) (4). 1 Loveland on Bankruptcy (4th ed.) p. 609; 2 Collier on Bankruptcy (13th ed.) pp. 1399-1400; 2 Remington on Bankruptcy (3rd ed.) § 777.

Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance. But such language is wanting in § 63. That section purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former.

Respondent argues that (a) (4) must be so read, since, otherwise, the limitation in (a) (1) would be practically without effect. See *In re Roth & Appel*, 181 Fed. 667; *In re Hutchcraft*, 247 Fed. 187. But this contention was rejected by the decision in *Williams v. U. S. Fidelity Co.*, *supra*; see *Central Trust Co. v. Chicago Auditorium*, *supra*, pp. 592, 593, and is not supported, as respondent contends, by *Zavelo v. Reeves*, 227 U. S. 625. That case held only that § 63, read in the light of the spirit and purpose of the Act, did not authorize proof of claim upon an obligation entered into by the bankrupt after the filing of the petition. See *In re Burka*, 104 Fed. 326.

Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the Act "to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. U. S. Fidelity Co.*, *supra*, p. 554; *Central Trust Co. v. Chicago Auditorium*, *supra*, p. 591. If this purpose be given its appropriate weight, a meaning cannot be attributed to the plain words of subdivision (a) (4), which would so restrict them as to preclude proof of claim upon

the liability of an endorser of commercial paper, and result in its survival of the bankrupt's discharge as an obligation enforceable against him.

That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. *In re Merrill & Baker*, 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin v. Magwire*, 15 Wall. 549. Or, the contingency may be such as to make any valuation of the claim impossible, even though liability has attached. Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar v. Dunbar*, *supra*; see *Atkins v. Wilcox*, 105 Fed. 595.

But the liability of an endorser is of neither class. Its amount is certain; and the contingency of notice of dishonor to the endorser is within the control of the creditor, so as to place his claim, so far as its certainty of accrual and its susceptibility of liquidation are concerned, upon the same footing as the contract of indemnity which was held provable in *Williams v. U. S. Fidelity Co.*, *supra*, although the claimant had done nothing at the time of the bankruptcy to satisfy the liability for which the indemnity was given. See also *Central Trust Co. v. Chicago Auditorium*, *supra*, pp. 593, 594.

The claim against the endorser of paper not matured at the time of the bankruptcy thus stands on the same plane as contracts of suretyship or guarantee of payment of a debt not due until after the bankruptcy. See *In re Refining Co.*, *supra*; Collier on Bankruptcy, *supra*; Reming-

ton on Bankruptcy, *supra*. Even though not due until after the year allowed for proof of claims, if proved in time, such a claim may be liquidated as are other unmatured claims. *In re Buzzini, supra*, p. 830. As the claim is provable, and as notice of dishonor after the petition is filed is necessary only to charge the endorser, in the event he does not secure his discharge, the claimant need not give notice of dishonor in order to share in the estate. See *Coleman Co. v. Withoft, supra*, p. 253.

The application of respondent to expunge the claims should be denied in each case. The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

GROUP NO. 1 OIL CORPORATION v. BASS, COLLECTOR OF INTERNAL REVENUE.

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

No. 425. Argued February 26, 1931.—Decided April 13, 1931.

Leases by the State of Texas to a private corporation granted, for a term of years with privilege of renewal, the right to enter on designated lands of the state public domain for the purpose of drilling and operating for oil and gas and to erect and maintain all necessary structures for the production, transportation and storage of those products. They required the lessee or owner of the rights conveyed to pay the State the value of one-eighth of the oil produced and of one-tenth of the gas sold. As construed by the State Supreme Court, such leases effect present sales to the lessee of the oil and gas in place. *Held*, that the profits derived by the lessee from the sale of oil and gas produced, after deducting the State's royalties, are not immune from federal taxation upon the ground that the leases are state instrumentalities. P. 281.

41 F. (2d) 483, affirmed.

CERTIORARI, 282 U. S. 830, to review a judgment reversing a judgment against the Collector for money collected

by him as income taxes. For the District Court's opinion see 38 F. (2d) 680.

Messrs. Homer L. Bruce and James A. Baker for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Sewall Key, Hayner N. Larson, Claude R. Branch, and John G. Remy*, Special Assistants to the Attorney General, *Erwin N. Griswold*, and *Clarence M. Charest*, General Counsel, and *Ottamar Hamele*, Special Attorney, Bureau of Internal Revenue, were on the brief, for respondent.

Messrs. James V. Allred, Attorney General of Texas, and *Fred Upchurch*, Assistant Attorney General, by special leave of Court, filed a brief on behalf of the State of Texas, as *amicus curiae*.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner brought suit in the District Court for Western Texas to recover federal income taxes alleged to have been illegally exacted for its fiscal years 1925 to 1928, inclusive. It set up that in those years it received income derived from the sale of oil and gas produced under leases to it by the State of Texas; that these leases were instrumentalities of the State for the development of its public domain; and that petitioner's income derived from them was constitutionally immune from the tax as one imposed by the Federal Government on an instrumentality of the State. The District Court gave judgment for petitioner, 38 F. (2d) 680, which the Circuit Court of Appeals for the Fifth Circuit reversed, holding that the immunity, if any, had been waived by the State by § 27 of Chapter 83, Laws of 1917, which provided that rights acquired under leases, including the present ones, were to be "subject to taxation as is other property." 41 F. (2d) 483. This Court granted certiorari, 282 U. S. 830.

Petitioner's leases relate to parts of the public domain of the State, set apart by the legislature for the benefit of the state university, under a mandate of the State Constitution of 1876, Art. 7, §§ 10-15, inclusive. See Texas Laws, 1917, c. 83. In terms they "grant and lease" for a period of ten years, with renewal privileges, the right to enter on designated lands for the purpose of "drilling and operating" for petroleum and gas, and to erect and maintain all necessary structures for the production, transportation, and storage of petroleum and gas. The lessee or "owner of the rights . . . conveyed" is required to pay the State the value of one-eighth of the petroleum produced and of one-tenth of the gas sold. The challenged tax is measured by the net profits derived by petitioner from the sale of oil and gas produced, after making allowed deductions from gross receipts, including the royalties paid to the State.

Section 12 of Article 7 of the State Constitution, as interpreted by the highest court of the State, "requires the Legislature to dispose of the University lands by *sale* only." *Theisen v. Robison*, 117 Tex. 489, 502; 8 S. W. (2d) 646. Leases of university lands like those of petitioner have been held by that court to be in compliance with this provision of the Constitution as present sales to the lessees, upon execution of the leases, of the oil and gas in place. *Theisen v. Robison*, *supra*. In so construing them, the court applied the settled rule of the State with respect to oil and gas leases. *Texas Co. v. Daugherty*, 107 Tex. 226; 176 S. W. 717; *Stephens County v. Oil & Gas Co.*, 113 Tex. 160; 254 S. W. 290; cf. *Waggoner Estate v. Wichita County*, 273 U. S. 113. As was said in *Theisen v. Robison*, *supra*, pp. 510, 511:

"They [the leases] do not authorize the purchaser to take and use seven-eighths or any other mere fractional part of the oil or gas in the land leased. The purchaser instead buys *all* the oil and gas, for a stipulated price, part

of the price being measured by the value of a certain fraction of the *produced* oil and gas, which is a very different thing from the value of that fraction of the oil and gas in place. The leases convey all the oil and gas in granting the right to find, produce, and appropriate *all* of them, in consideration of the payment of stipulated sums and also the value of a stated fraction of the oil and gas produced."

Property sold or otherwise disposed of by the government, either state or national, in order to raise revenue for government purposes, is in a broad sense a government instrumentality, with respect to which neither the property itself before sale, nor its sale by one government, may be taxed by the other. But it does not follow that the same property in the hands of the buyer, or his use or enjoyment of it, or the income he derives from it, is also tax immune. *New Brunswick v. United States*, 276 U. S. 547; *Forbes v. Gracey*, 94 U. S. 762; *Tucker v. Ferguson*, 22 Wall. 527; see *Weston v. Charleston*, 2 Pet. 449, 468; *Veazie Bank v. Fenno*, 8 Wall. 533, 547. Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government. We may assume that if the property is subject to tax after sale, the governmental seller will generally receive a less favorable price than if it were known in advance that the property in the hands of later owners, or even of the buyer alone, could not be taxed.

But the remote and indirect effects upon the one government of such a non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other. See *Willcuts v. Bunn*, 282 U. S. 216, 231; *Educational Films Corp. v. Ward*, 282 U. S. 379; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523-524. This Court has consistently held that where property or any interest in it has

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completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government-owned, or because the sale of it effected some government purpose. *New Brunswick v. United States*, *supra*; *Forbes v. Gracey*, *supra*; *Tucker v. Ferguson*, *supra*; see *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 371; *Choctaw, O. & G. R. Co. v. Mackey*, 256 U. S. 531, 537; *Central Pacific R. Co. v. California*, 162 U. S. 91, 125; *Railroad Co. v. Peniston*, 18 Wall. 5, 35-37; *Weston v. Charleston*, *supra*, p. 468.

Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction. See *Weston v. Charleston*, *supra*, p. 468. The interest which passed to petitioner here, as defined by the laws of the State, is not distinguishable from the mining claims, acquired in lands of the United States under its statutes, which, together with minerals and ores derived from them, were held subject to state taxation in *Forbes v. Gracey*, *supra*.

True, since restricted, allotted, or tribal lands of Indians are instrumentalities of the Federal Government, it has been held that neither leases of the lands, *Indian Oil Co. v. Oklahoma*, 240 U. S. 522; nor gross income derived from them, *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292; see *Howard v. Gipsy Oil Co.*, 247 U. S. 503; *Large Oil Co. v. Howard*, 248 U. S. 549; *Jaybird Mining Co. v. Weir*, 271 U. S. 609; nor net income, *Gillespie v. Oklahoma*, 257 U. S. 501, may be taxed by a State. But no case has extended such immunity to property, real or personal, or income derived from its sale, where it has

passed to the buyer by a completely executed act of sale, without restriction, and no interest in it has been retained for the benefit of the Indians. Whatever may be the appropriate limits of the immunity, as applied in this class of cases, those limits are clearly exceeded by that asserted here. *Affirmed.*

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

STANDARD MARINE INSURANCE COMPANY,
LIMITED, *v.* SCOTTISH METROPOLITAN AS-
SURANCE COMPANY, LIMITED.

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

No. 261. Argued March 13, 16, 1931.—Decided April 13, 1931.

1. It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is the value at time and place of shipment, without allowance for increase of value or anticipated profits. P. 288.
2. An insurer against loss of anticipated profits on cargo and an insurer of the cargo are not co-insurers of the same risk, and the former is not entitled to be subrogated with the latter to the cargo owner's right of recovery for destruction of the cargo by a maritime tort. P. 287.
3. Insurance upon "increased value" of cargo is upon the same footing, in this regard, as insurance upon profits, in so far as the former covers value in excess of the value of the cargo at time and place of shipment. P. 288 *et seq.*

39 F. (2d) 436, affirmed.

CERTIORARI, 282 U. S. 822, to review a decree affirming a decree of the District Court, 28 F. (2d) 540, in a limitation of liability proceeding, which apportioned the recovery between two intervening insurance companies.

Mr. Russell T. Mount for petitioner.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Dreyfus & Co. purchased wheat at \$1.38½ a bushel, c. i. f. Montreal. The wheat was shipped on the S. S. "Glenorchy" from Port Arthur to Montreal by the seller, who had insured it, with respondent, for buyer's account, at a valuation of \$1.42 a bushel, the risk to begin immediately after the loading of the vessel. Dreyfus also effected insurance, with petitioner, covering "increased value" of the grain above its c. i. f. cost. That value was stipulated to be the difference between c. i. f. cost and the highest market value per bushel between the day of sailing and the day on which cargo would have arrived at destination if the loss had not occurred, plus 5¢. The applicable clause of the policy, so far as material, is printed in the margin.*

A collision of the Glenorchy with the S. S. "Leonard B. Miller" resulted in a total loss of the cargo. In a proceeding for limitation of liability, brought by the owner of the Miller, in the District Court for Northern Ohio, both vessels were held at fault, and the cargo owner recovered \$309,500 for the insured wheat, with interest from

* "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased Value' for the purposes of this insurance, to be arrived at by taking the difference between the c. i. f. invoice cost and the highest market value per bushel, plus 5c. (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificates, both days inclusive; and in the event of casualty, to be valued at the difference between the c. i. f. invoice cost and the highest market value per bushel, plus 5c. (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. . . ."

the date of collision. That was its value, at \$1.54¾ a bushel, at the time and place of shipment, which is the value recoverable for loss of cargo by maritime tort. *The Vaughan & Telegraph*, 14 Wall. 258, 267, 268.

Respondent paid Dreyfus \$284,000, the full amount of its policy. Petitioner paid \$62,500, stipulated to be the amount due on its policy at the rate of 31¼¢ per bushel, the difference between \$1.38½, the c. i. f. price, and \$1.69¾, the highest market value within the ten days after departure required for the voyage, plus 5¢. Both insurers intervened in the limitation proceeding, each asserting its right to be subrogated to the cargo owner's right of recovery. The special commissioner to whom the matter was submitted reported that petitioner and respondent were co-insurers of cargo, and that they should share pro rata, in proportion to their policy liabilities, in the cargo owner's recovery, after payment of his expenses in litigating the claim.

The District Court decreed payment to respondent of \$284,000, the full amount of its insurance liability, with interest from the date of loss, and payment to petitioner of the balance, after deducting the commissioner's fees. 28 F. (2d) 540. The Court of Appeals for the Sixth Circuit affirmed. 39 F. (2d) 436. Both courts thought that as the insurer, on payment of the loss, is subrogated only to such right of recovery as the insured had, *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 312, and as the latter had no right to recover for any increase in value beyond that at the time and place of shipment, petitioner, so far as it had insured such an increase in value, was not entitled to participate in the recovery, since participation would amount to the assertion of a right of recovery which the insured did not possess.

This Court granted certiorari, 282 U. S. 822, on a petition setting up, as grounds for the writ, the importance of the question and an alleged conflict between the decision

below and that of the Court of Appeals for the Ninth Circuit in *Brown v. Merchants' Marine Ins. Co.*, 152 Fed. 411.

Co-insurers, on payment of the loss insured against, are subrogated to the right of the insured to recover from one who causes the loss, and participate pro rata in the recovery. As the policy liabilities of the present insurers were occasioned by the destruction of the same cargo by the same peril, and as the insured has recovered for its destruction by that peril, the question precisely stated is not whether petitioner may assert, by way of subrogation, a right of recovery which the insured did not possess, but the extent to which petitioner is entitled to be subrogated to the right which the insured did possess and assert against the colliding vessels. Hence the disposition of the present case turns upon the question whether petitioner and respondent were co-insurers against the same risk, or independent insurers against different risks.

We think it clear, and it seems to be conceded, that since respondent is an insurer against loss of cargo, petitioner, if its policy be regarded as insuring against loss of profits of the venture, is not a co-insurer with respondent, even though the liability of both accrued by reason of the destruction of the cargo by the same peril. The very purpose of insurance of profits is to protect the insured against risk of loss which is not covered by insurance upon the cargo itself. See *Canada Sugar Refining Co. v. Insurance Co. of North America*, 175 U. S. 609; *Patapsco Insurance Co. v. Coulter*, 3 Pet. 222; 1 Arnould on Marine Insurance (11th ed.) §§ 236, 287, 288; cf. *O'Brien v. North River Ins. Co.*, 212 Fed. 102.

When the insured thus separates and separately insures two distinct elements of risk—value of cargo and profits which may be earned on it—both insurers cannot share by subrogation in his right to recover against wrongdoers for cargo damage alone. For, while destruction of the cargo has in a sense occasioned both losses, the wrong-

doer is liable for one and not the other; and hence there is no right of recovery by the insured for loss of profits to which the insurer against that loss may be subrogated. The object of subrogation is to make indemnity to the insured, up to the amount of the policy, the measure of the liability of the insurer, and that is its justification. But the liability would be less than such indemnity if the insurer could be subrogated to a right of recovery by the insured for a loss other than that insured against.

Petitioner insists that its insurance was not of anticipated profits, but of increased value of the property, not differing from any other insurance on property, with respect to which the insurer when called upon to contribute to loss of its value becomes entitled to share pro rata with other insurers of the property in any recovery by the insured against third persons causing the loss. *Brown v. Merchants' Marine Ins. Co.*, *supra*. But this argument leaves out of account the peculiar nature of insurance on increased value of cargo over its value at the port of departure, which, for present purposes, is to be distinguished from insurance on hull or any other property, increase in value of which may be embraced in, and recovered under policies insuring against a loss of the property.

It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is that at time and place of shipment, without allowance for increase of value or anticipated profits. *Smith v. Condry*, 1 How. 28, 35; *The Vaughan & Telegraph*, *supra*, pp. 267, 268; *The Scotland*, 105 U. S. 24, 35; *The Aleppo*, 1 Fed. Cases, No. 158; *The Umbria*, 59 Fed. 489, 490; Phillips on Insurance, §§ 1226, 1229; 1 Arnould on Marine Insurance (11th ed.) § 365; see *The Old Reliable*, 262 Fed. 108, 110; *Guibert v. The George Bell*, 3 Fed. 581, 584, 585. The cargo is placed at risk when the voyage begins. Its value then is the measure of the risk and of the loss suffered if the cargo

is lost or damaged on the voyage. Market value at destination on the date of the loss is not the measure, for that was not its value at the place of loss. To attribute to the cargo the market value at destination is to measure, not the loss, but the profits which would have accrued if the voyage had been completed and if the market price at the time of loss had continued to be the market price at the time of arrival.

Petitioner's policy describes the insurance as upon "increased value on grain." But so far as it covered the increase in value over that at the port of departure, it insured against a loss not covered by the insurance on cargo or recoverable against tort-feasors causing cargo loss. See *Strass v. Spillers & Bakers*, [1911] 2 K. B. 759; British Marine Insurance Act, Dec. 21, 1906, 6 Edw. 7, c. 41, § 16, which is a codification of the common law. Gow, *Sea Insurance*, p. v. (Preface). The liability on the policy above the value of cargo at Port Arthur represents profits, as valued, which it might reasonably be assumed would have accrued to insured if the cargo had reached Montreal. But whether that coverage may for all purposes be correctly described as insurance of profits or not, it can stand on no different footing in the present case, for, like insurance of profits, it covers risk of loss not covered by the cargo policy; and the reasons which preclude the insurer of profits from participating, by way of subrogation, in the recovery of the insured for maritime torts causing loss of the cargo should exclude petitioner from participation here.

Had petitioner's policy been the usual one on cargo, but to the extent only that it was not covered by respondent's insurance, petitioner's liability would not have been the $31\frac{1}{4}\text{¢}$ a bushel which it paid, the difference between c. i. f. price and the stipulated market value at destination, but $12\frac{3}{4}\text{¢}$ a bushel, the difference between the value insured by respondent and sound value at port of shipment. To

that extent petitioner and respondent would both have been insurers of cargo, entitled to share in the recovery of insured for its full loss, as the courts below permitted them to do. But petitioner's liability was for the larger amount; and so far as bound to pay in excess of the value at shipment, it insured against a risk for which there could be no recovery on the cargo policy, and for which the owner did and could make no recovery against wrongdoers for the destruction of the cargo. Petitioner may not be subrogated to a recovery for a loss against which it did not insure.

Brown v. Merchants' Marine Ins. Co., *supra*, on which petitioner relies, does not support its contention. In that case, a vessel having an actual value of \$140,000 was insured by several time policies, in which it was valued at \$75,000. There were also policies aggregating \$12,200 on "disbursements and/or increased value." The vessel was sunk in collision and became a total loss, which the underwriters paid. As both vessels were at fault, the damage was divided; and the insured recovered, as net collision damages, after payment of expenses, less than the \$75,000 value stated in the policies.

It was held that the insurers of increased value were entitled to share in the recovery pro rata with the other underwriters. But the recovery was based upon the loss of the total value of the ship, which, in that case, was the subject *pro tanto* of the increased value insurance. Without regard to possible rights of priority, among the several underwriters, to the fund which all were entitled to claim by subrogation, the question there was different from that presented here, where the fund recovered was for a loss against which petitioner did not insure, and to which for that reason it may not be subrogated.

Affirmed.

Counsel for Parties.

SUSQUEHANNA POWER COMPANY v. STATE TAX
COMMISSION OF MARYLAND. (No. 1.)

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 368. Argued March 19, 20, 1931.—Decided April 13, 1931.

1. A hydro-electric power company, acting under a license from the Federal Power Commission, erected a dam across the Susquehanna River (here assumed to be navigable) and established an adjacent power plant. As part of the project, it acquired the lands, partly in the river bed and partly adjoining upland, which were submerged by the pool created by the dam. *Held*, that the company and its property are not such agencies or instrumentalities of the Federal Government that the lands are immune from State taxation. P. 293.
 2. The exemption of an instrumentality of one government (state or federal) from taxation by the other must be given such practical construction as will not unduly impair the taxing power of the government imposing the tax or the appropriate exercise of its functions by the other government. P. 294.
 3. Where a privilege or franchise is granted by the Federal Government to a private corporation to effect some governmental purpose, the property owned and used by the grantee in the exercise of the privilege, but for its private business advantage, is subject to state taxation. P. 294.
 4. In taxing submerged lands of a licensee under the Federal Water Power Act, the State may extend the assessment to the increased value that they have acquired as part of the licensed project, though this is made possible only by the federal license and the use of the water of a navigable stream. P. 295.
- 159 Md. 334; 151 Atl. 29, affirmed.

APPEAL from a judgment sustaining an assessment of lands by the Tax Commission.

Mr. Wm. Clarke Mason, with whom *Messrs. Stevenson A. Williams, Frederick R. Williams, and A. Allen Woodruff* were on the brief, for appellant.

Messrs. Wm. L. Marbury, Jr., Assistant Attorney General of Maryland, and *Robert H. Archer*, with whom *Mr.*

Wm. P. Lane, Jr., Attorney General, was on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal, § 237 Jud. Code, as amended by the Act of January 31, 1928, from a judgment of the Court of Appeals of Maryland, 159 Md. 334; 151 Atl. 29, which upheld an order of appellee, the State Tax Commission, assessing 2110 acres of appellant's submerged lands, for 1929 taxation, at \$2,349,300.

Appellant is a licensee of the Federal Power Commission, created under the Act of June 10, 1920, c. 285, 41 Stat. 1063. Acting under the license, it has constructed a dam across the Susquehanna River which, for present purposes, we assume to be navigable, and has established an adjacent power plant at a point within the State. As a part of the power project, it acquired by purchase from private owners, and by grant from the State, large areas of land, including the bed of the river and adjoining upland. On completion of the dam, the waters of the Susquehanna were backed up, forming a pool about fourteen miles in length, and submerging a large area formerly upland, including a town site, and land previously occupied and used as a canal. The lands assessed by appellee lie under the pool created by appellant's dam, and are used, and derive their chief value, as a part of the power project.

In the present suit, brought to review the order of the Commission fixing the assessment, appellant assailed its action, taken under Laws of Maryland, 1914, c. 841; Bagby, Ann. Code (1924), Art. 81, § 249 (2), directing assessment of property for taxation, as in conflict with the Federal Constitution. Appellant urges, as principal grounds for reversal, first, that in constructing and operating its power plant under the federal license, it, and its lands and property used in the power project, are agencies

or instrumentalities of the Federal Government, state taxation of which is impliedly prohibited by the Constitution, and, second, that in assessing the lands for taxation, appellee has assigned to them a value attributable to appellant's license, likewise immune from taxation, and to the river waters, not appellant's property, in violation of the due process clause of the Fourteenth Amendment.

1. The Federal Power Commission is authorized to grant to licensees permission to construct dams on navigable waterways, and to make use of surplus water not necessary for navigation. Act of June 10, 1920, *supra*. The Act contemplates the use of such surplus water in the development of power, and, for that purpose, the construction and operation of works and transmission lines. See *Ford & Son v. Little Falls Co.*, 280 U. S. 369. It provides (§ 14) that after the expiration of a license, the Government shall have the right to take over and operate the licensed project upon payment of just compensation as defined by the Act. The Commission is given extensive regulatory and supervisory powers over the construction, maintenance, operation, financing, rates, and service of licensed projects, and over the system of accounting maintained by licensees. The Act does not deal directly with state taxation, but § 8, forbidding voluntary transfers of licenses, provides that "tax sales shall not be deemed voluntary transfers . . ."

Appellant is a business corporation, operating its power plant for profit. The challenged tax is imposed, not on the license, but on the private property of the licensee used in its business. Lands privately owned are subject to state taxation although lying under navigable waters, *Central R. R. Co. v. Jersey City*, 209 U. S. 473; *Leary v. Jersey City*, 248 U. S. 328, as is private property in which the Federal Government may have an interest, *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375; *New Brunswick v. United States*, 276 U. S. 547; *Shaw v.*

Oil Co., 276 U. S. 575, or which is subject to its control in the exercise of its power over navigable waters. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626. Hence, the present lands are subject to the taxing power of the State unless they are to be regarded as instrumentalities of the Federal Government because of their use as a part of the project which it has licensed.

Assuming, for present purposes, that the license of the Power Commission is a federal instrumentality, immune from taxation or other direct interference by the State, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523, 524.

With that end in view, the distinction has long been taken between a privilege or franchise granted by the Government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 436, and in *Osborn v. The Bank*, 9 Wheat. 738, 867; see *Railroad Co. v. Peniston*, 18 Wall. 5, 34-37. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation. *Thomson v. Pacific Railroad*, 9 Wall. 579; *Central Pacific R. Co. v. California*, 162 U. S. 91; *Railroad Co. v. Peniston*, *supra*; *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, *supra*; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Ackerlind v. United States*, 240 U. S. 531; *Alward v. Johnson*, 282 U. S. 509; see *Choc-*

taw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531; *Group No. 1 Oil Corp. v. Bass*, *ante*, p. 279.

The present case is not only controlled by the earlier decisions of this Court, but it would be difficult to suppose any case in which the adverse effect of a tax upon a governmental purpose would be more remote or attenuated, or in which the asserted immunity would more seriously impair the sovereign power of the State to tax, than in this one.

Appellant is not aided by *Long v. Rockwood*, 277 U. S. 142, on which it chiefly relies. It was there held that royalties derived from a patent granted upon an invention by the Federal Government could not be taxed by a State. But there would be no warrant for extending such immunity to property of the patentee used to manufacture the patented article, and only a comparable extension would justify the immunity claimed here for appellant's lands because used as a part of its licensed power project.

2. No basis is laid in the present record for assailing the tax on constitutional grounds, either because the Commission has placed a higher value on appellant's lands than on others having a similar location and use, or because it has directly taxed appellant's license. The contention urged is that the lands are assessed at a higher value than they were before they were submerged, and higher than farm uplands in the neighborhood, and that since their use as a part of appellant's power project is rendered possible only by the federal license and by the water in the river, the assessment at the higher value, in effect, involves a forbidden tax on the license, and taxation of appellant for the value of the waters of a navigable stream.

Accepting, as we must on this record, the valuation of the Commission as neither excessive nor discriminatory, we can perceive no basis, either legal or economic, for relieving appellant from the burden of the tax by attempt-

ing the segregation of a part of that value and attributing it to independent legal interests, not subject to taxation, because those interests have a favorable influence on the value of the property.

An important element in the value of land is the use to which it may be put. That may vary with its location and its relationship to the property or legal interests of others. See *Manufacturing Co. v. Gilford*, 64 N. H. 337; 10 Atl. 849. Its proximity to means of transportation, highways, railroads or tidewater, see *New York, L. E. & W. R. Co. v. Yard*, 43 N. J. L. 632; *Trask v. Carragan*, 37 N. J. L. 264; cf. *Hersey v. Barron County*, 37 Wis. 75; or its location in the vicinity of water power belonging to another but available for use upon it, *State v. Flavell*, 24 N. J. L. 370, may increase its utility and hence its taxable value. A dock on New York harbor may have a greater value than one on non-navigable waters, cf. *Leary v. Jersey City*, *supra*; *Central R. R. Co. v. Jersey City*, *supra*, even though the advantages of the former may be terminated through the exercise of the superior power of the Federal Government over navigable waters, see *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

A large part of the value of property in civilized communities has been built up by its inter-related uses; but it is a value ultimately reflected in earning capacity and the price at which the property may be sold, and hence is an element to which weight may appropriately be given in determining its taxable value. It has never been thought that the taxation of such property at its enhanced value is in effect taxation of its owner for the property of others. Nor can we say that the present tax, based upon what must be taken to be the fair value of appellant's lands profitably used in the business of developing and selling power, is forbidden because that use would not have been possible without the control which appellant has acquired over navigable waters through the grant of

its license. Those considerations which lead to the recognition of the power of a State to tax the property used by the grantee in the enjoyment of a federal license require recognition of the power to tax it on the basis of accepted standards of value, customarily applied in the taxation of other forms of property. See *Railroad Co. v. Peniston*, *supra*.

We have examined other objections to the tax, made in brief and argument; but we do not discuss them, as they are unsubstantial, and as the objections, on federal grounds, were not presented by the record or passed upon by the state court.

Affirmed.

SUSQUEHANNA POWER COMPANY v. STATE TAX
COMMISSION OF MARYLAND. (No. 2.)

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 369. Argued March 20, 1931.—Decided April 13, 1931.

A state tax on the capital stock of a corporation based on an assessment equal to the value of its personal property within the State without regard to liens or debts, was construed and upheld by the state court as an indirect tax on the personalty, which was not taxed otherwise. *Held* an adequate state ground of decision, obviating consideration of constitutional objections directed to a different construction of the statute. P. 300.

Dismissed.

APPEAL from a judgment sustaining a capital stock tax. Reported below: 159 Md. 359; 151 Atl. 39.

Mr. William Clarke Mason, with whom *Messrs. Stevenson A. Williams, Frederick R. Williams, and A. Allen Woodruff* were on the brief, for appellant.

Messrs. William L. Marbury, Jr., Assistant Attorney General of Maryland, and *Charles H. MacNabb*, with

whom *Mr. William P. Lane, Jr.*, Attorney General, was on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal, § 237 Jud. Code, as amended by Act of January 31, 1928, from a judgment of the Court of Appeals of Maryland, 159 Md. 359; 151 Atl. 39, upholding an order of appellee, the State Tax Commission, which fixed an assessment on the capital stock of appellant, for 1929 taxation, at \$6,000,000.

The assessment was made under the provisions of Art. 81, §§ 154, 163, 166 and 166-A of the Maryland Code. Sections 163, 166 and 166-A impose a tax on the capital stock of every domestic corporation, which "shall be collected from" the corporation, and which, when paid, may be charged to stockholders, and is a lien upon their stock. At the time of the adoption of § 163, corporations were exempt from taxation on their real and personal property; but § 163 provided that "in no case shall the stock of any corporation, in the aggregate, be valued at less than the full value of the real estate and chattels, real or personal, held by or belonging to such corporation." Direct taxation of real property of domestic corporations was restored by Laws, 1896, c. 120, § 1 (2); and by § 166-A, *supra*, it was provided that in assessing the stock of corporations for taxation, the taxable value should be ascertained by deducting the assessed value of the corporation's real estate from the aggregate value of all its stock.

Appellant is a Maryland corporation, and has been granted a license by the Federal Power Commission. Acting under it, it has constructed a dam on the Susquehanna River, in connection with which it has established and is operating a power project. See *Susquehanna Power Co. v. State Tax Commission*, No. 368, *ante*, p. 291. All its shares of capital stock are owned by the Philadelphia

Electric Power Company, a Pennsylvania corporation, with its only place of business in that commonwealth. The report of appellant to the Commission for the assessment of its capital stock showed its gross assets to be \$46,821,885.28, of which its tangible personal property was not less than \$6,000,000; its total liabilities \$41,954,998.92, and its net worth \$4,866,886.36. The order of the Commission fixed the aggregate value of the capital stock at \$28,726,132, from which it deducted \$22,726,132, the assessed value of its real estate, leaving \$6,000,000 as the assessed value of the stock.

Appellant challenges the taxing statute, as applied, on the ground that it violates the due process clause of the Fourteenth Amendment, because the assessed valuation required by it is arbitrary and excessive, and because it imposes a tax on intangible shares of stock owned by a nonresident, which have a situs, for purposes of taxation, only at the owner's residence. Appellant also assails the statute on the ground that, as the assessed value of the capital stock includes a value attributable to the license granted to appellant by the Federal Power Commission, the tax is on a federal instrumentality, which the Constitution impliedly forbids.

The Court of Appeals of Maryland, in upholding the assessment, pointed out that it did not exceed the value of appellant's tangible personal property within the State, and that the tax was in lieu of any direct tax on that property; and sustained it as an indirect tax on the property. It said, 159 Md. at p. 366, 151 Atl. at p. 42:

"There is in this State no direct tax on the personal property of the corporation, Code Art. 81 sec. 163, and the value of the real estate upon which there is a direct tax, is deducted from the aggregate value of both its real and personal property before its stock is finally valued for assessment. So that the final assessment of the shares in

so far as it represents tangible property includes no part of the value of the real estate but is based upon the value of the personal property alone . . ." ". . . under the amended law the value of the real property was excluded for the valuation of its stock, and that valuation represented only the tangible and intangible personal property of the corporation, without regard to any liens thereon. And since it could have taxed such property directly without reference to such liens there is no valid reason why it may not be taxed indirectly through appellant's capital stock, on an assessment made without reference to liens or debts, for in neither case would the corporation be called upon to pay taxes upon more than the assessable value of its property. And there is no possible basis for the contention that the method adopted subjects any of the corporate property to double taxation. For under it the realty is subjected only to direct taxation, and the personal property only to indirect taxation, based in both instances on the fair value of the property taxed."

The tax was thus sustained on an adequate state ground, and it is unnecessary to consider the objections made to it on constitutional grounds. None of them is directed at the statute viewed, as the state court has construed it, as imposing a tax on the personal property of appellant. Nor is it necessary on this record to consider how far any objection made may be availed of by the non-resident stockholder, in the event of an attempted enforcement of the provisions of the statute which authorize the tax to be charged to stockholders, and create a lien upon the stock.

The objection that the property used by appellant in its power project is a federal instrumentality, is not specifically raised on this record; but it was considered and rejected in *Susquehanna Power Company v. State Tax Commission*, *supra*.

Dismissed.

Opinion of the Court.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* THOMPSON OIL & GAS COMPANY.

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

No. 288. Argued March 16, 17, 1931.—Decided April 13, 1931.

Section 234 (a) (9) of the Revenue Act of 1918 provides that in computing the net income of a corporation from oil-mining properties, there shall be deducted a reasonable allowance for depletion based upon cost, and that in case of such properties acquired before March 1, 1913, the fair market value of the property on that date shall be taken in lieu of costs up to that date.

Held that in determining for the taxable year the capital value recoverable through depletion allowance, there should be deducted from the March 1, 1913, value of the property the amount of depletion actually sustained in intervening years, even though the deductions allowed for depletion in those years, under the Acts then in force, were less than the actual depletion. P. 304.

40 F. (2d) 493, reversed.

CERTIORARI, 282 U. S. 823, to review a judgment reversing a decision of the Board of Tax Appeals, 15 B. T. A. 993, which sustained a determination of income tax deficiency.

Assistant Attorney General Richardson, with whom Solicitor General Thacher, Assistant Attorney General Youngquist and Messrs. Sewall Key and J. Louis Monarch, Special Assistants to the Attorney General, Paul D. Miller, Clarence M. Charest, General Counsel, and John MacC. Hudson, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Messrs. Phil D. Morelock and James S. Y. Ivins for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Commissioner of Internal Revenue determined a deficiency in the respondent's income tax for 1918. Upon

the taxpayer's petition the Board of Tax Appeals sustained the Commissioner.¹ An appeal was taken to the Court of Appeals, which reversed the judgment of the Board, 40 F. (2d) 493. This court granted certiorari, 282 U. S. 823.

The question presented is whether under § 234 (a) (9) of the Revenue Act of 1918,² in determining for any taxable year the capital value, recoverable through depletion allowance, of oil mining properties acquired prior to March 1, 1913, there should be deducted from the March 1, 1913 value of the properties the amount of depletion actually sustained in earlier years, or only so much of such depletion as was allowable as deductions under the revenue acts in force in those years.

The Board of Tax Appeals found the following facts: The taxpayer owned an oil and gas mining lease acquired prior to March 1, 1913. On that date the recoverable oil in the reserve embraced by the lease was 278,000 barrels, and its value was \$156,645, or \$0.56347 per barrel. Between March 1, 1913 and December 31, 1915, it extracted 162,717 barrels of oil, so that at the unit rate mentioned it sustained depletion amounting to \$91,686.15. Its deduction for depletion in computing net income under the

¹ 15 B. T. A. 993.

² 40 Stat. 1077. Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: . . . (9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of costs up to that date: . . . such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. . . .

Revenue Act of 1913³ was computed not by reference to the number of barrels extracted, or to the value of the reserve on March 1, 1913, but by taking five per cent. of the gross income from the sale of oil. The depletion allowance for 1913 to 1915, inclusive, computed by this method, amounted to \$6322.02.

In 1916 the taxpayer secured an extension of its lease at a cost of \$30,000, whereby its oil reserve was increased by 300,000 barrels. There then remained of the original reserve 115,283 barrels having a value as of March 1, 1913, of \$64,958.85. The Commissioner added to this depleted value the cost of the extension of the lease, and added to the remaining oil reserves of the original lease the additional 300,000 barrels then acquired. He thus ascertained a new total recoverable reserve of 415,283 barrels having a basic value or cost of \$94,958.85, or \$0.22866 per barrel. There were no subsequent additions to the reserves.

In 1916 there were produced under the lease 49,452 barrels of oil, and in 1917, 39,204 barrels, leaving the reserve at January 1, 1918, 326,627 barrels.

A new method of allowance for depletion was adopted in the Revenue Act of 1916.⁴ Depletion was sustained under the formula therein prescribed in those two years,

³ c. 16, § II. B.; 38 Stat. 167. That in computing net income . . . there shall be allowed as deductions: . . . sixth, a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made, . . .

⁴ c. 463, 39 Stat. 767-768. Sec. 12 (a). In the case of a corporation . . . such net income shall be ascertained by deducting from the gross amount of its income . . . Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including . . . (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; . . .

amounting to \$20,272.08. It is agreed that this figure is correct and represents the sustained depletion as well as allowed depletion for those years.

During 1918 there were produced 33,697 barrels of oil. At the unit price adopted by the Commissioner of \$0.22866 per barrel, the depletion sustained and allowed for that year was \$7705.16. It is this depletion allowance for the year 1918 which is here called in question.

In view of the fact that the depletion actually sustained by the taxpayer between March 1, 1913 and December 31, 1915, was \$91,686.15, whereas in conformity with the act of 1913 the deduction actually allowed it as for depletion was only \$6322.02, the respondent contended that the unit rate of depletion per barrel for 1918 should have been based upon the original March 1, 1913 value of the reserves, plus the cost of the extension of the lease, and less only that portion of the actually sustained depletion which was in fact allowed pursuant to the terms of the 1913 act. The Commissioner, on the other hand, subtracted from the March 1, 1913, value plus the cost of the extension of the lease, the sustained or actual depletion, holding that the entire depletion actually sustained should be deducted from the original March 1, 1913 value, regardless of whether it was allowable as deductions from the gross income of the years 1913, 1914 and 1915. The Circuit Court of Appeals decided in favor of the respondent.

The parties agree that respondent is not entitled as matter of right to make any deduction from annual income for depletion of the oil extracted and sold during the year. If it may take any such deduction, authority therefor must be found in the statute.⁵ It follows that the question for decision is purely one of statutory construction.

It is clear that Congress intended that the lessee of an oil well should be entitled to a reasonable allowance for

⁵ *Stanton v. Baltic Mining Co.*, 240 U. S. 103.

depletion based upon cost or March 1, 1913 value. It did not however attempt to prescribe a formula for ascertaining it, but expressly delegated that function to the Commissioner of Internal Revenue, who was to make rules and regulations to that end. Pursuant to this authority, regulations were made, which required the deduction of depletion theretofore sustained in ascertaining the capital remaining in any year recoverable by depletion deductions.⁶ It is undisputed that the Commissioner calculated the depletion deduction in this case in accordance with the regulations.

The taxpayer contends, however, and the court below held, that the allowance granted was not reasonable—as the act required it should be—because although it reflected the actual depletion in the year 1918, considered by itself, the result of the application of the regulation will fall short of returning to the taxpayer its March 1, 1913, capital tax-free at the date of exhaustion of the oil reserve. It is said that this was the intent of Congress as shown not only by the terms of the act, but by the history of prior legislation. Hence it is claimed that only the depletion allowed under the act of 1913 should be deducted in ascertaining the depletable capital at January 1, 1918. Thus respondent would recover its entire capital tax-free. The Government contends that the depletion allowance provided by the regulations is reasonable.

It is evident that the act of 1913 did not allow enough to return the capital on exhaustion of the reserve. The deduction permitted by that act fell some \$85,000 short of

⁶Art. 203. Capital recoverable through depletion deductions in the case of lessee.—(a) In the case of a lessee, the capital remaining in any year recoverable through depletion and depreciation deductions is (1) the value as of the basic date of the lessee's equity in the property plus (2) subsequent allowable capital additions but minus (3) depletion and depreciation sustained, whether legally allowable or not, from the basic date to the taxable year. . . .

what was required in 1913-1915 for that purpose. Was it then the intent of the act of 1918 to permit a deduction from gross income for depletion which would represent not only that year's sustained depletion, but make up for sustained but disallowed depletion in the earlier years? The Government says, and we think rightly, that there is nothing in the terms of the act to indicate any such purpose. The tax is an income tax for 1918, and in the absence of express provision to the contrary, it is not to be supposed that the taxpayer is authorized to deduct from that year's income, depreciation, depletion, business losses or other similar items attributable to other years.⁷ The very fact that Congress denied deductions equal to the sustained depletion in the earlier years negatives an intent that they should be allowed in later years, as if for depletion then sustained. The construction adopted by the court below in effect results in including in the taxable year items referable to other years, and is contrary to the theory of a tax for specific years.

The nature of the tax as one for annual periods has been repeatedly mentioned in dealing with its application in various situations.⁸ The taxable year 1918, and that only, is involved, and deductions applicable to that year only should be allowed.

The court below recognized that its decision resulted in attributing an excessive value to the reserves remaining in 1918, but thought that *United States v. Ludey*, 274 U. S. 295, required it so to hold. That case, however, involved the determination of taxable gain or loss on the

⁷ As to losses, see *De Loss v. Commissioner*, 28 F. (2d) 803; *Burns v. Commissioner*, 31 F. (2d) 399. Compare *Newman v. Commissioner*, 41 F. (2d) 743.

⁸ *Aluminum Castings Co. v. Routzahn*, 282 U. S. 92; *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359; *Fawcus Machine Co. v. United States*, 282 U. S. 375.

sale of an oil property. To ascertain gain on a sale of a capital asset, there must be subtracted from the sale price a sum sufficient to restore the value at the date of acquisition (or March 1, 1913).⁹ The remainder is income. So in the *Ludey* case it was held that, in order to ascertain the depleted cost, only the allowed depletion should be deducted from the original cost. Allowed depletion rather than sustained depletion was there the true measure of deduction. But here the question is what allowance Congress intended should be made from the gross annual income of the operation of an oil well. In the one case the question is how much of the capital has already been returned tax-free; in the other how much of the oil reserve remains at the beginning of a taxable year to be depleted over the period remaining until exhaustion. The court below relied on certain statements in the opinion in the *Ludey* case which were applicable in the determination of gain on a sale, but which do not apply in this case, for if the sale of each barrel of oil were a partial sale of the reserve (which it is not) to apply the rule which respondent seeks to deduce from the *Ludey* case would increase the cost or 1913 value of each barrel sold, in determining gain or loss in 1918, beyond its actual cost or 1913 value, taken for barrels sold in prior years. The decision in the *Ludey* case has been adopted in the later statutes as affecting sales of capital assets,¹⁰ but the provision for annual depletion allowance has remained substantially unchanged.¹¹ This in itself is persuasive evi-

⁹ *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179.

¹⁰ Act of 1924, c. 234, 43 Stat. 253, 255; Act of 1926, c. 27, § 202 (b) (2), 44 Stat. 9, 12; Act of 1928, c. 852, § 111 (b) (2), 45 Stat. 791, 815.

¹¹ Act of 1921, § 234 (a) (9), 42 Stat. 227, 256; Act of 1924, § 234 (a) (8), 43 Stat. 253, 284; Act of 1926, § 234 (a) (8), 44 Stat. 9, 42; Act of 1928, § 23 (1), 45 Stat. 791, 800.

dence that Congress has approved the executive construction embodied in the regulations.¹²

Respondent insists that the increasing liberality in the statutory provisions for depletion allowances in the successive Revenue Acts, indicates that Congress never intended that the 1918 act should be so construed or administered as to deprive the taxpayer of the return of his entire capital tax-free. But the increasing liberality was to be applicable in calculating net income for the successive years and we can find no evidence either in the acts or in the regulations, of any intent to increase future depletion allowances to redress the inadequacy of those previously permitted.

It follows that the judgment must be

Reversed.

ALDRIDGE *v.* UNITED STATES.

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

No. 683. Argued March 16, 1931.—Decided April 20, 1931.

1. A negro, about to be tried for the murder of a white man, is entitled to have the jurors asked on their *voir dire* whether they have any racial prejudice that would prevent a fair and impartial verdict. P. 311 *et seq.*
2. A request for such an inquiry, at a trial in the District of Columbia (where prospective jurors are examined by the Court), held sufficient, although informal. P. 310.
47 F. (2d) 407, reversed.

CERTIORARI, 282 U. S. 836, to review a judgment affirming a sentence for murder.

¹² *United States v. Cerecedo Hermanos*, 209 U. S. 337; *National Lead Co. v. United States*, 252 U. S. 140.

Mr. James F. Reilly for petitioner.

Mr. Leo A. Rover, United States Attorney for the District of Columbia, with whom *Mr. Neil Burkinshaw*, Assistant United States Attorney, was on the brief, for the United States.

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

The petitioner was convicted, in the Supreme Court of the District of Columbia, of murder in the first degree and was sentenced to death. The conviction was affirmed by the Court of Appeals. This Court granted a writ of certiorari, limited to the question raised by the exception to the ruling of the trial court on the examination on *voir dire* of prospective jurors.

The petitioner is a negro, and the deceased was a white man, a member of the police force of the District. The record shows the following proceedings on the examination of jurors on the *voir dire*:

The court "inquired if any of them knew the defendant, Alfred Scott Aldridge, or his counsel, or any of the witnesses whose names have been called. The court further inquired if any of the prospective jurors knew any of the facts in the case or if any of them ever remembered having read of it in the newspaper, or if they had any prejudice or bias against circumstantial evidence, or if any of the prospective jurors had any conscientious scruples against capital punishment. The court further inquired if any prospective juror had formed or exercised an opinion as to the guilt or innocence of the defendant, and further inquired whether any prospective juror was acquainted with any member of the Metropolitan Police Force of the District of Columbia, or more particularly those attached to the third precinct.

"Whereupon, with the consent of the court, counsel for the parties hereto approached the bench and in a whispered tone, out of the hearing of the prospective jurors, the following took place:

"Mr. Reilly. At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public, but——

"The Court. I don't think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman.

"Mr. Reilly. But it was brought to our attention so prominently. It is a racial question——

"The Court. It was not this jury.

"Mr. Reilly. No. But it was a racial question, and the question came up——

"The Court. I don't think that is proper.

"Mr. Reilly. Might I, out of an abundance of caution, note an exception.

"The Court. Note an exception.

"Counsel for the defendant requested the court to allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant."

In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked. The exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness. We find no reason to doubt the nature of the inquiry which the counsel for the accused desired. It was admitted at the bar of this Court that the members of the jury were white. In ask-

ing that the question relative to "racial prejudice" be put to the jurors, it is only reasonable to assume that counsel referred, not to immaterial matters, but to such a prejudice as would disqualify a juror because precluding an impartial verdict. The reference to what counsel had heard as to the attitude of a juror on the previous trial, where the jury had disagreed, indicated the purpose of the question, which was clear enough to invite appropriate action by the court. If the court had permitted the question, it doubtless would have been properly qualified. But the court, interrupting counsel, disposed of the inquiry summarily. The court failed to ask any question which could be deemed to cover the subject. If the defendant was entitled to have the jurors asked whether they had any racial prejudice, by reason of the fact that the defendant was a negro and the deceased a white man, which would prevent their giving a fair and impartial verdict, we cannot properly disregard the court's refusal merely because of the form in which the inquiry was presented.

The propriety of such an inquiry has been generally recognized. In *Pinder v. State*, 27 Fla. 370; 8 So. 837, the counsel for the accused sought to have the jurors asked on their *voir dire*: "Could you give the defendant, who is a negro, as fair and as impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?" The Supreme Court of Florida held that the refusal of the court to allow the question was error and reversed the conviction.¹ In *Hill v. State*, 112 Miss. 260; 72 So. 1003, the

¹ In the *Pinder* case, *supra*, the court said: "Though the question is not in express terms provided for in the statute above cited" (McClellan's Digest, § 10, p. 446) "yet it was a pertinent, and, as we think, proper question, to test fully the existence of bias or prejudice in the minds of the jurors. It sought to elicit a fact that was of the most vital import to the defendant; and a fact, too, that if existent, was locked up entirely within the breasts of the jurors to

Supreme Court of Mississippi held that it was fatal error to refuse to permit a negro on trial for murder to put to prospective jurors on their *voir dire* the following question: "Have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less or slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?" The Supreme Court of North Carolina reversed the conviction of a negro because of the refusal of the trial judge to permit a juror to be asked if "he believed he could, as a juror, do equal and impartial justice between the State and a colored man." *State v. McAfee*, 64 N. C. 339.² See, also,

whom the question was propounded; a knowledge of the existence of which could only be acquired by interrogating the juror himself. The answer to it if in the affirmative could have worked no harm to the juror or to anyone else, but would have done credit to the humanity and intelligence of the juror, and would have satisfactorily exhibited to the court and to the defendant his entire competency, so far as the element of bias or prejudice was involved. But, if the answer to it from the jurors had been in the negative, then, we have no hesitancy in saying that it would have shown them to be wholly unfit and incompetent to sit upon the trial of a man of the negro race, whose right to a trial by a fair and impartial jury is as fully guaranteed to him under our constitution and laws, as to the whitest man in Christendom. And such incompetency asserts itself with superadded force in such a case as this where the life or death of the defendant was the issue to tip the scale in the jury's hands for adjustment."

² In that case, the court said (at p. 340): "It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings toward the colored race was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character, it is at once seen that he would have been grossly unfit to sit in the jury box."

Fendrick v. State, 39 Tex. Cr. 147; 45 S. W. 589; *State v. Sanders*, 103 S. C. 216; 88 S. E. 10.

The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed. Thus, in New York, on the trial of a negro for the murder of his wife, who was white, a talesman, who had testified to a disqualifying prejudice, was excluded by the court on its own motion, and the Court of Appeals held that the exclusion was not error, although in the absence of a challenge to the talesman by either party. *People v. Decker*, 157 N. Y. 186, 190; 51 N. E. 1018. See, also, *State v. Brown*, 188 Mo. 451, 459, 460; 87 S. W. 519.

The right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character. *Potter v. State*, 86 Tex. Cr. 380, 384; 216 S. W. 886; *People v. Reyes*, 5 Cal. 347, 349; *Watson v. Whitney*, 23 Cal. 375, 379; *People v. Car Soy*, 57 Cal. 102; *Horst v. Silverman*, 20 Wash. 233, 234; 55 Pac. 52. In *People v. Reyes*, *supra*, Mexicans were charged with assault with intent to commit murder, and conviction was reversed because of the refusal to allow questions to determine whether a prospective juror was a member of the Know Nothing party, and whether he had taken any oath or obligation which resulted in prejudice, or whether independent of such an oath he entertained a prejudice, which would prevent him from giving the accused a fair trial.³

³ The court in that case said (at p. 349): "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him? . . ."

"Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask

We do not overlook the reference of the Court of Appeals, in support of the ruling of the trial court, to conditions in the District of Columbia "where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc." But the question is not as to the civil privileges of the negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote⁴ as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death.

The argument is advanced on behalf of the Government that it would be detrimental to the administration of the

a person whether he is prejudiced or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings. If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so, and the question and answer would be harmless. If, upon the other hand, he had taken oaths, and was under obligations which influenced his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror, and such facts should be known."

⁴ For an illustration of a case where the suggestion of bias was held to be too remote, *e. g.*, as to political affiliations, see *Connors v. United States*, 158 U. S. 408.

law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

We are of the opinion that the ruling of the trial court on the *voir dire* was erroneous and the judgment of conviction must for this reason be reversed.

Judgment reversed.

MR. JUSTICE McREYNOLDS, dissenting.

Our jurisdiction over this case is limited by § 391, Title 28, U. S. Code, which provides—

“All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

The petitioner, a negro, killed a white policeman in the District of Columbia. He was indicted, tried and found guilty by a jury. He moved for a new trial upon the ground, among others, “That this court committed error in refusing to examine the jury on their *voir dire* as to whether any juror may entertain racial prejudice in a matter of homicide where the defendant is a negro and the deceased a white policeman.” This was overruled and sentence of death followed.

Upon appeal to the Court of Appeals for the District the following error, among others, was assigned: “The

court's action in refusing the request of the defendant to propound to the jury during the court's examination of the jury on its *voir dire* as to whether any juror may entertain racial prejudice in the matter of a homicide where the defendant is a negro and the deceased a white policeman."

Replying to this that court said—

"Counsel for defendant assigns as error the refusal of the court to allow him to inquire of the prospective jurors on their *voir dire* whether they entertained racial prejudice in a case wherein the defendant is a negro and the deceased a white man. We had occasion to consider this same question in the case of *Crawford v. United States*, 59 App. D. C. 356. We have given the matter further careful consideration in this case and find no reason to recede from our former decision. In a jurisdiction like the District of Columbia, where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc., we are of the opinion that there was no abuse of discretion on the part of the trial court in refusing to permit the question to be answered by the jurors."

This Court granted a certiorari to bring up the judgment of affirmance but limited review to the point raised by the quoted assignment of error.

It appears that while the trial judge was examining prospective jurors on their *voir dire*, counsel for the accused said to him: "At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public." The precise nature of "that question" is unknown to us. The Judge thought "that question" (whatever it was) improper and refused to ask it. Whereupon counsel noted an exception and "requested the court to allow the

record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant."

Solely because of the refusal of the trial judge to propound an undisclosed question "relative to racial prejudice," (whatever that may be) we are asked to upset a judgment approved by the judges of both local courts who, it is fair to presume, understand conditions in the District better than we do.

Nothing is revealed by the record which tends to show that any juror entertained prejudice which might have impaired his ability fairly to pass upon the issues. It is not even argued that considering the evidence presented there was room for reasonable doubt of guilt.

It does appear that counsel said he understood at a former trial a female juror, a southerner, (whatever that may mean) declared "the fact the defendant was a negro and the deceased a white man perhaps somewhat influenced her." And that is the sum of the information to be gathered from the record in respect of any "race prejudice" which might have so distorted some juror's judgment as to prevent honest and fair consideration.

How this unidentified woman juror voted; whether she was white or black; whether her prepossessions were right or wrong or materially different from those generally entertained by men of one color towards those of another; we cannot know. But "perhaps she was somewhat influenced" by the fact that the dead man and the defendant were of different color. Must we therefore decide that "perhaps" and accordingly some member of the second jury failed to act fairly, intelligently, and without due regard to his oath!

Two local courts could not conclude that there was adequate reason for holding the accused man had suffered deprivation of any substantial right through refusal by

the trial judge to ask prospective jurors something relative to racial prejudice. And certainly I am unable to affirm that they were wrong.

Section 391 of the U. S. Code, I think, was intended to prevent escape of culprits from prompt, deserved punishment in cases like this. Congress had clear right to put the limitation on courts of review and the enactment should be given effect according to its purpose.

Unhappily, the enforcement of our criminal laws is scandalously ineffective. Crimes of violence multiply; punishment walks lamely. Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to promote order, and not to hinder it by excessive theorizing of or by magnifying what in practice is not really important.

I think the judgment below should be affirmed.

STRATON ET AL. *v.* NEW, TRUSTEE IN BANKRUPTCY, ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 137. Argued March 3, 1931.—Decided April 20, 1931.

1. Where creditors have obtained and docketed judgments constituting liens on the real estate of their debtor, and have instituted a creditors' suit in a state court to marshal the liens and enforce them by a sale of the real estate, the bankruptcy of the debtor, occurring more than four months after the institution of the creditors' suit, does not oust the state court of jurisdiction, nor vest in the court of bankruptcy power to enjoin further proceedings in the state court. Pp. 320, 323.
2. The state court proceeding described in the certificate in this case, when examined with the West Virginia statutes upon which it is based, is found to be a suit by a judgment creditor for the enforcement of the lien of his judgment on the debtor's real estate,

in which all liens of creditors on such real estate are ascertained and marshalled and the realty sold for their satisfaction. It is not of the class of proceedings under state insolvency laws which are suspended by the Federal Bankruptcy Law. P. 327.

RESPONSE to a question certified, upon an appeal to the court below from an order of the District Court, in bankruptcy. The order enjoined commissioners of a West Virginia court from selling certain real estate pursuant to its decree.

Mr. Randolph Bias for Straton et al.

Mr. Arthur F. Kingdon, with whom *Mr. E. A. Hansbarger* was on the brief, for New et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The District Court for Southern West Virginia entered an order in the bankruptcy of the Fall Branch Coal Company enjoining commissioners appointed by a West Virginia state court from proceeding with the sale of certain real estate of the bankrupt pursuant to a decree of that court. The petitioners were the trustee in bankruptcy and two mortgagees.

The petition alleged that the commissioners were advertising for sale only the property of the bankrupt in West Virginia, that it would be advantageous to all parties to have this property sold with property of the bankrupt situate in Kentucky, and that the bankruptcy court had exclusive jurisdiction to make the sale. The respondents in their answer denied the right of the District Court to enjoin the proceedings in the state court, and appealed from an order awarding an injunction.

April 11, 1927, one Alley obtained judgment against the coal company in the Circuit Court of Mingo County, West Virginia, which was docketed May 5, 1927, and thus be-

came a lien on its real estate in that county. February 20, 1928, Alley filed in the same court a judgment creditors' suit against the coal company, and made parties thereto all creditors having liens against its real estate, including the two mortgagees who were co-petitioners with the trustee in the bankruptcy court. In his bill he prayed that the liens and assets be marshalled and that the company's real estate be sold and the proceeds distributed among the lien claimants according to their respective rights. The cause was duly matured and, at April term, 1928, was referred to a commissioner in chancery to report the real estate owned by the debtor and the liens thereon. At the July term, 1928, the commissioner presented his report, and thereupon the respondents were appointed to make sale of the property. August 4, 1928, sixteen months after rendition of Alley's judgment, and five and one-half months after the filing of the creditors' bill, the coal company filed its voluntary petition in bankruptcy, and on October 11, 1928, while the commissioners of the state court were proceeding to carry out its order of sale, the petition was filed to enjoin them from further proceeding.

Upon these facts the question certified is:

Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?

The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the

creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300. It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the district court having acquired the exclusive right to administer all property in the bankrupt's possession. *Lazarus v. Prentice*, 234 U. S. 263. *White v. Schloerb*, 178 U. S. 542. *Murphy v. John Hofman Co.*, 211 U. S. 562. *United States Fidelity & G. Co. v. Bray*, 225 U. S. 205. *Hebert v. Crawford*, 228 U. S. 204. It may inquire into the validity of liens, marshal them, and control their enforcement and liquidation. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, and authorities cited; *Whitney v. Wenman*, 198 U. S. 539. Remington, Bankruptcy (3d ed.) § 2472.

Though a lien be not discharged by bankruptcy, its owner may not, without the bankruptcy court's permission, institute proceedings in a state court to enforce it, since his so doing might interfere with the orderly administration of the estate. Thus a mortgagee will be restrained from instituting or proceeding further in a foreclosure action, begun after the date of the petition in bankruptcy.¹ And a creditor holding a valid judgment

¹ *Isaacs v. Hobbs Tie & Timber Co.*, *supra*. *In re Pittelkow*, 92 Fed. 901. *In re Ball*, 118 Fed. 672. *In re Jersey Island Packing Co.*, 138 Fed. 625. *In re Zehner*, 193 Fed. 787. *In re Hasie*, 206 Fed. 789. *Matthews v. Webre Co.*, 213 Fed. 396; affirmed *sub. nom.* *Pugh v. Loisel*, 219 Fed. 417 (cert. denied, 238 U. S. 631). *McLoughlin v. Knop*, 214 Fed. 260. *Cohen v. Nixon & Wright*, 236 Fed. 407. *In re Larkin*, 252 Fed. 885. *In re North Star Ice & Coal Co.*, 252 Fed. 301. *In re U. S. Chrysotile Asbestos Co.*, 253 Fed. 294. *In re*

more than four months old will be enjoined from enforcing its lien by suit brought after the date of the petition.² And as the lien created by a judgment entered within four months is avoided, the court of bankruptcy has jurisdiction to administer the property regardless of the lien and will restrain the prosecution of an action to enforce it.³

The bankruptcy law contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed. But it is clearly implied that they shall be saved from the operation of the law, for § 67 (f)⁴ voids only liens obtained by legal proceedings within that period. It has consequently been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the bankruptcy court in distribution of the estate, in accordance with applicable local law.⁵

There is no dispute concerning these propositions. Appellants, however, assert that the jurisdiction in bankruptcy to ascertain, marshal and enforce liens, is not exclusive, but concurrent with that of other courts competent to that end, if the liens in question are not discharged but recognized as valid in bankruptcy, and that the rule of comity is applicable that the court first lawfully taking jurisdiction shall retain it. *Wabash R. Co. v.*

Oswegatchie Products Co., 279 Fed. 547. *Brown Shoe Co. v. Wynne*, 281 Fed. 807. *First Trust Co. v. Baylor*, 1 F. (2d) 24. *In re Dyer*, 8 F. (2d) 376. *Allebach v. Thomas*, 16 F. (2d) 853. *In re Holstein Harvey, Inc.*, 26 F. (2d) 798.

² *In re L'Hommedieu*, 146 Fed. 708. *In re Arden*, 188 Fed. 475. *In re Schow*, 213 Fed. 514.

³ *Clark v. Larremore*, 188 U. S. 486. *In re Albright*, 18 F. (2d) 591. *Remington, Bankruptcy* (3d ed.) § 1905.

⁴ U. S. C., Tit. 11, § 107 (f).

⁵ *In re Wood*, 95 Fed. 946; *In re L'Hommedieu*, 146 Fed. 708; *In re Koslowski*, 153 Fed. 823; *In re Torchia*, 185 Fed. 576; *In re Randolph*, 187 Fed. 186; *In re Zeis*, 245 Fed. 737; *In re Fraser*, 261 Fed. 558.

Adelbert College, 208 U. S. 38. *Harkin v. Brundage*, 276 U. S. 36. They contend that when the petition was filed in this case, the state court was proceeding in a suit within its jurisdiction and had taken possession of the *res* for the purpose of enforcing such a lien.

The certificate states that the judgment of the plaintiff in the creditors' suit constituted a lien on real estate from a date sixteen months prior to the initiation of the bankruptcy proceeding. It is obvious that it and any other judgments involved in that suit, and the mortgage liens which were to be marshalled in it, including those of the two mortgagees who joined in the petition for injunction against further action by the state court, were valid notwithstanding the bankruptcy, because the creditors' suit was filed five and one-half months before the petition in bankruptcy, and all such other judgments and liens must then have been in existence and matured, or they would not have been proper subjects for the state court's action.

If appellants are correct in their contention that the creditors' suit was no more than a proceeding to enforce liens saved from discharge by the subsequent bankruptcy of the debtor, it follows, as they claim, that the District Court sitting in bankruptcy had no power to enjoin that action.

In *Metcalf v. Barker*, 187 U. S. 165, Lesser Brothers were adjudged bankrupts on their own petition, on May 12, 1899. They had on October 2, 1896, being insolvent, transferred all their property, partnership and individual, to certain favored creditors. On October 22, 1896, and October 29, 1896, Metcalf recovered judgments in the Supreme Court of the State of New York against the Lessers, upon which executions were issued and returned unsatisfied. On December 17, 1896, Metcalf commenced a judgment creditors' action in the Supreme Court of New York, which came to trial on December 17, 1897, as a result

whereof the transfers were adjudged fraudulent and void as to plaintiff. The transfers had involved both personal property and real estate. The judgment of the court set aside the transfers of personal property and of the real estate in favor of the plaintiff. Meantime receivers had been appointed for the Lessers and the judgment of the Supreme Court determined that the tangible property and its proceeds then in the hands of the receivers, and certain claims by the receivers, were to be administered by them for the benefit of the creditors of the partnership, including Metcalf, while the real estate involved became subject to the lien of the judgments of Metcalf as of October 22 and 29, 1896.

From this judgment there were appeals, as a result of which the decreë in favor of Metcalf did not become final until March 12, 1900. On March 8, 1900, the trustee in bankruptcy procured from the United States District Court an order on Metcalf to show cause why an injunction should not issue enjoining him from taking any further proceedings under any judgment in the creditors' action. Objection was made to the jurisdiction of the court, which was overruled, and the injunction made permanent. Metcalf presented a petition to revise to the Circuit Court of Appeals, which certified to this Court certain questions, amongst others, whether the District Court had jurisdiction to make the injunction order, and whether Metcalf, by the commencement of the creditors' action, acquired a lien on the property of the bankrupts superior to the title of the trustee. This Court answered that the District Court had no jurisdiction, and that Metcalf did acquire such a lien.

The bill was a technical creditors' bill; its purpose was to subject equitable assets to the lien of a judgment which the judgment did not bind at law. This Court held that the lien when established related back to the date of the filing of the bill, which was much more than four months

before the initiation of the cause in bankruptcy. It was urged that at the date of bankruptcy the claim was contingent and was only an equitable lien, and that in truth and in substance the judgment was recovered within four months of bankruptcy, and under § 67 (f) must be declared null and void. This Court overruled the contention, quoted § 67 (f), and said (p. 174):

“In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. . . . A judgment or decree in enforcement of an otherwise valid preëxisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens.”

In *Clarke v. Larremore*, 188 U. S. 486, a judgment was recovered, but did not constitute a lien on the debtor's personal property. Within four months prior to the filing of a bankruptcy petition the judgment creditor issued execution under which levy was made on the debtor's goods. It was held that the levy and the sale thereunder were avoided. The Court said: “The judgment in favor of petitioner against Kenney was not like that in *Metcalf v. Barker*, . . . one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien. . . .”

In *Globe Bank v. Martin*, 236 U. S. 288, the Court said: “The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment or other proceedings within four months, has been recognized in decisions of this court” (citing *Metcalf v. Barker*).

Following these cases the federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate.⁶

⁶ *White v. Thompson*, 119 Fed. 868; *In re Koslowski*, 153 Fed. 823; *In re Pilcher*, 228 Fed. 139; *In re Brinn*, 262 Fed. 527; *In re Maddox*, 280 Fed. 227; *In re Thompson*, 288 Fed. 385; *In re Berlowe*, 7 F. (2d) 898; *Wilkinson v. Goree*, 18 F. (2d) 455; *In re Van Blokland*, 20 F. (2d) 1016; *In re Conservative Mtge. & Guaranty Co.*, 24 F. (2d) 38; *Whitney v. Barrett*, 28 F. (2d) 760. Compare *Blair v. Brailey*, 221 Fed. 1; *Brown Shoe Co. v. Wynne*, 281 Fed. 807. See also, *Hillyer v. LeRoy*, 179 N. Y. 369; 72 N. E. 237. Contra: *In re Baughman*, 138 Fed. 742. It is also well settled that where an attachment is levied more than four months prior to bankruptcy, the prosecution of the claim to judgment and sale within the four months will not be enjoined or the sale set aside. *In re Blair*, 108 Fed. 529; *In re Beaver Coal Co.*, 110 Fed. 630; *In re Snell*, 125 Fed. 154; *In re Kane*, 152 Fed. 587; *In re Crafts-Riordon Shoe Co.*, 185 Fed. 931; *In re Shinn*, 185 Fed. 990; *Yumet v. Delgado*, 243 Fed. 519; *Griffin v. Lenhart*, 266 Fed. 671; *In re Norris*, 283 Fed. 860; *In re Houtman*, 287 Fed. 251; *In re Thompson*, 288 Fed. 385; *Gatell v. Millian*, 2 F. (2d) 365. Contra: *In re U. S. Graphite Co.*, 161 Fed. 583. On similar grounds the bankruptcy courts refuse to enjoin the prosecution of foreclosure proceedings under a mortgage, the lien of which is preserved in bankruptcy, if initiated prior to the date of the petition. *Eyster v. Gaff*, 91 U. S. 521; *In re Gerdes*, 102 Fed. 318; *Carlin v. Seymour Lumber Co.*, 113 Fed. 483; *In re McKane*, 152 Fed. 733; *Sample v. Beasley*, 158 Fed. 607; *In re Pennell*, 159 Fed. 500; *In re Rohrer*, 177 Fed. 381; *In re Wagner's Est.*, 206 Fed. 364; *In re Schmidt*, 224 Fed. 814; *Amer. Trust Bank v. Ruppe*, 237 Fed. 581; *Duncan v. Girand*, 276 Fed. 554; *Louisville Realty Co. v. Johnson*, 290 Fed. 176; *In re Iroquois Utilities, Inc.*, 297 Fed. 397; *Ft. Dearborn Tr. & Sav. Bank v. Smalley*, 298 Fed. 45; *In re Smith*, 3 F. (2d) 40; *In re Gillette Realty Co.*, 15 F. (2d) 193; *In re Hurlock*, 23 F. (2d) 500; *In re Simpson*, 31 F. (2d) 317; *Bushong v. Theard*, 37 F. (2d) 690; certiorari denied, 281 U. S.

The trustee in bankruptcy may intervene in such suits to protect⁷ the interests of the estate.⁷

It is clear that if the action in the state court was merely in the nature of an execution or proceeding to obtain the avails of the judgment lien it should not have been enjoined by the district court.

The appellees, however, insist that the purpose and function of the creditors' bill was a general disposition and distribution of the debtor's property; that it was a winding up proceeding pursuant to state law, and was therefore superseded by the bankruptcy. They invoke the settled rule that state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and a winding up of his affairs similar to that provided by the national act are suspended while the latter remains in force, and proceedings under them are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before. *Sturges v. Crowninshield*, 4 Wheat. 122; *Mayer v. Hellman*, 91 U. S. 496; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181; *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496; *Stellwagen v. Clum*, 245 U. S. 605; *International Shoe Co. v. Pinkus*, 278 U. S. 261.

It was pointed out in *Stellwagen v. Clum*, *supra*, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the bankruptcy act, are available to litigants. Appellees must therefore show that the

763; *In re Marts*, 38 F. (2d) 283. Contra: *In re Dana*, 167 Fed. 529; *In re Kaplan*, 144 Fed. 159; *First Savings Bank v. Butler*, 282 Fed. 866.

⁷ § 11 (b); U. S. C., Tit. 11, § 29; *In re Porter*, 109 Fed. 111; *In re New England Breeders' Club*, 175 Fed. 501; *In re Kearney Bros.*, 184 Fed. 190.

statutory action in the state court is, in fact, an insolvency proceeding. The certificate states no facts which lead to such a conclusion, nor does it so denominate the creditors' suit. Reference to the statutes of West Virginia, of which we take judicial notice, demonstrates that it is not in that category.

In that State a judgment is a lien on the debtor's real estate as against all except *bona fide* purchasers for value without notice, and as against the latter from the date of docketing it in the county where the land lies.⁸ The debtor's real estate cannot be sold under execution. *In re McGraw*, 254 Fed. 442. The plaintiff must resort for enforcement of his judgment against real estate to such a proceeding as is described in the certificate.⁹ He may do so without exhausting his legal remedies, as against personal property.¹⁰ The statute provides for a course of procedure such as is described in the certificate,—namely, that the liens and the debtor's real estate shall be determined by a commissioner appointed by the court and, if

⁸ Code 1849, c. 186, § 6; Code 1860, c. 186, § 6; Code 1868, c. 139, § 5; 1882, c. 126, § 5; Code 1923, c. 139, § 5; Code 1931, c. 38, art. 3, § 6; *In re McGraw*, 254 Fed. 442. And execution is not needed to make the judgment such a lien. *Maxwell v. Leeson*, 50 W. Va. 361; 40 S. E. 420.

⁹ "The lien of a judgment may be enforced in a court of equity after an execution or fieri facias thereon has been duly returned to the office of the court or to the justice from which it issued showing by the return thereon that no property could be found from which such execution could be made: *Provided*, That such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment." . . . Code 1849, c. 186, § 9; Code 1860, c. 186, § 9; Code 1868, c. 139, § 8; 1872, c. 30; 1882, c. 126, § 7; 1891, c. 95, § 7; Code 1923, c. 139, § 7; Code 1931, c. 38, art. 3, § 9.

¹⁰ *Price v. Thrash*, 30 Grat. 515. (The statutory provision of West Virginia is taken from that of Virginia: Code (Va.) 1849, p. 709, c. 186, § 9.)

the claims which he reports be not paid, a decree shall be made for a sale of the real estate subject to the liens so far as may be necessary to pay them according to their priorities, if any. If a lien-holder, after notice has been given of the proceeding as required by the statute, does not appear and present his claims he is barred from participation, except that if a surplus remain after the payment of claims presented he may share in such surplus upon proving his claim at any time before final decree. There is also a provision for the presentation and participation of lien claims where judgment has been recovered before final decree in the creditors' action. This statute says nothing about a distribution of assets amongst general creditors. It contains no provision that lien claims presented which cannot be paid because the proceeds of the sale are insufficient shall be wiped out as debts of the defendant. It does not purport to discharge the debtor from his indebtedness generally. It is merely a proceeding in equity to do what would be done by a sheriff or marshal under an appropriate writ for the sale of real estate in execution at law. *In re McGraw, supra*. Such officer upon receiving the proceeds of a judicial sale would under the supervision of the court pay them to those whose liens were discharged by the sale. He would marshal the liens against the proceeds precisely as this statute directs the chancellor to do. The act is in no sense an insolvency statute, and a proceeding thereunder is not therefore avoided by the adjudication of the debtor as a bankrupt. On the contrary, it is a mere proceeding to enforce a valid lien or liens against the real estate bound thereby, and falls within the rule announced in *Metcalf v. Barker, supra*.¹¹ This is the view of the Supreme Court

¹¹ The bill in *Metcalf v. Barker* was a true creditors' bill, seeking to make available to a judgment creditor assets which could not be reached by an execution at law. *Jones v. Green*, 1 Wall. 330; *Dunphy*

of West Virginia, which has held that the action is merely one to enforce liens, and that where the bankruptcy of the debtor occurred six months after its institution, it need not be stayed, since the state court which had first acquired jurisdiction was entitled to proceed to final decree. *Abney Barnes Co. v. Davy-Pocahontas Coal Co.*, 83 W. Va. 292; 98 S. E. 298.

It is suggested that the commissioners appointed by the state court were in effect receivers, and it was stated in argument that they did not qualify by giving bond until within four months of the filing of the petition in bankruptcy, and that therefore the state court action should be enjoined and the property taken into possession of the bankruptcy court. But as above said, the statute of West Virginia merely substitutes these commissioners for the usual judicial officer who makes a sale and reports the result thereof to the court.¹²

Assuming them to be receivers, their function is not that of an officer charged with winding up the affairs of the debtor, such as would cause a conflict with the bankruptcy law.¹³ Moreover, we find nothing in the certificate to the effect that the commissioners had not qualified more than four months prior to the filing of the petition in the bankruptcy court.

The appellees rely upon *In re Watts*, 190 U. S. 1. But that case does not support their contentions. It is suffi-

v. Kleinschmidt, 11 Wall. 610, 614; *Taylor v. Bowker*, 111 U. S. 110, 116; *National Tube Works Co. v. Ballou*, 146 U. S. 517. The bill in this case assumes the existence of the lien on the property and is a mere measure to enforce it.

¹² Code 1860, c. 178; Acts 1882, c. 142; 1899, c. 49; 1903, c. 15; 1915, c. 76. Code 1923, c. 132; Code 1931, c. 55, art. 12. See *In re McGraw*, *supra*.

¹³ See *In re Smith*, 92 Fed. 135; *In re Lengert Wagon Co.*, 110 Fed. 927; *In re Storck Lumber Co.*, 114 Fed. 360; *In re F. A. Hall Co.*, 121 Fed. 992; *In re Salmon*, 143 Fed. 395; *In re Weedman Stave Co.*, 199 Fed. 948.

cient to say that there a state court made an order appointing a general receiver for a corporation. He proceeded to inventory and appraise the assets of the debtor, asked for orders requiring the creditors to prove their claims, and was proceeding to a complete winding up. Within a month and a half after the appointment a petition in bankruptcy was filed. This Court said:

“We do not understand it to be contended that the passage of the bankruptcy act in itself suspended the statute of Indiana in relation to the appointment of receivers, but only that when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the insolvent corporation, the proceedings in bankruptcy displaced those in the state court and terminated the jurisdiction of the latter.”

This was merely a statement of the well settled principle that a general winding up receivership is tantamount to an insolvency proceeding which will be superseded by bankruptcy, and, *a fortiori*, if, as in that case, the petition is filed within four months of the appointment of the receiver. The language quoted from that case by appellees respecting the paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts on which it was predicated.

Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the district court jurisdiction to enjoin pending suits in state courts deal with the situation where a lien was acquired within four months of the filing of the petition, or where, after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy;¹⁴ but

¹⁴ See Note 6, *supra*.

these cases are contrary to the decisions of this Court and to the great weight of federal authority.

The question is answered "No."

STATE-PLANTERS BANK & TRUST CO. ET AL. *v.*
PARKER ET AL., TRUSTEES IN BANKRUPTCY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 166. Argued March 4, 1931.—Decided April 20, 1931.

Certified questions will not be answered if unnecessarily general, nor where the certificate does not contain a sufficient statement of the facts upon which the propositions of law arise and suggests the existence of facts which might require a different answer from that which would be given were they absent. P. 334.

CERTIFICATE of questions arising upon an appeal from an order of the District Court in bankruptcy.

Messrs. Percy S. Stephenson and Littleton M. Wickham, with whom Messrs. J. Jordan Leake and A. S. Buford, Jr., were on the brief, for State-Planters Bank & Trust Co. et al.

Mr. John W. Oast, Jr., with whom Mr. Leon T. Seawell was on the brief, for Parker et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The facts stated in the certificate follow.

July 1, 1925, Edwards-Slaughter Co., Inc., executed a deed of trust to State-Planters Bank and Trust Company to secure \$60,000 in bonds, the payment of which was guaranteed by First National Company. It also executed and delivered to the bank its promissory note in the sum of \$20,000, secured by a preferred maritime mortgage on

one of its vessels, to be held under the terms of the trust instrument as security for the bonds. In accordance with article ten of the deed, which required that, so long as any of the bonds should be outstanding, the bankrupt should carry fire and marine insurance on its steamers, endorsed to the trustee, policies upon the vessel in the amount of \$60,000, payable to the bankrupt and to the bank as trustee, were duly delivered to the latter. Subsequently, when these policies were about to lapse for non-payment of premiums, the bank paid the same and renewed the policies with funds furnished to it upon demand by the guarantor.

The steamship was destroyed by fire on September 18, 1927, and the net sum of \$58,256.67 was collected on the policies. A controversy arose as to whether the whole fund or only \$20,000 thereof was applicable to the bonds secured by the deed of trust, the bank contending that it was entitled to apply the entire amount to this purpose, because of a provision of the deed to the effect that all proceeds of insurance should be treated in the same manner as those from a sale by foreclosure and should be applied in payment of bonds. For the purpose of determining this dispute the bank filed its bill in the state court, against the bankrupt and others, in which it alleged that the holders of the bonds and coupons were entitled to the entire proceeds of the policies, but that, as certain claims had been asserted thereagainst by others than the bond and coupon holders, it desired to have the guidance and protection of the court, and therefore requested it to supervise the distribution of the fund. The bankrupt and the guarantor filed answers alleging that the whole of the insurance moneys should be applied to the payment of the bonds and coupons, and praying that they be so used.

The suit was instituted February 8, 1928, and on May 24 was referred to a master in chancery, who filed his re-

port on September 29. Prior thereto, on August 8, Edwards-Slaughter Co., Inc., had been adjudged a bankrupt. Upon the filing of the master's report the district judge issued a rule against the bank and its attorneys, Leake and Buford, to show cause why they should not be enjoined from further prosecuting the suit in the state court. This rule was made absolute, and an order was entered directing the bank to pay the fund in its hands into the bankruptcy court. From this order the bank and its attorneys appealed. Pursuant to the order the fund was paid over to the trustees and is now held by them.

First National Company, not having been made a party to the rule, filed its petition challenging the jurisdiction of the court to interfere with the state court proceedings, or summarily to require an adverse claimant of the fund in controversy to pay the same into court, and praying that the injunction and order be set aside and the money returned to the bank. Upon objection by the trustees in bankruptcy the court declined to permit the guarantor to intervene or file its petition, and it also has appealed.

Three questions are certified. The first is:

"1. Where a trustee under a mortgage, having in its possession a fund which it claims to be subject to the mortgage, institutes a suit in a state court of chancery asking the court to declare the rights of the parties in the fund and supervise the distribution thereof, and makes parties thereto and obtains service upon all persons claiming an interest in the fund, who file answers praying action on the part of the court, does the state court acquire such jurisdiction of the *res* as gives it exclusive jurisdiction to determine the rights of the parties in the fund and order the distribution thereof?"

This need not be answered. It is unnecessarily general, and has no reference to any conflict between the jurisdiction of a court of bankruptcy and a state court. See *White v. Johnson*, 282 U. S. 367, 371, and cases cited.

The second and third questions may be considered together. They are:

"2. Where a state court has acquired jurisdiction of the *res* in a suit instituted by a trustee to have the rights of claimants declared in a trust fund and to have such fund distributed under direction of the court, does the bankruptcy of one of the claimants of the fund occurring more than four months after the institution of the suit in the state court oust the state court of jurisdiction and vest exclusive jurisdiction in the bankruptcy court to determine the rights of the parties in the fund?

"3. Where a fund claimed by a trustee in bankruptcy is held by a trustee under a mortgage executed by the bankrupt under a *bona fide* and substantial claim that it should be applied on bonds secured by the mortgage, has the court of bankruptcy the power to order its transfer to the trustee in bankruptcy in a summary proceeding?"

These constitute but one question. The facts stated do not involve the right of a trustee in bankruptcy to institute a plenary suit against an adverse claimant, or to be substituted for the bankrupt in a pending proceeding. The only question is as to the power to proceed summarily in disregard of an existing action in a state court having jurisdiction.

We do not answer these questions because the certificate does not contain a sufficient statement of the facts upon which the propositions of law arise (*Cincinnati, H. & D. R. Co. v. McKeen*, 149 U. S. 259; *United States v. City Bank*, 19 How. 385; *Cross v. Evans*, 167 U. S. 60) and suggests the existence of facts which might require a different answer from that which would be given were they absent. See *White v. Johnson*, *supra*.

Without expressing an opinion upon their legal effect, we note the following matters:

The other claims which were made against the fund in the hands of the mortgage trustee are not defined; if they

were claims of liens, the nature, the dates of creation, and the possible priorities of such liens are not stated. How the bankruptcy of the debtor might affect them cannot be determined. It does not appear whether the owners of these claims were made parties to the proceeding from which the appeal was taken, or whether they had notice of it.

We are told that the bankrupt answered in the state court action and prayed that the fund be applied in payment of bonds and coupons, but the date when this occurred is not given.

It is not clear whether the only question before the state court was one of law, namely, the construction of a clause of the deed of trust, or whether there were other questions of law or fact involved. It is disclosed that the guarantor of the bonds, although a defendant in the state court, was not made a party in the bankruptcy proceeding, was refused a hearing therein, and is one of the appellants.

Inasmuch as the summary jurisdiction of the district court is challenged, any of these features of the case may have an important bearing upon a correct decision. To answer the questions as framed would, in view of what is omitted from them, though brought to our notice by the statement of facts, lead rather to misunderstanding and confusion than to the clarification of applicable rules of law.

The certificate will be

Dismissed.

NEW JERSEY *v.* NEW YORK ET AL.

No. 16, original. Argued April 13, 14, 15, 1931.—Decided May 4, 1931.

The State of New Jersey sued the State of New York and the City of New York to enjoin them from diverting water from non-navigable tributaries of the Delaware for the purpose of increasing

the water supply of the City. Pennsylvania intervened to protect her interest in the river. *Held:*

1. The case is not governed by a strict application of the common law rules of private riparian rights, but by the principle of equitable apportionment applicable between the States of the Union. P. 342.

2. The mere fact that the proposed diversion is to another watershed is not a bar. P. 343.

3. The objection that the proposed diversion will interfere with the navigability of the river is met, for the purposes of this case, by proof that navigability will not be impaired. P. 344.

4. The diversion, however, must remain subject to the paramount authority of Congress, and the powers of the Secretary of War and the Chief of Engineers of the Army, in respect of navigation and navigable waters of the United States. *Id.*

5. Subject to qualifications mentioned *infra*, the proposed diversion is reasonably necessary to New York, and not arbitrary or beyond the freedom of choice that must be left to that State. *Id.*

6. The possibility that the diversion may limit development of water power in New Jersey under future plans for damming the river, which would need the consent of Congress and of New York and Pennsylvania, is not such a showing of present interest as entitles New Jersey to relief. P. 345.

7. The diversion from the tributaries of the amount proposed by New York will not materially affect the sanitary condition of the river, its industrial and agricultural uses, its use as a source of municipal water supply, or its shad fisheries. *Id.*

8. But it is necessary that the diversion should be curtailed and regulated, and be accompanied by sanitary treatment of sewage entering the stream in New York, in order to prevent injury to the use and reputation of the river for recreational purposes in New Jersey, and in order to avoid an increase of salinity in the lower river and in Delaware Bay which would injure the oyster industry there. *Id.*

9. The diversion, as limited by the decree, shall not constitute a prior appropriation or give the defendant State and City any superiority of right over the other two States in the enjoyment and use of the river and its tributaries. P. 347.

10. The prayers of Pennsylvania for a present allocation of water to it and for appointment of a river master, are denied without prejudice. *Id.*

.11. The Court retains jurisdiction to make future orders and modifications. P. 348.

HEARING on exceptions to the report of the Special Master, in a suit by New Jersey to enjoin diversion of water, in New York, from tributaries of the Delaware River. The State of New York and the City of New York were the defendants. Pennsylvania became a party by intervention. See 280 U. S. 528, 533; *post*, p. 805.

Messrs. Duane E. Minard, Assistant Attorney General of New Jersey, and *James M. Beck*, with whom *Messrs. William A. Stevens*, Attorney General, and *George S. Hobart* were on the brief, for plaintiff.

The common law rule of riparian rights is applicable to this case for the following reasons:

(a) That rule is in effect in all three States and none of them has passed any statute authorizing the proposed diversion.

(b) The proposed diversion will cause substantial damage to the plaintiff and its citizens.

(c) The defendant city has suitable and adequate sources of water supply within its natural watershed which can be used without injury to the plaintiff and its citizens.

There is no necessity for the proposed diversion; at most it is merely a matter of convenience, which is insufficient to justify a diversion from a foreign watershed in which other States have natural rights that would be substantially damaged thereby.

The proposed diversion will substantially affect the navigation in, and the navigable capacity of, the Delaware River and of the tributaries in question; and the defendant city has not complied with the conditions precedent prescribed by Congress.

The proposed diversion will cause substantial damage to the plaintiff and its citizens by impairing property rights

that are dependent upon the existence of water power appurtenant to their riparian lands.

The proposed diversion will cause substantial damage to the plaintiff and its citizens by increasing the hardness of the water used and usable for industrial purposes, and thereby impair the present and future industrial development of the plaintiff's territory and depreciate the value of the lands of the plaintiff and its citizens.

It will cause substantial damage with respect to use and value for recreation; to the oyster industry; to fish; to agriculture; and from the standpoint of sanitation and water supply.

If the defendant city be entitled to divert waters from the tributaries in question, it should be required to do so in the manner that will cause the least damage to the plaintiff and its citizens.

The conclusion of the Special Master that substantial damage to the plaintiff and its citizens could be removed by reducing the volume of the diversion proposed by New York and by modifying the plan of release from impounding reservoirs during periods of low flow, was not within the issues raised by the pleadings and is unsupported by any evidence.

The decree should be final.

Mr. Thomas Penney, Jr., Special Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.*, Attorney General, was on the brief, for the defendant State of New York.

The doctrine of riparian rights does not apply.

The Master's limit on quantity of diversion unduly restricts future needs. The question of taking in excess of 600 m. g. d. is not before this Court.

The probable basis for the Master's reduction of the proposed diversion from 600 m. g. d. to 440 m. g. d. was present need rather than damages.

The findings of damage by the Special Master were not supported by competent evidence, nor the weight thereof, nor of the magnitude required by this Court before it will grant an injunction in a suit of this kind.

The operation of the plan would not produce any adverse effect upon any interest of plaintiff or its citizens.

Totaling diverse damages is an erroneous principle.

The decree should be final and not subject to modification.

Mr. Arthur J. W. Hilly, Corporation Counsel of the City of New York, with whom *Messrs. J. Joseph Lilly, Frank H. Deal, Frank J. Coyle, and David C. Broderick* were on the brief, for defendant City of New York.

The plaintiff State established no damage, of any consequence, to itself or to any interest which it might be deemed to represent.

The diversion from the non-navigable tributaries of the Delaware of the equivalent of 600 million gallons of water per day does not exceed the fair share of the State of New York in the waters of that river, under the doctrine of equitable apportionment.

The imposition of the Pennsylvania plan of release upon the taking by the defendant city of only 440 million gallons of water per day is inequitable and unjust.

The Special Master erred in recommending that the decree to be entered herein be not final.

The Delaware is not a navigable stream above Port Jervis.

Mr. George G. Chandler, with whom *Mr. William A. Schnader*, Attorney General of Pennsylvania, was on the brief, for the Commonwealth of Pennsylvania, intervener.

The interstate common law doctrine of equitable apportionment should govern the diversion and use of the

interstate waters of the Delaware and its tributaries; and under that doctrine the present New York taking is chargeable against its fair and equitable share in the waters.

The principle of the Pennsylvania plan of impounding and release should be adopted and applied to the present New York taking because it is the best plan and will best conserve and improve river conditions.

The Pennsylvania plan of impounding and release will protect all interests against substantial damage from the New York taking.

This Court should retain jurisdiction over the present cause in order to permit the future application by Pennsylvania for an appointment of a River Master and for an allocation to Philadelphia and Eastern Pennsylvania of 750 m. g. d. from the Pennsylvania tributaries of the upper Delaware River. Jurisdiction should also be retained to protect Pennsylvania interests against the possibility of adverse salinity in the lower Delaware resulting from the New York diversion.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity by which the State of New Jersey seeks to enjoin the State of New York and the City of New York from diverting any waters from the Delaware River or its tributaries, and particularly from the Neversink River, Willowemoc River, Beaver Kill, East Branch of the Delaware River and Little Delaware River, or from any part of any one of them. The other rivers named are among the headwaters of the Delaware and flow into it where it forms a boundary between New York and Pennsylvania. The Delaware continues its course as such boundary to Tristate Rock, near Port Jervis in New York, at which point Pennsylvania and New York

are met by New Jersey. From there the River marks the boundary between Pennsylvania and New Jersey until Pennsylvania stops at the Delaware state line, and from then on the river divides Delaware from New Jersey until it reaches the Atlantic between Cape Henlopen and Cape May.

New York proposes to divert a large amount of water from the above-named tributaries of the Delaware and from the watershed of that river to the watershed of the Hudson River in order to increase the water supply of the City of New York. New Jersey insists on a strict application of the rules of the common law governing private riparian proprietors subject to the same sovereign power. Pennsylvania intervenes to protect its interests as against anything that might be done to prejudice its future needs.

We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut v. Massachusetts*, 282 U. S. 660. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled

as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas. See *Missouri v. Illinois*, 200 U. S. 496, 520. *Kansas v. Colorado*, 206 U. S. 46, 98, 117. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237. *Wyoming v. Colorado*, 259 U. S. 419, 465, 470. *Connecticut v. Massachusetts*, 282 U. S. 660, 670.

This case was referred to a Master and a great mass of evidence was taken. In a most competent and excellent report the Master adopted the principle of equitable division which clearly results from the decisions of the last quarter of a century. Where that principle is established there is not much left to discuss. The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the States concerned. *Missouri v. Illinois*, 200 U. S. 496, 526. *Wyoming v. Colorado*, 259 U. S. 419, 466. *Connecticut v. Massachusetts*, 282 U. S. 660, 671.

New Jersey alleges that the proposed diversion will transgress its rights in many respects. That it will interfere with the navigability of the Delaware without the authority of Congress or the Secretary of War. That it will deprive the State and its citizens who are riparian owners of the undiminished flow of the stream to which they are entitled by the common law as adopted by both States. That it will injuriously affect water power and the ability to develop it. That it will injuriously affect the sanitary conditions of the River. That it will do the same to the industrial use of it. That it will increase the salinity of the lower part of the River and of Delaware Bay to the injury of the oyster industry there. That it will injure the shad fisheries. That it will do the

same to the municipal water supply of the New Jersey towns and cities on the River. That by lowering the level of the water it will injure the cultivation of adjoining lands; and finally, that it will injuriously affect the River for recreational purposes. The bill also complains of the change of watershed, already disposed of; denies the necessity of the diversion; charges extravagant use of present supplies, and alleges that the plan will violate the Federal Water Power Act, (but see U. S. Code, Tit. 16, § 821,) interfere with interstate commerce, prefer the ports of New York to those of New Jersey and will take the property of New Jersey and its citizens without due process of law.

The Master finds that the above-named tributaries of the Delaware are not navigable waters of the United States at and above the places where the City of New York proposes to erect dams. Assuming that relief by injunction still might be proper if a substantial diminution within the limits of navigability was threatened, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 709, he called as a witness General George B. Pillsbury, Assistant Chief of Engineers of the United States Army, who was well acquainted with the River and the plan, and who, although not speaking officially for the War Department, satisfied the Master's mind that the navigable capacity of the River would not be impaired. Of course in that particular as in some others New York takes the risk of the future. If the War Department should in future change its present disinclination to interfere, New York would have to yield to its decision, and the possible experiences of the future may make modifications of the plan as it now stands necessary in unforeseen particulars. This will be provided for in the decree. Subject to these considerations and to what remains to be said the New York plan as qualified here is reasonably necessary. Some plan must be formed and soon acted upon,

and taking into account the superior quality of the water and the other advantages of the proposed site over others, it at least is not arbitrary or beyond the freedom of choice that must be left to New York.

With regard to water power the Master concludes that any future plan of New Jersey for constructing dams would need the consent of Congress and of the States of New York and Pennsylvania and, though possible as a matter of engineering, probably would not pay. He adds that there is no such showing of a present interest as to entitle New Jersey to relief. *New York v. Illinois*, 274 U. S. 488, 490. *New Jersey v. Sargent*, 269 U. S. 328. We have spoken at the outset of the more general qualifications of New Jersey's rights as against another State. The Master finds that the taking of 600 millions of gallons daily from the tributaries will not materially affect the River or its sanitary condition, or as a source of municipal water supply, or for industrial uses, or for agriculture, or for the fisheries for shad. The effect upon the use for recreation and upon its reputation in that regard will be somewhat more serious, as will be the effect of increased salinity of the River upon the oyster fisheries. The total is found to be greater than New Jersey ought to bear, but the damage can be removed by reducing the draft of New York to 440 million gallons daily; constructing an efficient plant for the treatment of sewage entering the Delaware or Neversink (the main source of present pollution,) thereby reducing the organic impurities 85%, and treating the effluent with a germicide so as to reduce the *Bacillus Coli* originally present in the sewage by 90%; and finally, subject to the qualifications in the decree, when the stage of the Delaware falls below .50 c. s. m. at Port Jervis, New York, or Trenton, New Jersey, by releasing water from the impounding reservoirs of New York, sufficient to restore the flow at those points to .50 c. s. m. We are of opinion that the Master's report should

be confirmed and that a decree should be entered to the following effect, subject to such modifications as may be ordered by the Court hereafter.

1. The injunction prayed for by New Jersey so far as it would restrain the State of New York or City of New York from diverting from the Delaware River or its tributaries to the New York City water supply the equivalent of 440 million gallons of water daily is denied, but is granted to restrain the said State and City from diverting water in excess of that amount. The denial of the injunction as above is subject to the following conditions.

(a) Before any diversion shall be made an efficient plant for the treatment of sewage at Port Jervis, New York, shall be constructed and the sewage of Port Jervis entering the Delaware or Neversink Rivers shall be treated to such an extent as to effect a reduction of 85% in the organic impurities. And the effluent from such plant shall be treated with a chemical germicide, or otherwise, so that the *B. coli* originally present in the sewage shall be reduced by 90%.

Untreated industrial waste from plants in said town of Port Jervis shall not be allowed to enter the Delaware or Neversink Rivers, and the treatment of such industrial wastes shall be such as to render the effluent practically free from suspended matter and non-putrescent; and said treatment of sewage and industrial waste shall be maintained so long as any diversion is made from the Delaware River or its tributaries.

(b) At any time the stage of the Delaware River falls below .50 c. s. m. at Port Jervis, New York, or Trenton, New Jersey, or both (.50 c. s. m. being equivalent to a flow of 1535 c. f. s. at Port Jervis and 3400 c. f. s. at Trenton), water shall be released from one or more of the impounding reservoirs of New York City in sufficient volume to restore the flow at Port Jervis and Trenton to .50

c. s. m., provided, however, that there is not required to be released at any time water in excess of 30% of the diversion area yield, and the diversion area yield having been ascertained to be 2.2 c. s. m., the maximum release required shall be 30% of that amount, or .66 cubic feet per second per square mile of the areas from which water is diverted.

In determining the quantity of water to be released so as to add to the flow of the Delaware River, the Neversink River shall be treated as if it flowed into the Delaware River above Port Jervis, and the number of second feet of water released from the impounding reservoir on the Neversink River shall be added to the number of second feet of water released from other reservoirs, so as to determine whether the quantity of water, required by this decree to be released, has been released.

(c) That the State of New Jersey and the Commonwealth of Pennsylvania, through accredited representatives, shall at all reasonable times have the right to inspect the dams, reservoirs and other works constructed by the City of New York and to inspect the diversion areas and the inflow, outflow and diverted flow of said areas, and to inspect the meters and other apparatus installed by the City of New York and to inspect all records pertaining to inflow, outflow and diverted flow.

2. The diversion herein allowed shall not constitute a prior appropriation and shall not give the State of New York and City of New York any superiority of right over the State of New Jersey and Commonwealth of Pennsylvania in the enjoyment and use of the Delaware River and its tributaries.

3. The prayer of the intervener, Commonwealth of Pennsylvania, for the present allocation to it of the equivalent of 750 million gallons of water daily from the Delaware River or its Pennsylvania tributaries is denied without prejudice.

4. The prayer of the Commonwealth of Pennsylvania for the appointment of a river master is denied without prejudice.

5. This decree is without prejudice to the United States and particularly is subject to the paramount authority of Congress in respect to navigation and navigable waters of the United States, and subject to the powers of the Secretary of War and Chief of Engineers of the United States Army in respect to navigation and navigable waters of the United States.

6. Any of the parties hereto, complainant, defendants or intervenor, may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy.

7. The costs of the cause shall be divided and shall be paid by the parties in the following proportions: State of New Jersey 35 per cent., City of New York 35 per cent., State of New York 15 per cent., Commonwealth of Pennsylvania 15 per cent.

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

SMOOT SAND & GRAVEL CORPORATION *v.*
WASHINGTON AIRPORT, INC.

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

No. 678. Argued April 17, 1931.—Decided May 4, 1931.

1. The boundary line between Virginia and the District of Columbia is at high water mark on the Virginia side of the Potomac. *Mary-*

land v. West Virginia, 217 U. S. 577, and *Marine Railway v. United States*, 257 U. S. 64, considered. P. 350.

2. The compact of 1785 between Maryland and Virginia gave citizens of each State rights in the shores but did not affect the boundary in this case. P. 351.

44 F. (2d) 343, reversed.

CERTIORARI, post, p. 812, to review a decree which reversed a decree of the District Court dismissing the suit for want of jurisdiction. The suit was brought by the Airport Co. in a Virginia court and was removed to the Federal court. It sought to enjoin the present petitioner (which was operating under a Government contract,) from excavating, filling, constructing a wall, etc., on lands claimed by the airport on the south shore of the Potomac.

Mr. Thomas D. Thacher, with whom *Messrs. Seth W. Richardson, G. A. Iverson, Paul W. Kear, and Erwin N. Griswold* were on the brief, for petitioner.

Mr. Louis Titus for respondent.

Messrs. John R. Saunders, Attorney General of Virginia, *Edwin H. Gibson* and *Collins Denny, Jr.*, Assistant Attorneys General, and *Hugh Reid*, by special leave of Court, filed a brief on behalf of the Commonwealth of Virginia as *amicus curiae*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This suit was brought by the respondent for an injunction against alleged trespasses on land between high and low water mark on the Virginia side of the Potomac River opposite the District of Columbia. It was brought originally in the Circuit Court of Arlington County, Virginia, and on the petition of the defendant the Smoot Sand and Gravel Company was removed to the District

Court of the United States for the Eastern District of Virginia. That Court dismissed the case for want of jurisdiction, but the decree was reversed by the Circuit Court of Appeals. 44 F. (2d) 342. A writ of certiorari was granted by this Court.

The Circuit Court of Appeals states that the sole question presented is whether the boundary line between Virginia and the District of Columbia is at high or at low water mark on the Virginia side of the Potomac, and that is the only question argued here. In view of the previous decisions and intimations of this Court it does not need extended discussion now.

It must be assumed, notwithstanding some suggestion of ancient controversies, that the title of Maryland was that conveyed to Lord Baltimore by the charter of Charles I. and ran to and along the farther bank of the Potomac River. *Marine Railway & Coal Co. v. United States*, 257 U. S. 47, 63. This means that the boundary was the usual high water mark, *Oklahoma v. Texas*, 260 U. S. 606, 626, *et seq.*; so that the only question is whether anything has happened since to change the original line. At the present stage of this old discussion the most important inquiry is raised by the supposed contradiction between the language of this Court in settling the decree in *Maryland v. West Virginia*, 217 U. S. 577, and that in the later case of *Marine Railway & Coal Co. v. United States*, 257 U. S. 47. With regard to that it is to be noticed that Mr. Justice Day, who wrote the earlier decision, took part also in the later and seems to have agreed with it. There was no adequate reason why he should not have agreed. *Maryland v. West Virginia* was a suit to settle a portion of the boundary line between those States. The decision could not affect the District of Columbia. It relied primarily upon an arbitration upon the issue in 1877, in which it was admitted that the original boundary was

high water mark on the Virginia side, but held that the low water mark was established by prescription. The arbitration also relied upon a Compact of 1785, 1 Dorsey, Maryland Laws, 1692-1839, p. 187; 12 Hening, Virginia Statutes, p. 50, giving it a construction to which we cannot agree. Prescription was a sufficient reason for the decision, and could not be invoked against the District. The Compact is seen in a different light in *Marine Railway & Coal Co. v. United States*. As stated in 257 U. S. 64, Article 7 gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves, &c., but left the question of boundary open to long continued disputes. The rights of private citizens established by Article 7 were further cared for by Article 12 giving citizens of each State having lands in the other liberty to transport to their own State the produce of such lands or to remove their effects, free of any charge or tax. But private ownership does not affect State boundaries. Some argument is based on the word 'shores.' But that is merely a topographical indication and imports nothing as to the sovereignty over them. We adhere to the opinion that the Compact has no bearing on the present case.

Decree reversed.

MR. JUSTICE McREYNOLDS, dissenting.

Twenty years ago (1910), in *Maryland v. West Virginia*, 217 U. S. 577, it was definitely ruled by this Court (and rightly so) that under the compact of 1785 between Virginia and Maryland the uniform southern boundary of the latter State was low water mark on the right bank of the Potomac. Proper solution of the present controversy depends upon the precise question there decided. Fair consistency and proper regard for titles along the

ten-mile river front in the District of Columbia, I think, demand that we follow what was thus solemnly declared.

Marine Ry. Co. v. United States (1921), 257 U. S. 47, was a proceeding begun by them to recover land on the Potomac River front at Alexandria originally below low water mark. Notwithstanding the essential point there was distinct from the one upon which *Maryland v. West Virginia* turned, the opinion carefully affirmed that "the former decisions of the Court must be followed so far as they go"—a truism, I submit, still worthy of acceptance. And the further observation that "the compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case" is plainly correct, whether relevant or not.

As *Marine Ry. Co. v. United States* related only to land below low water mark the compact of 1785 of course was inapplicable to the controversy. That compact did not undertake to settle titles to lands so located. No more did it apply to lands in Baltimore City.

In such circumstances the suggestion that the writer of the opinion in *Maryland v. West Virginia* by assenting to *Marine Ry. Co. v. United States* gave his approval to a doctrine directly opposed to the one he had definitely expressed for the Court seems to me without substance. The Court, through him, had ruled that the Maryland boundary extended to low water mark on the south side. Why should he object to an opinion which after expressly accepting former decisions held that land lying in the river north of that line had been part of Maryland?

The challenged decree should be affirmed.

Syllabus.

TWIN CITY PIPE LINE CO. ET AL. v. HARDING
GLASS CO.

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

No. 330. Argued March 17, 18, 1931.—Decided May 4, 1931.

1. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. P. 356.
2. It is only because of the dominant public interest that one who has had the benefit of performance by the other party will be permitted to avoid his own promise. *Id.*
3. In determining whether a contract contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State, and the principles of the common law, are to be considered. P. 357.
4. Public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances. P. 358.
5. In settlement of litigation involving a pipe line company, which supplied gas to domestic and industrial consumers in Arkansas, and one of its customers,—a manufacturing concern which consumed much gas at its plant,—it was agreed that the pipe line company, although it had been adjudged not bound to do so, would build an additional service line to the manufacturer's plant and that the manufacturer would take all its requirements of gas from the pipe line company, so long as that company could adequately supply them, and would pay the rates then in effect or thereafter fixed by public authority, and that, in the event of a shortage of gas, so that there was not enough to supply adequately the domestic consumers, the pipe line company might discontinue serving the manufacturer, upon condition that the same character of service be given to it as was given to other industries. The pipe line company performed the agreement on its part, but the manufacturer, after several years, sought to repudiate it as contrary to public policy, having provided other means for obtaining gas. *Held:*

That, as the contract was upon adequate consideration and was not arbitrary or unfair, and was not shown to have any tendency

to injure the public, it was enforceable according to its terms.
Pp. 355, 357.
39 F. (2d) 408, reversed.

CERTIORARI, 282 U. S. 825, to review a decision which reversed a decree of the District Court for the specific performance of a contract.

Mr. Harry P. Daily, with whom *Mr. John P. Woods* was on the brief, for petitioners.

Messrs. Joseph R. Brown and *James B. McDonough* for respondent.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

The Twin City Pipe Line Company is a public utility. The Industrial Oil & Gas Company is a producer of natural gas in Arkansas. The majority of the stock of these companies is owned by the same shareholders. The respondent operates a large glass factory at Fort Smith. The pipe line company takes all the gas produced by the oil company, transports it by pipe line from the fields to Fort Smith and there furnishes it at prices fixed by public authority to industrial consumers and to another utility, the Fort Smith Light & Traction Company, which distributes it to domestic and commercial consumers.

Three suits, in which all the above-named companies and one Hale were parties, were commenced in the latter part of 1925. Two were brought by the pipe line company to recover for gas furnished to the glass company. The other was a suit in equity in which the glass company was plaintiff and the other companies and Hale were defendants. At that time gas for the operation of the glass plant was being furnished from a main of the pipe line company laid in a street on which the site of the plant abuts. The plant was the largest consumer of gas in Fort

Smith and required a dependable supply of from a million to a million and a half cubic feet per day. In its complaint the glass company alleged that the petitioners discriminated against it and failed to furnish an adequate supply; it asserted that the pipe line company was bound to construct a line about half a mile in length to connect a main, used to deliver gas to the traction company, with the glass plant and to drill additional gas wells to provide an adequate supply. The traction company objected to the proposed connection on the ground that the pressure and supply of gas available for the service of its customers thereby would be impaired. The suits were consolidated and tried July 26, 1926, the court entered its decree denying the glass company the relief sought in its suit, giving to the pipe line company judgment against the glass company for \$17,155.46, to the latter judgment over against Hale and to him judgment over against the oil company for the same amount. The glass company and the oil company appealed.

By written instrument dated August 30, 1926, the parties settled all matters involved in the litigation. It was agreed that all judgments be satisfied and canceled, that all existing contracts between the parties be abrogated and that the appeals and suits be dismissed. The pipe line company agreed to build the additional line for the service of the glass company. The latter agreed to take all its requirements of gas so long as the pipe line company could adequately supply them and to pay the rates then in effect or thereafter fixed by public authority. The glass company agreed that in the event of a shortage of gas so that there was not enough adequately to supply domestic consumers the pipe line company might discontinue serving the glass company upon condition that the same character of service be given to it that was given to other industries.

All the agreements, save that of the glass company to continue to take its requirements of gas from the pipe line company, have been fully performed. The cost of the additional line constructed to serve the glass plant was \$4,489.92. The oil company brought in seven wells while the suits were pending and twelve more after the contract was made. The gas from these was made available to the pipe line company for the service of its customers including the glass company. The latter took gas as agreed until January 2, 1929. About that time a company controlled by it completed a pipe line from gas fields to the glass plant. The glass company asserted that the contract was invalid because contrary to public policy and began to take practically all the gas it needed from its own subsidiary.

Petitioners brought this suit to enjoin the glass company from taking gas from anyone other than the pipe line company and to require it specifically to perform the contract. The district court entered its decree granting the relief prayed. The Circuit Court of Appeals reversed and remanded the case with directions to dismiss the bill. 39 F. (2d) 408.

The question is whether the contract is unenforceable because contrary to public policy of Arkansas.

The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Printing Company v. Sampson*, L. R. 19 Eq. 462, 465. *Baltimore & Ohio Southwestern Ry. v. Voigt*, 176 U. S. 498, 505. The meaning of the phrase "public policy" is vague and variable; courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that

doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise. *Steele v. Drummond*, 275 U. S. 199, 205. *B. & W. Taxi. Co. v. B. & Y. Taxi. Co.*, 276 U. S. 518, 528. *Holman v. Johnson*, 1 Cowp. 341, 343.

In determining whether the contract here in question contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily it is for the lawmakers to determine the public policy of the State. *Kellogg v. Larkin*, 3 Pin. (Wis.) 123, 136. *Buck v. Walter*, 115 Minn. 239, 244; 132 N. W. 205. *McNamara v. Gargett*, 68 Mich. 454, 460-461; 36 N. W. 218. *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 294; 22 N. E. 798. The constitution of Arkansas (Art II, § 19) declares: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed . . ." This provision is a restraint upon the state legislature. *Cap. F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770; 22 S. W. (2d) 993. No question of perpetuity is presented. And it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade or that it infringes any statute or regulation made under the authority of the State. Cf. §§ 7368, 7373, Crawford & Moses Digest.

We need not pause to determine whether the pipe line company was bound by franchise, statute or regulation to construct the additional pipe line demanded by the glass company for the service of its plant. The court decided against the glass company's claim. The settlement of that matter and the others in controversy constituted adequate consideration for the agreement to take and pay for the gas in question. *Mississippi River Logging Co. v. Robson*, 69 Fed. 773. It may not be held

invalid in the absence of a clear showing that some definite public detriment will probably result from its performance. *Steele v. Drummond*, *supra*, 205. *B. & W. Taxi. Co. v. B. & Y. Taxi. Co.*, *supra*, 528. *Kellogg v. Larkin*, *supra*, 136.

The contract was not arbitrarily or unfairly imposed upon the glass company. It secured the exceptional means of service which the court held the pipe line company was not bound to furnish. The contract left the glass company free to obtain its supply elsewhere unless the pipe line company's service was adequate and bound the latter to rates—presumably just—fixed by public authority. Public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances. *Warmack v. Major Stave Co.*, 132 Ark. 173, 178; 200 S. W. 799. *Hartford Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U. S. 91, 99. *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 218; 97 N. W. 721. It is not suggested that, when there is taken into account the gas made available by the wells brought in after the glass company's suit was commenced, the performance of the contract by the pipe line company leaves it without sufficient gas adequately to supply its other customers or interferes with the proper discharge of any of its duties as a public utility. The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.

The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. The decision of the district court is in principle strongly supported by the supreme court of Arkansas in *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461; 127 S. W. 975. And see *Kimbrow v. Wells*, 112 Ark. 126, 130; 165

S. W. 645. *Warmack v. Major Stave Co.*, *supra*. *Griffin v. Oklahoma Natural Gas Corp.*, 37 F. (2d) 545.

Decree reversed.

STROMBERG *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 584. Argued April 15, 1931.—Decided May 18, 1931.

Appellant was charged under California Penal Code, § 403a, which condemns displaying a red flag in a public place or in a meeting place (a) "as a sign, symbol or emblem of opposition to organized government" or (b) "as an invitation or stimulus to anarchistic action" or (c) "as an aid to propaganda that is of a seditious character." These three purposes, which are expressed disjunctively in the statute, were alleged conjunctively in the information. On her general demurrer to the information, which was overruled, she contended, as was permitted by the California practice, that the statute was repugnant to the Fourteenth Amendment. At the trial the jury was instructed, following the express terms of the statute, that the appellant should be convicted if the flag was displayed for any of the three purposes. There was a general verdict of guilty. The appellant accepted this instruction, in the state appellate court, but insisted that, under the Fourteenth Amendment, the statute was invalid as being an unwarranted limitation on the right of free speech. The appellate court entertained the contention and decided adversely, expressing doubt of the validity of the statute as related to the first of the three clauses defining purpose ("opposition to organized government,") but construing them as disjunctive and separable, and upholding the statute as to the other two. *Held:*

1. That the objection of unconstitutionality, made in the court below, went not only to the statute as a whole, but to each of the three clauses separately. P. 365.

2. Inasmuch as the case was submitted to the jury as permitting conviction under any or all of the three clauses, and, inasmuch as it is impossible to determine from the general verdict upon which of the clauses the conviction rested, it follows that, if any of the clauses is invalid under the Constitution, the conviction cannot be upheld. P. 367.

3. The conception of "liberty" under the due process clause of the Fourteenth Amendment embraces the right of free speech. P. 368.

4. The State may punish those who abuse the right of free speech by utterances which incite to violence and crime and threaten the overthrow of organized government. *Id.*

5. There is no reason to doubt the validity of the second and third clauses of the statute, construed as they are, by the state court, as relating to such incitement to violence. P. 369.

6. The first clause, condemning display of a flag "as a sign, symbol or emblem of opposition to organized government," construed by the state court as possibly including "peaceful and orderly opposition to a government as organized and controlled by one political party, by those of another political party equally high minded and patriotic, which did not agree with the one in power," or "peaceful and orderly opposition to government by legal means and within constitutional limitations,"—is unconstitutional. *Id.*

7. The maintenance of opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, is a fundamental principle of our constitutional system. *Id.*

8. A statute which upon its face, and authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. *Id.*

62 Cal. App. 788; 290 Pac. 93, reversed.

APPEAL from a judgment affirming a conviction under § 403a of the Penal Code of California.

Mr. John Beardsley for appellant.

Mr. John D. Richer, Deputy Attorney General of California, with whom *Mr. U. S. Webb*, Attorney General, was on the brief, for appellee.

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

The appellant was convicted in the Superior Court of San Bernardino County, California, for violation of

§ 403-a of the Penal Code of that State. That section provides:

“Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.”

The information, in its first count, charged that the appellant and other defendants, at the time and place set forth, “did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character.”

The information contained a second count charging conspiracy, but this need not be considered, as the conviction on that count was set aside by the state court. The appellant alone was convicted on the first count.

On the argument of a general demurrer to the information, the appellant contended, as was permitted by the practice in California, that the statute was invalid because repugnant to the Fourteenth Amendment of the Federal Constitution. The demurrer was overruled, and the appellant pleaded not guilty. Conviction followed, motions for a new trial and in arrest of judgment were denied, and on appeal to the District Court of Appeal the judgment was affirmed. (*People v. Mintz*, 290 Pac. 93.) Petition for a hearing by the Supreme Court of California was denied, and an appeal has been taken to this Court.

This Court granted an order permitting the appellant to prosecute the appeal *in forma pauperis* and, for the

purpose of shortening the record, a stipulation of facts has been presented on behalf of the appellant and the Attorney General of the State. It appears that the appellant, a young woman of nineteen, a citizen of the United States by birth, was one of the supervisors of a summer camp for children, between ten and fifteen years of age, in the foothills of the San Bernardino mountains. Appellant led the children in their daily study, teaching them history and economics. "Among other things, the children were taught class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all." Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp, in which the appellant supervised and directed the children in raising a red flag, "a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States." In connection with the flag-raising, there was a ritual at which the children stood at salute and recited a pledge of allegiance "to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class." The stipulation further shows that "a library was maintained at the camp containing a large number of books, papers and pamphlets, including much radical communist propaganda, specimens of which are quoted in the opinion of the state court." These quotations abundantly demonstrated that the books and pamphlets contained incitements to violence and to "armed uprisings," teaching "the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action." Appellant admitted ownership of a number of the books, some of which bore her name. It appears from the stipulation that none of these books or pamphlets were used in the teaching at the camp.

With respect to the conduct of the appellant, the stipulation contains the following statement: "She" (the appellant) "testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary."

The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named. The instruction was as follows:

"In this connection you are instructed that if the jury should believe beyond a reasonable doubt that the defendants, or either of them, displayed, or caused to be displayed, a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place, as charged in count one of the information, and if you further believe from the evidence beyond a reasonable doubt that said flag, badge, banner, or device was displayed, or caused to be displayed, as a sign, symbol, or emblem of opposition to organized government, or was an invitation or stimulus to anarchistic action, or was in aid to propoganda that is of a seditious character, you will find such defendants guilty as charged in count one of the information.

"In this connection you are instructed that if you believe a red flag, such as herein described, was displayed in either of the places mentioned in said information, that it is only necessary for the prosecution to prove to you, beyond a reasonable doubt, that said flag was displayed

for any one or more of the three purposes mentioned in the information; in other words, if the prosecution should prove to you beyond a reasonable doubt that the red flag, such as herein described, was displayed at the place or either of said places and for the purposes and objects as alleged in said information, it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt, of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information."

Appellant, before the District Court of Appeal, accepted this instruction as correct and waived any claim of error on that account. But appellant continued her challenge of the constitutionality of the statute, and the court on appeal entertained her contention and decided the constitutional question against her. In the District Court of Appeal there were three justices, and the concurrence of two justices was necessary to pronounce a judgment. Cal. Const., Art. VI, § 4 (a); Cal. Stats., 1929, c. 691, pp. 1202, 1203. Two opinions were delivered, one by a single justice, and another by the remaining two justices. The three justices concurred with respect to the affirmance of the conviction of the appellant under the first count, and there was a dissent only in relation to the proceedings on the reversal of the judgment under the second count for conspiracy, a point not in question here. The opinions make it clear that the appellant insisted that, under the Fourteenth Amendment, the statute was invalid as being "an unwarranted limitation on the right of free speech."

As the trial court had treated the three purposes of the statute disjunctively, and the appellant had accepted that

construction, we think that the only fair interpretation of her contention is that it related to the validity, not merely of the statute taken as a whole, but of each one of the three clauses separately relied upon by the State in order to obtain a conviction. Her concession as to the interpretation of the statute emphasizes, rather than destroys, that contention. The opinion of the two concurring justices explicitly states: "She" (the appellant) "directs her argument to the phrase in section 403a of the Penal Code 'of opposition to organized government.'" Thus directing her argument, we do not think that it can properly be said that the appellant having agreed that, according to the terms of the statute, her conviction could rest exclusively upon that ground, was not contending that the statute was invalid to the extent that it was so applied.

We are not left in doubt as to the construction placed by the state court upon each of the clauses of the statute. The first purpose described, that is, relating to the display of a flag or banner "as a sign, symbol or emblem of opposition to organized government," is discussed by the two concurring justices. After referring, in the language above quoted, to the constitutional question raised by the appellant with respect to this clause, these justices said in their opinion [p. 97]:

"If opposition to organized government were the only act prohibited by this section we might be forced to agree with appellant. 'Opposition' is a word broad in its meaning. It has been defined as follows:

"The act of opposing or resisting; antagonism. The state of being opposite or opposed; antithesis; also, a position confronting another or a placing in contrast. That which is, or furnishes an obstacle to some result; as, the stream flows without opposition. The political party opposed to the ministry or administration; often used adjectively as, the opposition press.'

"It might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old, and in so far as it is within the law, such peaceful opposition is guaranteed to our people and is recognized as a symbol of independent thought containing the promise of progress. It may be permitted as a means of political evolution, but not of revolution."

With respect to the second purpose described in the statute, the display of a flag or banner "as an invitation or stimulus to anarchistic action," the concurring justices quoted accepted definitions and judicial decisions as to the meaning of "anarchistic action." These authorities, as set forth and approved in the opinion, show clearly that the term was regarded by the state court as referring to the overthrow by force and violence of the existing law and order, to the use of "unlawful, violent and felonious means to destroy property and human life." The conclusion was thus stated: "It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form."

The state court further gave its interpretation of the third clause of the statute, that is, in relation to the display of a flag or banner "as an aid to propaganda that is of a seditious character." Both opinions dealt with the

meaning of this clause. Thus in one opinion it is said: "Appellants' counsel concedes that sedition laws which 'interdict against the use of force or violence' are consistently upheld by the courts, and all of the authorities cited by him support that proposition. . . . Sedition is defined as the stirring up of disorder in the State, tending toward treason, but lacking an overt act. Certainly the 'advocacy of force or violence' in overturning the government of a State falls within that definition." The other opinion takes a similar view. Assuming that the local statute is thus construed by the state court as referring to the advocacy of force or violence in the overthrow of government, we do not find it necessary, for the purposes of the present case, to review the historic controversy with respect to "sedition laws" or to consider the question as to the validity of a statute dealing broadly and vaguely with what is termed seditious conduct, without any limiting interpretation either by the statute itself or by judicial construction.

Having reached these conclusions as to the meaning of the three clauses of the statute, and doubting the constitutionality of the first clause, the state court rested its decision upon the remaining clauses. The basis of the decision, as more fully stated in the opinion of the two concurring justices, was this: "The constitutionality of the phrase of this section, 'of opposition to organized government' is questionable. This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California." Accordingly, disregarding the first clause of the statute, and upholding the other clauses, the conviction of the appellant was sustained.

We are unable to agree with this disposition of the case. The verdict against the appellant was a general

one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

We are thus brought to the question whether any one of the three clauses, as construed by the state court, is upon its face repugnant to the Federal Constitution so that it could not constitute a lawful foundation for a criminal prosecution. The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. *Gitlow v. New York*, 268 U. S. 652, 666; *Whitney v. California*, 274 U. S. 357, 362, 371, 373; *Fiske v. Kansas*, 274 U. S. 380, 382. The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus pro-

vide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions. *Gitlow v. New York, supra*; *Whitney v. California, supra*. We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence.

The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag "as a sign, symbol or emblem of opposition to organized government," and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the State could not constitutionally prohibit. Thus it was said that the clause "might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first

clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.

As for this reason the case must be remanded for further proceedings not inconsistent with this opinion, and other facts may be adduced in such proceedings, it is not necessary to deal with the questions which have been argued at the bar as to the constitutional validity of the second and third clauses of the statute, not simply upon their face, but as applied in the instant case; that is, to consider the conclusions of fact warranted by the evidence, either as shown by the original record filed with the Court on the present appeal, or as disclosed by the stipulation, as to the import of which the parties do not agree.

Judgment reversed.

MR. JUSTICE McREYNOLDS, dissenting.

This Court often has announced, and scores, perhaps hundreds, of times has applied the rule, that it may not pass upon any question in a cause coming from a state court which the record fails to show was there determined or duly presented for determination.

The only federal matter ruled upon by the court below (District Court of Appeals), and the only one there submitted, arose upon the general demurrer to the Information. Did this adequately set forth an offense for which the defendant could be punished without violating the Fourteenth Amendment?

Section 403a, Penal Code of California, provides—

“Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organ-

ized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

And the Information charged that the plaintiff "did wilfully, unlawfully, and feloniously display a red flag and banner in a public place and a meeting place as a sign, symbol, and an emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character."

Below, counsel definitely "stated that he was satisfied that the instructions [to the jury] were correct, and waived any claim of error on that account." Accordingly, decision was not requested upon any question arising out of the charge; no such question was decided. The instructions were properly disregarded and are now unimportant.

The sole matter of a federal nature considered by the Court of Appeals was the claim that the provisions of § 403a of the Penal Code were in conflict with the Fourteenth Amendment. It held the statute divisible and that as petitioner stood charged with violating all of the inhibitions therein, some of which were certainly good, the conviction could not be upset even if one paragraph were invalid. The conclusion seems plainly right and, I think, the challenged judgment should be affirmed.

MR. JUSTICE BUTLER, dissenting.

The Court decides that, in so far as § 403a declares it a crime to display a flag for the first purpose specified, "as an emblem of opposition to organized government," the section denies right of free speech, and the court holds that right to be included in the concept of "liberty" safeguarded against state action by the due process clause of the Fourteenth Amendment. It sustains the parts for-

bidding the public display of a flag "as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." The count on which the conviction rests charges that the appellant displayed a flag in ways and for all the purposes denounced by the section. Assuming all the clauses of the section to be valid, the display of a flag for the purpose specified in any one of them would be sufficient to warrant conviction. The Court holds the first clause invalid and, finding that the judgment may have rested upon that clause exclusively, sets aside the conviction.

1. I am of opinion that the record affirmatively shows that appellant was not convicted for violation of the first clause.

Shortly prior to the trial of this case, the supreme court of California held invalid a city ordinance purporting to make unlawful the public display of a flag or emblem of an organization espousing for the government of the people of the United States principles antagonistic to our Constitution or form of government. *In re Hartman*, 182 Cal. 447; 188 Pac. 548. Under that decision the California lower courts were bound to hold invalid the first clause of § 403a construed as peaceable opposition to organized government. And the record shows that in the case before us counsel and the trial court had that decision in mind.

The instruction quoted and relied on in the opinion here is No. 17, requested by the state's attorney. The opinion construes that instruction as if it stood alone. It does not stand alone. Defendant's attorney did not object or except to it but on the other hand requested, and the court gave, other instructions. They are Nos. 10 and 11 as follows:

"You are instructed that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws,

or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis.

“You are instructed that under the Constitution and laws of the United States, and of this State, an organization peaceably advocating changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis, may adopt a flag or emblem signifying the purpose of such organization, and that the display or possession of such flag or emblem cannot be made an unlawful act.”

The effect of the three instructions here referred to was definitely to direct the jury that defendant had the right without limit to advocate peaceable changes in our government, that under our constitution and laws an organization peaceably advocating changes in our government, no matter to what extent or upon what theories or principles, may adopt a flag signifying the purposes of such organization, and that it is impossible to make that unlawful.

2. The record fails to show that, aside from having the trial judge give to the jury these instructions suggested by her, defendant did in any manner separately challenge in the trial court the validity of the first clause.

That question could not have been raised by the demurrer to the information because it charged conjunctively the three purposes that are disjunctively denounced by the section. And the failure of defendant's counsel in any manner to object or except to state's instruction No. 17 coupled with his statement before the district court of appeal (*People v. Mintz*, 290 Pac. 93) that “he was satisfied that the instructions were correct, and waived any claim of error on that account” indubitably shows that he was of opinion that the giving of defendant's instructions above quoted eliminated all possibility of con-

viction for the display of a flag as an emblem of peaceable opposition to organized government.

3. And, if defendant at the trial did assail the first clause, that contention is shown by the opinion of the court below to have been definitely waived.

It is there stated that (p. 95): "The part of section 403a necessary to be considered in passing upon the questions raised by the appeal, reads as follows: 'Any person who displays a red flag, . . . in any meeting place . . . as an aid to propaganda that is of a seditious character is guilty of a felony.'" That statement is closely followed by the one showing that defendant's counsel was satisfied with the instructions.

These definite statements in the opinion were agreed to by the three judges constituting the court. They are not in any manner negatived or impaired by the concurring opinion of two of the judges. Pp. 96-102. The first clause was discussed in the concurring opinion only for the purpose of showing that, notwithstanding its questionable validity, the rest of the section should be held valid. Clearly these judges did not intend to sustain a conviction resting on the clause so questioned in their opinion.

The full substance of all they say that has any bearing follows (p. 97): "Appellant's contention that section 403a of the Penal Code is unconstitutional on the ground that it is an unwarranted limitation on the right of free speech guaranteed to the people by the Constitutions of the United States and of the State of California, deserves serious consideration. She directs her argument to the phrase in section 403a of the Penal Code; 'of opposition to organized government.' If opposition to organized government were the only act prohibited by this section we might be forced to agree with appellant." After some pages of discussion they conclude as to the second clause

(p. 99): "It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form."

Turning then to a consideration of the third clause, they say: "The section in question also prohibits the display of a red flag as an aid to propaganda that is of a seditious nature." After discussion, they conclude (p. 99) that: "The term 'sedition' and the word 'seditious' have well-defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities."

Then summing up as to the second and third clauses, they say (p. 99): "As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag 'as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character' is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people."

They refer again to the first clause: "The constitutionality of the phrase of this section, 'of opposition to organized government' is questionable." And, disclosing the purpose of the reference, they say: "This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California."

I am of opinion that fair consideration of both opinions in all their parts makes it very clear that defendant did not claim below that under the charge the jury might or could

have found her guilty of violating the first clause of the section, that the district court of appeal did not decide or consider whether conviction under that clause was or could lawfully be had, and that the validity of the first clause was discussed in the concurring opinion only upon the question whether, if that part of the section were unconstitutional, the other parts must also fail.

4. It seems to me that on this record the Court is not called on to decide whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment or whether the anarchy that is certain to follow a successful "opposition to organized government" is not a sufficient reason to hold that all activities to that end are outside the "liberty" so protected. Cf. *Prudential Ins. Co. v. Cheek*, 259 U. S. 530. *Gitlow v. New York*, 268 U. S. 652, 666. *Whitney v. California*, 274 U. S. 357. *Fiske v. Kansas*, 274 U. S. 380.

I am of opinion that the judgment below should be affirmed.

GRANITEVILLE MANUFACTURING CO. *v.* QUERY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 596. Argued April 27, 1931.—Decided May 18, 1931.

1. A State may constitutionally lay a stamp tax in respect of the making of promissory notes within her borders. So held where the notes were made by a domestic corporation and sent to payee banks in other States under an arrangement whereby notes, when received and accepted, were to be placed to the maker's credit, the maker being at liberty, however, to withdraw and revoke any note until it had been so received and credited by the payee. P. 379.

2. Such a tax is an excise, levied in relation to an action done within the State; it is not a tax on property, nor upon the transfer of property, situate beyond the State's jurisdiction. P. 379.

44 F. (2d) 64, affirmed.

APPEAL from an order of the District Court of three judges refusing an interlocutory injunction to restrain the collection of certain stamp taxes in South Carolina.

Mr. P. F. Henderson for appellant.

Messrs. John M. Daniel, Attorney General of South Carolina, and *J. Fraser Lyon* were on the brief for appellees.

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

The Graniteville Manufacturing Company, a corporation of South Carolina, brought this suit in the District Court of the United States to restrain the collection of certain stamp taxes imposed upon its promissory notes under Act 574, p. 1089, of the Acts of 1928 of that State.¹

¹ The statute is as follows: "Section 1. That on and after the passage of this Act, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instrument, matters of things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns or ships the same or for whose benefit or use the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule.

" SCHEDULE A.

" 4. Promissory notes, except bank notes issued for circulation and executory contracts for the payment of money which are executed or carried out in an instrument of writing to which documentary

A motion for an interlocutory injunction was heard by three judges, as required by § 266 of the Judicial Code (U. S. C., Title 28, § 380). Holding that the plaintiff had no adequate remedy at law, the court granted an injunction with respect to notes made outside the State but denied relief as to notes which were signed within the State. 44 F. (2d) 64.

There is no controversy as to the facts, which were stipulated and found by the court substantially as follows:

“These notes were executed at various times from July 24, 1923, to March 12, 1930. The notes were all payable to banks, at their banking houses, respectively, outside of South Carolina, none of them being located or doing any business within that State. The custom and practice between the plaintiff and each of the banks was that in each instance, at the office of the bank, a line of credit was first established; that is, an agreement was made that the plaintiff's borrowing from the bank should never exceed a certain amount, each specific loan to be made thereafter being subject to acceptance by the bank. When a loan was desired, the bank having been notified that a loan would be desired at a certain date and an inquiry having been made of it as to the then existing discount rate, the note would be signed by the president or other executive officer of the plaintiff, and forwarded to the bank by mail. The note was subject to withdrawal and revocation by the plaintiff until it was actually received and accepted by the bank and the proceeds actually placed to the credit of the plaintiff in the bank. . . . Payment of the note

stamps are affixed; nonnegotiable notes; written obligations to pay money, except as may herein otherwise be provided for; assignment of salaries, wages or other compensation; and for each renewal of same, for a sum not exceeding One Hundred (\$100.00) Dollars, four (4) cents; and for each additional One Hundred (\$100.00) Dollars, or fractional part thereof, four (4) cents.”

was made to the bank at its banking house by the plaintiff sending checks from its office at Graniteville upon other banks; and when the note was paid, it was marked paid, or canceled, and returned to the plaintiff at Graniteville, S. C., and there kept.

“The foregoing facts apply to all of the notes; but with reference to the place where the notes were signed, they may be divided into two classes. Prior to December 1, 1924, the plaintiff's executive officers resided in Augusta, Ga., and all of its notes, up to that time, were signed by its executive officers in Augusta, Ga., and mailed from there to banks outside of South Carolina, and those notes were never in the State of South Carolina until after they were paid and returned to the plaintiff at its office at Graniteville, S. C. But after December 1, 1924, plaintiff's executive officers resided at Graniteville, S. C., and the notes executed subsequent to that time were signed by those officers at Graniteville, S. C., placed in the mail there for delivery to the bank outside of South Carolina, and upon payment, were later returned to the plaintiff at Graniteville, S. C.”

It is only as to the latter class of notes which were signed in South Carolina that the District Court upheld the tax. The tax as thus sustained is an excise tax, of a familiar sort, levied with respect to the creation of instruments within the State. So laid, the tax was not imposed upon property, or upon the transfer of property, situated beyond the jurisdiction of the State as was found to be the case in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Frick v. Pennsylvania*, 268 U. S. 473; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1. It is simply a tax levied in relation to an act done within the State in making an instrument. *New York ex rel. Hatch v. Reardon*, 204

U. S. 152; *Brodnax v. Missouri*, 219 U. S. 285. See, also, *Nicol v. Ames*, 173 U. S. 509, 519. We see no reason to doubt the validity of the tax as thus enforced.

Order affirmed.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
v. RAILROAD COMMISSION OF CALIFORNIA
ET AL.

LOS ANGELES & SALT LAKE RAILROAD CO. v.
SAME.

SOUTHERN PACIFIC CO. ET AL. v. SAME.

APPEALS FROM THE SUPREME COURT OF CALIFORNIA.

Nos. 470, 471, 472. Argued April 23, 24, 1931.—Decided May 18, 1931.

1. The power of a State to compel interstate carriers to construct a union passenger station in a city is not superseded by the Interstate Commerce Act, except that the approval of the Interstate Commerce Commission must first be obtained, and its certificate of public convenience and necessity issued, with respect to rearrangement, extension and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan. P. 390.
2. An Act of Congress regulating a subject of interstate commerce to a limited extent is not to be taken as impliedly superseding state authority over matters not covered by it unless, fairly interpreted, it is in conflict with the state regulation. P. 392.
3. The power of the Commission to issue a certificate authorizing construction, acquisition, extension and abandonment of railroads (Interstate Commerce Act, § 1, pars. 18-21), may be invoked not only by carriers but also by a State seeking to require carriers to construct a union passenger station terminal involving readjustments of trackage. P. 393.
4. An order of a state commission requiring railroads to construct a union passenger station in a large city, at large expense, held not repugnant to the due process or the equal protection clause of the Fourteenth Amendment, in view of the full hearings given by the state and federal commissions and facts showing the inadequacy

of existing facilities from the standpoint of public convenience and necessity, the nature of the plan proposed, and the importance of the interests affected and to be served. P. 394.

209 Cal. 460; 288 Pac. 775, affirmed.

APPEALS from judgments affirming orders of the Railroad Commission of California which required appellant railroad companies to construct a union passenger station in the City of Los Angeles, together with incidental connections, extensions, terminal facilities, etc. See also: 190 Cal. 214, affirmed, 264 U. S. 331; 280 U. S. 52.

Mr. C. W. Durbrow, with whom *Messrs. Robert Brennan, E. W. Camp, A. S. Halsted, Frank Karr, and Guy V. Shoup* were on the brief, for appellants.

The State Commission's order as to joint use of main lines and terminal facilities and connections between main lines is void because it involves the attempted exercise of a power which has been expressly vested in the Interstate Commerce Commission. Par. 4, § 3; *Alabama Ry. v. Jackson Ry.*, 271 U. S. 244, 250. See also, as to extension of main lines and station tracks, paragraphs 18-21, § 1, and abandonment of main lines and the operation thereof, *Colorado v. United States*, 271 U. S. 153, 168. Cf. *Texas & Pac. Ry. v. Gulf R. Co.*, 270 U. S. 266; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456; *New England Divisions Case*, 261 U. S. 184; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563.

When Congress occupies a field of interstate commerce, a state statute is superseded even though the federal statute does not cover the subject as fully and completely as the state law. *Charleston & W. C. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604; *Pennsylvania R. Co. v. Pub. Serv. Comm.*, 250 U. S. 566, 569; *Missouri Pac. Ry. v. Porter*, 273 U. S. 341; *Erie R. Co. v. New York*, 233 U. S. 671, 683. Distinguishing: *Missouri Pac. Ry. Co. v. Larabee Mills*, 211 U. S. 612; *Savage v. Jones*,

225 U. S. 501; *Missouri, K. & T. Ry. v. Harris*, 234 U. S. 412; *Sligh v. Kirkwood*, 237 U. S. 52. Cf. *Oregon-Washington Co. v. Washington*, 270 U. S. 87, 102; *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 153; *Southern Ry. Co. v. Railroad Commission*, 236 U. S. 439, 448; *Lehigh Valley R. Co. v. Pub. Util. Comm.*, 278 U. S. 24.

The order of the State Commission cannot be validated by certificates issued by the Interstate Commerce Commission. There cannot be a divided authority between the two commissions. *Missouri Pac. R. Co. v. Stroud*, 267 U. S. 404, 408.

Paragraphs 18, 19, and 20, of § 1 empower the Federal Commission to issue certificates only on application of carriers, *Texas & Pac. Ry. Co. v. Gulf Ry. Co.*, 270 U. S. 266, 272; *Chicago, C., C. & St. L. Ry. Co. v. United States*, 275 U. S. 404, 408.

The purpose of paragraphs 18 to 20 was to protect interstate commerce from undue burdens or discrimination, *Colorado v. United States*, 271 U. S. 153; to prevent carriers from weakening themselves by constructing or operating superfluous lines and to protect them from being weakened by another carrier constructing a competing line not required in the public interest. *Texas Ry. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475.

The proceedings in Congress show that applications under paragraphs 18 to 20 were intended to be made by the carriers. See MacVeagh, "Transportation Act, 1920," pp. 220, 221, 222.

When Congress intended that proceedings against carriers might be taken by the Commission on complaint or on its own motion, such intention is clearly expressed.

Paragraph 21 of § 1 does not give the Commission authority to issue the certificates. *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *Second Los Angeles Case*, 280 U. S. 52, 70; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244.

Unless the phrase "and to extend their lines" is limited to car service, there would seem to be no standard set by the Act for the guidance of the Commission in exercising its powers as to extensions. Such a standard must be found in the Act. *Union Bridge Co. v. United States*, 204 U. S. 364, 384, 385; *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311.

If the phrase "and to extend their lines" were intended to confer upon the Interstate Commerce Commission the power to compel extensions other than those needed to provide "car service," it would impose a construction on the Act which at once raises grave constitutional questions under the Fifth Amendment. Such a construction will be avoided. *United States v. Delaware Co.*, 213 U. S. 366, 407-8; *Texas v. United States*, 258 U. S. 204.

The State Commission's order deprives the railroads of their property without due process of law and denies them the equal protection of the laws, and takes their property for public use without just compensation, in contravention of the Fourteenth Amendment to the Constitution. *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585-595; *Chesapeake & Ohio Ry. Co. v. Pub. Serv. Comm.*, 242 U. S. 603, 606; *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 528; *McNeill v. Southern Ry. Co.*, 202 U. S. 543; *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415; *Southern Bell Tel. Co. v. Calhoun*, 287 Fed. 381; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm.*, 173 Cal. 577. Distinguishing: *New York & Q. Gas Co. v. McCall*, 245 U. S. 345; *New York v. Pub. Serv. Comm.*, 269 U. S. 244.

A steam railroad does not "undertake" to bring its rails to the homes and places of business of its patrons in order to serve them. It "undertakes" to serve only those patrons who come to it. *Hollywood Chamber of*

Commerce v. Railroad Comm., 192 Cal. 307; *First Los Angeles Case*, 264 U. S. 331.

When a railroad establishes a terminal in a city it does not thereby undertake to move that terminal to any other point within the city, and cannot be compelled to do so if the facilities which it has provided are adequate and convenient. 190 Cal. 214, 228.

Pacific Tel. & Tel. Co. v. Eshelman, 166 Cal. 640; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm.*, 173 Cal. 577; and *Hollywood Chamber of Commerce v. Railroad Comm.*, 192 Cal. 307, sustain the contention that the California Railroad Commission has never had power under the state statute within constitutional limitation to require railroads to acquire and dedicate to public use lands and rights of way, extend their main lines of railroad to reach territory which they have not undertaken to serve, and to comply with the other requirements of the State Commission's order.

The same principles have been applied by other state courts. *Oklahoma Natural Gas Co. v. Corporation Comm.*, 88 Okla. 51; *Oklahoma Natural Gas Co. v. Scott*, 115 Okla. 8; *Montgomery v. Southwestern Arkansas Tel. Co.*, 110 Ark. 480; *State v. Pub. Serv. Comm.*, 287 Mo. 522; *State v. Pub. Serv. Comm.*, 270 Mo. 429; *United Fuel Gas Co. v. Pub. Serv. Comm.*, 105 W. Va. 603; *Public Serv. Comm. v. United Railway Co.*, 126 Md. 478; *Towers v. United Rys. & Elec. Co.*, 126 Md. 478; *People v. Stevens*, 197 N. Y. 1, 10; *People v. Stevens*, 203 N. Y. 7, 19. Distinguishing: *Railroad Comm. v. Northern Alabama Ry.*, 182 Ala. 357; *Railroad Comm. v. Alabama Great Southern R. Co.*, 185 Ala. 354; *Dewey v. Atlantic Coast Line*, 142 N. C. 392; *Griffin v. Southern Ry. Co.*, 150 N. C. 312; *Corporation Comm. v. Seaboard Air Line Ry. Co.*, 161 N. C. 270; *Corporation Comm. v. Southern Ry. Co.*, 185 N. C. 435; *State v. St. Louis Ry. Co.*, 165 S. W. 941; *State v. St. Louis Ry. Co.*, 199 S. W. 829; *Gulf*,

C. & S. F. Ry. Co. v. State, 167 S. W. 192; *State v. Atlantic Coast Line*, 67 Fla. 441; *State v. Jacksonville Terminal Co.*, 71 Fla. 295; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 302; *Denver & R. G. R. Co. v. Denver*, 250 U. S. 241; *Missouri, O. & G. Ry. Co. v. State*, 29 Okla. 640; *Mayer v. Norwich & W. R. Co.*, 109 Mass. 103; *Chicago Ry. Co. v. State*, 90 Okla. 173; *Missouri Ry. Co. v. State*, 38 Okla. 401.

This Court has rejected the theory that a State may compel a railroad so to extend its main line tracks under the reserved power to amend, alter or repeal charters. *Superior Water Co. v. Superior*, 263 U. S. 125, 136; *Chicago R. Co. v. Wisconsin*, 238 U. S. 491, 501; *Delaware Ry. Co. v. Morristown*, 276 U. S. 182, 193.

The absolute duties of the railroads are limited to furnishing reasonable and adequate facilities to their several patrons. If a station is too small a railroad may be required to enlarge it. If a station burns down a railroad may be required to replace it. These are matters within the realm of regulation under the police power. These are but carrying out obligations incurred when it entered upon the field of its activity. But to require a railroad company to abandon its own adequate facilities and to go elsewhere than on its own property and acquire additional land and construct new facilities to be used jointly by itself and other railroad companies, is outside the realm of regulation, and impairs constitutional rights.

The railroads are denied their constitutional rights by failure of the State Commission to provide compensation for the use of their railroad properties by one another. *Western Union v. Pennsylvania R. Co.*, 195 U. S. 540, 570; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327; *Louisville & N. R. Co. v. Interstate R. Co.*, 108 Va. 502, 505; *Southern Ry. Co. v. Shealy*, 18 F. (2d) 784; *Sand Springs R. Co. v. Okla-*

homa Union Ry. Co., 227 Pac. 430; *Pacific Tel. & Tel. Co. v. Eshelman*, 166 Cal. 640, 646; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416.

The State Commission cannot impair the railroads' constitutional rights under the guise of exercising its police power to require the elimination of grade crossings. *Lehigh Valley R. Co. v. Commissioners*, 278 U. S. 24, 35.

Mr. Arthur T. George, with whom *Messrs. Ira H. Rowell* and *Roderick B. Cassidy* were on the brief, for appellees.

Messrs. Erwin P. Werner, *Milton Bryan*, *Max Thelen*, *Jess E. Stephens*, and *Edwin C. Blanchard*, by special leave of Court, filed a brief as *amici curiae*.

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

These are appeals from judgments of the Supreme Court of California, which affirmed an order of the Railroad Commission of that State requiring the appellants to construct a union passenger station in the City of Los Angeles, together with incidental connections, extensions, improvements and terminal facilities, in substantial compliance with the plan outlined by the Commission. 209 Cal. 460; 288 Pac. 775.

Proceedings were begun before the State Railroad Commission in the year 1916, and in December, 1921, after two hearings, the Railway Companies were required to remove certain grade crossings and to build a union terminal within a defined area known as the Plaza site in Los Angeles. 19 Op. R. R. Com. Cal. 740; 20 *id.* 937. The Supreme Court of the State held that the order was beyond the power of the Commission, because the subject matter had been committed to the Interstate Commerce Commission by the Transportation Act of 1920. 190 Cal. 214; 211

Pac. 460. The judgment was affirmed by this Court. 264 U. S. 331. The Court held that the relocation of tracks, which was incidental to the proposed union station, required a certificate of approval of the Interstate Commerce Commission under paragraphs 18 to 21 of § 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (41 Stat. 476-478), as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad Commission.¹

Pending the consideration of that case, a proceeding was instituted before the Interstate Commerce Commission by the City of Los Angeles to obtain an order requiring the three Railway Companies to build the union station at the designated place. That Commission decided, July 6, 1925 (100 I. C. C. 421), that it was without authority to require the construction of the station. But, in order to facilitate the disposition of the case, the Commission made certain hypothetical certificates substantially as follows:²

“(1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such

¹ See *Interstate Commerce Commission v. U. S. ex rel. Los Angeles*, 280 U. S. 52, 61.

² *Id.*, pp. 62, 63.

station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business."

In reaching its conclusion, the Interstate Commerce Commission made an extended review of the question of the expense involved, stating that "if a union station were built at the Plaza under substantially the plan presented by the California Commission, the new money necessary to be raised, less the value of property released from passenger service, would be about \$5,500,000. The total investment in passenger facilities under the Plaza plan would approximate \$9,500,000." 100 I. C. C., p. 457.

After setting forth its findings upon the record before it, the Commission reserved jurisdiction for the purpose of making such further findings and orders, and issuing such certificates, as should be warranted in the event that the plan of the State Commission as finally evolved should be materially different from that "as here considered to be in the public interest." *Id.*, p. 461.

Following this action of the Interstate Commerce Commission, the proceeding before the State Commission was reopened. The action of the Federal Commission was submitted, hearings were had at which evidence was received, and, on July 8, 1927, the State Commission made the order, which was the subject of the judgments now under review, requiring the building of the station within the Plaza area and the establishment of the connections, additions and facilities which that project involved. The State Commission found that "the present and future public convenience and necessity" required the construction of the union station, and that it could be constructed at a cost of approximately \$10,000,000 in substantial com-

pliance with the plan outlined, which was found to be in all essential respects similar to that considered by the Interstate Commerce Commission in its order above mentioned. 30 Op. R. R. Com. Cal. 151.

Petitions for final order were then presented by the City of Los Angeles and the State Commission to the Interstate Commerce Commission. After further hearing the latter Commission made its report, on May 8, 1928, adhering to the conclusions of its former report that "public convenience and necessity" required the extension by the Railway Companies of their respective main lines in the City of Los Angeles "so as to reach and serve a union passenger station and terminal which they may construct in the Plaza district," pursuant to order of the State Commission to that effect, with "the abandonment of other portions of main lines to provide for incidental rearrangement of routes, and the abandonment of train service on Alameda Street," and that "such joint use is in the public interest and practicable, without impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business." The Interstate Commerce Commission issued its certificate accordingly, but the petition for the issue of an order requiring the Railway Companies to construct a union station was denied. 142 I. C. C. 489.

Application was then made to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Interstate Commerce Commission to consider the evidence introduced before it for the purpose of determining whether the Commission should order the Railway Companies to build the union station, and, after consideration of the evidence, to make such an order as the facts required. Dismissal of that petition was reversed by the Court of Appeals of the District of Columbia, and, upon writ of certiorari, this Court reversed the judgment of the Court of Appeals. This Court held that the Congress

had not conferred upon the Interstate Commerce Commission authority to require the building of the station. 280 U. S. 52.

Referring to its former decision, the Court said (*id.*, p. 71): "The only issue there presented to this Court, was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. The point in that case was the necessity for the acquiescence by the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held."

Thereupon, the Railway Companies petitioned the Supreme Court of the State to review the order of the State Commission requiring the construction of the station, and that court entered the judgments of affirmance from which these appeals have been taken.

The questions presented are solely those of constitutional authority. All questions of fact as to public convenience and necessity, and as to the practicability of the proposed plan, have been resolved against the Railway Companies by the proper tribunals. This Court has held that the State Commission could not require the construction of the proposed station, and the relocation of connecting tracks, without the approval of the Interstate Commerce Commission. That approval has been given. This Court has also decided that the Interstate Commerce Commission has not been empowered to require the building of the station. That Commission has not attempted to exercise any such authority. The question now is as to the authority of the State Commission, in view of the action of the Federal Commission, to require the construction of the station with the incidental arrangement of tracks and facilities. The decision of the state court

is conclusive so far as the constitution and laws of the State are concerned. The State Commission has acted within the power conferred upon it. The only questions before us are those arising under the Federal Constitution and the Interstate Commerce Act.

First. The Railway Companies contend that the order of the State Commission is repugnant to the commerce clause and is in conflict with the powers vested by the Congress in the Interstate Commerce Commission. The argument is that as to union terminal facilities, joint use of tracks and abandonment of lines, the Congress has occupied the field and that state authority has been abrogated. *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370; *Pennsylvania R. Co. v. Public Service Commission*, 250 U. S. 566; *Colorado v. United States*, 271 U. S. 153; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341. The contention presupposes that state authority could be exerted were it not for the provisions of the federal legislation. That is, that it was the intention of Congress to prevent the exercise of state power in this matter of serious public interest, although no authority was given to the Federal Commission to meet the public need. Such an intention to override existing state authority to deal with local exigencies is not to be imputed to the Congress unless its enactment compels that conclusion. In deciding that the Congress had given to the Interstate Commerce Commission no power to require the building of such a union terminal as that projected in this case, this Court adverted to the extent of the authority that would be involved and the effect of its exercise upon local interests. The Court said (280 U. S. pp. 68, 69):

“Such authority, if conferred in Los Angeles, would have application to all interstate railroad junctions, including the numerous large cities of the country, with their

residential, commercial, shopping, and municipal centers now fixed and established with relation to existing terminals. It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. A selection of its site from the standpoint of a city might greatly affect property values and likewise local transportation systems. The exercise of such power would compel the carriers to abandon existing terminals, to acquire new land and rights of way and enter upon new construction, to abandon large tracts and to sell territory of the same extent as no longer necessary for the use of the carriers.

“There would have to be tribunals to apportion the expenditures and cost as between the carriers. A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope. It would be a monumental work and one requiring the most extensive exercise of expert engineering and railroad construction. It would make possible great changes of much importance in the plans of every city and in the rearrangement and mutations of railroad property and public and private business structures everywhere. We find no statutory preparation for the organization of such machinery.”

The considerations which led the Court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the State had not been taken away except to the extent that the approval of the Federal Commission was required. The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the

intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 293, 294; *Southern Ry. Co. v. Railroad Comm.*, 236 U. S. 439, 446; *Illinois Central R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 510; *Carey v. South Dakota*, 250 U. S. 118, 122; *Lehigh Valley R. Co. v. Public Utility Commrs.*, 278 U. S. 24, 35; *International Shoe Co. v. Pinkus*, 278 U. S. 261, 265. We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act.

Second. The appellants further insist that the certificates of the Interstate Commerce Commission are void. The point is that the certificates were not issued upon the application of the Railway Companies but in proceedings adverse to them and over their protest. It is urged that paragraphs 18 to 20 of § 1 of the Interstate Commerce Act give the Commission no power to issue such certificates except upon application of the carriers, and that the certificates were also unauthorized under paragraph 21 of that section.

The provisions of these paragraphs (18 to 21) contain no such limitation as that suggested. While they relate "to the construction, acquisition, extension and abandonment of a railroad," and "deal primarily with rights sought to be exercised by the carrier" (*Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. United States*, 275 U. S. 404, 408) these paragraphs do not exclude appropriate action by the Commission upon applications by

those who have a proper interest in the subject matter, although they are not carriers. If the State could be deemed to have no authority to compel the building of such a union terminal as that here involved, the question would not arise. But if the State originally had this authority, and the federal legislation has not superseded it, but has required, as this Court has held, a certificate of public convenience and necessity from the Interstate Commerce Commission as a condition precedent to the validity of any order on the part of the State Commission, we find no warrant for construing the statute as precluding the application which is necessary to obtain such a certificate. In its first opinion, this Court said that it was advised that the City of Los Angeles had filed a petition with the Interstate Commerce Commission and that the Court thought that the course taken by the City "was the correct one." 264 U. S. pp. 347, 348. While the statement was *obiter*, it intimated an opinion which has been confirmed by further consideration of the purpose and terms of the statute. Nothing was said in the second opinion contrary to that view. The approval of the Interstate Commerce Commission and the issue of its certificate of public convenience and necessity being indispensable under the Act, application could properly be made by the authorities of the State, assuming that with such certificate they were entitled to require the establishment of the station.

Third. We are thus brought to the contention of the appellants that the order of the State Commission deprives the Railway Companies of their property without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution.

The principle that the State, directly or through an authorized commission, may require railroad companies

to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied. *Wisconsin, Minn. & Pac. R. Co. v. Jacobson*, 179 U. S. 287, 296, 301; *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 26, 27; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 279; *Seaboard Air Line Ry. Co. v. Railroad Comm.*, 240 U. S. 324, 327; *Mississippi R. R. Comm. v. Mobile & Ohio R. Co.*, 244 U. S. 388, 390, 391; *Erie R. Co. v. Public Utility Commrs.*, 254 U. S. 394, 409, 410. Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons.³ *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 63. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads, *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U. S. 303, 307. But the power to regulate is not unlimited. "It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business." *Norfolk & Western Ry. Co. v. Public Service Comm.*, 265 U. S. 70, 74; *Mississippi*

³ In its second opinion in relation to the present controversy, this Court cited the state court decisions with respect to requirements for the building of union stations, as follows (280 U. S., pp. 67, 68): "There are cases in the state courts in which by virtue of statutory provision railroads are required expressly to unite in a passenger station, if determined by Commissioners appointed by the Court or by a Railroad Commission. *Mayor and Aldermen of Worcester v. Norwich & Worcester R. Co.*, 109 Mass. 103, 113; *Railroad Commission v. Alabama Northern R. Co.*, 182 Ala. 357; *Railroad Commission v. Alabama Great Southern R. Co.*, 185 Ala. 354, 362; *Missouri, O. & G. R. Co. v. State*, 29 Okla. 640; *Chicago, R. I. & P. R. Co. v. State*, 90 Okla. 173; *State v. St. Louis Southwestern R. Co.* (Tex. Civ. App.), 165 S. W. 491, 199 S. W. 829, 930."

Railroad Comm. v. Mobile & Ohio R. Co., *supra*. The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. *Wisconsin, Minnesota & Pacific R. Co. v. Jacobson*, *supra*; *Norfolk & Western Ry. Co. v. Public Service Comm.*, *supra*. And "the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order." *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 529.

In the present case, careful inquiry has been made into all the relevant facts. There have been three hearings before the State Commission and two hearings before the Interstate Commerce Commission. The inadequacy of existing facilities has been shown and the relative merits of various plans have been the subject of elaborate study. The expense involved in the plan adopted, when considered in relation to the importance of the interests affected and to be served, does not appear to be so large as to warrant the condemnation of the plan as unreasonable and beyond the authority of the State. In its second report, pursuant to which the certificate of public convenience and necessity was issued, the Interstate Commerce Commission said (142 I. C. C., 495, 496):

"It will be observed that our findings of fact in the original report, previously set out, are in effect duplicated by findings numbered 1 to 6 of the Railroad Commission of the State of California in its decision of July 8, 1927, as appears in Appendix 1 hereto. The State Commission in addition found (7) that the present and future public convenience and necessity require and will require the construction by defendants and each of them of a union passenger station within that portion of Los Angeles described in the third finding, with the track and other facilities reasonably necessary, convenient, or incidental to the use of such passenger station; (8) that in its opin-

ion an adequate union passenger station could be constructed within the described portion of the city at a cost of approximately \$10,000,000, in substantial compliance with the plan outlined in its Exhibit 4-B, which is found to be in all essential respects similar to the plan considered by us in our original decision and report; (9) that such plan for a union passenger station in the Plaza portion of Los Angeles in the opinion of the State Commission is and would be in the public interest, and that its construction is practicable, without impairing the ability of the defendants to perform their respective duties to the public; and (10) that such construction ought reasonably to be made. . . . All of the testimony of record in the original proceeding before us was examined and given careful analysis in our original report. We adhere to the conclusions there expressed, upon a further consideration of the whole record, including the subsequently imported testimony taken before the California Commission. In our judgment, the findings of the California Commission numbered 7 to 10, inclusive, as appears in the appendix and as above summarized, find sufficient support in the record."

We find no basis for the conclusion that the findings of fact are unsupported by evidence, or that, in view of the facts thus ascertained, the order of the State Commission is unreasonable or arbitrary.

In this view, the judgments of the Supreme Court of the State are affirmed.

Judgments affirmed.

MR. JUSTICE McREYNOLDS is of opinion that the judgment of the court below should be reversed upon the ground that the assailed order of the Railroad Commission is arbitrary, unreasonable, and beyond any power which the State is competent to confer.

FRANK L. YOUNG CO. *v.* McNEAL-EDWARDS CO.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT.

No. 490. Argued April 24, 27, 1931.—Decided May 18, 1931.

A Massachusetts statute provides that if an action be brought in the State by a nonresident, he shall be held to answer any action brought against him there by the defendant if the demands are of such nature that judgment or execution in the one case may be set off against judgment or execution in the other. The writ in such cross-action may be served on the attorney of record for the plaintiff in the "original action." A resident of Massachusetts sued a resident of another State for breach of warranty in a sale of fish oil and attached the drums, belonging to the nonresident, in which the oil had been shipped. The nonresident then sued the resident, in Massachusetts, for conversion of the drums; and thereupon the resident, dismissing the attachment suit, again sued the nonresident, on the same cause of action for breach of warranty, and served the summons on the attorney for the nonresident in the suit brought by the latter. *Held:*

1. The service was good *in personam* under the statute mentioned. P. 400.

2. The statute, by virtue of the Conformity Act, applies in the federal court; and that court acquired jurisdiction over the nonresident through service on his attorney of record. *Id.*

3. This application of the state law is constitutional. P. 401. 42 F. (2d) 362; 43 *id.* 99, reversed.

CERTIORARI, 282 U. S. 831, to review a judgment of the Circuit Court of Appeals which reversed the District Court, in a suit on a contract, and dismissed the cause for want of jurisdiction. See also 35 F. (2d) 829.

Mr. W. Barton Leach, with whom *Messrs. John G. Palfrey* and *Charles F. Albert* were on the brief, for petitioner.

Mr. Asa P. French, with whom *Mr. Jonathan W. French* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case presents the question whether under the Conformity Act, U. S. Code, Title 28, § 724, and the Massachusetts statute, Gen. Laws, c. 227, §§ 2, 3, the District Court acquired jurisdiction over the respondent. The Conformity Act provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held." By the Massachusetts Laws, § 2, *supra*, "If an action is brought by a person not an inhabitant of the commonwealth . . . he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other." By § 3 "The writ in such cross action may be served on the attorney of record for the plaintiff in the original action." In this case the McNeal-Edwards Company, a corporation of Virginia, sold to the Frank L. Young Company of Massachusetts 1107 drums of Menhaden oil; buyers to return the drums. The buyers later sued the Virginia Company for breach of warranty of quality and attached the drums, but the attachment was inadequate security for damages and was the limit of the jurisdiction. Later the Virginia Corporation sued the buyers for the conversion of the drums, and thereupon at a still later date the buyers brought a second suit against the Virginia Corporation for the same cause of action as before, had the writ served upon the attorney of record in the Virginia Corporation's suit, and discontinued its former action. The petitioner, in short, is plainly within the Massachusetts statute, for although there is some sugges-

tion that by reason of the petitioner's former suit the suit by the Virginia Corporation was not the 'original action' within § 3 supra, we regard this as a mere quibble, and have no doubt that the Massachusetts law applies if the Conformity Act brings it in. The case was dismissed by the Circuit Court of Appeals for want of jurisdiction. 42 F. (2d) 362; 43 F. (2d) 99. A writ of certiorari was granted by this Court.

We have to consider the Massachusetts law so far as it applies to counterclaims arising out of the same contract that was sued upon by the Virginia Company. If there should be any objections to a wider application, they do not affect the respondent and are not open here. *Hatch v. Reardon*, 204 U. S. 152, 160. Thus limited, the law is only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute. *Home Savings Bank v. Boston*, 131 Mass. 277, 280. We take it that there is no doubt that the Massachusetts principle would be applied in the Courts of the United States, *Dushane v. Benedict*, 120 U. S. 630; and no greater doubt if the principle were established by a code. *Clement v. Field*, 147 U. S. 467, 475. *Pacific Express Co. v. Malin*, 132 U. S. 531. *Higgins v. McCrea*, 116 U. S. 671. Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things "for, the plaintiff being already in court *qua* plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence." Langdell, Eq. Pleading, ch. 5, § 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge v. Insurance Co.*, 15 Wall. 573, is repeated in *Chicago &*

North Western Ry. Co. v. Lindell, 281 U. S. 14, 17. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich v. Blatchford*, 175 Mass. 369; 56 N. E. 700.

The case is within the jurisdiction of the District Court in all other respects if the respondent has been served with process effectively. We are of opinion that the service was good and that the case should not have been dismissed.

Judgment reversed.

ATLANTIC COAST LINE RAILROAD CO. v. POWE,
ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 600. Argued May 1, 1931.—Decided May 18, 1931.

1. In an action under the Employers' Liability Act for death of a switchman, killed while on the outside of a moving car by being brought into contact with a semaphore near the track, there is no ground to charge negligence in placing the semaphore too near the track when the distance exceeds the minimum permitted by the state railroad commission, and when it does not appear that to make the place safe by increasing the distance would have been practicable for the railroad company. P. 402.
2. The question in such cases is not whether a reasonable insurance of employees against injury should be thrown upon the traveling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. P. 403.
3. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Id.*
159 S. E. 473, reversed.

CERTIORARI, 282 U. S. 836, to review a judgment affirming a judgment for the present respondent in an action under the Federal Employers' Liability Act.

Mr. Arthur R. Young, with whom *Messrs. Thomas W. Davis* and *V. E. Phelps* were on the brief, for petitioner.

Mr. John P. Grace, with whom *Mr. W. Turner Logan* was on the brief, for respondent. *Mr. Lionel K. Legge* also submitted a brief for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act for causing the death of Marshall, the respondent's deceased. It has been before the Court after an earlier trial, *Atlantic Coast Line R. Co. v. Tyner*, 278 U. S. 565, and now is brought here again to review a judgment of the Supreme Court of South Carolina affirming a judgment for the plaintiff. 159 S. E. 473. The petitioner contends that it was entitled to have a verdict directed in its favor on the grounds that there was no evidence that it was negligent and that Marshall must be taken to have assumed the risk of the supposed cause of his death.

It may be assumed that Marshall, a switchman, was killed while on the outside of a moving car by being brought into contact with a semaphore near the railroad track. The only ground for charging the Company with negligence that we regard as material is the suggestion that the semaphore was too near the track. The general principles laid down with regard to mail cranes in *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, and *Chesapeake & Ohio Ry. Co. v. Leitch*, 276 U. S. 429, apply equally to semaphores. It is impracticable always to set such structures so far away as to leave no danger to one leaning out, and in dealing with a well known incident of the employment, adopted in the interest of the public and of the employees, it is unreasonable to throw the risks of it upon those who were compelled to adopt it.

The semaphore in this instance was four feet and ten inches at its base from the outer edge of the track and probably a little more at four feet above the top of the rail. An order of the South Carolina Railroad Commission, made, as it states, in consideration of the safety of the public and employees of the road and of the necessity for employees to give and receive signals, provides that no structure be allowed nearer than four feet from the outer edge of the main or side track, measurement being made four feet above the top of the rail. It will be seen that the Railroad Company in this case more than complied with the order. It is true that four feet was a minimum distance, but it satisfied the requirement of the Commission, and it would be going far to say that the Railroad Company was not warranted in supposing that it had done its duty, so far as the Commission was concerned, when it put the semaphore four feet and ten inches away. Marshall from his previous experience probably knew of the semaphore as he was required to do by the rules of the road. It was shown that some other semaphores were farther from the track, but the circumstances do not appear, and there is nothing to show that in this case the petitioner could have made the position safer than it was, except by changing the place of the track. As remarked in *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 417, the question is not whether a reasonable insurance against such misfortunes should be thrown upon the travelling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. No negligence is proved against the petitioner. It is urged that a certiorari was denied in *Central of Georgia Ry. Co. v. Davis*, 7 F. (2d) 269, which seemed to qualify the doctrine of the *Berkshire* case. But "The denial of a writ of certiorari imports no expression of opinion upon the merits of the

Statement of the Case.

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case, as the bar has been told many times." *United States v. Carver*, 260 U. S. 482, 490.

Judgment reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LOGAN.

SAME *v.* BRUCE.

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

Nos. 521 and 522. Argued April 29, 1931.—Decided May 18, 1931.

1. Prior to March, 1913, the taxpayer held shares in one of several steel companies, owners of the stock of a company engaged in mining ore under a long term lease. The lease did not require production of maximum or minimum tonnage or any definite payments. By agreement among themselves, the steel companies were entitled to share the ore extracted according to their stock holdings in the mining company. In 1916, the taxpayer and her co-shareholders sold their shares to another steel company, which thus became entitled to participate in the ores thereafter taken from the leased mine. The consideration for the sale was part cash and in part the purchaser's agreement to pay annually thereafter for distribution among the selling stockholders 60 cents for each ton of ore apportioned to it. *Held*, that until the receipts by the taxpayer under this contract shall have equalled the value of her shares in March, 1913, they are return of capital and are not taxable in part as income. P. 412.
 2. Another of the vendor stockholders died in 1917, bequeathing her interest in the payments to be made by the purchaser. *Held* that, prior to return of the amount at which the bequest was valued for federal estate tax purposes, the payments received by the legatee are not income. P. 413.
- 42 F. (2d) 193; *id.* 197, affirmed.

CERTIORARI, 282 U. S. 833, to review judgments reversing orders of the Board of Tax Appeals determining income tax deficiencies. 12 B. T. A. 586.

Assistant Attorney General Youngquist, with whom Solicitor General Thacher and Messrs. Sewall Key and J. Louis Monarch, Special Assistants to the Attorney General, and Whitney North Seymour were on the brief, for petitioner.

Respondents sold corporate stock, receiving therefor part cash and an interest in a contract providing for a payment of 60 cents on each ton of ore which the purchaser became entitled to take from the Mahoning mine. Respondents later acquired additional interests in the same contract by bequest from their mother.

The Commissioner determined that the contract had a fair market value and accordingly treated the sale of the stock as a closed transaction and valued the contract rights as of the time of their receipt, which he used as the basis for apportioning the annual receipts from the contract between income and capital.

The court below held that the fair market value of the contract had not been established, that the sale of respondents' stock was not a closed transaction, and that no part of the annual receipts from the contract was income, because respondents had not yet received the March 1, 1913, value of their stock or the value of the inherited interests in the contract at the time of their mother's death.

Whether property has a fair market value is a question of fact. The finding of the Board that the contract had fair market value was supported by substantial evidence and should have been accepted by the court below, as it was by the Circuit Court of Appeals for the Sixth Circuit in a group of cases presenting the same question with respect to the same transaction. *Irwin v. Gavit*, 268 U. S. 161; *Hitchcock v. Commissioner*, 44 F. (2d) 756, 758; *Newman v. Commissioner*, 41 F. (2d) 743, certiorari denied, 282 U. S. 858; *Chicago Ry. Equip. Co.*

v. *Blair*, 20 F. (2d) 10, 13; *Reinecke v. Spalding*, 280 U. S. 227; *Bishoff v. Commissioner*, 27 F. (2d) 91, 92; *Bedell v. Commissioner*, 30 F. (2d) 622, 625; *Stone v. United States*, 164 U. S. 380, 382; *United States v. Supplee-Biddle Co.*, 265 U. S. 189, 196.

The annual receipts from the contract were inherently income; and it is not entirely clear that respondents were entitled to any of the statutory allowances for depletion or exhaustion. However, an allowance was made by the Board for the exhaustion of the contract, and for present purposes we merely contend that it is sufficient. The Circuit Court of Appeals for the Sixth Circuit approved the apportionment between income and capital, and its decision is in direct conflict with the decision of the court below. The requirement that capital must all be returned tax free before there is any income is limited to cases of sales, and in several decisions the courts have held that, where the period of payment is extended over several years, it is more logical to say there is some income involved in each payment. *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; *Goldfield Cons. Mines Co. v. Scott*, 247 U. S. 126; *Stanton v. Baltic Mining Co.*, 240 U. S. 103; *New Creek Co. v. Lederer*, 295 Fed. 433, certiorari denied, 265 U. S. 581; *Kentucky Tobacco Co. v. Lucas*, 5 F. (2d) 723; *Roxburghe v. United States*, 64 Ct. Cls. 223, certiorari denied, 278 U. S. 598; *Peck v. Kinney*, 143 Fed. 76, 80; *Hitchcock v. Commissioner*, 44 F. (2d) 756; *Eldredge v. United States*, 31 F. (2d) 924; *Warner v. Walsh*, 15 F. (2d) 367; *United States v. Bolster*, 26 F. (2d) 760; *Allen v. Brandeis*, 29 F. (2d) 363; *Klein v. Commissioner*, 6 B. T. A. 617; *Ruth Iron Co. v. Commissioner*, 26 F. (2d) 30; *Kosmerl v. Commissioner*, 25 F. (2d) 87; *Platt v. Bowers*, 13 F. (2d) 951; *Rosenberger v. McCaughn*, 25 F. (2d) 669, certiorari denied, 278 U. S. 604; *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179; *Nichols*

v. *United States*, 64 Ct. Cls. 241, certiorari denied, 277 U. S. 584.

Messrs. Herbert C. Smyth and John Enrietto, with whom *Messrs. Millard F. Tompkins and John W. Ford* were on the brief, for Mrs. Logan.

The transaction of March 11, 1916, was a sale of stock and not an exchange of property for property; so that there is no taxable gain until the aggregate payments exceed the March 1, 1913, value of the stock. *Johnson v. Commissioner*, 19 B. T. A. 840; *Pinellas Ice Co. v. Commissioner*, 21 B. T. A. 425; *Geary v. Commissioner*, 6 B. T. A. 1109.

In determining the gain, if any, on the sale of property, the March 1, 1913, value must be deducted before there is any taxable gain. *Goodrich v. Edwards*, 255 U. S. 527; *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179; *Burnet v. Thompson Oil & Gas Co.*, ante, p. 301; *Lucas v. Alexander*, 279 U. S. 573, 580. Distinguishing: *Ruth Iron Co. v. Commissioner*, 26 F. (2d) 30; *Kosmerl v. Commissioner*, 25 F. (2d) 87; *Platt v. Bowers*, 13 F. (2d) 951; *Eldredge v. United States*, 31 F. (2d) 924.

It is stipulated that the total payment received by the respondent from the sale of her 250 shares of stock, down to and including the year 1920, was less than the March 1, 1913, value of the shares sold. The fact that some of the payments are spread over a series of years does not render the statute inoperative and cause something less to be restored, to wit, the supposed present value determined by mathematical formula of these future contingent payments. *Hitchcock v. Commissioner*, 44 F. (2d) 756, 757.

Before there is any taxable gain, the consideration must be received and must be cash, or readily reducible to cash. *Bedell v. Commissioner*, 30 F. (2d) 622, 624. The transaction here involved cannot be treated as a

closed and completed transaction until the promise to make the future payments is performed.

The expectation or prospect of profit does not give rise to a taxable transaction. The gain must be realized. *Lynch v. Turrish*, 247 U. S. 221, 230; *Safe Deposit & Tr. Co. v. Miles*, 273 Fed. 822, 825; *Weiss v. Stearn*, 265 U. S. 242, 252; *Lucas v. American Code Co.*, 280 U. S. 445, 449.

In the following cases on sales of property, the court found that the gain, if any, is postponed to the date of realization. *United States v. Schillinger*, 14 Blatch. 71; *United States v. Christine Oil Co.*, 269 Fed. 458; *Bourn v. McLaughlin*, 19 F. (2d) 148; *Tsivoglou v. United States*, 27 F. (2d) 564, affirmed, 31 F. (2d) 706.

The taxing statutes and regulations are simply aids in arriving at income and cannot be used to create income. *Taplin v. Commissioner*, 41 F. (2d) 454, 456.

The consideration consisting of a promise to make payments in the future, uncertain in amount, for a present transfer of stock on March 11, 1916, was not the equivalent of cash, and hence, the transaction was not a closed and completed one in 1916.

The question is whether any fair market value can be definitely ascertained to the extent that a taxpayer can be taxed for a profit merely because he is the promisee and taxed on that profit before performance. A value presupposes that it can be determined with substantial certainty and without undue complexity. Algebraic formulae for determining values are not lightly to be imputed to legislators. *Edwards v. Slocum*, 287 Fed. 651.

The existence of a so-called intrinsic value is not sufficient to support a fair market value for purposes of computing gain or loss. *Bourn v. McLaughlin*, 19 F. (2d) 148; *Tsivoglou v. United States*, 27 F. (2d) 564, affirmed, 31 F. (2d) 706.

The promise to pay in this case is so contingent, uncertain and indefinite that it cannot be considered the equivalent of cash or to have a "fair market value."

As to the interest in the payments bequeathed to Mrs. Logan, she received no taxable income until the amounts received by her exceeded the value at which they were included in the gross estate for federal estate taxation.

Even if the sale was a closed and completed transaction in 1916, the apportionment of each payment thereafter into capital and income, as made by the Board of Tax Appeals and the Commissioner in each year, is wrong.

Mr. Raymond B. Goodell, with whom *Mr. Walter M. Anderson* was on the brief, for Mrs. Bruce.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

These causes present the same questions. One opinion, stating the essential circumstances disclosed in No. 521, will suffice for both.

Prior to March, 1913, and until March 11, 1916, respondent, Mrs. Logan, owned 250 of the 4,000 capital shares issued by the Andrews & Hitchcock Iron Company. It held 12% of the stock of the Mahoning Ore & Steel Company, an operating concern. In 1895 the latter corporation procured a lease for 97 years upon the "Mahoning" mine and since then has regularly taken therefrom large, but varying, quantities of iron ore—in 1913, 1,515,428 tons; in 1914, 1,212,287 tons; in 1915, 2,311,940 tons; in 1919, 1,217,167 tons; in 1921, 303,020 tons; in 1923, 3,029,865 tons. The lease contract did not require production of either maximum or minimum tonnage or any definite payments. Through an agreement of stockholders (steel manufacturers) the Mahoning Company is obligated to apportion extracted ore among them according to their holdings.

On March 11, 1916, the owners of all the shares in Andrews & Hitchcock Company sold them to Youngstown Sheet & Tube Company, which thus acquired, among other things, 12% of the Mahoning Company's stock and the right to receive the same percentage of ore thereafter taken from the leased mine.

For the shares so acquired the Youngstown Company paid the holders \$2,200,000 in money and agreed to pay annually thereafter for distribution among them 60 cents for each ton of ore apportioned to it. Of this cash Mrs. Logan received $250/4000$ ths—\$137,500; and she became entitled to the same fraction of any annual payment thereafter made by the purchaser under the terms of sale.

Mrs. Logan's mother had long owned 1100 shares of the Andrews & Hitchcock Company. She died in 1917, leaving to the daughter one-half of her interest in payments thereafter made by the Youngstown Company. This bequest was appraised for federal estate tax purposes at \$277,164.50.

During 1917, 1918, 1919 and 1920 the Youngstown Company paid large sums under the agreement. Out of these respondent received on account of her 250 shares \$9,900.00 in 1917, \$11,250.00 in 1918, \$8,995.50 in 1919, \$5,444.30 in 1920—\$35,589.80. By reason of the interest from her mother's estate she received \$19,790.10 in 1919, and \$11,977.49 in 1920.

Reports of income for 1918, 1919 and 1920 were made by Mrs. Logan upon the basis of cash receipts and disbursements. They included no part of what she had obtained from annual payments by the Youngstown Company. She maintains that until the total amount actually received by her from the sale of her shares equals their value on March 1, 1913, no taxable income will arise from the transaction. Also that until she actually receives by reason of the right bequeathed to her a sum equal to its

appraised value, there will be no taxable income therefrom.

On March 1, 1913, the value of the 250 shares then held by Mrs. Logan *exceeded* \$173,089.80—the total of all sums actually received by her prior to 1921 from their sale (\$137,500.00 cash in 1916 plus four annual payments amounting to \$35,589.80). That value also exceeded original cost of the shares. The amount received on the interest devised by her mother was less than its valuation for estate taxation; also less than the value when acquired by Mrs. Logan.

The Commissioner ruled that the obligation of the Youngstown Company to pay 60 cents per ton had a fair market value of \$1,942,111.46 on March 11, 1916; that this value should be treated as so much cash and the sale of the stock regarded as a closed transaction with no profit in 1916. He also used this valuation as the basis for apportioning subsequent annual receipts between income and return of capital. His calculations, based upon estimates and assumptions, are too intricate for brief statement.* He made deficiency assessments according to the view just stated and the Board of Tax Appeals approved the result.

* In the brief for petitioner the following appears:

“The fair market value of the Youngstown contract on March 11, 1916, was found by the Commissioner to be \$1,942,111.46. This was based upon an estimate that the ore reserves at the Mahoning mine amounted to 82,858,535 tons; that all such ore would be mined; that 12 per cent (or 9,942,564.2 tons) would be delivered to the Youngstown Company. The total amount to be received by all the vendors of stock would then be \$5,965,814.52 at the rate of 60 cents per ton. The Commissioner's figure for the fair market value on March 11, 1916, was the then worth of \$5,965,814.52, upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6 per cent, with a provision for a sinking fund at 4 per cent. For lack of evidence to the contrary this value was approved by the Board. The value of the 550/4000 interest

The Circuit Court of Appeals held that, in the circumstances, it was impossible to determine with fair certainty the market value of the agreement by the Youngstown Company to pay 60 cents per ton. Also, that respondent was entitled to the return of her capital—the value of 250 shares on March 1, 1913, and the assessed value of the interest derived from her mother—before she could be charged with any taxable income. As this had not in fact been returned, there was no taxable income.

We agree with the result reached by the Circuit Court of Appeals.

The 1916 transaction was a sale of stock—not an exchange of property. We are not dealing with royalties or deductions from gross income because of depletion of mining property. Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation.

which each acquired by bequest was fixed at \$277,164.50 for purposes of Federal estate tax at the time of the mother's death.

“During the years here involved the Youngstown Company made payments in accordance with the terms of the contract, and respondents respectively received sums proportionate to the interests in the contract which they acquired by exchange of property and by bequest.

“The Board held that respondents' receipts from the contract, during the years in question, represented 'gross income'; that respondents should be allowed to deduct from said gross income a reasonable allowance for exhaustion of their contract interests; and that the balance of the receipts should be regarded as taxable income.”

When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was \$2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture.

“In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.” *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 184, 185. Rev. Act 1916, § 2, 39 Stat. 757, 758; Rev. Act 1918, c. 18, 40 Stat. 1057. Ordinarily, at least, a taxpayer may not deduct from gross receipts a supposed loss which in fact is represented by his outstanding note. *Eckert v. Commissioner of Internal Revenue*, ante, p. 140. And, conversely, a promise to pay indeterminate sums of money is not necessarily taxable income. “Generally speaking, the income tax law is concerned only with realized losses, as with realized gains.” *Lucas v. American Code Co.*, 280 U. S. 445, 449.

From her mother's estate Mrs. Logan obtained the right to share in possible proceeds of a contract thereafter to pay indefinite sums. The value of this was assumed to be \$277,164.50 and its transfer was so taxed. Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may

yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See *Burnet v. Whitehouse*, ante, p. 148.

The judgments below are

Affirmed.

UNITED STATES EX REL. McLENNAN *v.* WILBUR,
SECRETARY OF THE INTERIOR.

UNITED STATES EX REL. SIMPSON *v.* WILBUR,
SECRETARY OF THE INTERIOR, ET AL.

UNITED STATES EX REL. BARTON *v.* WILBUR,
SECRETARY OF THE INTERIOR.

UNITED STATES EX REL. PYRON *v.* WILBUR, SEC-
RETARY OF THE INTERIOR, ET AL.

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

Nos. 618, 676, 704, 743. Argued April 15, 16, 1931.—Decided May 18,
1931.

1. The provisions of the Mineral Leasing Act of February 25, 1920, plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion; also, the difference between applicants for mere privileges and those persons who, because of expenditures, or otherwise, deserved special consideration. P. 418.
2. Section 13 of this Act, by which the Secretary is "authorized" to grant prospecting permits looking to the discovery and exploitation of oil deposits belonging to the United States, is susceptible of the construction that it leaves the Secretary a discretion to reject, or refuse to receive, all applications for such permits, by a general order made in pursuance of a policy of the President to conserve such deposits. P. 419.

So held in view of the words of the section; the belief, widely accepted when the Act was passed, that decline of petroleum production in the United States was imminent; the enormous increase that actually occurred and the present surplus; the general powers of the Secretary over the public lands, and the right of the President to withdraw them from private appropriation.

3. Mandamus will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. P. 420.

46 F. (2d) 217, 224, affirmed.

CERTIORARI, *post*, p. 811, to review judgments reversing judgments for mandamus, in suits brought against the Secretary of the Interior and the Commissioner of the General Land Office by applicants for permits to prospect for oil and gas.

Messrs. Lewis Edwin Hoffman and Chester I. Long for McLennan.

Mr. Homer Hendricks, with whom *Messrs. Donald V. Hunter and James C. Sheppard* were on the brief, for Simpson.

Mr. James Conlon, with whom *Mr. Charles F. Breen* was on the brief, for Barton.

Mr. James G. Leovy, with whom *Messrs. John W. Fisher, A. W. Gregg, and Weston Vernon, Jr.*, were on the brief, for Pyron.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher, Messrs. Claude R. Branch and Aubrey Lawrence*, Special Assistants to the Attorney General, and *Paul D. Miller* were on the brief, for respondents.

Messrs. James A. Greenwood, Attorney General of Wyoming, and *Clarence L. Ireland*, Attorney General of

Colorado, with whom *Messrs. L. A. Foot*, Attorney General of Montana, *George P. Parker*, Attorney General of Utah, *E. K. Neumann*, Attorney General of New Mexico, and *Peter Q. Nyce* were on the brief, as *amici curiae*, by special leave of Court.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

All these causes turn on the same point of law; the records disclose facts not materially different; one opinion will suffice.

The Act of Congress approved February 25, 1920, 41 Stat. 437, intended to promote certain mining operations, contains thirty-eight sections.

Section 1. "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, . . . shall be subject to disposition in the form and manner provided by this Act"

"Sec. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or

gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. . . .”

“Sec. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: . . .”

Section 9 authorizes the Secretary to lease lands containing deposits of phosphates under such general regulation as he may adopt. By § 17 unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field “may be leased by the Secretary of the Interior to the highest responsible bidder, . . .” such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, etc. Section 21 authorizes the Secretary to lease deposits of oil shale under such regulations as he may prescribe, for indefinite periods.

Section 2 declares that the Secretary “is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, . . .” and thereafter “shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant. . . .”

“Sec. 22. That any bona fide occupant or claimant of oil or gas bearing lands in the Territory of Alaska, who, or whose predecessors in interest, prior to withdrawal had

complied otherwise with the requirements of the mining laws, but had made no discovery of oil or gas in wells and who prior to withdrawal had made substantial improvements for the discovery of oil or gas on or for each location or had prior to the passage of this Act expended not less than \$250 in improvements on or for each location shall be entitled, upon relinquishment or surrender to the United States within one year from the date of this Act, or within six months after final denial or withdrawal of application for patent, to a prospecting permit or permits, lease or leases, under this Act covering such lands, . . .”

Section 23. That the Secretary “is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium . . .”

These provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the difference between applicants for mere privileges and those persons who because of expenditures, or otherwise, deserved special consideration.

The petitioners, acting separately and as directed by the general rules and regulations, either filed or sought to file applications for permits to prospect for oil and gas under § 13. In order to effectuate the conservation policy of the President, the Secretary of the Interior by a general order either rejected or refused to receive their applications. Thereupon, these proceedings were begun in the Supreme Court, District of Columbia. They seek writs of mandamus to compel the Secretary to receive or reinstate the applications and act upon each according to its merits.

Answering, the Secretary admitted issuance of the general order and action thereunder. All this he claimed was done in pursuance of the authority vested in him by law. The Supreme Court of the District held against him and ordered receipt or reinstatement of petitioner's applications followed by definite action thereon. The Court of Appeals reached a different conclusion and reversed the judgments.

The answers aver "that under the Act, [1920] the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant." Having examined the Act we cannot say that by any clear and indisputable language it refutes his position. Certainly, there is ground for a plausible, if not conclusive, argument that so far as it relates to the leasing of oil lands it goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare.

It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. It was passed when according to a widely accepted view decline of petroleum production in the United States was imminent. In fact, there has been an enormous increase and a consequent troublesome surplus. Looking only at its words one may interpret § 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the public lands as guardian of the people. § 441, R. S.; *United States v. Grimaud*, 220 U. S. 506; *Williams v. United States*, 138 U. S. 514; *Knight v. U. S. Land Assn.*, 142 U. S. 161; also the right of the President to withdraw public lands from private appropriation. *United States v. Midwest Oil Co.*, 236 U. S. 459; Withdrawal Act, 1910, 36 Stat. 847.

Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable. *U. S. ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 308; *Louisiana v. McAdoo*, 234 U. S. 627, 633; *Work v. Rives*, 267 U. S. 175.

The judgments under review must be

Affirmed.

CARBICE CORPORATION OF AMERICA *v.* AMERICAN PATENTS DEVELOPMENT CO. ET AL.

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

No. 54. Reargued April 27, 1931.—Decided May 18, 1931.

Patent No. 1,595,426, for a refrigerating transportation package, consisting of an outer, insulating container, with the food substance to be refrigerated (e. g. ice cream) so packed therein as to surround a quantity of solid carbon dioxide in its separate insulating container and thus to act, with the evolved gaseous dioxide, as a protection for the solid dioxide against exterior heat, the gas also serving to displace air from the food and refrigerate it,—*held* void for want of novelty and invention.

REHEARING of the cause reported *ante*, p. 27, limited to the validity of the patent.

Mr. Samuel E. Darby, Jr., for petitioner.

Mr. Charles Neave for respondents. •

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Circuit Court of Appeals held the patent valid and infringed. 38 F. (2d) 62. In our opinion delivered

March 9, 1931, we found it unnecessary to determine the validity of the patent, because we held that the bill should be dismissed on the ground that the owner of a patent may not limit its use so as to require that unpatented materials employed in practicing the invention shall be purchased only from the licensor, *ante*, p. 27. On March 16, 1931, the Carbice Corporation petitioned that the Court rule also on the validity of the patent. The reason assigned was the inauguration by the Dry Ice Corporation of a campaign of intimidation against customers of the Carbice Corporation by releasing to the public press a statement that the validity of the patent as sustained by the Court of Appeals had not been disturbed; that the true patent monopoly had in no way been limited by this Court; that we had indicated that the proper way to enforce the patent monopoly is by directly suing those who use solid carbon dioxide in the patent combination without a license; and that the Dry Ice Corporation would immediately bring such a suit. A re-argument, limited to the question of the validity of the patent, was ordered. The respondents petitioned for a rehearing on the issue determined in our former opinion. The latter petition was denied.

The refrigerating transportation package which is specified and claimed in the patent in suit is described in the earlier opinion, *ante*, p. 27. The alleged invention is for the locational arrangement of materials within a container. Whether a locational arrangement within a structure can ever be patented as a manufacture need not be determined. Nor need we consider whether the patent, as issued, contained a sufficient disclosure of the alleged invention. For the combination in suit lacks patentable invention and novelty. Each of the elements—refrigerant, material to be refrigerated, and container—performs its function in a known way. Long prior to the date of the claimed invention, it was known that solid carbon dioxide, which has a temperature of 110

degrees below zero, is a refrigerant; that when it "melts" it passes directly into a dry gas heavier than air, of like low temperature, which may serve as a refrigerant until its temperature rises to that of the outside air. It was known also that a frozen article—be it ice cream or solid carbon dioxide—will remain frozen longer if insulated; and that paper is an insulator. It was not invention to conclude that a cake of the solid dioxide wrapped in paper would remain solid longer if also surrounded by ice cream, than if placed in more immediate proximity to the walls of the container and thus to the outer air; or to conclude that the gas, being heavier than air would, as generated, drive the air out of the container, and thus serve as an additional insulator. Compare *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 72-73; *Dreyfus v. Searle*, 124 U. S. 60, 63; *Wilson v. Janes*, 3 Blatch. 227.

Moreover, the structural device of surrounding the refrigerant by the article to be refrigerated had been shown in the Mosler and Ladewig refrigerating butter-box, United States Patent No. 236,906, issued January 25, 1881; and in Rumpel's portable lunch box, United States Patent No. 1,130,932, issued March 9, 1915. It is true that in these prior art structures the refrigerant employed was not completely surrounded by the refrigerated materials, as the top or bottom of the ice container was usually left exposed. This was done to permit access to the ice chamber for the purpose of removing water. Since carbon dioxide sublimates directly into a dry gas, such access obviously need not be provided, and the refrigerant may be surrounded on all four sides. This difference is unimportant. These references suffice to render the patent invalid also because of anticipation without considering the additional defense of prior use.

Syllabus.

ARIZONA *v.* CALIFORNIA ET AL.

No. 19, original. Argued March 9, 10, 1931.—Decided May 18, 1931.

1. The United States has power to construct a dam across a navigable river for the purpose of improving navigation, and need not first obtain approval of its plans by the State in which the dam is to be located, even though this be expressly required of it by a statute of the State. P. 451.
2. On a motion to dismiss, equivalent to a demurrer, an allegation in the bill that a river is not and never has been navigable is not taken as an admitted fact if the court judicially knows the contrary. P. 452.
3. Judicial notice taken (from the evidence of history) that a large part of the Colorado River south of Black Canyon in Arizona was formerly navigable, and that the main obstacles to navigation have been the accumulations of silt coming from the upper reaches of the river system, and the irregularity in the flow due to periods of low water; and (from reports of Committees of Congress recommending the project here in question) that, in the opinion of the government engineers, the silt will be arrested by the dam, and, through use of the stored water, irregularity in the flow below Black Canyon can be largely overcome, and navigation for considerable distances both above and below the dam will become feasible. P. 453.
4. Commercial disuse of a navigable river, resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an abandonment of it as a navigable river or prohibit future exertion of federal control over it. P. 454.
5. The Boulder Canyon Project Act, December 21, 1928, authorizes the Secretary of the Interior, at the expense of the United States, to construct at Black Canyon on the Colorado River, a dam, a storage reservoir, and a hydroelectric plant; provides for their control, management, and operation by the United States; and declares that the authority is conferred "subject to the terms of the Colorado River Compact," "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking." The compact referred to is an agreement for the apportionment of the water of the river and its tributaries, entered into by all the States

in which they flow, except Arizona. The compact declares that "inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes." The compact is approved by the Act. This was a suit by Arizona, against the Secretary of the Interior and the States which made the compact, to enjoin operations under the Act as invasions of Arizona's interests in the river and as threatening existing and future use of the water within her limits, principally for irrigation.

Held:

(1) The Court cannot inquire into the motives of the members of Congress in passing the Act. P. 455.

(2) As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, the erection and maintenance of the dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for the Court to determine. *Id.*

(3) The fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred by the Act, even if those other purposes, standing alone, would not have justified an exercise of Congressional power. *Id.*

(4) Although the authority conferred by the Act is therein stated to be "subject to the Colorado River Compact," which instrument would make the improvement of navigation subservient to all other purposes, yet the specific statement of primary purpose in the Act governs the general references to the compact; and the Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose. P. 456.

(5) Possibility that the power to regulate navigation may be abused is not an argument against its existence. 457.

(6) There is no occasion to decide whether the authority to construct the dam and reservoir might not also have been constitutionally conferred for the specified purpose of irrigating public lands of the United States, or for the specified purpose of regulating the flow and preventing floods in this interstate river; or as a means of conserving and apportioning its waters among the States equitably entitled thereto, or for the purpose of performing international obligations. P. 457.

6. In support of the prayer for injunction, Arizona alleges that the mere existence of the Act will invade her quasi-sovereign rights in respect of the appropriation of waters within or on her borders; that the State has great need of further appropriations from the river for irrigation; that vested rights of appropriation under her laws can be acquired only by diverting the water and applying it to beneficial use; that, owing to topographical conditions, this can only be accomplished through large and costly projects, involving large-scale financing that will be impossible unless it clearly appear, at or before the time of constructing the requisite works, that vested rights to permanent use of the water will be acquired; that actual projects have been planned and approved under the State's laws which look to appropriation of a large part of the unappropriated water of the river, and which would irrigate an immense area in the State, including a large area of state land; that the needed appropriations will be prevented because, under the Act, it is proposed to store the entire unappropriated flow at the dam, and Arizona, and those claiming under her, will not be permitted to take water from the reservoir, except upon agreeing that the use shall be subject to the compact, by the terms of which they will not be entitled to appropriate any water in excess of that to which there are now perfected rights in Arizona; and that the Act prevents Arizona, and those claiming under her, from acquiring necessary rights of way over lands of the United States for the irrigation of Arizona land, by subjecting such rights to the compact. *Held* that there is no ground for an injunction, because:

(1) The contention is based not upon any actual or threatened impairment of Arizona's rights but upon assumed potential invasions. P. 462.

(2) The Act does not purport to affect any legal right of the State or limit, in any way, the exercise of her legal right to appropriate water. *Id.*

(3) Section 18 of the Act declares that nothing in it "shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified" by interstate agreement. As Arizona has made no such agreement, the Act leaves her legal rights unimpaired. *Id.*

(4) There is no allegation of definite physical acts of present or future interference with the exercise of Arizona's right to appropri-

ate water by diversions above the dam, or with enjoyment of water so appropriated; nor any specific allegation of physical acts impeding exercise of her right to make future appropriations by diversions below the dam, or limiting enjoyment of rights so acquired, unless it be by preventing an adequate flow in the river at any necessary point of diversion. P. 462.

(5) If by operations at the dam, when completed, any then perfected right of Arizona, or of those claiming under her, should hereafter be interfered with, appropriate remedies will be available. P. 463.

(6) There is no threatened physical interference with irrigation projects approved under the Arizona law, and the Act interposes no legal inhibition on their execution. *Id.*

(7) There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated. P. 464.

(8) This Court cannot issue declaratory decrees. *Id.*

(9) Arizona has no constitutional right to use, in aid of appropriation, any land of the United States, and cannot complain of the provision conditioning the use of such public land. *Id.*

(10) The bill should be dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under her, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same. *Id.*

HEARING upon motions to dismiss a bill for an injunction, which was filed in this Court by the State of Arizona. The parties defendant were Ray Lyman Wilbur, Secretary of the Interior, and the States of California, Nevada, Utah, New Mexico, Colorado, and Wyoming.

Solicitor General Thacher, with whom *Mr. Robert P. Reeder* was on the brief, for Wilbur, Secretary of the Interior.

The United States is an indispensable party. *Morrison v. Work*, 266 U. S. 481, 485; *Kansas v. Colorado*, 185 U. S. 125; *Minnesota v. Hitchcock*, 185 U. S. 373, 387; *Oregon v. Hitchcock*, 202 U. S. 60, 68, 69; *Louisiana v.*

Garfield, 211 U. S. 70, 78; *Louisiana v. McAdoo*, 234 U. S. 627; *New Mexico v. Lane*, 243 U. S. 52; *Wells v. Roper*, 246 U. S. 335; *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485; *Texas v. Interstate Commerce Comm.*, 258 U. S. 158, 164; *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, 382. See also *Goldberg v. Daniels*, 231 U. S. 218, 221; *International Postal Supply Co. v. Bruce*, 194 U. S. 601. The United States may not be sued even by a State without its consent. *Kansas v. United States*, 204 U. S. 331, 342.

No vested rights of the complainant or of any of her citizens will be invaded by the execution of the Act. By their own terms, both the Act and the compact are subordinated to all such rights; nor is there any interference, actual or threatened, with the right of Arizona, or her inhabitants, to make appropriation from the unappropriated waters of the Colorado River.

On the contrary, California has agreed to limit the total appropriations to 4,900,000 acre-feet, leaving 3,600,000 to satisfy present diversions from the main stream in Arizona not exceeding 600,000 acre-feet. The balance of 3,000,000 acre-feet in the main stream thus will remain to satisfy present and future uses in Nevada and future appropriations in Arizona. If Arizona's contentions are correct, the entire unappropriated flow of the stream is now and will continue until appropriation by others to be subject to appropriation by her citizens without regard to the terms of the compact to which she is not a party. Until the dam has been built and the right of the State of Arizona or her citizens to make appropriations adequate to her existing needs has been invaded, or is presently threatened, there can be no basis for relief.

The Act and the compact expressly recognize all existing rights to take water from the Colorado River and its tributaries.

Where the thread of the river constitutes the boundary between two States, neither State may reserve to itself all the water from the stream for future appropriation.

The fact that a neighbor State proposes to divert to another watershed a portion of the water to which it is entitled is not material. Such diversions have been recognized as valid by this Court (*Wyoming v. Colorado*, 259 U. S. 419, 466; and see *Missouri v. Illinois*, 200 U. S. 496, 526), and they are so recognized by the six States parties to the Colorado River Compact.

So far as the United States proposes to divert water not theretofore appropriated, and to use it for the reclamation and irrigation of public lands, it cannot be restrained by Arizona within whose borders those lands are situated and under whose Organic Act such rights were expressly reserved. *United States v. Rio Grande Dam Co.*, 174 U. S. 690, 703; Enabling Act, c. 310, §§ 20, 28, 36 Stat. 557, 570, 575. The United States may make use of its property for such purposes regardless of the wishes of the State. *Winters v. United States*, 207 U. S. 564, 577. See also *Stearns v. Minnesota*, 179 U. S. 223, 245; *Utah Power & L. Co. v. United States*, 243 U. S. 389, 403, 404; *United States v. Holt State Bank*, 270 U. S. 49, 54, 55; *Hunt v. United States*, 278 U. S. 96, 100.

And so far as Congress orders the erection of structures in a stream for the facilitation of interstate navigation or for flood control of such a stream, it is empowered to do so by the Constitution. *Gibson v. United States*, 166 U. S. 269; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Cubbins v. Mississippi River Comm.*, 241 U. S. 351, 369. See also *Sanitary District v. United States*, 266 U. S. 405, 426.

Where the land to be protected by flood control is the property of the United States, Congress undoubtedly has power to regulate the flow of the stream.

It follows that the complaint, which merely alleges that the United States and other States in the Colorado River Basin are proposing to appropriate the unappropriated waters of the Colorado River Basin to beneficial uses, cannot be sustained when no actual or presently threatened invasion of any existing or vested right is alleged. Upon the allegations of the bill it is apparent that this suit begins where the suit brought by Kansas against Colorado ended—that is, with failure to show any injury, actual or threatened, which can justify the intervention of a court of equity. *Kansas v. Colorado*, 206 U. S. 46, 117.

This Court has said repeatedly that it will not consider merely abstract questions. *New York v. Illinois*, 274 U. S. 488, 489, 490; *New Jersey v. Sargent*, 269 U. S. 328.

Congress has power under the commerce clause to order the construction of the dam at Black Canyon.

The navigability of the Colorado between Laguna Dam and Callville has been repeatedly recognized by Congress and by territorial and state legislatures. Until this bill was filed its navigability, so far as we have been able to ascertain, has never been questioned. The authorities in Arizona prior to the commencement of this litigation have consistently asserted its navigability. And so we submit that its navigability below the proposed dam is a matter so notorious as not to require proof, and to be clearly within the knowledge of the Court.

The aid to be given by the dam in improving navigability is obvious. The reservoir will hold back water during time of flood and will allow an increased minimum flow at other seasons of the year. The silt which is flowing along with the water at the present time will be retained in the reservoir, and the desilted water, flowing with regularity in the channel of the lower river, will steadily improve the condition of that channel.

This Court may take judicial notice of the navigability of the stream. *The Montello*, 11 Wall. 411, 414; *Muller v. Oregon*, 208 U. S. 412, 421; *The Planter*, 7 Pet. 324, 342; *Brown v. Piper*, 91 U. S. 37, 42; *Brown v. Spilman*, 155 U. S. 665, 670; *United States v. Thornton*, 160 U. S. 654, 658, 659; *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 174 U. S. 674, 683; *United States v. Rio Grande Dam Co.*, 174 U. S. 690, 696-698; *Cubbins v. Mississippi River Comm.*, 241 U. S. 351, 367; *Carroll v. United States*, 267 U. S. 132, 159, 160.

When facts are averred which run counter to facts of which the Court takes judicial notice, the averments are disregarded. *Jones v. United States*, 137 U. S. 202, 215; *Pearcy v. Stranahan*, 205 U. S. 257, 263; *Middlesex Transp. Co. v. Pennsylvania R. Co.*, 82 N. J. Eq. 550, 553; *Heiskell v. Knox County*, 132 Tenn. 180, 186; see also *McSween v. Live Stock Board*, 97 Fla. 750, 774.

Even though there is but little if any transportation on the river at the present time, Congress has not lost its power to improve the stream. *Economy Light & Power Co. v. United States*, 256 U. S. 113, 124.

In the face of its mandatory declaration of purpose, to say that purposes other than the improvement of navigation are to be served by the construction of the dam and reservoir will not suffice to defeat the Act as one beyond the power of Congress. Congress might properly give weight to the fact that by the same measures it would secure additional desirable results without thereby infringing upon any rights of the complainant.

It is true that in the compact the States, which were considering the river as a whole, said that it had ceased to be navigable and that the use of its waters for purposes of navigation should be subservient to other uses; but the power of Congress to deal with it as a navigable stream was clearly recognized so far as the river below the dam is concerned. Congress has declared that its navigability

is to be improved and its floods controlled by the construction of the dam. Other uses of the water may be made to the extent which Congress has authorized in the Act; but such uses are not inconsistent with the intent of Congress to improve navigability, for Congress doubtless knew that while provision is made for appropriations of water into the distant future, there will always be a substantial flow of water in the lower reaches of the river if only to satisfy the rights of appropriators in southern Arizona, in the Imperial Valley of California, and, if any, in Mexico. And Congress knew, of course, that the use of the water for the generation of electrical energy would not reduce the flow of the stream.

Regardless of the power of Congress under the commerce clause, the Act is constitutional. The United States is the owner of nearly six hundred square miles of irrigable public lands and Indian reservations along and near the shores of the Colorado River in Arizona and in California. As such owner, it is entitled to impound water, to regulate its flow, and to consume a portion of it. *United States v. Rio Grande Co.*, 174 U. S. 690, 703.

The State of California, whose jurisdiction extends to the middle of the Colorado River, is entitled to receive water from that stream. It is submitted that the Government may properly release to the State as much water as the State is entitled to appropriate.

The flow of water is to be regulated and the water desilted, not only to improve navigation but in order to save the Yuma, Palo Verde, and Imperial Valleys from destruction.

Even where Congress has no power to enact regulatory legislation as to a subject matter, it may make appropriations for the public welfare. It has done so ever since the earliest years of the country's history. Cf. *Massachusetts v. Mellon*, 262 U. S. 447. Even if the dam were to be erected solely in order to save the Imperial Valley from

destruction, the Boulder Canyon Project Act would be constitutional.

Mr. U. S. Webb, Attorney General of California, with whom *Messrs. W. B. Mathews* and *Charles L. Childers* were on the brief, for California.

Congress is presumed to have acted with full knowledge of the subject matter and in good faith. Its conclusion is not to be questioned. *United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 544; *Chesapeake & Pot. Tel. Co. v. Manning*, 186 U. S. 238, 245; *Wisconsin v. Duluth*, 96 U. S. 379.

The means which Congress may adopt to a constitutional end is final.

Congress has absolute power to determine what is or is not an obstruction of or an improvement to navigation.

The Colorado River is so notoriously navigable that the Court will take judicial notice of that fact; but even if it be not navigable at all, still the Act will not fail. Congress has declared its intention to improve the navigability of this stream. The commerce clause of the Constitution says nothing about the improvement of the navigability of navigable streams. It refers to the regulation of commerce. Under this clause, Congress has been sustained in the authorization of the construction of a canal, *Wisconsin v. Duluth*, 96 U. S. 379; in the building of a railroad, *Wilson v. Shaw*, 204 U. S. 24. If this stream is not now navigable, Congress has authority to make it so. If private property is to be taken or injured, ample authority is given in the Act itself for the exercise of eminent domain.

The State has a right, in her quasi-sovereign capacity, to sue or defend for the protection of her people, but she must first show that her people or their property are in immediate need of such protection. Until that is

shown, no case or controversy of which the Court will take judicial cognizance is presented.

Arizona does not claim to own the running water, nor could she do so. Only such water as is taken into possession and control is subject to ownership. Control of these waters is an exercise of the police power, which is another term for the power of government. *Mutual Loan Co. v. Martell*, 222 U. S. 225. It is an exercise of political power.

The right of the United States to exercise control over the Colorado River for improvement of navigation or otherwise is also the exercise of political power, *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Louis Oyster Co. v. Briggs*, 229 U. S. 82, 88. It is thus a conflict between the political power of the State and the political power of the Nation.

The Arizona Enabling Act and Constitution reserved to the Nation a selection of lands along the river by the Government for power purposes, which was made, and includes the lands at Black Canyon. They also reserved to the United States all rights and powers for carrying out the Reclamation Act "to the same extent as if this State had remained a territory."

Arizona tells the Court she has repealed this section of her Constitution. Such attempted repeal, however, is wholly ineffective. *Stearns v. Minnesota*, 179 U. S. 223, 244.

The bill does not allege the non-existence of a flood menace on the lower river and below Black Canyon. The United States is the owner of nearly 600 square miles of irrigable public lands adjacent to the lower river, and below Black Canyon.

It has inherent power to protect its own property. The United States is the owner of the Laguna Dam; it has constructed the Yuma Reclamation Project at a cost of many millions of dollars; it has constructed and is

maintaining extensive levee protective works along the lower river. These works may all be destroyed by flood. Storage and regulation of the flow of the river is the only means of permanent protection of these properties from floods. In the particular case the United States clearly has the right to construct flood control works under the commerce clause.

The United States has the absolute power and control of the public lands, as a proprietor and as a sovereign.

Mr. Thomas H. Gibson, with whom *Messrs. John S. Underwood*, Attorney General of Colorado, *E. K. Neumann*, Attorney General of New Mexico, *Gray Mashburn*, Attorney General of Nevada, *Clarence L. Ireland*, *Delph E. Carpenter*, *L. Ward Bannister*, and *Francis C. Wilson* were on the brief, for Colorado, New Mexico, and Nevada; and *Messrs. George P. Parker*, Attorney General of Utah, and *James A. Greenwood*, Attorney General of Wyoming, with whom *Messrs. William W. Ray* and *William O. Wilson* were on the brief, for Utah and Wyoming.

The rights against the alleged invasion of which the injunction is prayed, are purely political, upon the existence of, and alleged injury to, which the complainant attempts to raise a purely political issue. Of such an issue this Court cannot take judicial cognizance.

Aside from these political rights, no private, civil, personal or property right of the State of Arizona or of anyone else is set forth or sought to be protected from injury.

No issuable fact, either in respect of the navigability of the Colorado River or the reclamation of public lands, is raised by the bill.

The allegations in respect of the navigability of the stream and the reclamation of public lands were made for the sole purpose, and with the specific intent, of laying a foundation for questioning the motives and purposes of Congress in enacting the Act. The actual facts,

of which this Court can take judicial notice, are that the stream is navigable in fact and in law. *Jones v. United States*, 137 U. S. 202.

The Court is bound by the conclusive presumption that any facts essential to the validity of the Act did, in fact, exist at the time of its enactment and that if any special finding of those facts was required to warrant the passage of the Act, for the purposes of this case, the fact that Congress enacted it and in so doing declared its purpose to be the improvement of navigation, is the equivalent of such a finding. *United States v. Des Moines*, 142 U. S. 544, 545; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 104; 6 R. C. L. 112, 113, 114.

The complaint is so fatally defective as to require dismissal with prejudice.

The Act is constitutional. The sections impressing upon the management of the Boulder Canyon Project and its water-users the interbasinal division of water made by the compact, and regulating the use of the public lands of the two Basins, are valid as an exercise of the power of Congress to regulate the use and to dispose of the property of the United States. Constitution, Art. IV, § 3; *Irvine v. Marshall*, 20 How. 558, 561-562; *Gibson v. Choteau*, 13 Wall. 92, 99; *Camfield v. United States*, 167 U. S. 518-524, 525-6; *Stearns v. Minnesota*, 179 U. S. 223; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126; *Kansas v. Colorado*, 206 U. S. 46, 92; *Light v. United States*, 220 U. S. 523, 536-7; *United States v. Midwest Oil Co.*, 236 U. S. 459, 475; *Utah Power & L. Co. v. United States*, 243 U. S. 389, 403-5; *Oregon & Cal. R. Co. v. United States*, 243 U. S. 549, 553; *McKelvey v. United States*, 260 U. S. 353, 358-9; *United States v. Alford*, 274 U. S. 264, 267; *Sinclair v. United States*, 279 U. S. 263, 297; *United States v. Hanson*, 167 Fed. 881, 883-4.

Arizona is not a party to the Colorado River Compact and is not in a position to question its constitutionality.

The compact is valid and constitutional. It is necessary to prevent litigation, strife and turmoil throughout the entire Colorado River Basin and for protection of the future development and general welfare of the six approving States. It assures harmonious coöperation between federal and state governments.

The States have power to enter into compacts or agreements with other States or with the United States. *Poole v. Fleeger*, 11 Pet. 185, 209–210; *id.* (Baldwin, J.) Appendix to 11 Pet. pp. 170a, 174–176; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725–731; *Stearns v. Minnesota*, 179 U. S. 223, 245; *Virginia v. Tennessee*, 148 U. S. 503; *Holmes v. Jennison*, 14 Pet. 540, 570; *Washington v. Oregon*, 214 U. S. 205, 218; *United States v. Texas*, 143 U. S. 621, 646; s.c. 162 U. S. 1.

Consent of Congress having been obtained, the States are, “in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the States as they were before . . . whereby their compacts became of binding force . . . operating with the same effect as a treaty between sovereign powers,” and “became conclusive upon all the subjects and citizens thereof, and bind their rights.” *Rhode Island v. Massachusetts*, 12 Pet. 657, 725. See *Poole v. Fleeger*, 11 Pet. 185, 209–210.

Consent of Congress may be obtained either before or after conclusion of the compact and may be express or implied. *Wharton v. Wise*, 153 U. S. 155, 158, 159; *Virginia v. Tennessee*, 148 U. S. 503, 521, 525; *Virginia v. West Virginia*, 11 Wall. 39; *Pennsylvania v. Wheeling Co.*, 13 How. 518; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Poole v. Fleeger*, 11 Pet. 185, 209–210; *id.* (Baldwin, J.) Appendix to 11 Pet. pp. 170a, 174–176; *Green v. Biddle*, 8 Wheat. 1, 86.

No form of compact is required. A compact may be in form of a writing subscribed by the agreeing States, or in form of concurrent legislation or by any other method. The present compact, consisting of an approved written document and concurring Acts of the Legislatures of the six approving States and of Congress, constitutes a valid compact even though the language used in the several Acts may vary. *Olin v. Kitzmiller*, 259 U. S. 260; *Wharton v. Wise*, 153 U. S. 155, 168; *Virginia v. Tennessee*, 148 U. S. 503, 517; *Washington v. Oregon*, 214 U. S. 205, 218; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725-731; *Holmes v. Jennison*, 14 Pet. 540, 570.

The compact involves subject matter within the jurisdiction of the contracting States, and a valid and constitutional exercise of their sovereignty. *Wyoming v. Colorado*, 259 U. S. 419; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 354-357; *Kansas v. Colorado*, 185 U. S. 125, s.c. 206 U. S. 46; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237-8; *Richey Co. v. Miller & Lux*, 218 U. S. 258; *Missouri v. Illinois*, 180 U. S. 208, s.c. 200 U. S. 496; *Gutierrez v. Albuquerque L. & L. Co.*, 188 U. S. 545, 552, 553; *Shively v. Bowlby*, 152 U. S. 1.

The State of Arizona may accept or reject the compact, at its election, but the compact is now effective among the six approving States and the United States. Appropriations of funds by Congress since approval of the compact have "signified the consent of that body to its validity." *Green v. Biddle*, 8 Wheat. 1, 26.

The compact binds the United States, its rights "in or to the waters of the Colorado River and its tributaries," and its property within the Colorado River drainage. See § 13, pars. b, c, and d, Boulder Canyon Project Act. It binds and is conclusive upon the six approving States, their citizens and inhabitants and their rights and property within the Colorado River Basin. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Kansas v. Colorado*,

206 U. S. 46, 98; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237-8; *Richey Co. v. Miller & Lux*, 218 U. S. 258, 261; *Virginia v. Tennessee*, 148 U. S. 503, 525.

Rights vesting under the compact are protected by the Constitution from impairment. *Olin v. Kitzmiller*, 259 U. S. 260; *Green v. Biddle*, 8 Wheat. 1; *Hawkins v. Barney*, 5 Pet. 457; *Stearns v. Minnesota*, 179 U. S. 223; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Tucker v. Ferguson*, 22 Wall. 143, 155.

The compact is conclusive with respect to the subject matter. Its construction is a judicial question. *Poole v. Fleeger*, 11 Pet. 185, 209-210; *id.* (Baldwin, J.), Appendix to 11 Pet. pp. 170a, 175-6; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Sim v. Irvine*, 3 Dall. 425, 454; *Marlatt v. Silk*, 11 Pet. 1, 2, 18; *Burton v. Williams*, 3 Wheat, 529, 533.

Arizona has not approved the compact and is not bound by its provisions. The enforcement of the compact among the approving States will not injure Arizona. It is inoperative as regards that State, and will remain so until approved by the state legislature.

Messrs. *Dean G. Acheson* and *Clifton Mathews*, with whom *Mr. K. Berry Peterson*, Attorney General of Arizona, was on the brief, for Arizona.

This is not a suit against the United States. *Philadelphia Co. v. Stimson*, 223 U. S. 605; *United States v. Lee*, 106 U. S. 196; *Belknap v. Schild*, 161 U. S. 10, 16-18; *Scranton v. Wheeler*, 179 U. S. 141, 152, 153; *American School v. McAnnulty*, 187 U. S. 94, 107-111; *Lane v. Watts*, 234 U. S. 525, 536-540; *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 151, 152; *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 238; *Little v. Barreme*, 2 Cranch 170, 177-179; *Noble v. Union River Logging Ry. Co.*, 147 U. S. 165, 171, 172; *Wm. Cramp & Sons Co. v. International Curtis Marine Turbine Co.*, 246 U. S. 28,

40; *Ex parte Young*, 209 U. S. 123, 149-161; *Truax v. Raich*, 239 U. S. 33; *Public Service Co. v. Corboy*, 250 U. S. 153, 159; *Looney v. Crane Co.*, 245 U. S. 178, 191.

The bill presents a justiciable controversy within the jurisdiction of this Court.

The right of Arizona to control the appropriation and use of waters within its boundaries, including the erection therein of storage and diversion works, and to preserve such water and the use thereof for its people, are rights which the State may protect by suit in this Court. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Kansas v. Colorado*, 206 U. S. 46, 99; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355; *Missouri v. Holland*, 252 U. S. 416, 431; *Trenton v. New Jersey*, 262 U. S. 182; *New York v. New Jersey*, 256 U. S. 296, 301-302; *Colorado v. Toll*, 268 U. S. 228, 230-231.

The standing of Arizona to assert such rights of quasi-sovereignty in this Court is in no way diminished by the fact that the Colorado River flows within or upon the borders of other States as well as Arizona. *Kansas v. Colorado*, 206 U. S. 46; *Wyoming v. Colorado*, 259 U. S. 419; *Bean v. Morris*, 221 U. S. 485.

These rights are not political rights, beyond the cognizance of this Court. *Georgia v. Stanton*, 6 Wall. 50; *Massachusetts v. Mellon*, 262 U. S. 447.

Defendant Wilbur threatens to invade the quasi-sovereign rights of Arizona by building a dam within its jurisdiction and diverting and using water from its jurisdiction in violation of its laws. Obvious and fundamental considerations of preserving and wisely administering the greatest resource of an arid State led to the enactment of these laws. They secure interests of the State in persons and property as vital as any that it has. If the bill stated no more than that acts of this defendant, done and threatened to be done in Arizona, under a statute which was an unconstitutional interference with

rights reserved to the State, invaded the sovereign rights of the State in the waters within its jurisdiction in contravention of its will manifested in statutes, it would be a reasonable and proper means of asserting the quasi-sovereign rights of the State. *Missouri v. Holland*, 252 U. S. 416; *Colorado v. Toll*, 268 U. S. 228; *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460.

Defendant Wilbur also threatens to prevent any use in Arizona of unappropriated Colorado River water now flowing there, and, at the same time, to deliver such water for use in other States under contracts, adverse to Arizona, for permanent service.

The Act, in § 5, provides that: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." The contracts are to be made by the Secretary of the Interior, are to impose, except upon users in the Imperial and Coachella Valleys in California, such charges as he may determine, and are to provide that all use of water so permitted is subject to the Colorado River compact. Section 8 (a) of the Act and the defendant's water regulations explicitly so require.

Under the compact the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III (a). The Colorado brief contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. For the purposes of the case it makes little difference whether the apportionment to the Lower Basin is 7,500,000 or 8,500,000 acre-feet per annum. The existing appropriations of 6,500,000 acre-feet and the threatened delivery of 1,050,000 acre-feet to Los Angeles will exhaust the

former, and out of the latter leave only 950,000 acre-feet for the three Lower Basin States. There are immediate needs in Arizona alone of 4,500,000 acre-feet. The bill alleges the existence of actual projects to irrigate 1,000,000 acres of land in Arizona not now irrigated but susceptible of irrigation from the Colorado River. This will require the appropriation of 4,500,000 acre-feet of water annually. Permits to appropriate this water have been granted by the State.

In Arizona, because of the expense of constructing and operating diversion dams, canals and other works necessary for irrigation, irrigable tracts must be combined into large projects operated and administered as a unit and requiring financing on a large scale. This financing is impossible unless water can be appropriated and the right to its beneficial use in perpetuity acquired. Without this right there is no security whatever for the financing.

The very purpose and effect of the Act and the defendant's water regulations and contract is to prevent the citizens of Arizona from appropriating—i. e., acquiring the right in perpetuity to exclusive beneficial use of—any part of the unappropriated flow of the stream, and to force them to accept from the defendant Wilbur a mere license subject to the terms of the compact. To say, as do the defendant States, that Arizona is not bound by the compact is a mere sophistry. For it appears that these States wrote the provisions of the Act here shown to be so harmful to Arizona for the very purpose of subjecting her to the compact. H. Rep. 1657, 69th Cong. 2d Sess., p. 10.

It is plain from the Act itself that its purpose and effect is "to enthrone the compact," and force Arizona and its people, as a condition to any use of the unappropriated flow of the stream, to forego the right to its continued use in perpetuity granted by the laws of Arizona,

and surrender its use to subsequent appropriators in the Upper Basin, in Mexico, or upon a further apportionment made in the future.

It is not necessary that the bill should deny title in the United States to any land necessary for appropriation of unappropriated water in Arizona.

The motions to dismiss admit Arizona's allegation that the Colorado River is not navigable. This is an allegation of fact. Facts not appearing on the face of the bill cannot be considered in determining a demurrer or motion to dismiss. *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 232; *Stewart v. Masterson*, 131 U. S. 151, 158.

The Court cannot properly take judicial notice that the Colorado River is navigable. *The Montello*, 11 Wall. 411, s. c., 20 Wall. 430; *United States v. Rio Grande Dam Co.*, 174 U. S. 690; *Economy Light & Power Co. v. United States*, 256 U. S. 113.

These cases establish the proposition that courts do not take judicial notice of the navigability of a stream, unless its navigability is a matter of common knowledge and free from doubt. See also *Donnelly v. United States*, 228 U. S. 243; *The Daniel Ball*, 10 Wall. 557, 561. Similar questions were involved in *St. Anthony Water Co. v. Water Commissioners*, 168 U. S. 349, 359; *Leovy v. United States*, 177 U. S. 621, 627, 635, 637; *Oklahoma v. Texas*, 258 U. S. 574, 590, 591; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; *United States v. Holt State Bank*, 270 U. S. 49, 56, 57. Cf. *United States v. Utah*, 279 U. S. 816, *ante*, p. 64.

The Court is not bound by the declaration of purposes contained in the Act, but may determine its real purpose by considering its effect. *United States v. Des Moines Nav. & Ry. Co.*, 142 U. S. 510, 544; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104; *Hammer v. Dagenhart*, 247 U. S. 251, 271; *Child Labor Tax Case*, 259 U. S.

20; *Hill v. Wallace*, 259 U. S. 44; *Linder v. United States*, 268 U. S. 5; *Henderson v. Mayor*, 92 U. S. 259, 268; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313, 319; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10.

By this Act Congress has attempted to exercise control of the Colorado River and its tributaries, not for the improvement of navigation, but for other purposes, the accomplishment of which would, if the river were navigable, destroy its navigability.

By approving and attempting to enforce the compact, Congress has recognized and undertaken to protect "present perfected rights" of water users in the Upper and Lower Basins to divert and consume annually 9,000,000 acre-feet of water, which is one-half of the total average annual flow of the Colorado River System. Of this 9,000,000 acre-feet of appropriated water the Upper Basin has appropriated and is using 2,500,000 acre-feet and the Lower Basin 6,500,000 acre-feet annually.

By the diversion of this water and the creation of these "present perfected rights," the Colorado River, if it ever was navigable (which Arizona denies), has lost what little navigability it once possessed. Even in the '60s and '70s of the last century, before any appreciable quantity of water had been diverted from the river, the one great and (even then) insuperable obstacle to its navigation was lack of water. As diversions increased and present rights became perfected, even the slight (so-called) navigation which once existed on the river disappeared. That its disappearance was caused, in part at least, by the diversion and consumption of this 9,000,000 acre-feet of water cannot be doubted. Does the Act provide that the water thus lost to navigation shall be restored? On the contrary, by approving the compact, it provides, in effect, that the loss shall be made perpetual.

As to water not yet appropriated, the compact and the Act clearly contemplate that eventually all the water of the Colorado River System will be diverted and used consumptively, and not for navigation. It is no answer to say that the water will be used for navigation first, and afterwards taken out and used consumptively. At least one-half of it is to be used in the Upper Basin, hundreds of miles above the site of the proposed dam and reservoir. By the compact, which the Act approves, the Upper Basin is given the lion's share (five-sixths) of the apportioned water now remaining unappropriated. Whatever excuse or justification there may have been for thus favoring the Upper Basin, it cannot be pretended that improvement of navigation was thereby aimed at or accomplished.

Instead of being designed to improve navigation, the compact was drawn with the unmistakable intention of dedicating the river to uses inconsistent with navigation. That is not a mere speculation, but appears from the express language of the compact. The reason for this was stated by the then Secretary of Commerce, Honorable Herbert Hoover, federal representative on and chairman of the Colorado River Commission, in his report transmitting the compact to Congress. H. Doc. 605, 67th Cong., 4th Sess., p. 4.

By the terms of the Act itself, the recital therein that one of its purposes is the improvement of navigation must yield to and be controlled by the declaration in the compact that "the Colorado River has ceased to be navigable for commerce," and that "the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes."

Even if navigability were conceded, it would still be true that the Act, by accepting and approving this decla-

ration in the compact, shows on its face that improvement of navigation is not its purpose. Also, though navigability were conceded, it would still be true that the effect of the Act is not to improve, but to destroy such navigability.

By §§ 1, 6, and 8 (a) of the Act, the construction, maintenance, operation and use of the project are made subject to the terms and provisions of the compact. Since, in the case of conflict, the provisions of the Act must yield to those of the compact, any use of the project which may be inconsistent with the compact (though apparently authorized by the Act) is prohibited.

The Act specifies, definitely and concretely, only two uses to which the project shall be put. One is the storage and sale of water. The other is the generation and sale of electrical power. Both uses would be hurtful rather than helpful to navigation, if there were any navigation to be hurt or helped.

It requires no argument to show that the navigation of a river, which has become non-navigable from lack of water, cannot be improved by taking more water out of it. Yet that is what this Act proposes to do. All contracts for the sale and delivery of water are required to be made subject to the Colorado River Compact, which subordinates navigation to other uses of the river. The Act places no limit on the quantity of water which the Secretary may divert and sell, nor does it restrict him as to the place of diversion or as to the place of consumption.

Under color of the Act, defendant Wilbur has actually made a pretended contract whereby he undertakes to deliver to the Metropolitan Water District of Southern California, 1,050,000 acre-feet annually of the water to be stored in the proposed reservoir. This great quantity of water—more than one-eighth of the total unappropriated flow at Black Canyon—is to be delivered at a point im-

mediately below the dam or, at the option of the District, it may be diverted directly from the reservoir. The District where this water is to be consumed is some 300 miles from the Colorado River and outside of its watershed.

Even if the Colorado River were navigable, it could not be pretended that navigation thereof would be improved by the main canal and appurtenant structures connecting Laguna Dam with the Imperial Valley. The whole purpose of the canal is to take water out of the river, and to take it out in greater quantities and at a point higher up the river than now.

Even in the old days, when its normal flow (now reduced by one-half) had not been depleted, it was only in seasons of high water that the Colorado River ever approached a condition of navigability—a condition which, even then, it never quite attained. By storing the water and using it for the generation of electric power, as proposed in the Act, the flow of the river will be “equated;” there will be no more seasons of high water, and all possibility of navigation will be automatically ended.

As introduced, the bill did not contain the word “navigation.” The words “improving navigation” and “improvement of navigation” were inserted as amendments, upon recommendation of the House Committee on Irrigation and Reclamation, after hearings, in the course of which the constitutionality of the bill had been questioned. H. Rep. 918, 70th Cong., 1st Sess., p. 1. No other reference was inserted or proposed. Minority Report, *l. cit.*, p. 14.

By this Act, even assuming the river to be navigable, Congress has exceeded its powers and has invaded rights reserved to the State over navigable water. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 230; *Mumford v. Wardwell*, 6 Wall. 423, 436; *St. Clair County v. Lovington*, 23 Wall. 46, 68; *McCready v. Vir-*

ginia, 94 U. S. 391, 394; *Hardin v. Jordan*, 140 U. S. 371, 381; *Knight v. U. S. Land Assn.*, 142 U. S. 161, 183; *Kansas v. Colorado*, 206 U. S. 46, 93; *Scott v. Lattig*, 227 U. S. 229, 242; *Port of Seattle v. Oregon & Wash. R. Co.*, 255 U. S. 56, 63; *United States v. River Rouge Imp. Co.*, 269 U. S. 411, 419.

If and wherever navigable, the Colorado River belongs to and is owned by the State in which it is situated. The State in its sovereign capacity owns the water in the river, the bed of the river, and its banks to high water mark. This is a full proprietary ownership. It is subject to the power of Congress to regulate commerce by improving navigation. It is not subject to any other restriction or limitation. The State, being the owner, has the exclusive and unrestricted right to use and dispose of the water in the river and the land under it, to authorize the use thereof by others, and to regulate and control such use in whatever manner and to whatever extent it sees fit, subject only to the power of Congress in respect to navigation.

Even assuming the Colorado River to be navigable, the United States does not own it, and has no right to use it or control it for any purpose, except that of regulating commerce by improving navigation. Not being the owner, the United States cannot, for any purpose or upon any pretext, sell or dispose of the water in the river or the land under it.

The fact that other States have rights in the Colorado River adds nothing to the powers of Congress. Where the river forms the boundary between Arizona and another State, each owns to the middle of the stream. If they disagree about the division or use of boundary waters, their dispute, like any other interstate boundary dispute, can be settled by a decree of this Court. Congress is powerless to settle it or to make any division or appor-

tionment of such waters. *Louisiana v. Mississippi*, 202 U. S. 1, 40; *Washington v. Oregon*, 211 U. S. 127, 131; *New Mexico v. Colorado*, 267 U. S. 30, 41. The same is true of a controversy between an upper and a lower State. *Kansas v. Colorado*, 185 U. S. 125, 145; s. c. 206 U. S. 46, 98; *Wyoming v. Colorado*, 259 U. S. 419, 465.

The result, therefore, of assuming the Colorado River to be navigable is to establish even more firmly Arizona's right to appropriate and use its waters and to regulate and control their appropriation and use by others.

The Act cannot be sustained as a regulation respecting property of the United States under Article IV, § 3, cl. 2, of the Constitution. It is not pretended, and cannot be, that this Act provides for the reclamation of any public land.

The Act goes far beyond the power of Congress over the public land.

The Act is not an exercise of any other power delegated to Congress.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Boulder Canyon Project Act, December 21, 1928, c. 42, 45 Stat. 1057, authorizes the Secretary of the Interior, at the expense of the United States, to construct at Black Canyon on the Colorado River, a dam, a storage reservoir, and a hydroelectric plant; provides for their control, management, and operation by the United States; and declares that the authority is conferred "subject to the terms of the Colorado River compact," "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses

exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking.”

The Colorado River Compact is an agreement for the apportionment of the water of the river and its tributaries. After several years of preliminary informal discussion, Colorado, Wyoming, Utah, New Mexico, Arizona, Nevada, and California—the seven States through which the river system extends—appointed commissioners in 1921 to formulate an agreement; and Congress, upon request, gave its assent, and authorized the appointment of a representative to act for the United States. Act of August 19, 1921, c. 72, 42 Stat. 171. On November 24, 1922, these commissioners and the federal representative signed an agreement to become effective when ratified by Congress and the legislatures of all of these States. The Boulder Canyon Project Act approved this agreement subject to certain limitations and conditions, the approval to become effective upon the ratification of the compact, as so modified, by the legislatures of California and at least five of the six other States. The legislatures of all these States except Arizona ratified the modified compact and the Act was accordingly declared to be in effect. Proclamation of June 25, 1929, 46 Stat. 20.

On October 13, 1930, Arizona filed this original bill of complaint against Ray Lyman Wilbur, Secretary of the Interior, and the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming. It charges that Wilbur is proceeding in violation of the laws of Arizona to invade its quasi-sovereign rights by building at Black Canyon on the Colorado River a dam, half of which is to be in Arizona, and a reservoir to store all the water of the river flowing above it in Arizona, for the purpose of diverting part of these waters from Arizona for consumptive use

elsewhere, and of preventing the beneficial consumptive use in Arizona of the unappropriated water of the river now flowing in that State; that these things are being done under color of authority of the Boulder Canyon Project Act; that this Act purports to authorize the construction of the dam and reservoir, the diversion of the water from Arizona, and its perpetual use elsewhere; that the Act directs and requires Wilbur to permit no use or future appropriation of the unappropriated water of the main stream of the Colorado River, now flowing in Arizona and to be stored by the said dam and reservoir, except subject to the conditions and reservations contained in the Colorado River Compact; and that the Act thus attempts to enforce as against Arizona, and to its irreparable injury, the compact which it has refused to ratify. The bill prays that the compact and the Act "and each and every part thereof, be decreed to be unconstitutional, void and of no effect; that the defendants and each of them be permanently enjoined and restrained from enforcing or carrying out said compact or said act, or any of the provisions thereof, and from carrying out the three pretended contracts hereinabove referred to, or any of them, or any of their provisions, [meaning certain contracts executed by Wilbur on behalf of the United States for the use of the stored water and developed power after the project shall have been completed] and from doing any other act or thing pursuant to or under color of said Boulder Canyon Project Act."

Process was made returnable on January 12, 1931; and on that day all of the defendants moved that the bill be dismissed. The grounds assigned in the motions are (1) that the bill does not join the United States, an indispensable party; (2) that the bill does not present any case or controversy of which the Court can take judicial cognizance; (3) that the proposed action of the defendants will not invade any vested right of the plaintiff or of any

of its citizens; (4) that the bill does not state facts sufficient to constitute a cause of action against any of the defendants. The case was heard on these motions.

The wrongs against which redress is sought are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur in building the dam and reservoir without first securing the approval of the State Engineer as prescribed by its laws; and, second, the threatened invasion of Arizona's quasi-sovereign right to prohibit or to permit appropriation, under its own laws, of the unappropriated water of the Colorado River flowing within the State. The latter invasion, it is alleged, will consist in the exercise, under the Act and the compact, of a claimed superior right to store, divert, and use such water.

First. The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer; and the statutes declare in terms that this provision applies to dams to be erected by the United States. Arizona Laws 1929, c. 102, §§ 1-4. See also Revised Code of 1928, §§ 3280-3286. The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

The United States may perform its functions without conforming to the police regulations of a State. *Johnson v. Maryland*, 254 U. S. 51; *Hunt v. United States*, 278 U. S. 96. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the State

Engineer for approval.¹ And the Federal Government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado River is navigable. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 430; *South Carolina v. Georgia*, 93 U. S. 4, 11; *Gibson v. United States*, 166 U. S. 269; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 64; *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 258-68. Arizona contends both that the river is not navigable, and that it was not the purpose of Congress to improve navigation.

The bill alleges that "the river has never been, and is not now, a navigable river." The argument is that the question whether a stream is navigable is one of fact; and that hence the motion to dismiss admits the allegation that the river is not navigable. It is true that whether a stream is navigable in law depends upon whether it is navigable in fact; *United States v. Utah*, ante, p. 64;² and that a motion to dismiss, like a demurrer, admits every well-pleaded allegation of fact, *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 232. But a court may take judicial notice that a river within its jurisdiction is navigable. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 697; *Wear v. Kansas*, 245 U. S. 154, 158.

¹The further allegation that the proposed dam, reservoir, and power plants, when completed, may not be subject to the taxing power of Arizona, may be disregarded. The Act provides that the title to such works shall remain forever in the United States, and such exemption is but an ordinary incident of any public undertaking by the Federal Government.

²Compare *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 20 Wall. 430; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349; *Leovy v. United States*, 177 U. S. 621; *Economy Light & Power Co. v. United States*, 256 U. S. 113; *Oklahoma v. Texas*, 258 U. S. 574, 590, 591; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; *United States v. Holt State Bank*, 270 U. S. 49, 56, 57.

We know judicially, from the evidence of history, that a large part of the Colorado River south of Black Canyon was formerly navigable,³ and that the main obstacles to navigation have been the accumulations of silt coming from the upper reaches of the river system, and the irregularity in the flow due to periods of low water.⁴ Commercial

³ Navigability extended as far north as the mouth of the Virgin River at Black Canyon. See Report Upon the Colorado River of the West, H. R. Ex. Doc. No. 90, 36th Cong., 1st Sess., June 5, 1860, pts. I-II, and maps; H. R. Mis. Doc. No. 37, 42d Cong., 1st Sess., April 15, 1871; H. R. Ex. Doc. No. 18, 51st Cong., 2d Sess., December 2, 1890; H. R. Doc. No. 101, 54th Cong., 1st Sess., December 27, 1895; H. R. Doc. No. 67, 56th Cong., 2d Sess., December 5, 1900; Ann. Rep., Chief of Engineers, War Department, 1879, pp. 1773-85; Hodge, *Arizona As It Is*, (1877) pp. 208-10; Hinton, *Handbook to Arizona*, (1878) pp. 66-67, 371-72, and maps; Freeman, *The Colorado River*, (1923) cc. I, V, VII, particularly pp. 146-67; Sloan, *History of Arizona*, (1930), vol. i, pp. 216-36.

By the Act of July 5, 1884, c. 229, 23 Stat. 133, 144, Congress appropriated \$25,000 for the improvement of navigation on the Colorado River between Fort Yuma and a point thirty miles above Rioville, which was located at the mouth of the Virgin River. An additional \$10,000 for a levee at Yuma was appropriated by the Act of July 22, 1892, c. 158, 27 Stat. 88, 108-09. See H. R. Doc. Nos. 204 and 237, 58th Cong., 2d Sess., December 18, 1903. As to navigability north and east of Boulder Canyon, see *United States v. Utah*, *ante*, p. 64.

⁴ See Report by Director of Reclamation Service on Problems of Imperial Valley and Vicinity, Sen. Doc. No. 142, 67th Cong., 2d Sess., February 23, 1922, pp. 3-10, 240; Report of the Colorado River Board on the Boulder Dam Project, H. R. Doc. No. 446, 70th Cong., 2d Sess., December 3, 1928, pp. 12-14; Report of the All-American Canal Board, July 22, 1919, pp. 24-33. For the geological history of the lower Colorado area, see Information Presented to the House Committee on Irrigation and Reclamation in connection with H. R. 2903, 68th Cong., 1st Sess., 1924, pp. 135-43. All the former documents on the Colorado River Development were adopted as part of the hearings on Boulder Canyon Project Act. See Hearings Before the House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess., January 6, 1928, pp. 8-10.

disuse resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an abandonment of a navigable river or prohibit future exertion of federal control. *Economy Light & Power Co. v. United States*, 256 U. S. 113, 118, 124. We know from the reports of the committees of the Congress which recommended the Boulder Canyon project that, in the opinion of the government engineers, the silt will be arrested by the dam; that, through use of the stored water, irregularity in its flow below Black Canyon can be largely overcome; and that navigation for considerable distances both above and below the dam will become feasible.⁵ Compare *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359; *United States v. Cress*, 243 U. S. 316, 326.

The bill further alleges that the "recital in said act that the purpose thereof is the improvement of naviga-

⁵ The House Committee on Irrigation and Reclamation stated that one of the purposes of the Act was to have the flow of the river below the dam "regulated and even" and thus "susceptible to use by power boats and other small craft. The great reservoir will, of course, be susceptible of navigation." See Boulder Canyon Project, H. R. Rep. 918, 70th Cong., 1st Sess., March 15, 1928, p. 6. As to control of silt deposits, see *id.*, pp. 16-17. A similar report was made to the Senate. See Boulder Canyon Project, Sen. Rep. 592, 70th Cong., 1st Sess., March 20, 1928, pp. 5-7, 16-20. The House Committee said in summary: "The proposed dam would improve navigation probably more than any other works which could be constructed. The dam will so regulate the flow as to make the river very practicable of navigation for 200 miles below and impound water above which could easily be navigated for more than 75 miles." H. R. Rep. 918, *supra*, p. 22. Compare Hearings Before the House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess., pt. 3, January 13-14, 1928, pp. 340-41; Hearings Before the Senate Committee on Irrigation and Reclamation on S. 728 and S. 1274, *id.*, January 17-21, 1928, pp. 368-77, 384, 420-21. Since below Black Canyon the Colorado River is a boundary stream, such navigation will be at least partially interstate.

tion" "is a mere subterfuge and false pretense." It quotes a passage in Art. IV of the compact, to which the Act is subject, which declares that "inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes;" and alleges that "even if said river were navigable, the diversion, sale and delivery of water therefrom as authorized in said act, would not improve, but would destroy, its navigable capacity."⁶

Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire. *McCray v. United States*, 195 U. S. 27, 53-59; *Weber v. Freed*, 239 U. S. 325, 329-30; *Wilson v. New*, 243 U. S. 332, 358-59; *United States v. Doremus*, 249 U. S. 86, 93-94; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 187; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 210.⁷ The Act declares that the authority to construct the dam and reservoir is conferred, among other things, for the purpose of "improving navigation and regulating the flow of the river." As the river is navigable and the means which the Act provides are not unrelated

⁶ Reliance is also had upon the fact that the bill as originally introduced contained no reference to navigation, but that the statements of this purpose, found in the Act, were inserted during the course of the hearings. See *Minority Views*, H. R. Rep. No. 918, 70th Cong., 1st Sess., pt. 3, pp. 14-18.

⁷ Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers. *United States v. Des Moines Nav. & Ry. Co.*, 142 U. S. 510, 544; *Atchison, Topeka & Santa Fé R. Co. v. Matthews*, 174 U. S. 96, 102; *Calder v. Michigan*, 218 U. S. 591, 598; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357, 366. Compare *O'Gorman & Young, Inc., v. Hartford Fire Ins. Co.*, 282 U. S. 251, 258.

to the control of navigation, *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. Compare *Fong Yue Ting v. United States*, 149 U. S. 698, 712-14; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 340; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 65, 72-73; *Everard's Breweries v. Day*, 265 U. S. 545, 559. And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power. Compare *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 275; *In re Kollock*, 165 U. S. 526, 536; *Weber v. Freed*, *supra*; *United States v. Doremus*, *supra*.

It is urged that the Court is not bound by the recital of purposes in the Act; that we should determine the purpose from its probable effect; and that the effect of the project will be to take out of the river, now non-navigable through lack of water, the last half of its remaining average flow. But the Act specifies that the dam shall be used: "First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . .; and third, for power." It is true that the authority conferred is stated to be "subject to the Colorado River Compact," and that instrument makes the improvement of navigation subservient to all other purposes. But the specific statement of primary purpose in the Act governs the general references to the compact. This Court may not assume that Congress had no purpose

to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose. Moreover, unless and until the stored water, which will consist largely of flood waters now wasted, is consumed in new irrigation projects or in domestic use, substantially all of it will be available for the improvement of navigation. The possible abuse of the power to regulate navigation is not an argument against its existence. *Lottery Case*, 188 U. S. 321, 363; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 168-69; *Wilson v. New*, 243 U. S. 332, 354; *Hamilton v. Kentucky Distilleries, supra*; *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U. S. 44, 48.

Since the grant of authority to build the dam and reservoir is valid as an exercise of the Constitutional power to improve navigation, we have no occasion to decide whether the authority to construct the dam and reservoir might not also have been constitutionally conferred for the specified purpose of irrigating public lands of the United States.⁸ Compare *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 703; *United States v. Alford*, 274 U. S. 264. Or for the speci-

⁸ "A large part of the land through which the Colorado River flows, or which is adjacent or tributary to it, is public domain of which the United States is the proprietor." Colorado River Compact, H. R. Doc. No. 605, 67th Cong., 4th Sess., March 2, 1923, p. 6. As to extent of this land and irrigation projects on it in connection with the Boulder Canyon Dam, see Report of the Director of the Reclamation Service on Problems of Imperial Valley and Vicinity, Sen. Doc. No. 142, 67th Cong., 2d Sess., February 23, 1922, appendices C-D. See also Department of Interior, Twenty-fifth Ann. Rep. Bureau of Reclamation (1926), pp. 2-29; Vacant Public Lands on July 1, 1929, Department of Interior, General Land Office, Circular No. 1197, pp. 3-10; Report of the International Water Commission, H. R. Doc. No. 359, 71st Cong., 2d Sess., April 21, 1930, pp. 98-177, and Bibliography, p. 97.

fied purpose of regulating the flow and preventing the floods in this interstate river.⁹ Or as a means of conserving and apportioning its waters among the States equitably entitled thereto. Or for purpose of performing international obligations.¹⁰ Compare *Missouri v. Holland*, 252 U. S. 416.

Second. The further claim is that the mere existence of the Act will invade quasi-sovereign rights of Arizona by preventing the State from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders. The opportunity and need for further appropriations are fully set forth in the bill. Arizona is arid and irrigation is necessary for cultivation of additional land. The future growth and welfare of the State are largely dependent

⁹ Compare the legislation for Mississippi river flood control, independent of navigation improvements. Joint Resolution of May 2, 1922, c. 175, 42 Stat. 504; Act of September 22, 1922, c. 427, § 13, 42 Stat. 1038, 1047; Act of December 22, 1927, c. 5, 45 Stat. 2, 38; and particularly Act of May 15, 1928, c. 569, 45 Stat. 534.

¹⁰ The Colorado River and its tributaries have frequently been the subject of treaties between the United States and Mexico. See Treaty of Guadalupe Hidalgo, February 2, 1848, Art. VII, in Malloy, *United States Treaties*, vol. i, pp. 1107, 1111; Gadsden Treaty, December 30, 1853, Art. IV, *id.*, pp. 1121, 1123; Boundary Convention of March 1, 1889, Arts. I, V, *id.*, pp. 1167-92. Compare the 1912 proposals reported in Hearings Before the House Committee on the Irrigation of Arid Lands, 66th Cong., 1st Sess., July 9-14, 1919, *Append.*, pp. 323-26. As to the Rio Grande, see Convention of May 21, 1906, Treaty Series No. 455; 21 Op. Atty. Gen. 274, 282, 518; Sen. Doc. No. 154, 57th Cong., 2d Sess., February 14, 1903. For the international aspects of the proposed Colorado River Development, see Hearings Before the House Committee on Irrigation of Arid Lands, 66th Cong., 1st Sess., July 9-14, 1919, *Append.*, pp. 323-48; Colorado River Compact, H. R. Doc. No. 605, 67th Cong., 4th Sess., March 2, 1923, pp. 5-6; Report of the All-American Canal Board, July 22, 1919, pp. 14-15; Report of International Water Commission, *supra* Note 8, pp. 17-23, 85-283.

upon such reclamation. It is alleged that there are within Arizona 2,000,000 acres not now irrigated which are susceptible of irrigation by further appropriations from the Colorado River.¹¹ To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations. Under the law of Arizona, the perfected vested right to appropriate water flowing within the State cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use. Topographical conditions make it necessary that land in the State be irrigated in large projects. The Colorado River flows, both on the boundary between Arizona and Nevada, and in Arizona alone, through an almost continuous series of deep canyons, the walls of which rise in Arizona to a height varying from a few hundred to more than 5,000 feet. The cost of installing the dams, reservoirs, canals, and distribution works required to effect any diversion, will be very heavy; and financing on a large scale is indispensable. Such financing will be impossible unless it clearly appears that, at or prior to the time of constructing such works, vested rights to the permanent use of the water will be acquired.

¹¹ Of the total length of 1,293 miles of the Colorado River, 688 miles are within or on the boundaries of Arizona. After leaving Utah, the main river flows for 292 miles wholly in Arizona. Then, the middle of the channel forms the boundary between Arizona and Nevada for 145 miles; and for 235 miles, the boundary between Arizona and California. Tributaries of the river flow within Arizona for a combined length of 836 miles, and most of these enter the main stream below Black Canyon.

The alleged interference with the right of the State to control additional appropriations is based upon the following facts. The average annual flow of the Colorado River system, including the tributaries, is 18,000,000 acre-feet.¹² Only 9,000,000 acre-feet have been appropriated by Arizona and the defendant States. Of this 3,500,000 acre-feet have been appropriated in Arizona under its laws, and the remaining 5,500,000 acre-feet by the other States. The 9,000,000 acre-feet unappropriated are now subject to appropriation in Arizona under its laws. It is alleged that there are numerous sites suitable for the construction, maintenance, and operation of dams and reservoirs required for the irrigation of land in Arizona; and that actual projects have been planned for the irrigation of 1,000,000 acres, including 100,000 acres owned by the State. For this purpose 4,500,000 acre-feet annually will be additionally required. Permits to appropriate this water have been granted by the State; and definite plans to carry out projects for the building of dams on that part of the river flowing in or on the borders of Arizona have been approved by the State Engineer. It is stated that but for the passage of the Boulder Canyon Project Act, construction work would long since have commenced.

It is conceded that the continued use of the 3,500,000 acre-feet of water already appropriated in Arizona is not now threatened. And there is no allegation that at the present time the enjoyment of these rights is being interfered with in any way. The claim strenuously urged is that the existence of the Act, and the threatened exercise of the authority to use the stored water pursuant to its terms, will prevent Arizona from exercising its right to control the making of further appropriations. It is argued

¹²An acre-foot is the quantity of water required to cover an acre to a depth of one foot—43,560 cubic feet. See *Wyoming v. Colorado*, 259 U. S. 419, 458.

that such needed additional appropriations will be prevented because Wilbur proposes to store the entire unappropriated flow of the main stream of the Colorado River at the dam; that Arizona, and those claiming under it, will not be permitted to take any water from the reservoir except upon agreeing that the use shall be subject to the compact; that under the terms of the compact they will not be entitled to appropriate any water in excess of that to which there are now perfected rights in Arizona;¹³ and that in order to irrigate land in Arizona it is frequently necessary to utilize rights of way over lands of the United States, and since the Act provides that all such

¹³ The allegation is in substance this. Of the average annual flow of 18,000,000 acre-feet, the Act and compact permit the present final appropriation of only 15,000,000. This quantity must satisfy all existing appropriations as well as all future appropriations. Of these 15,000,000, one-half is apportioned to the so-called Upper Basin, which includes Utah, Colorado, Wyoming, and New Mexico. The remaining 7,500,000 acre-feet have been allotted to the so-called Lower Basin, which includes Arizona and parts of Nevada and California. Of the water thus allotted to the lower basin, 6,500,000 acre-feet have already been appropriated; and, under a contract made by Wilbur with the Metropolitan Water District of Southern California, the remaining 1,000,000 are to be diverted to it. Thus it is argued that consistently with the Act and compact, it will be impossible for Arizona to make any further appropriation, unless it be under the following provision. The compact provides that no part of the 3,000,000 acre-feet of the estimated annual flow, not now apportioned, shall be appropriated until after October 1, 1963, as such water may be required to satisfy rights of Mexico, through which country the river flows after leaving the United States. If the satisfaction of recognized Mexican rights reduces the unappropriated water below 1,000,000 acre-feet annually, the lower basin States may require the upper basin States to deliver from their apportionment, one-half of the amount required to meet the deficit. It is claimed that Arizona thus may use, but not legally appropriate, any unappropriated water which is available for use by it; and that this restricted right does not justify the expenditures necessary for putting the water to beneficial use in Arizona.

rights of way or other privileges to be granted by the United States shall be upon the express condition and with the express covenant that they shall be subject to the compact, the Act in effect prevents Arizona and those claiming under it from acquiring such rights.

This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions. The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein "shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified" by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired. There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated.¹⁴ Nor any

¹⁴ There is in the bill a further allegation that, under color of the Act, Wilbur has seized and taken possession of all that part of the Colorado River which flows in Arizona and on the boundary thereof, and of the water now flowing therein, and of all the dam sites and reservoir sites suitable for irrigation of the Arizona land and for the generation of electric power "and now has said river, said water and said sites in his possession; and has excluded and is now excluding the State of Arizona, its citizens, inhabitants, and property owners from said river, said water and said sites, and from all access thereto; has prevented and is now preventing said State, its citizens, inhabitants and property owners from appropriating any of said 8,000,000 acre-feet of unappropriated water . . ." But from other parts of

specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion.

When the bill was filed, the construction of the dam and reservoir had not been commenced. Years must elapse before the project is completed. If by operations at the dam any then perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available. Compare *Kansas v. Colorado*, 206 U. S. 46, 117. The bill alleges, that plans have been drawn and permits granted for the taking of additional water in Arizona pursuant to its laws. But Wilbur threatens no physical interference with these projects; and the Act interposes no legal inhibitions on their execution.¹⁵ There is no occasion for determining

the bill and from the argument, it is clear that there has been no physical taking of possession of anything, and that Wilbur has not trespassed on lands belonging either to Arizona or any of its citizens. This allegation is thus merely a conclusion of law from the fact that Wilbur, in conformity with the provisions of the Act, has made plans for the construction of the dam and reservoir, promulgated regulations concerning the use of the water to be stored, and executed contracts for the use of some of it.

¹⁵ It is also argued that of the 7,500,000 acre-feet allotted by the compact to the upper basin States, only 2,500,000 have already been appropriated, and that thus the presently unused surplus of 5,000,000 acre-feet cannot be appropriated in Arizona. But Arizona is not bound by the compact as it has withheld ratification. If and when withdrawals pursuant to the compact by the upper basin States diminish the amount of water actually available for use in Arizona, appropriate action may then be brought.

The allegation that the inclusion in the compact of the waters of the Gila River (all of which are said to have been appropriated in Arizona) operates to reduce the amount of water which may be taken by that State, can likewise be disregarded. Not being bound

now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated. *New Jersey v. Sargent*, 269 U. S. 328, 338. This Court cannot issue declaratory decrees. Compare *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74; *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274, 289-90. Arizona has, of course, no constitutional right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land. Compare *Utah Power & Light Co. v. United States*, 243 U. S. 389, 403-05.

As we hold that the grant of authority to construct the dam and reservoir is a valid exercise of Congressional power, that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, and that there is now no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued. The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

Bill dismissed.

MR. JUSTICE McREYNOLDS is of the opinion that the motions to dismiss should be overruled and the defendants required to answer.

by the compact, Arizona has not assented to this inclusion of the Gila appropriations in the allotment to the lower basin; and there is no allegation that Wilbur or any of the defendant States are interfering with perfected rights to the waters of that river, which enters the Colorado 286 miles below Black Canyon.

Syllabus.

EAST OHIO GAS CO. v. TAX COMMISSION OF
OHIO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

No. 453. Argued April 22, 23, 1931.—Decided May 18, 1931.

1. A State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. P. 470.
2. While a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in the interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. *Id.*
3. The transportation of natural gas from wells outside of a State by the pipe-lines of producing companies to the state line, and thence, by means of the distributing company's high pressure transmission lines to their connections with its local systems, is essentially national—not local—in character, and is interstate commerce within as well as without the State. *Id.*
4. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends. *Id.*
5. Natural gas, purchased by an Ohio corporation for supply to its local consumers, was piped into, and distributed within, the State at high pressures. When it reached the company's local supply mains, the pressure was greatly reduced and the volume of the gas was greatly expanded. It there divided into many thousands of relatively tiny streams that entered the small service lines connecting the service mains with the pipes on the consumers' premises, and, so segregated in those lines and pipes, it remained in readiness, or moved forward, to serve as needed. *Held:*

(1) That the treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. P. 471.

(2) The furnishing of the gas to the consumers in this way is not interstate commerce, but a business of purely local concern ex-

clusively within the jurisdiction of the State, which may constitutionally be subjected to an excise tax based on the gross receipts. *Id.*

6. Opinion in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, disapproved, to the extent that it is in conflict with the decision here. P. 472.

43 F. (2d) 170, affirmed.

APPEAL from a decree of the District Court of three judges refusing a preliminary injunction and dismissing the bill, in a suit to restrain collection of a state tax.

Mr. William B. Cockley, with whom *Messrs. Thomas H. Hogsett* and *Thomas M. Harman* were on the brief, for appellant.

The interstate movement continues to consumers' appliances. In *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23, it was expressly decided that the local distribution of natural gas by an importing company is an integral part of interstate commerce. This is controlling. Moreover, it is supported both by the principle that when an interstate character has been acquired it continues until the commodity "reaches the point where the parties originally intended that the movement should finally end" (*Illinois R. Co. v. Railroad Comm.*, 236 U. S. 157, 163,) and by the principle that where "the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it," it is interstate throughout. *Western Union v. Foster*, 247 U. S. 105, 113. The intended destination from the beginning is appellant's consumers, and the transmission is as continuous and rapid as science can make it. See *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 639; and *Binderup v. Pathe Exchange*, 263 U. S. 291, 309.

There is no logical change of interstate movement until the gas reaches consumers' appliances. Suggested analogies that bulk is broken, and the gas stored or processed,

when it passes from transmission to distribution lines of the importing company are inapplicable and contrary to facts. *In re Pennsylvania Gas Co.*, 225 N. Y. 397.

It is of no importance that the company's consumers do not expressly contract for West Virginia gas. *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Shafer v. Farmers Grain Co.*, 268 U. S. 176; *Bowman v. Continental Oil Co.*, 256 U. S. 642.

Mr. Gilbert Bettman, Attorney General of Ohio, with whom *Messrs. L. F. Laylin* and *William J. Ford* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellees, acting under the tax laws of Ohio, assessed against appellant additional excise taxes for 1927, 1928 and 1929. The latter brought this suit to restrain collection on the ground that, when construed to cover the amounts demanded, the state legislation is repugnant to the commerce clause of the Federal Constitution. Plaintiff applied to the court consisting of three judges for a temporary injunction; and, pursuant to stipulation made at the hearing, the case was submitted for final determination upon an agreed statement of facts. The court announced an opinion, 43 F. (2d) 170, sustaining the state enactments and entered its decree dismissing the complaint.

Under the Ohio Code every corporation engaged in the business of supplying to consumers within the State natural gas for light, heat or power is a natural gas company, § 5416, and is required to report to the tax commission, § 5470. The latter is directed annually to determine the entire gross receipts of such company, for the year ending on the then next preceding first day of May, excluding

therefrom all receipts "derived wholly from interstate business," § 5475, and to certify the amount so determined to the auditor of state, § 5481. He is directed to charge each such company "a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business . . . by taking one and thirty-five one-hundredths per cent. of all such gross receipts . . ." § 5483.

Appellant, an Ohio corporation, is engaged as a public utility in the business of furnishing natural gas to consumers in more than 50 municipalities in that State. During the years in question it obtained approximately 25 per cent. of its supply from its own Ohio wells, 72 per cent. from the Hope Natural Gas Company of West Virginia and 3 per cent. from the Peoples Natural Gas Company of Pennsylvania. The West Virginia gas is gathered to a station in that State, there freed from gasoline vapors and pumped at a pressure of from 200 to 300 pounds per square inch into transmission lines which connect, at the boundary between the States, with appellant's high pressure transmission lines. By means of these the gas is transmitted to a station in Stark county whence it is taken by other lines to pressure reducing stations. The lines there connect with distribution lines in which is maintained pressure of from 30 to 50 pounds per square inch and which are a part of the distribution system in each municipality served. From the latter the gas enters the local supply mains wherein pressure is reduced to that necessary—a few ounces per square inch—to carry the gas through the service pipes extending to the premises of consumers and suitably to supply their burners. The consumers control the flow of gas on their premises. The Pennsylvania gas is collected, treated, compressed for transmission, delivered to appellant at the state line

and by it transported, relieved of pressure and conducted through such mains and service pipes to consumers' appliances precisely as is West Virginia gas. The Ohio gas is gathered and conducted from the fields in that State to the high pressure distribution lines and thereafter treated and brought to consumers as is the gas brought from the other States. Appellant's contracts with consumers do not specify any source from which it is to obtain gas. To an extent not disclosed by the record, appellant collects minimum charges for service and charges for readiness to serve without regard to the quantity of gas consumed. It furnishes to some communities exclusively gas from outside the State, to some only that from Ohio and to others a mixture of that from West Virginia and Ohio.

In accordance with the statute, as then construed by the attorney general, appellant in its reports to the tax commission for the years in question returned as receipts from interstate business all sums collected from customers receiving only gas from wells outside Ohio, treated as intrastate earnings the receipts from those using only Ohio gas, and apportioned between intrastate and interstate business, on the relation of the quantity of each to the total, receipts from those served by a mixture of Ohio and other gas. The commission accepted that classification, and the taxes were computed and paid on that basis. In 1930 appellees, construing the laws to require the inclusion of all receipts, without regard to the source of the gas furnished, applied the prescribed rate to the amounts theretofore treated as receipts from interstate business, and demanded from appellant payment of the sums so arrived at together with penalties prescribed for failure to pay excise taxes when due.

The question is whether the state statute, construed to include the amounts reported as receipts from interstate business, operates directly to regulate or burden interstate commerce.

Admittedly the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on intrastate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. *Pullman Co. v. Richardson*, 261 U. S. 330, 338. *New Jersey Tel. Co. v. Tax Board*, 280 U. S. 338, 346. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. *Sprout v. South Bend*, 277 U. S. 163, 170-171, and cases cited.

The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends. *Public Utilities Comm. v. Landon*, 249 U. S. 239, 245. *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 307-309. *Peoples Gas Co. v. Pub. Serv. Comm.*, 270 U. S. 550, 554. *Public Util. Comm. v. Attleboro Co.*, 273 U. S. 83, 89. But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing

companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. *State v. Flannelly*, 96 Kan. 372, 383-384; 152 Pac. 22; *W. Va. & Md. Gas Co. v. Pub. Serv. Comm.*, 134 Md. 137, 143-145; 106 Atl. 265. Cf. *Atlantic Coast Line v. Standard Oil Co.*, 275 U. S. 257, 269. *Brown v. Maryland*, 12 Wheat. 419. *Leisy v. Hardin*, 135 U. S. 100. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State.

Appellant relies on *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23. There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that State from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403-404; 122 N. E. 260), held that the entire movement of the gas was interstate commerce and that, in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in *Public Utilities Comm. v. Landon*, *supra*, and in *Missouri v. Kansas Gas Co.*, *supra*. In the former the court

said (p. 245): "Interstate movement [of natural gas being transported from State to State] ended when the gas passed into local mains." In the latter, it was said (p. 308): "With the delivery of the gas [transported from one State to another] to the distributing companies . . . the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. . . . In such case the effect on interstate commerce, if there be any, is indirect and incidental . . . [p. 309]. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." It does not appear that there were presented, in *Pennsylvania Gas Co. v. Public Serv. Comm.*, to the state court or here the considerations on which it is held that interstate commerce ends and intrastate business begins when gas flowing through pipe lines from outside the State passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here.

The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce.

Decree affirmed.

Argument for Defendant.

NEW JERSEY *v.* CITY OF NEW YORK.

No. 17, original. Argued April 30, 1931.—Decided May 18, 1931.

1. The Court approves the findings of its Special Master showing that the City of New York creates a nuisance in New Jersey by dumping into the ocean large quantities of garbage which subsequently float into New Jersey waters and are washed up upon New Jersey bathing beaches; and that the City has unreasonably delayed to make provision for disposing of garbage by incineration. Pp. 478, 482.
2. Having jurisdiction of the defendant and of the property injured by the nuisance, the Court has jurisdiction to enjoin the defendant from dumping garbage in the ocean beyond the waters of New Jersey and of the United States. P. 482.
3. The fact that the garbage is dumped at places permitted by the Supervisor of the Harbor of New York under the Act of June 29, 1888, does not affect the Court's jurisdiction or constitute a defense. *Id.*
4. A reasonable time should be accorded the City within which to carry out its plan for the erection and operation of incinerators, or to provide other means, to be approved by the decree, for disposing of the objectionable substances; and the case is again referred to the Special Master to find what is such reasonable time. P. 483.

HEARING on defendant's exceptions to the report of the Special Master, in a suit brought in this Court by the State of New Jersey against the City of New York for an injunction.

Mr. Duane E. Minard, Assistant Attorney General of New Jersey, with whom *Mr. William A. Stevens*, Attorney General, was on the brief, for plaintiff.

Mr. Arthur J. W. Hilly, Corporation Counsel of the City of New York, with whom *Messrs. Elliot S. Benedict, J. Joseph Lilly*, and *Thomas W. A. Crowe* were on the brief, for defendant.

Obstruction of navigation of fishing and other boats, and injuries to fishing rights and fish nets, due to the dumping of garbage in the ocean by the defendant, are

maritime torts. *Crappo v. Kelly*, 16 Wall. 610, 623; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58. Usually the forum for the redress of such injuries is an admiralty court. *The Armorica*, 189 Fed. 503, 504; *The Blackheath*, 195 U. S. 361; *The Raithmoor*, 241 U. S. 166.

There can be little doubt but that the injuries alleged herein are consequential and not direct. Authorities in analogous cases of trespass and nuisance sustain the contention. *Chipman v. Palmer*, 77 N. Y. 51; *Gordon v. Ellenville & K. R. Co.*, 195 N. Y. 137; *Burt Olney Canning Co. v. State*, 230 N. Y. 351; *Swain v. Tennessee Copper Co.*, 111 Tenn. 430. Distinguishing: *Huffmire v. Brooklyn*, 162 N. Y. 584; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218.

Jurisdiction is lacking because the situs of the nuisance is beyond the territorial jurisdiction of this Court. *Central R. Co. v. Jersey City*, 209 U. S. 473, 479; *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122-123; *U. S. ex rel. Clausen v. Day*, 279 U. S. 398, 401; *The George & Earl*, 30 F. (2d) 441, 443; *Lord v. The Steamship Co.*, 102 U. S. 541, 544; *Maul v. United States*, 274 U. S. 501; *Jones v. United States*, 137 U. S. 202; *The James G. Swann*, 50 Fed. 108.

In cases of nuisance or trespass, the place where the act occurs, which makes possible the nuisance or trespass, is the situs of the tort. *Horne v. City of Buffalo*, 49 Hun. 76; *Chipman v. Palmer*, 77 N. Y. 51; *People v. International Nickel Co.*, 168 App. Div. 245; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245. See also *Northern Indiana R. Co. v. Michigan Central R. Co.*, 15 How. 233; *Mississippi & M. R. Co. v. Ward*, 2 Black 485; *McGowan v. Columbia River Packers' Assn.*, 245 U. S. 352.

If the situs of the object inflicting the injury is the controlling factor and that is outside the territorial limits of the United States, why is not the matter of its abatement outside the jurisdiction of this Court. Cf. *United*

States v. Newark Meadows Imp. Co., 173 Fed. 426; 20 Op. Atty. Gen. 293; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *New Jersey v. Sargent*, 269 U. S. 328, 337.

Certain cases which hold that where equity has jurisdiction of the person of the defendant it may give a personal decree against him although the *res* of the controversy is beyond the jurisdiction of the court, seem to be based on the principle that the court's decree can be enforced personally by contempt proceedings if disobeyed, or in some other personal manner. A recalcitrant municipal corporation, however, cannot be imprisoned for contempt, or, in the absence of statute, fined. Its public property cannot be taken for the purpose of collecting judgments or enforcing decrees against it. *Workman v. New York City*, 179 U. S. 552, 565.

Not every case involving a State as plaintiff and a citizen of another State as defendant, is justiciable under Art. III, § 2 of the Constitution. *New Jersey v. Sargent*, 269 U. S. 328; *Cohens v. Virginia*, 6 Wheat. 264, 398-399; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Massachusetts v. Mellon*, 262 U. S. 447, 480-481.

The courts of both the States of New Jersey and New York, as well as of other localities, have always held that they had no jurisdiction over controversies like this. *Hill v. Nelson*, 70 N. J. L. 376; *Karr v. N. Y. Jewell Filtration Co.*, 78 N. J. L. 198; *Watts v. Kinney*, 6 Hill 82, 87; *People v. Central R. Co.*, 42 N. Y. 283; *Sprague Nat. Bank v. Erie R. Co.*, 40 App. Div. 69, 72; *Brisbane v. Pennsylvania R. Co.*, 205 N. Y. 431, 434; *Allen v. Connecticut River L. Co.*, 150 Mass. 560; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 108.

The plaintiff failed to prove its case by clear and convincing evidence that conditions on plaintiff's beaches and in its waters were due to defendant's acts. *Missouri v. Illinois*, 200 U. S. 496; *New York v. New Jersey*, 256

U. S. 296, 309; *North Dakota v. Minnesota*, 263 U. S. 365, 374; *Connecticut v. Massachusetts*, 282 U. S. 660; *Mississippi & M. R. Co. v. Ward*, 2 Black 485.

Compliance with permits issued by the Supervisor of the Harbor of New York under the Act of June 25, 1888 (25 Stat. 209) as amended (Title 33, c. 9, §§ 441-451, U. S. Code), exculpates the defendant.

The Master erred in finding that garbage and refuse reaching the plaintiff's shores from the dumpings by coastwise and other vessels, and from other sources, is negligible in comparison with that dumped by defendant and reaching plaintiff's shores.

The Master erred in finding that the defendant has unreasonably delayed erecting incinerators to dispose of its garbage.

There was a complete failure of proof by plaintiff as to loss of property or values in its seashore communities.

There was evidence for defendant of the summer popularity, growth of the communities and investments therein, and increase in assessed values, during the years while defendant is charged with fouling plaintiff's beaches and waters.

MR. JUSTICE BUTLER delivered the opinion of the Court.

New Jersey invokes our original jurisdiction under § 2, Art. III of the Constitution.

The complaint alleges that the City of New York for many years has dumped and still is dumping noxious, offensive and injurious materials—all of which are for brevity called garbage—into the ocean; that great quantities of the same, moving on or near the surface of the water, frequently have been and are being cast upon the beaches belonging to the State, its municipalities and its citizens, thereby creating a public nuisance and causing great and irreparable injury. It prays an injunction re-

straining the City from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches.

Defendant by its amended answer denies the allegations that constitute the gravamen of the complaint.

For a first defense it states that for many years it has dumped garbage into the Atlantic Ocean under the supervision of the supervisor of the harbor of New York and in accordance with permits issued by him under the Act of June 29, 1888 (33 U. S. C., §§ 441, 443, 449 and 451) at points about 8, 12 and 20 miles southeast from the Scotland Lightship and about 10, 12½ and 22 miles respectively from the New Jersey shore and not in the waters of New Jersey or of the United States, and that in view of these facts the Court has no authority to enjoin it from so dumping garbage.

And for a second defense it alleges that for many years garbage in large quantities has been and is being dumped by others inside and outside the entrance of the harbor and at various places from 2½ to 8 miles from the New Jersey shore and at other places from 3 to 25 miles southeast of Scotland Light, that this material would float upon the New Jersey beaches alleged to have been polluted, that it is impossible to determine whether garbage dumped by defendant is carried to such beaches, and that, if any injury or damage is suffered by New Jersey, its municipalities or citizens, the injury is not chargeable to defendant.

And for a third defense it alleges that the complaint fails to state facts sufficient to entitle plaintiff to any relief.

The Court appointed Edward K. Campbell as Special Master and authorized him to take and report the evidence together with his findings of fact, conclusions of law and recommendations for a decree. The Master filed his report and the evidence introduced by the parties. It sets forth his findings, conclusions, and recommendations.

The substance of the findings of facts follows:

New Jersey borders on the Atlantic for about 100 miles. The shore principally involved extends from Atlantic Highlands southerly 50 miles to Beach Haven. On this stretch of shore, there are 29 municipalities. The State has conveyed or leased portions of the frontage to municipalities and individuals. It still owns 285,000 lineal feet between Sea Bright and Beach Haven. Municipalities have about 13,000 lineal feet and private parties the rest. The assessed value of property within these municipalities exceeds \$139,000,000, and their population is more than 160,000. They are summer resorts, and the number of summer visitors is many times greater than their population. The beaches are gently sloping and wide and have been improved at great expense. The ocean and bathing, fishing and boating are the principal attractions. Inhabitants of the municipalities chiefly depend for their livelihood upon the business of maintaining these summer resorts. Approximately 500 persons are engaged in the operation of fish pounds constructed under authority of the State within three nautical miles from the coastline. This is a commercial activity that results in the taking of large quantities of fish annually.

Vast amounts of garbage are cast on the beaches by the waters of the ocean and extend in piles and windrows along them. These deposits are unsightly and noxious, constitute a menace to public health and tend to reduce property values. Prompt removal is necessary, and men are regularly employed to haul them away. At times there are 50 truckloads deposited on a single beach. When garbage is carried upon the shore the adjacent waters hold large quantities in suspension. Floating garbage makes bathing impracticable, frequently tears and damages fish pound nets and injuriously affects the business of fishing. Usually the sea along the shore clears within a few days

and sometimes within a single day. The deposits generally occur when the winds are from the east or northeast, but sometimes southeast winds bring them in. The heavier deposits occur four or five times in a season and frequently throughout the year, varying in number on different beaches.

For about 20 years prior to 1918 defendant disposed of its garbage by a reduction system and, except for a brief period in 1906, did not dump any at sea. A plant was destroyed by fire in 1917 and a contractor failed. It then applied to the supervisor of the harbor for permission to dispose of its garbage at sea and, because of the conditions then existing, he gave such permission and designated a dumping place. But later, because of complaint from New Jersey beaches, he designated the areas specified in defendant's answer. The defendant has installed and uses some incinerating plants but, by reason of increasing population and volume of garbage, the quantities still being dumped at sea are very large.

Weather permitting, the City dumps garbage daily. Less is dumped in the winter than in the summer. In February, 1929, the quantity was 52,000 cubic yards, while in June of the same year it was 192,000. When dumped, the mass forms piles about a foot above the water, spreads over the surface and breaks into large areas. Some materials remain on the surface and others are held in suspension. These masses float for indefinite periods and have been found to move at the rate of more than a mile per hour. Areas of garbage have been seen between the dumping places and the New Jersey beaches, and some have been followed from the place where dumped to the shore. In his report to the chief of engineers for 1918 and in each of his subsequent annual reports the supervisor of the harbor of New York stated that garbage deposited in the sea, no matter what the distance from the shore, is liable to wash up on the beaches.

The Master concluded that large parts of these floating and submerged areas of garbage, dumped by the defendant, are driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water.

In 1907 a committee appointed by the mayor reported to him: "All of the refuse collections could be dumped into the Atlantic ocean, but unfortunately the least harmful material sinks and the foulest floats, so that much of the floatable mass will be scattered along beaches through the action of current and wind. This fouling of beaches creates a nuisance that the public should not be asked to tolerate." In June, 1921, a committee composed of heads of departments and officials of the City reported to the mayor: "Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal." The defendant, through its mayor and other representatives, has for years been informed that the dumping of its garbage is undesirable, and that other municipalities by the sea have suffered injury as the result of such dumping. Governors and the legislature of New Jersey have repeatedly complained to defendant. In 1929 the City had 20 incinerators and considerable garbage is being destroyed by them. In December of that year the department of sanitation presented to the mayor a program for increasing the number. The cause of the delay in providing an adequate disposal system was not shown.

The Master concluded that the method of disposing of garbage by dumping at sea was not an approved or a good system and disposition of such material by incineration or the "reduction system" was a proper way to dispose of the same. He found that the delay of defendant in adopting a proper method of disposal had been unreasonably long.

The Master found that whatever garbage reaches the plaintiff's shores from vessels and other dumpings than those of the defendant was negligible in comparison with that constantly being dumped by the defendant.

As his conclusions of law, the Master reports that the defendant has created and continues to create a public nuisance on the property of New Jersey and that the latter is entitled to relief in accordance with the prayer of its complaint, but that defendant should be given reasonable time within which to put into operation sufficient incinerators. He recommends that decree be entered accordingly.

The plaintiff filed no exceptions to the Master's report. The defendant excepted to substantially all material findings and conclusions. The Court has heard the arguments of counsel for the respective parties and considered their briefs for and against the exceptions and upon final submission of the case. The evidence abundantly sustains the findings of fact.

The defendant maintains that the Master erred in concluding that it has unnecessarily delayed providing incinerators. The record shows that garbage gathered in the Boroughs of Queens and Richmond has not been dumped at sea. The quantities shown to have been so dumped were taken from the Boroughs of Manhattan, Bronx and Brooklyn. The amounts collected, the amounts dumped and the percentage that the latter are of the former for the years 1924 to 1929 inclusive were shown in the evidence

and are indicated in the margin.* While such percentages have substantially decreased, the diminution of quantities actually dumped has been relatively slight.

Further discussion of the evidence would serve no useful purpose. It is enough to say that defendant has suggested no adequate reason for disturbing the findings. They are approved and adopted by the Court.

Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction. Cf. *Massie v. Watts*, 6 Cranch 148, 158 *et seq.* *Hart v. Sansom*, 110 U. S. 151, 154. *Cole v. Cunningham*, 133 U. S. 107, 116. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 622-623.

There is no merit in defendant's contention, suggested in its amended answer, that compliance with the supervisor's permits in respect of places designated for dumping of its garbage leaves the Court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the Act that purports to give to one

*Year.	Amount collected (from 3 boroughs only), cu. yds.	Amount Dumped at Sea	Approximate Percentage
1924.....	1,837,970	1,675,657	.91
1925.....	1,812,251	1,517,934	.83 2/10
1926.....	1,869,752	1,303,119	.69 6/10
1927.....	1,782,299	1,219,416	.68 4/10
1928.....	1,955,818	1,378,572	.70
1929.....	2,519,758	1,478,165	.58 7/10

dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect.

The Master's conclusions of law and recommendations for a decree are approved.

A decree will be entered declaring that the plaintiff, the State of New Jersey, is entitled to an injunction as prayed in the complaint, but that before injunction shall issue a reasonable time will be accorded to the defendant, the City of New York, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by it at sea or to provide other means to be approved by the decree for the disposal of such materials. And, in as much as the evidence does not disclose what is such reasonable time the case is referred to the same Special Master for findings of fact upon that subject. He is authorized and directed to hear witnesses presented by each of the parties, and, should he deem it necessary so to do, to call witnesses of his own selection and then with all convenient speed to report to the Court his findings and a form of decree.

It is so ordered.

NASH-BREYER MOTOR CO., FORMERLY TROY
MOTOR SALES CO., v. BURNET, COMMISSIONER
OF INTERNAL REVENUE.

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

No. 549. Argued April 29, 1931.—Decided May 18, 1931.

1. The proper venue for review by a Circuit Court of Appeals of a decision of the Board of Tax Appeals, where the taxpayer is a cor-

poration having a principal office in a State where is situate the office of the Collector to whom it made its return, is the circuit in which that State is included. Revenue Act 1926, § 1002 (b). P. 487.

2. In such case § 1002 (d) gives the Commissioner and the taxpayer the right by stipulation to choose between the Circuit Court of Appeals designated by § 1002 (b) and the Court of Appeals of the District of Columbia, but not to choose a different Circuit Court of Appeals. *Id.*

42 F. (2d) 192, affirmed.

CERTIORARI, 282 U. S. 835, to review a judgment of the Circuit Court of Appeals dismissing a petition to review a decision of the Board of Tax Appeals.

Messrs. Theodore B. Benson and Arthur H. Deibert, with whom Messrs. M. F. Mitchell and George G. Witter were on the brief, for petitioner.

Solicitor General Thacher, with whom Assistant Attorney General Youngquist and Messrs. Claude R. Branch, J. Louis Monarch, and Morton K. Rothschild, Special Assistants to the Attorney General, and Whitney North Seymour were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a Delaware corporation having its principal office in California, filed federal income and profits tax returns for its fiscal years 1920 and 1921 with the Collector of Internal Revenue for its district in that state. Following a decision of the Board of Tax Appeals which upheld respondent's determination of tax deficiencies against petitioner for both years, 14 B. T. A. 546, petitioner and respondent entered into an agreement, stated to be pursuant to § 1002¹ of the Revenue Act of 1926, 44 Stat. 110,

¹ The Revenue Act of 1926 reads in part: "Sec. 1001. (a) The decision of the Board [of Tax Appeals] . . . may be reviewed by a

that the decision of the Board might be reviewed by the Court of Appeals for the Second Circuit. The petition for review in that court recited that the parties had so agreed.

The Court of Appeals, of its own motion, dismissed the petition for lack of jurisdiction, 42 F. (2d) 192, on the authority of *Massachusetts Fire & Marine Ins. Co. v. Commissioner*, 42 F. (2d) 189, in which it had held that § 1002 (d) permits the parties to choose only between the Court of Appeals of the District of Columbia and the court of appeals for any circuit in which there is some ground for saying that venue might lie under subdivisions (a), (b) or (c). This Court granted certiorari, 282 U. S.

Circuit Court of Appeals, or the Court of Appeals of the District of Columbia. . . .

VENUE

“Sec. 1002. Such decision may be reviewed—

“(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

“(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

“(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

“(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

JURISDICTION

“Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board. . . .”

835, the Government acquiescing because of the importance of the question and the conflict of the decision below with one of the Court of Appeals for the First Circuit where, however, the point was neither discussed, *Simmons Co. v. Commissioner*, 33 F. (2d) 75, nor raised in the petition for certiorari, which was denied. 280 U. S. 588.²

Petitioner contends that under (d) the parties may stipulate for review in any circuit court of appeals. In view of the rule of the statutes that venue of the federal courts generally turns upon the geographical location of the parties and is never within their exclusive control, it would require plain language in this statute to support an unlimited choice. But the words of (d)—“the Circuit Court of Appeals for the circuit”—seem to refer, not to the court of appeals for any circuit, but to some particular circuit court of appeals previously described, necessarily that one which could have entertained the petition, under (a), (b) or (c), in the absence of an agreement under (d). Only such a construction comports with the statement of the House Committee on Ways and Means, that the provisions now in § 1002 “. . . prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized.” House Reports, 69th Congress, 1st Session, Vol. 1, Report No. 1, p. 19. An unlimited choice might overburden a circuit court of appeals, whose docket was

² The Court of Appeals for the Second Circuit has twice assumed jurisdiction in cases like the present one, without discussion. *Greylock Mills v. Commissioner*, 31 F. (2d) 655; *Fowler v. Commissioner*, 42 F. (2d) 837. In the latter case, certiorari was denied, but review was not sought on the question of venue. 282 U. S. 898. The only other case discussing the question accords with the present. *Spring Canyon Coal Co. v. Commissioner*, 38 F. (2d) 764 (C. C. A. 8th).

already overcrowded, with petitions for review with respect to which it could have had no venue under the other subdivisions of § 1002.

The Senate Committee on Finance, in proposing the addition of (d) to § 1002, stated that the purpose was to permit parties “. . . to stipulate the court to which the review will be taken, in order that any doubt as to the proper court may be removed . . .” Senate Reports, 69th Congress, 1st Session, Vol. 1, Report No. 52, p. 36. See also, to the same effect, the conference report in House Reports, *supra*, Report No. 356, p. 54. Whatever solution (d) may afford for the difficulties in those cases when doubts arise as to the proper circuit for review under (a), (b), or (c), here petitioner had its principal office in California and filed its return there, so that under (b) the venue could properly be laid only in the Court of Appeals for the Ninth Circuit. Hence the parties’ right of choice by stipulation under (d) was restricted to that court or the Court of Appeals of the District of Columbia.

Section 1003 (a) confers jurisdiction to review decisions of the Board of Tax Appeals on circuit courts of appeals and the Court of Appeals of the District of Columbia. Section 1002 is entitled “Venue.” Even if the effect of this distinction is to define venue but not to restrict the jurisdiction of the court below, it was not bound to exercise jurisdiction in the face of (d), which authorized the parties to control the venue only by stipulation conforming to its terms. See *Kansas City Ry. Co. v. United States*, 282 U. S. 760. The restriction on the power of the parties to stipulate as to venue would be meaningless if they could waive it without the consent of the court.

Affirmed.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* HERSHEY CHOCOLATE CO.

ESTATE OF LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

ESTATE OF DAVIS, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

ESTATE OF LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

ESTATE OF DAVIS, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

SAME *v.* KLEIN CHOCOLATE CO.

ESTATE OF LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

SAME *v.* SAME.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

ESTATE OF LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* WILBUR SUCHARD CHOCOLATE CO.

SAME *v.* SAME.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

ESTATE OF DAVIS, COLLECTOR OF INTERNAL REVENUE, *v.* YORK CHOCOLATE CO.

ESTATE OF LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

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

Nos. 426-441. Argued April 21, 22, 1931.—Decided May 18, 1931.

1. "Sweet chocolate" and "sweet milk chocolate," which contain sugar in addition to chocolate or chocolate and milk solids, and which are widely known, distributed and used as confectionery, are "candy" within the meaning of §§ 900 (9), Revenue Act of 1918 and 900 (6), Revenue Act of 1921, imposing excises on the sales price of candy and other luxuries. P. 490.
2. Administrative construction of a doubtful statute will not be lightly disturbed. P. 492.
3. Reenactment of a statutory provision without change in the face of a consistent administrative construction is persuasive of a legislative recognition and approval of the statute as construed. *Id.*

42 F. (2d) 408, reversed.

CERTIORARI, 282 U. S. 827, to review judgments which reversed judgments in favor of the above-named Collectors in suits in the District Court for recovery of money collected as taxes.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Sewall Key* and *J. P. Jackson*, Special Assistants to the Attorney General, *Erwin N. Griswold*, *Clarence M. Charest*, General Counsel, and *Harrison F. McConnell*, Special Attorney, Bureau of Internal Revenue, were on the brief for petitioners.

Mr. William Clarke Mason, with whom *Messrs. John E. Snyder*, *F. Lyman Windolph*, *C. J. Hepburn*, *S. V. Hosterman*, and *A. Allen Woodruff* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Section 900 of the Revenue Act of 1918, 40 Stat. 1057, 1122, imposed, at varying percentages, an excise tax upon

the sales price of enumerated articles, most of which may be characterized as luxuries. The enumeration of the ninth subdivision was, "Candy, 5 per centum." Section 900 (6) of the Revenue Act of 1921, 42 Stat. 227, 292, reënacted this provision but reduced the tax to 3%. Respondents, manufacturers of "sweet chocolate" and "sweet milk chocolate," brought suits in the District Court for Eastern Pennsylvania, to recover about \$8,000,000 of taxes assessed under these sections for the years 1918 to 1924, on the ground that the articles sold are not "candy," sale of which was taxed. On written stipulation of the parties, the cases were tried by the court without a jury. Judgments for petitioners were reversed by the Court of Appeals for the Third Circuit. 42 F. (2d) 408. This Court granted certiorari, 282 U. S. 827, to resolve the conflict of the decision below with that of the Court of Appeals for the First Circuit, in *Malley v. Walter Baker & Co.*, 281 Fed. 41.

The trial court found that sweet chocolate is a solid or plastic mass, made by mixing sugar with chocolate, which is the powdered cacao nib or bean, with or without the addition of flavoring material, and that sweet milk chocolate also contains milk solids; that the type of sweet chocolate manufactured and sold by respondents is commonly sold in small bars, sometimes containing nuts, or in blocks, "attractively dressed up" for sale under names which would appeal to candy consumers, and is usually consumed in the same manner as candy, that is, eaten in small quantities from the hand as a sweetmeat. One of the respondents described its product as a "confection" upon some of its labels and display matter.

Respondents rest their case mainly upon differences in composition of sweet chocolate from that of confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter, which, it is urged, is alone described by the word "candy." They

assert that chocolate is food and candy is not, and hence chocolate cannot be properly described as candy. But it is common knowledge that sugar, also a food, is an ingredient both of candy as thus defined and of sweet chocolate, sometimes to the extent of 50% or more of the latter, as was conceded on the argument here. We likewise know, as was conceded, that chocolate in a great variety of forms is an important ingredient of what is commonly known as candy, and that pieces of sweet chocolate of the type described by the findings are often included in packages of confectionery commonly sold as candy. These considerations at least suggest that the form and use of sugar compounds, intended for taste-gratifying consumption, are quite as important in determining whether they are candy, as their particular composition. See *Malley v. Walter Baker & Co.*, *supra*, p. 46.

No doubt the word "candy," in view of its use to designate confections made principally of sugar before the widespread consumption of sweet chocolate preparations as confections or sweetmeats, and as the dictionary suggests, may be used in this narrower and more restricted sense. But it may be, and we think is used, as the dictionary also suggests, in a popular and more general sense, as synonymous with sugar compounds sold and used as confectionery or sweetmeats, and embraces them, as well as candy made chiefly of sugar.

If it were necessary to our decision, in the absence of any controlling legislative history or any suggested plausible reason why a tax on candy, in a general revenue measure taxing luxuries, should be deemed to apply to one type of confectionery and not the other, we should hesitate to say that the word was used in its restricted sense, or to hold that a substance made of sugar and chocolate, a widely known and popular form of confectionery identified, in use and method of distribution, with other

types of confectionery known as "candy," was not intended to be taxed. See *DeGanay v. Lederer*, 250 U. S. 376, 381; *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253.

Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history. Shortly after the adoption of the 1918 Act, Art. 22 of Regulations 47, May 1, 1919, announced that "Candy within the meaning of the act includes . . . sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts." This continued to be the ruling of the Treasury Department until the repeal of the tax by § 1100 (a) of the Revenue Act of 1924, 43 Stat. 253, 352. It and later regulations excluded unsweetened chocolate from the tax and, as revised in December, 1920, the regulation, and also Art. 19 of Regulations 47, January 6, 1922, under the 1921 Act, excluded from the tax all sweet chocolate which obviously would not be consumed in the condition or form in which sold. This was but a recognition that use may be a determining factor in ascertaining what sugar compounds are embraced in the word candy.

The administrative construction was upheld in 1922 by *Malley v. Walter Baker & Co.*, *supra*, the only case, other than the present, which has considered it. The provision has been consistently enforced as construed, was reenacted by Congress in the 1921 Act, and remained on the statute books without amendment until its repeal. Such a construction of a doubtful or ambiguous statute by officials charged with its administration will not be judicially disturbed except for reasons of weight, which this record does not present. See *Brewster v. Gage*, 280 U. S. 327, 336; *Universal Battery Co. v. United States*, 281 U. S. 580, 583; *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378. The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent

administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed. See *National Lead Co. v. United States*, 252 U. S. 140, 146. We see no reason for rejecting that construction.

The court below found support for its decision in the fact that various tariff and revenue acts have separately classified candy and chocolate, and respondents make the point here. But it is to be noted that in none of the acts cited does the word candy appear alone, as in the present statute. In the earlier tariff acts the duty was laid on "sugar candy." See Act of August 10, 1790, 1 Stat. 180; Act of June 7, 1794, 1 Stat. 390. In those of August 5, 1909, 36 Stat. 11; October 3, 1913, 38 Stat. 114; and September 21, 1922, 42 Stat. 858, which may be taken as typical, a duty was imposed on importations of "sugar candy and all confectionery not specially provided for" at one rate, and by different paragraph, on chocolate, at a different rate. The differences in rate made classification necessary; and as the cacao bean is not produced in the United States and sugar is, that fact may be taken to account in a tariff act for the differences both in rate and classification. But a difference in composition, relatively minor so far as it has any bearing on the general character of the product or its use, is of little moment in determining whether the product falls within or without a single class of luxuries taxed, for revenue only, at a single rate. Similarly, rulings of the Department of Agriculture setting up standards under the Pure Food Laws for the composition of various types of confectionery, including sweet chocolate, throw no light on the present problem.

Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill.

For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co. v. Deering*, 254 U. S. 443, 474; *Lapina v. Williams*, 232 U. S. 78, 90; *United States v. Freight Assn.*, 166 U. S. 290, 318.

Reversed.

GASOLINE PRODUCTS CO., INC., *v.* CHAMPLIN
REFINING CO.

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

No. 362. Argued April 17, 1931.—Decided May 18, 1931.

1. The Seventh Amendment preserves the substance of jury trial and not the old form of procedure. P. 498.
2. Where its requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, the Seventh Amendment does not compel a new trial of that issue even though another and separable issue must be tried again. P. 499.
3. Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. P. 500.
4. Petitioner sued for royalties under a contract licensing the use of a patented process of manufacture. Respondent counterclaimed for damages alleged to have resulted from failure by petitioner to perform a related contract to construct part of a plant for lack of which, respondent said, it incurred expenses for storage and suffered losses from several causes, including loss of anticipated profits. There was a verdict for the petitioner on its cause of action and for the respondent on the counterclaim. *Held* that in reversing the judgment as to the counterclaim and directing a new trial with respect to the amount of damages because of error in the instructions concerning the measure of damages under it, it was not necessary to disturb the judgment on the main cause of action; but there should be a retrial of all the issues raised by the counterclaim, be-

cause the dates of formation and breach, as well as the scope, of the contract therein relied upon were left in such doubt by the record, including the verdict, that the question of damages could not be submitted to a jury independently of the question of liability without confusion and uncertainty.

39 F. (2d) 521, reversed.

CERTIORARI, 282 U. S. 824, to review a judgment reversing a judgment in an action on a contract and directing a new trial restricted to the amount of damages on a counterclaim.

Messrs. John B. Marsh and Robert Hale for petitioner.

Mr. Horace G. McKeever, with whom *Messrs. Harry O. Glasser, William S. Linnell, Carl C. Jones, and Emery O. Beane* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner brought suit in the District Court for Maine, to recover royalties alleged to be due under a contract by which it licensed respondent to use two "Cross cracking units," structures adapted to the use of the "Cross cracking process" for increasing the production of gasoline from crude oil. Respondent pleaded, by way of counterclaim, in two separate counts, a contract by petitioner to construct a "Cross vapor treating tower" for treatment of gasoline, produced by the cracking units, necessary to make it marketable. The consideration for this contract was alleged to be the execution of the license contract already referred to and of two related contracts, one by a third party for the construction of the cracking units, and another by which petitioner guaranteed that they would work. Performance of these contracts is admitted.

Both counts of the counterclaim were based on the same series of transactions. The first alleged a contract arising from an oral proposal by petitioner's vice-presi-

dent in January, 1926, to construct for respondent a Cross vapor system treating tower, the cost of which was to be repaid by respondent to petitioner if the tower functioned in a satisfactory manner. This proposal was alleged to have been accepted by the execution of the other contracts. The second count alleged a written proposal of like tenor by petitioner to respondent, accepted by respondent on February 6, 1926, and confirmed by the later execution of the other contracts. Both counts charged that by reason of petitioner's failure to construct the treating system, and pending the construction of a substitute system by respondent, the latter was compelled to store large quantities of the cracked gasoline awaiting treatment, resulting in four principal items of damage: the expenses of storage; depreciation of the gasoline by evaporation and other causes; the loss incident to shutting down respondent's plant because of the lack of treating apparatus; and the loss of anticipated profits from the sale of gasoline.

The jury returned a verdict on petitioner's cause of action, and a verdict for respondent on the counterclaim, leaving a balance in petitioner's favor for which the District Court gave judgment. The Court of Appeals for the First Circuit reversed because of errors in the charge of the trial court with respect to the measure of damages on the counterclaim; but in directing a new trial, it restricted the issues to the determination of damages only, 39 F. (2d) 521, following in this respect its earlier decisions in *Farrar v. Wheeler*, 145 Fed. 482; *Calaf v. Fernandez*, 239 Fed. 795; *Atteaux & Co. v. Pancreon Mfg. Corp.*, 22 F. (2d) 749. See also, adopting the same practice, *Original Sixteen to One Mine v. Twenty-one Mining Co.*, 254 Fed. 630; *Thorpe v. National City Bank*, 274 Fed. 200; *Chicago, R. I. & P. Ry. Co. v. Stephens*, 218 Fed. 535; *Fentress Co. v. Elmore*, 240 Fed. 328; *Great Western Coal Co. v. Railway Co.*, 98 Fed. 274; see *Empire Fuel Co.*

v. *Lyons*, 257 Fed. 890, 897. This Court granted certiorari, 282 U. S. 824, to review the single question whether the court below erred in thus limiting the new trial, upon a petition setting up a conflict of the decision with that of the Court of Appeals for the Third Circuit in *McKeon v. Central Stamping Co.*, 264 Fed. 385. See also *Kean v. National City Bank*, 294 Fed. 214, 226.

Petitioner contends that the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is a denial of its constitutional right to a trial by jury. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law." It is argued that as, by the rules of the common law in force when the Amendment was adopted, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone is a denial of the trial by jury which the Amendment guarantees.

It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all.¹ This continued to be the rule in some states after the adoption of the Constitution;² but in many it has not been followed, notwithstanding the presence in their constitutions of provisions preserving trial by jury. The Massachusetts courts early modified it to permit a new

¹ *Parker v. Godin*, 2 Strange 813; *Swain v. Hall*, 3 Wilson 45; *Berrington's Case*, 3 Salk. 362; *Bond v. Spark*, 12 Mod. 275.

² *Boswell v. Jones*, 1 Wash. 322 (Va. 1794); *Gardner's Administrator v. Vidal*, 6 Rand. 106 (Va. 1828); *Sawyer v. Merrill*, 10 Pick. 16 (Mass. 1830); *Tuttle v. Gates*, 24 Maine 395 (1844); *Knowles v. Dow*, 22 N. H. 387, 411 (1851).

trial of less than all the issues of fact when they were clearly separable. *Bicknell v. Dorion*, 16 Pick. 478; see *Simmons v. Fish*, 210 Mass. 563, 565; 97 N. E. 102. The rule as thus modified has been generally accepted in the New England states, see *Zaleski v. Clark*, 45 Conn. 397, 404; *McKay v. New England Dredging Co.*, 93 Maine 201; 44 Atl. 614; *Lisbon v. Lyman*, 49 N. H. 553, 582 *et seq.*; *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83; 80 Atl. 406; *Parizo v. Wilson*, 101 Vt. 514; 144 Atl. 856, and consistently followed by the Court of Appeals for the First Circuit.

Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: ". . . for form's sake, we must set aside the whole verdict . . ." *Eddie v. East India Co.*, 1 W. Bl. 295, 298. But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See *Herron v. Southern Pacific Co.*, *ante*, p. 91. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See *Walker v. Southern Pacific R. Co.*, 165 U. S. 593, 596. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, see *Ex parte Peterson*, 253 U. S. 300, 309, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury.

If, in the present case, the jury has found, in accordance with the applicable legal rules, the amount due to

petitioner on the contract for royalties and all the elements fixing its liability on the treating plant contract, there is no constitutional requirement that those issues should again be sent to a jury, merely because the exigencies of the litigation require that a separable issue be tried again. Such is not the effect of *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, which decided only that an appellate federal court may not direct judgment *non obstante veredicto*, solely because the verdict given is not sustained by the evidence, but in that event must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury upon an issue of fact, without the verdict of the jury. Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.

As the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed. But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried. The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.

But it is impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms. Different dates are alleged in the counterclaim as that of the contract—one, February 6, 1926; the other, the date

of final execution of the related contracts, fixed by some of the testimony at March 20th. No date was set for performance, and what the jury, by its verdict, found to be the reasonable time for performance, is not disclosed by the record.

The contract alleged was to construct a single treating tower; but there was a sharp conflict in the testimony as to whether the oral proposal was for one, two, or three towers. To pass on the claim for loss of profits, the jury must know whether the contract to construct was the extent of the undertaking, and, if so, the number of towers to be built, or whether petitioner also agreed that the plant, whatever the number of towers, was to be adequate to treat all gasoline produced by respondent. In addition, the jury must know whether there was a guaranty that the treating system would work satisfactorily, or, if not, whether in fact it would have done so. But the present verdict, awarding as damages on the counterclaim less than the total of the items claimed by respondent, exclusive of alleged loss of profits, cannot be taken as establishing any of these material facts.

Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 274; *American Locomotive Co. v. Harris*, 239 Fed. 234, 240; *Simmons v. Fish*, *supra*, p. 568; *McBride v. Huckins*, 76 N. H. 206, 213; 81 Atl. 528; *General Motors Co. v. Shepard Co.*, 47 R. I. 153, 156; 130 Atl. 593; *LeFebvre's Administrator v. Central Vermont Ry. Co.*, 97 Vt. 342, 358; 123 Atl. 211. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.

See *Simmons v. Fish, supra*. There should be a new trial of all the issues raised by the counterclaim.

Reversed.

MERCHANTS WAREHOUSE CO. *v.* UNITED STATES ET AL.

MERCHANTS WAREHOUSE CO. ET AL. *v.* SAME.

UNITED STATES ET AL. *v.* MERCHANTS WAREHOUSE CO. ET AL.

PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO. *v.* UNITED STATES ET AL.

PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO. ET AL. *v.* SAME.

UNITED STATES ET AL. *v.* PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO. ET AL.

PHILADELPHIA WAREHOUSING & COLD STORAGE CO. *v.* UNITED STATES ET AL.

PHILADELPHIA WAREHOUSING & COLD STORAGE CO. ET AL. *v.* SAME.

UNITED STATES ET AL. *v.* PHILADELPHIA WAREHOUSING & COLD STORAGE CO. ET AL.

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

Nos. 635-643. Argued April 21, 1931.—Decided May 18, 1931.

1. The credibility of witnesses and the weight of evidence in matters before the Interstate Commerce Commission are for the Commission to determine; and its findings of fact will not be reviewed by the courts if supported by evidence. P. 508.
2. The evidence in this case (which involves the validity of certain allowances made by railroads to certain warehouses) supports the conclusion of the Commission that the warehouses are not in fact public freight stations, as designated by the railroads; that the service performed by the warehouses do not differ from those

- performed by their competitors in the same place; and that their designation as freight stations was nominal only, the real purpose being to compensate them for soliciting freight shipments over the lines of the carriers. P. 508.
3. Payments made by a carrier to a warehouse for the service of assembling and loading package freight for shipment in individual carload consignments and of unloading and distributing like incoming consignments, amount to unlawful rebates, where, under the carrier's tariff, such service results in securing carload rates for less than carload shipments for the patrons of the warehouse and could not lawfully be performed by the carrier itself. Pp. 509, 510.
 4. Where carriers extend, in the form of money allowances to favored warehousemen, 48 hours free time, during which carload freight is unloaded at their warehouses, stored, and distributed in less than carload lots, all at the expense of the carriers, and this privilege is withheld from other competing warehousemen and from shippers who maintain their own private warehouses on industrial tracks or private sidings, the discrimination violates § 2 of the Interstate Commerce Act. P. 511.
 5. Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. *Id.*
 6. Warehouse companies who ship and receive freight for their patrons and are themselves the consignors and consignees where "package" freight moves in carloads at carload rates, are "persons" authorized to lodge complaints with the Interstate Commerce Commission, § 13 (1), and "persons" within the meaning of that word as used in §§ 2 and 3 of the Act. P. 512.
 7. The evil of discrimination was the principal thing aimed at by the Act, and its language is broad enough to embrace all discriminations of the sort described which lay within the power of Congress to condemn. *Id.*
 8. Since the discrimination here involved could not be overcome without extending the allowances to all shippers of carloads at carload rates and without changes in the carriers' tariffs, the Commission rightly ordered the carriers to cease employing the means by which it was accomplished. P. 513.
 9. Nothing herein is to be taken as indicating that a carrier may not designate a warehouse as a public freight station and select an agent for its management, where a forbidden discrimination is not effected. Cf. *Arbuckle Case, United States v. Baltimore & Ohio R. Co.*, 231 U. S. 274. *Id.*

10. Order of the District Court staying an order of the Interstate Commerce Commission pending disposition of appeals from a decree refusing to set it aside, *held* a proper exercise of discretion in the circumstances. P. 513.

44 F. (2d) 379, affirmed.

APPEALS from decrees dismissing bills by which several warehousing corporations sought to set aside an order of the Interstate Commerce Commission. The cross-appeals were from an order of the court staying the order of the Commission pending disposition of the main appeals.

Mr. John W. Davis, with whom *Messrs. H. Edgar Barnes, Allen S. Olmsted, 2d,* and *M. Hampton Todd* were on the briefs, for Merchants Warehouse Co. et al.

Mr. John P. Connelly for Philadelphia Warehousing & Cold Storage Co.

Mr. J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Elmer B. Collins*, Special Assistant to the Attorney General, and *Daniel W. Knowlton*, Chief Counsel, Interstate Commerce Commission, were on the brief, for the United States et al.

Mr. John J. Hickey for Gallagher et al.

MR. JUSTICE STONE delivered the opinion of the Court.

These are appeals under § 238 of the Judicial Code, from a decree of a District Court of three judges for Eastern Pennsylvania, dismissing the bills of complaint by which appellants, warehousing corporations doing business in Philadelphia, sought to set aside an order of the Interstate Commerce Commission. 44 F. (2d) 379. The order required the Reading Company and the Pennsylvania and Baltimore & Ohio railroads, interstate rail carriers, to cancel such provisions in their tariffs as pur-

ported to make the warehouses of appellants in Philadelphia a part of the station facilities of the carriers, and directed that they cease and desist from making allowances to appellants in connection with the loading and unloading of package freight at the latter's warehouses. There are also cross-appeals from an order of the District Court staying the order of the Commission pending disposition of the appeals in this Court.

The three railroads load and unload package freight at their stations in Philadelphia. The Pennsylvania and Baltimore & Ohio railroads have designated some of appellants' warehouses as parts of their station facilities there. All three have contracts of long standing with one or more appellants, under which the latter, at their warehouses, afford facilities and perform services, in connection with the loading and unloading of package freight, which they denominate terminal facilities and services, and for which the railroads pay them a stipulated compensation. In the case of the Pennsylvania, provision is made for this allowance in its published tariff.

Six warehouse companies, appellees, which also maintain warehouses in Philadelphia with private railroad sidings connected with one or another of the three railroads, and are competitors of appellants, instituted proceedings before the Interstate Commerce Commission, in which they assailed the terminal service contracts referred to as unjustly discriminatory and unduly preferential, and the payments made under them as unlawful rebates. Numerous merchants' organizations of Philadelphia intervened in the proceedings, which were consolidated and heard as a single cause, and resulted in the order before us. 160 I. C. C. 563.

The Interstate Commerce Commission and the court below found the facts as already stated and also the following: Carload freight, carried at carload rates, is customarily loaded and unloaded by the owner or consignee, as required by Rule 27 of the Consolidated Freight Classi-

fication, filed under § 6 of the Interstate Commerce Act, with the binding force of a tariff schedule. By exceptions to the classification, the railroads undertake, as a part of the transportation service covered by their tariffs, to load and unload carload package freight at their Philadelphia freight stations, except when handled directly to or from cars on team tracks. At their warehouses appellants load and unload cars and perform other services presently to be referred to, for which the railroads compensate them by the challenged allowances. These services do not differ in substance from those which the competing warehouses render. Both handle the same classes of freight and procure its shipment to or from them by advertising in trade publications and in circulars to prospective customers. Shippers using public warehouse facilities generally select the company offering the lowest aggregate charge for the distribution of their goods, and, by reason of the allowances made, the contract warehouses are able to quote lower prices than their competitors, thus securing business which would otherwise go to the latter. The primary motive for the payment of the allowances to the contract warehouses is to gain traffic, and the allowances are compensation to appellants for their solicitation of freight movements over the lines of the carriers.

The Commission and court also found as follows: Appellants' warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations, but are confined to the warehousing of merchandise for their patrons. The services which they perform in connection with loading and unloading of freight, including the sending of arrival notices to their patrons after receipt of notice of arrival from the railroad, the collection of freight charges, and other incidental matters, are in fact performed for the owners of the merchandise rather than for the railroads. While the contract warehouses are not owners of goods received or shipped, the dealings of the railroads are with them and

not with the owners of the goods; and as to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to appellants for distribution by them in less than carload lots. The contract warehouses, being given dominion over the merchandise for transportation purposes, are to be deemed consignors of shipments from, and consignees of shipments to, their warehouses.

Appellants do not seriously contend that the challenged allowances are not discriminatory in fact, but maintain that the discrimination is one which the law permits. While conceding that the contract warehouses and their patrons, by virtue of the contracts and allowances, gain important business advantages over their competitors, they insist that the advantages are those which flow exclusively from the fact that the contract warehousemen are agents of the carriers in the performance of transportation services, and that since the railroads may properly perform such services at their own stations and include charges for them in their filed tariffs, they may likewise select the warehouses of appellants as stations, perform the services there, and employ and compensate the warehousemen for doing them. As these contentions do not comport with the findings of the Commission and the court below that the contract warehouses are not in fact open public freight stations, and that the services rendered are not transportation services, those findings are sharply challenged as without support in the evidence.

We may assume that the railroads, in order to carry on their business as interstate carriers, are not bound to maintain their own freight stations, but may contract with others to supply them and to perform there the transportation services which they are under a duty to perform. *Arbuckle Case (United States v. Baltimore & Ohio R. Co.)*, 231 U. S. 274. If appellants' warehouses were held out to the public by the carriers, and used

exclusively, as freight stations, and the services rendered there were exclusively transportation services which the carriers were either bound or permitted to render, the case would lack those elements which appellees urge as challenging the right of the carriers to make the allowances to appellants. They say that the warehouses of appellants are devoted to their private business activities in the storage, distribution and assembling of freight for their patrons before or after its rail transportation, and that the alleged transportation services are but a part of these activities, not differing from those performed by other warehouses for their patrons as a part of their warehousing business. Appellees contend that the designation of them as transportation services, only when performed at warehouses of appellants, enables the carriers to discriminate in favor of appellants, at the expense of their competitors, by compensating for them in that guise, or, what is the same thing, by extending to appellants at their warehouses the benefit of transportation services withheld from their competitors.

We think, as the court below held, that the Commission's finding that appellants' warehouses are not in fact public freight stations, is supported by the evidence. As already indicated, they are owned or controlled by appellants and used by them, as storage and distribution warehouses located on private premises, served by private side tracks. They are not leased to the railroads. There is no provision in the contracts between the carriers and the warehousemen which suggests that the warehouses were regarded or intended to be treated by either as freight stations. There was evidence that apart from the designation of the warehouses as stations in the tariffs, they were neither held out nor treated as such by carriers or appellants, nor known as such generally to shippers or to representative trucking companies engaged in the business of handling freight in Philadelphia. Pamphlet instructions by the railroads to their employees list their

public freight stations in Philadelphia, but list appellants' warehouses as private industries served by private side tracks. None of the appellants acted as freight agents for the carriers or issued bills of lading. While there was evidence of shipment from appellant's warehouses of freight delivered to them by truck or previously stored there, it did not appear that any shipments were made except for those who were patrons of the warehouses. There were instances where freight brought by truck to contract warehouses and tendered by non-patrons for shipment over the road serving them were rejected on the sole ground that the warehouses were not freight stations, and the intending shippers were instructed by those in charge to tender the shipment at a "freight station" of the carrier.

This and other evidence, which it is unnecessary to review at length, support the conclusion of the Commission that appellants' warehouses are not in fact public freight stations, that the services performed there by appellants do not differ from those performed by their competitors; and that their designation as freight stations was nominal only, the real purpose being the compensation of appellants for soliciting freight shipments over the lines of the carriers. See *O'Keefe v. United States*, 240 U. S. 294, 303. This evidence distinguishes the present case from the *Arbuckle Case*, *supra*, on which appellants rely; cf. *Terminal Warehouse Co. v. United States*, 31 Fed. (2d) 951. The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence. See *Interstate Commerce Comm. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 92, 100; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Assigned Car Cases*, 274 U. S. 564, 580, 581.

Even though appellants' warehouses are not public freight stations, the questions remain whether the services

for which the allowances are made are transportation services for which the carriers may lawfully compensate, and if they are, whether the carriers may discriminate by granting such compensation to appellants and not to others. Under the contracts those services begin with the receipt for shipment of outgoing freight (the contract with the Reading Company applies only to inbound freight) and with the unloading of the cars of inbound freight. They end with loading for shipment of outgoing freight and, in the case of inbound freight, with the expiration of the forty-eight hour period of free time during which the carrier allows freight to remain at its freight stations, without charge, before delivery to the consignee, or with the delivery, during the period, of the freight on the truck platform of the warehouse. From the expiration of that period, freight not delivered is held by appellants either under such warehousing agreements as they may make with owners or consignees or, in the absence of such agreements, as undelivered freight stored with them by the carriers for the account of the owners.

During this period, they perform three important items of service, not to mention minor ones which, for present purposes, may be disregarded, but for all of which together the allowances are made. They load and unload cars; they may store the freight or some of it; and, what is of vital importance, so far as the present issues of discrimination and rebating are concerned, they may assemble package freight of less than carload lots and ship it in carloads at carload rates, and distribute or reship, in less than carload lots, a large amount of package freight, carried in carloads at carload rates.

Addressing ourselves first to the nature of this third item of service, we note that the rates of the three railroads for transportation of freight in carloads are substantially lower than for package freight in less than car-

load lots. By Rule 23 of the Consolidated Freight Classification, the carriers may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. By Rule 14, the carriers confine their service with respect to carload shipments to one consignor and one consignee. The service rendered by appellants' warehouses in distributing and assembling package carload freight is thus one which a carrier is not authorized or permitted to render, even at its own public freight stations, and if performed by it would nullify its published rates for carload transportation service. See *New York, N. H. & H. R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361.

But it is a service which inures to the benefit of shippers by securing delivery to them or their customers in less than carload lots of package freight which is transported at carload rates. When rendered, as it largely is, within the forty-eight hours free time, that benefit is without expense to appellants or their patrons since it is included in the service for which the carriers pay. A substantial part of the inbound freight, varying from 35% to 80% at the different contract warehouses, is delivered or shipped from them within the forty-eight hours free time. The amount of the allowances paid during the four years preceding the hearing aggregated more than \$809,000; and the conclusion is inescapable that a very large part of the total is for the service of breaking up and distributing carloads in less than carload lots, which the carriers could not lawfully perform at their own public freight stations. Examination of the evidence can leave no doubt that it is the performance of this service, free of charge, to shippers, featured in appellants' advertising and solicitation of patronage, which induces the consignment of freight by shippers to them over the lines of the carriers and withdraws the business from competing warehouses. Such allowances are forbidden, even though

paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by §§ 2 and 3 of the Interstate Commerce Act. See *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 446; *United States v. Union Stock Yard Co.*, 226 U. S. 286, 307.

Apart from this consideration, the practical effect of the arrangement with appellants is that the carriers extend, in the form of money allowances to the favored warehousemen, forty-eight hours free time, during which carload freight is unloaded at their places of business, stored, and distributed in less than carload lots, all at the expense of the carriers—a privilege which they withhold from other competing warehousemen and from shippers who maintain their own private warehouses on industrial tracks or private sidings. Granted that the carriers might lawfully undertake to perform or pay for some of these services at warehouses served by private side tracks, they may not extend the privilege to some and withhold it from others. Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation. *Union Pacific R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220. Appellants rely on *Interstate Commerce Comm. v. Diffenbaugh*, 222 U. S. 42, but it is distinguishable from both the present and the *Updike* case in that it did not involve discrimination among shippers or consignees, which was condemned in the latter.

Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co. v. Interstate Commerce Comm.*, 282 U. S. 740. In that case we held that a carrier may not haul private cars of some of

its passengers free of charge and deny the privilege to others on the theory that it is using the cars which it carries free, as instrumentalities of transportation. The very selection of the cars of some passengers and not others for the favored treatment was held to be a forbidden discrimination. The order of the Commission upheld there would be futile if discrimination could still be effected by filing an exception to the carrier's tariffs for hauling private cars, designating some private cars as transportation facilities, and then granting allowances to the owners for their use. That, in substance and practical operation, is the effect of the tariff exceptions and the allowances which the present order forbids.

Only a word need be said of the objection that appellants and their competitors are not shippers and that the relationship between them and the carriers is not one subject to control by the Commission. The warehouse companies are "persons" authorized to lodge a complaint with the Commission by § 13 (1) of the Interstate Commerce Act, and they are "persons" within the meaning of that word as used in §§ 2 and 3 of the Act. The relationship between persons and rail carriers, with which the Commission is authorized to deal, is not formal, and is not to be determined exclusively by reference to bills of lading. In point of substance the warehousemen were consignors and consignees of merchandise, and they alone could act as such in the case of carload shipments which they assembled or distributed. In this respect they do not differ from freight forwarders who render a like service, so far as concerns their relations with the carriers. *Lehigh Valley R. Co. v. United States*, *supra*; see *Interstate Commerce Comm. v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508. The evil of discrimination was the principal thing aimed at by the Act, see *Louisville & Nashville R. Co. v. United States*, *supra*, p. 749, and its language is certainly broad

enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. *Shreveport Case*, 234 U. S. 342, 356. Section 3 makes it unlawful for any rail carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever. . . ."

For reasons already indicated, the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending the benefit of the allowances to the competing warehouses. Since the allowances are for services which include the assembling and distribution of carloads from or into less than carload lots, the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs and classifications for the handling of carloads. As the Commission found that appellants' warehouses are not public freight stations in fact but are such in name only, it rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished. *New York, N. H. & H. R. Co. v. Interstate Commerce Comm.*, *supra*, p. 404. But nothing said here is to be taken as indicating that a carrier may not designate a warehouse as a public freight station and select an agent for its management where a forbidden discrimination is not effected.

The court below was within the limits of its discretionary power in staying the Commission's order pending the appeal. The practice complained of was of long standing, entered into, so far as appears, in good faith, at a time when the discrimination, if it existed, was much less serious than at present, and before the present prohibitions against such discriminations. Its legality now

is not free from doubt, as is indicated by the fact that the judges of the court below were not unanimous. The immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbance of a course of business affecting not alone the parties to this litigation, but the patrons of the various warehouses, which the court below found would be irreparable. These considerations, taken together, were sufficient to call for the exercise of its discretion. Cf. *Virginian Ry. Co. v. United States*, 272 U. S. 658, 672.

Affirmed.

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

CUSTER *v.* McCUTCHEON.

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

No. 422. Argued April 20, 1931.—Decided May 18, 1931.

A state law limiting the time within which an execution may issue on a judgment, which has been adopted by standing rule of the District Court pursuant to R. S. § 916, applies to the United States as to others having judgments in that court. P. 519.

41 F. (2d) 354, reversed.

CERTIORARI, 282 U. S. 826, to review a judgment dismissing a bill to restrain a marshal from executing a judgment which had been recovered by the United States.

Mr. J. F. Nugent argued the cause and *Messrs. James R. Bothwell* and *W. Orr Chapman* filed a brief for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher*, *Assistant Attorney General Richardson*, and *Messrs. Claude R. Branch*, Special Assistant to the Attor-

ney General, and *E. T. Burke* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondent's predecessor, as United States marshal, on October 9, 1929, levied an execution issued September 21, 1929, out of the District Court of Idaho, against the petitioner, upon a judgment entered in that court March 7, 1921, in favor of the United States. On October 10, 1929, the petitioner filed a bill in the same court to restrain the marshal from proceeding further under the execution process, on the ground that § 6910 of the Idaho Compiled Statutes of 1919 permitted the issuance of execution only within five years from the date of rendition of judgment. The District Court, on motion of the United States, dismissed the bill, and the Circuit Court of Appeals affirmed its judgment.¹ This Court granted certiorari.²

The question presented is whether the Idaho statute, which has been adopted as governing execution process in the United States District Court for that State, is applicable to an execution issued on behalf of the United States as a judgment plaintiff. The statute follows:

"The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

It has become a part of the law of procedure in the United States court by virtue of § 916 of the Revised Statutes,³ which provides:

"The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to

¹ 41 F. (2d) 354.

² 282 U. S. 826.

³ U. S. C., Title 28, § 727.

reach the property of the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or by any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise;”

and Standing Rule 73 of the District Court which is:

“Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this Court; and the Marshal of this Court shall conform his proceedings thereto; . . .”

As a result of § 916 and Rule 73, the Idaho statute is applicable to proceedings in the District Court as if it had been passed by Congress. In the language of Rule 73, it has been “adopted” as a rule of the court. While it is clear that it governs executions issued on judgments recovered by other litigants, the lower courts held that it does not apply to those sued out by the United States. This ruling is based upon the familiar doctrine that in the absence of specific provision to the contrary statutes of limitation do not bind the sovereign. The petitioner insists that this act is not in the ordinary sense of the term a statute of limitation, that it does not affect the time within which a suit may be brought upon the judgment, but that on the contrary it grants the right of execution, and the time element is an integral part of the statutory right conferred. Petitioner says that in this aspect

the United States as plaintiff is on no better footing than any other litigant availing itself of the provisions of the statute. A proper decision depends upon the scope and meaning to be given to R. S. 916, and the rule of court.

Section 14 of the Judiciary Act of 1789⁴ conferred upon the courts of the United States power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which might be necessary for the exercise of their jurisdiction agreeably to the principles and usages of law. These words comprehended executions on judgments. *Wayman v. Southhard*, 10 Wheat. 1, 22.

At the same session an act was passed "To regulate Processes in the Courts of the United States."⁵ It provided that:

"Until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

This act was to remain in force only until the expiration of the next session of Congress. It was followed by that of May 8, 1792;⁶ and thereafter by other acts,⁷ the last of which became R. S. § 916.

Section 916 prohibits the courts of the United States from adopting, recognizing or giving effect to any form of execution, except such as was, at the time of the passage of the act of 1872, from which it was derived, or has subsequently become by adoption of state statutes, a writ

⁴ c. 20; 1 Stat. 81. U. S. C., Title 28, § 377.

⁵ Act of September 29, 1789, c. 21; 1 Stat. 93.

⁶ c. 36, § 2; 1 Stat. 276.

⁷ May 19, 1828, c. 68; 4 Stat. 281. June 1, 1872, c. 255; 17 Stat. 197. The latter became R. S. 916, now U. S. C., Title 28, § 727.

authorized by the laws of the state. *Fink v. O'Neil*, 106 U. S. 272, 278.

This Court has twice considered the bearing of these statutes upon executions issued on judgments in favor of the United States. In *United States v. Knight*, 14 Pet. 301, it was held that the Act of 1828, *supra*, gave to debtors in prison under executions from the courts of the United States, at its suit, the privilege of jail limits in the several States as they were fixed by the laws of those States at the date of the act. It was asserted that the statute did not include executions on judgments in favor of the United States, as the sovereign is never bound by any statute unless expressly named. The contention was, however, overruled, and it was held that the obvious intent to create a conformity between the mode of proceeding in federal courts and state courts ought to be given effect.

In *Fink v. O'Neil*, *supra*, the question was whether the homestead of a defendant resident in Wisconsin was subject to seizure and sale under an execution issued out of a federal court on a judgment recovered by the United States. It was held that the Wisconsin statute exempting homesteads from such seizure, which admittedly embraced executions issued on judgments held by private citizens, applied also to the United States. It was observed that no distinction is made in any of the successive statutes on the subject between executions on judgments in favor of private parties and those in favor of the United States. The Court added:

“And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States.”

The contention of the Government that on grounds of public policy the sovereign ought not to be subject to exemptions binding on private suitors was overruled.

It is clear, therefore, that R. S. § 916 and rules of court adopted pursuant thereto confine the United States to such executions as may be issued by individuals under the state statutes, and impose upon it the same restrictions and exemptions as are applicable to other suitors, and the question here is whether an exception should be made to this general rule as respects the time fixed by the state statute within which execution must issue. We see no valid reason for making such an exception. The time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted. The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law.

It is argued on behalf of the United States that the five year period is not binding upon the State of Idaho, and therefore the adoption of the statute does not affect the Federal Government in respect of the time of issuance of the writ. We find no decision of the supreme court of Idaho exempting the sovereign from the provisions of the statute, nor does examination of other cognate sections of the Idaho Compiled Statutes disclose any matter which would indicate such a purpose. We think that in the interest of uniformity, and in the absence of either express state decision or provision by Congress to the contrary, the statute is to be held applicable to all plaintiffs seeking to avail themselves of the writ of execution therein provided, including the United States.

The judgment must be

Reversed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE
RY. CO. *v.* MOQUIN.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 543. Argued April 29, 1931.—Decided May 18, 1931.

In an action under the Federal Employers' Liability Act in a state court, where a verdict is found to be excessive in amount because of passion and prejudice excited by improper argument of the plaintiff's counsel, it is the duty of that court to grant a new trial; the error cannot be cured by remitting part of the verdict. P. 521. 181 Minn. 56; 231 N. W. 920, reversed.

CERTIORARI, 282 U. S. 833, to review a judgment sustaining a recovery under the Federal Employers' Liability Act upon condition that part of it be remitted.

Mr. Henry S. Mitchell, with whom *Messrs. John E. Palmer* and *James L. Hetland* were on the brief, for petitioner.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Respondent sued petitioner in the district court of Crow Wing County, Minnesota, to recover damages for injuries sustained in the course of his employment in interstate commerce. The trial resulted in a verdict for the respondent, which petitioner moved to set aside on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial. The motion was denied, and petitioner appealed to the Supreme Court of Minnesota. That court referred to the state practice, which requires counsel to interrupt and have the language used by offending counsel placed upon the record, to ask the court to instruct the jury to

disregard it, and to take an exception, if thought advisable. It, however, criticized the conduct of respondent's counsel, and said: "In the absence of objection from counsel, it may become the duty of the court to act on its own motion. . . . From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

A new trial was ordered, unless the respondent should file in the trial court a writing remitting a portion of the verdict. 231 N. W. 829, 832. Such a remittitur was filed, and thereupon the trial court entered judgment for the remainder. The petitioner again appealed, and the Supreme Court affirmed, merely referring to its previous opinion. 231 N. W. 920. We granted a writ of certiorari limited to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.¹

It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation,

¹ 282 U. S. 833.

as to the extent of the wrong inflicted upon his opponent.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BALDWIN *v.* IOWA STATE TRAVELING MEN'S
ASSOCIATION.

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

No. 445. Argued April 22, 1931.—Decided May 18, 1931.

1. The full faith and credit clause, Constitution, Art. IV, § 1, does not apply to the federal courts. P. 524.
 2. No right to litigate the same question twice is guaranteed by the due process clause of the Fourteenth Amendment. *Id.*
 3. When a defendant in a federal court appears specially only for the sole purpose of quashing service for want of jurisdiction over his person, and is fully heard upon the question, and, upon the overruling of the objection, takes no further part in the case and seeks no review, a judgment subsequently entered against him on the merits is *res judicata* on the question of jurisdiction and is not subject to be collaterally attacked on that same ground when sued on in another State. P. 524 *et seq.*
- 40 F. (2d) 357, reversed.

CERTIORARI, 282 U. S. 827, to review a judgment affirming the dismissal of an action on a judgment.

Mr. Denton Dunn, with whom *Messrs. C. W. Prince, James N. Beery*, and *F. W. Lehmann, Jr.*, were on the brief, for petitioner.

Mr. J. M. Parsons, with whom *Mr. Earl C. Mills* was on the brief, for respondent.

A special appearance to quash service will not warrant judgment against the defendant if, in fact, the objections to jurisdiction are good. *Big Vein Coal Co. v. Read*, 229 U. S. 31; *Hitchman Coal & C. Co. v. Mitchell*, 245 U. S.

229; *Toledo Ry. & L. Co. v. Hill*, 244 U. S. 49; *York v. Texas*, 137 U. S. 15; *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157; *Bank of Jasper v. First Nat. Bank*, 258 U. S. 112; *Morris v. Skandinavian Ins. Co.*, 279 U. S. 405.

Jurisdiction to render a judgment may always be questioned in a subsequent action on the judgment in another State. *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714; *Goldey v. Morning News Co.*, 156 U. S. 518.

Presumption that a court rendering judgment has jurisdiction does not apply against a foreign corporation. *St. Clair v. Cox*, 106 U. S. 350.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

A writ of certiorari was granted herein¹ to review the affirmance by the Circuit Court of Appeals² of a judgment for respondent rendered by the District Court for Southern Iowa. The action was upon the record of a judgment rendered in favor of the petitioner against the respondent in the United States District Court for Western Missouri.

The defense was lack of jurisdiction of the person of the respondent in the court which entered the judgment. After hearing, in which a jury was waived, this defense was sustained and the action dismissed. The first suit was begun in a Missouri state court and removed to the District Court. Respondent appeared specially and moved to quash and dismiss for want of service. The court quashed the service, but refused to dismiss. An alias summons was issued and returned served, whereupon it again appeared specially, moved to set aside the service, quash the return, and dismiss the case for want of jurisdiction of its person. After a hearing on affidavits and

¹ 282 U. S. 827.

² 40 F. (2d) 357.

briefs, the motion was overruled, with leave to plead within thirty days. No plea having been filed within that period, the cause proceeded and judgment was entered for the amount claimed. Respondent did not move to set aside the judgment nor sue out a writ of error.

The ground of the motion made in the first suit is the same as that relied on as a defense to this one, namely, that the respondent is an Iowa corporation, that it never was present in Missouri, and that the person served with process in the latter State was not such an agent that service on him constituted a service on the corporation. The petitioner objected to proof of these matters, asserting that the defense constituted a collateral attack and a retrial of an issue settled in the first suit. The overruling of this objection and the resulting judgment for respondent are assigned as error.

The petitioner suggests that Article IV, Section 1 of the Constitution forbade the retrial of the question determined on respondent's motion in the Missouri District Court; but the full faith and credit required by that clause is not involved, since neither of the courts concerned was a state court. (Compare *Cooper v. Newell*, 173 U. S. 555, 567; *Supreme Lodge Knights of Pythias v. Meyer*, 265 U. S. 30, 33). The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri District Court, would be to deny the due process guaranteed by the Fourteenth Amendment; but there is involved in that doctrine no right to litigate the same question twice (*Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25; compare *York v. Texas*, 137 U. S. 15).

The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the

appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. *Harkness v. Hyde*, 98 U. S. 476; *Goldey v. Morning News*, 156 U. S. 518; *Toledo Rys. & Lt. Co. v. Hill*, 244 U. S. 49; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; *Morris & Co. v. Skandinavia Ins. Co.*, 279 U. S. 405. The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151; *Wetmore v. Karrick*, 205 U. S. 141; *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111; *McDonald v. Mabee*, 243 U. S. 90. It had also the right to appeal from the decision of the Missouri District Court, as is shown by *Harkness v. Hyde*, *supra*, and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every

case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

While this Court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. *Phelps v. Mutual Life Assn.*, 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; *Moch v. Insurance Co.*, 10 Fed. 696; *Thomas v. Virden*, 160 Fed. 418; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158. And we are in accord with this view.

Respondent relies upon *National Exchange Bank v. Wiley*, 195 U. S. 257, but it is not in point; for there it was shown, not that the defendant in the judgment of the Ohio state court on which suit was brought had appeared and contested jurisdiction, but that an attorney without right or authority had assumed to appear and confess judgment on its behalf.

Bank of Jasper v. First National Bank, 258 U. S. 112, cited by respondent, involved a wholly different question from that here presented. There a suit in equity was brought in a state court against both resident and non-resident defendants. Pursuant to state law constructive service upon the nonresidents was made by publication. One of them, a Georgia bank, appeared specially and moved to quash the service. Its motion was overruled, and on appeal the supreme court of the State affirmed, holding that the purpose of the statute authorizing constructive service by publication was merely to notify non-residents of the pending suit so that they might, if they cared to do so, come into the case. It held that there was no right to quash the notice, but that the nonresident had its full right to object should the court thereafter commit an error against it. This Court held that the special appearance for the purpose of quashing the notice

of service did not amount to a general appearance. Subsequent proceedings in the state court, therefore, were taken without the presence of the bank and were not binding upon it unless the *res* to be affected was in Florida and subject to the control of the state court. That point was not litigated by the bank—it was not present. This Court held there was not such *res* subject to the power of the state court, and therefore its judgment was not binding upon those who were not actual parties.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

STATE BOARD OF TAX COMMISSIONERS OF
INDIANA *v.* JACKSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 183. Argued March 5, 1931.—Decided May 18, 1931.

1. Failure of the District Court to make findings of fact as now required by Equity Rule 70½ does not necessitate remanding a case tried before the rule was adopted. P. 533.
2. In classifying businesses for taxation, the legislature is not confined to the value of the business taxed, but may have regard for other elements. P. 536.
3. As applied to the fundamental state power of taxation, the equal protection clause does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. P. 537.
4. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it. *Id.*
5. In determining the validity of a tax under the equal protection clause, it is not for the court to consider the propriety or justice

- of the tax, or to seek for the motives, or criticize the public policy, which prompted its adoption by the legislature. P. 537.
6. A legislative classification of occupations for taxation must be sustained if there are substantial differences between them; and the differences need not be great. *Id.*
 7. An Indiana statute lays an annual license tax on stores, increasing progressively with the number of stores under the same general management, supervision or ownership—such that, in the present case, the owner of a “chain” of some 225 stores selling groceries, fresh vegetables and meats, was obliged to pay \$5,443.00, whereas the owner of a single store only, though it involved a much greater investment and income, would pay but \$3.00. *Held* not violative of the equal protection clause, in view of the distinctions and advantages which combine and are exerted in a single ownership and management of a series of like stores in different locations, as compared with mere coöperative associations of independent stores, or with department stores selling many kinds of goods under the same roof. Pp. 532, 541.
 8. The statute is not repugnant to Art. I, § 23, of the Indiana Constitution, providing: “The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens”; nor to Art. 10, § 1, requiring a uniform and equal rate of assessment and taxation and just valuations, which, as declared by the State Supreme Court, applies only to the assessment made under a general levy, and not to occupation or license taxes. P. 542.
- 38 F. (2d) 652, reversed.

APPEAL from a decree enjoining the Board of Tax Commissioners from instituting prosecutions against the appellee Jackson for failure to pay license taxes.

Messrs. Joseph W. Hutchinson and George W. Hufsmith, Deputy Attorneys General of Indiana, with whom *Messrs. James M. Ogden*, Attorney General, *Hugh D. Merrifield*, and *V. Ed. Funk*, Deputy Attorneys General, were on the brief, for appellants.

Messrs. William H. Thompson and Martin A. Schenck, with whom *Messrs. Samuel Ashby, Clark McKercher*, and *Henry H. Hornbrook* were on the brief, for appellee.

The Act does not relate to public health, welfare, morals, or safety, and cannot be sustained as an exercise of the police power. *Lawton v. Steele*, 152 U. S. 133, 137; *Tyson & Bros. v. Banton*, 273 U. S. 418, 443; *Adams v. Tanner*, 244 U. S. 590.

Mere ownership of stores, irrespective of the commodity sold, is not a business affected with a public interest. *Tyson & Bros. v. Banton*, 273 U. S. 418; *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522; *Truax v. Raich*, 239 U. S. 33; *Barbier v. Connolly*, 113 U. S. 27; *Chicago v. Netcher*, 183 Ill. 104; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375; *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N. C. 145; *Great Atlantic & Pacific Tea Co. v. Maxwell*, 199 N. C. 433; *Williams v. Standard Oil Co.*, 278 U. S. 235.

The arbitrary discriminations of the statute have no relationship to any anticipated evil. *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1; *Liggett Co. v. Baldrige*, 278 U. S. 105; *Yu Cong Eng v. Collector*, 271 U. S. 500; *Engel v. O'Malley*, 219 U. S. 128; *Burnes Nat. Bank v. Duncan*, 265 U. S. 17; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150; *State v. Loomis*, 115 Mo. 307.

"Store" is no unit of value nor is "number of stores under one ownership" any measure of value. The court below properly held that the Act as a tax statute rests on no reasonable classification having any relation to taxation, and in its arbitrary discrimination against a character of store ownership violates the Fourteenth Amendment. *Frost v. Corporation Comm.*, 278 U. S. 515, 522-3, 524; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389; *Schlesinger v. Wisconsin*, 270 U. S. 230, 240; *Farmers Loan & Tr. Co. v. Minnesota*, 280 U. S. 204, 210, 212; *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37-8; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417; *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U. S. 522, 527; *Bethlehem Motors Co. v. Flynt*, 256 U. S. 421; *Hanover Ins.*

Co. v. Harding, 272 U. S. 494; *Kansas City So. Ry. v. Road Imp. Dist.*, 256 U. S. 658; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 416; *Danville v. Quaker Maid, Inc.*, 211 Ky. 677; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8. Distinguishing: *Metropolis Theatre v. Chicago*, 228 U. S. 61; *Quong Wing v. Kirken-dall*, 223 U. S. 59; *Alaska Fish Co. v. Smith*, 255 U. S. 44.

The Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana. *Shuman v. Fort Wayne*, 127 Ind. 109; *Bright Nat. Bank v. Hartman*, 61 Ind. App. 440, 447; Cooley, *Law of Taxation*, 2d ed., p. 235; *Powell v. Pennsylvania*, 127 U. S. 678.

This court has taken judicial notice of the fact that chain stores in great numbers are to be found throughout the United States and have been in operation for many years, and has determined that no detriment to the public will be presumed to have resulted or to be threatened from the character of their ownership. *Liggett Co. v. Baldridge*, 278 U. S. 105.

The unanimous decision of the statutory three judge court has the factual basis of evidence adduced by both sides. No evidence of detriment to the public has been forthcoming. Affirmative evidence disproves any detriment.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from the decree¹ of a specially constituted District Court² perpetually enjoining the appellants from enforcing against the appellee the provisions of Act No. 207 of 1929 of the General Assembly of the State of Indiana. The appellee, by bill filed on behalf of himself and all others similarly situated, charged that the

¹ 38 F. (2d) 652.

² Pursuant to U. S. C., Tit. 28, § 380.

statute violates the Fourteenth Amendment of the Federal Constitution and two sections of the constitution of Indiana. It averred, and the answer admitted, that, unless enjoined, appellants would institute prosecutions against appellee under certain sections of the act. After hearing, the District Court entered a perpetual injunction, holding the law offensive to the federal and to the state constitution.

The statute provides that it shall be unlawful for any person, firm, association or corporation, foreign or domestic, to establish or operate any store³ within the State without first obtaining from the appellants a license, which must be renewed annually. It makes the operation of a store without a license a misdemeanor punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day it is so operated.

Section 5 of the act provides:

“Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in sections 2 and 4 of this act.

“The license fees herein prescribed shall be as follows:

“(1) Upon one store, the annual license fee shall be three dollars for each such store;

³ Section 8 defines a store as follows:

“The term ‘store’ as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.”

"(2) Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

"(3) Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

"(4) Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

"(5) Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store."

It is this section which appellee asserts renders the act unconstitutional as applied to him.

The bill of complaint alleges, and it is admitted, that the appellee is engaged in the business of selling groceries, fresh vegetables and meats at wholesale and retail in Indianapolis, and has been so engaged for more than ten years, has capital invested in his business, in excess of \$200,000, and annual sales of over \$1,000,000. He operates two hundred and twenty-five stores in the said city, and more than five hundred persons, firms, associations and corporations, foreign and domestic, are engaged in the operation of two or more stores in the State.

The bill charges that the graduation of the tax per store according to the number of stores under a single ownership and management is based on no real difference between a store part of such a group and one individually and separately owned and operated, or between the businesses transacted in them; that the number of stores conducted by one owner bears no relation to the public health, welfare, or safety, none to the size of the enterprise as a whole, to its capital, its earnings or its value; that the classification made by the statute is without basis in fact, is unreasonable and arbitrary, and results

in depriving him of his property without due process, and denying him the equal protection of the laws.

In the court below appellants defended on the grounds that the statute was an exercise of the police power and was also a revenue measure which levied an ordinary occupation tax. They offered no evidence to sustain the first ground mentioned, and do not press it here. They now stand only upon the power of the legislature, in prescribing an occupation tax, to classify businesses, so long as its action is not unreasonable and arbitrary. They say that the act fulfills the constitutional requirement that, in so classifying, the law-making body shall apply the same means and methods to all persons of the same class, so that the law will operate equally and uniformly, and all similarly circumstanced will be treated alike. The District Court held that the statute failed to conform to this standard.

The act adopts a different measure of taxation for stores known as chain stores, from that applied to those owned and operated as individual units. Evidence was offered by the appellee intended to demonstrate that there are no substantial or significant differences between the business and operation of the two kinds of stores, such as would justify the classification, and by the appellants to prove the existence of such differences.

The District Court failed to make findings of fact and law as now required by Equity Rule 70½, but contented itself with a partial summary of the facts and certain general conclusions of law. Had the rule been in force at the time of the trial, we should feel constrained to remand the case with directions to make such findings. We shall, in the circumstances, summarize the proofs.

In addition to the facts averred in the bill, above set forth, the appellee offered uncontradicted evidence on the following points. Of the retail stores of the country ap-

proximately sixty-three per cent. are independent or community stores, sixteen per cent. are department stores, twelve per cent. are chain stores, and four per cent. are mail-order houses. Several department stores in Indianapolis, doing a much larger business than the appellee, pay a tax of only \$3 as contrasted with his tax of \$5443, although their business is highly competitive with that of chain stores. Persons owning a greater number of stores, and with more money invested, in a business similar to that of appellee, but having only one store in Indiana, pay \$3 because they have but one store in the State. Large numbers of stores independently owned and controlled are members of associations or "voluntary chains" under which coöperative buying is conducted for the group, but each of them is required to pay a license fee of only \$3. The mere addition of a new unit or store to an existing chain of stores does not increase the sales more than arithmetically. The additional unit has its own expenses, and the volume of sales of the former stores in the chain, to which it constitutes an addition, is not increased by adding it.

The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to numerous stores; abundant supply of capital, whereby advantage may be taken of opportunities for establishment of new units; a pricing and sales policy different from that of the indi-

vidual store, involving slightly lower prices; a greater turn-over, and constant analysis of the turn-over to ascertain relative profits on varying items; unified, and therefore cheaper and better advertising for the entire chain in a given locality; standard forms of display for the promotion of sales; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounting methods; standardization of store management, sales policies and goods sold.

The appellants' evidence indicated that all of these advantages are interrelated and interdependent in the chain store business. The witnesses conceded that some of them may be found in large independent grocery or drug stores or the like, but they did not, as appellee claims, state that all of them combined, exist therein, as in chain stores.

The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities. With respect to associations of individual stores for purposes of coöperative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management.

But the appellee in proof and argument drew a comparison between the chain store and the department store which he insists exhibits the classification of the statute as illusory and arbitrary. He proved that there are two department stores in Indianapolis, each doing a business in excess of \$8,000,000 a year, one having 124 and the other 86 separate departments, and that under the law each pays a tax of only \$3. He uses these facts to give point to

his assertion that a store is not a unit of value. This argument ignores the fact that in determining how it shall classify occupations for taxation, the legislature is not confined merely to the value of the business taxed, but may have regard to other elements.

While it is true that large department stores reap many of the advantages and employ many of the methods of a chain store group, such as large capital, buying in quantity, and the ability to command the highest type of management, it is, nevertheless, evident that, whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously, greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, must after all consist of many separate types each devoted to a single store similar to an independent retail store. The mass buying done by a chain store owner for a number of units selling the same goods, is not comparable to the individuated purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, essentially separate and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a chain store owner operating an equal number of units all devoted to a single line of business.

Notwithstanding the differences disclosed between chain and other stores, the court below found that "all persons engaged in the operation of one or more stores . . . belong to the same class, for occupational tax purposes, as plaintiff, and should pay the same license fee, regardless of the number of stores owned and operated by them," and that any other classification is arbitrary

and unconstitutional. It is this holding which the appellants challenge.

The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Southwestern Oil Co. v. Texas*, 217 U. S. 114; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Rfg. Co. v. Louisiana*, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342; *Quong Wing v. Kirkendall*, 223 U. S. 59. As was said in *Brown-Forman Co. v. Kentucky*, *supra*, at p. 573:

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations

separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

In *American Sugar Rfg. Co. v. Louisiana*, *supra*, a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, was held not to work an unconstitutional discrimination.

In *Cargill v. Minnesota*, 180 U. S. 452, a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing exactly the same business, was held valid.

In *Armour Packing Co. v. Lacy*, 200 U. S. 226, a North Carolina statute imposed an occupation tax upon every meat packing house doing business in that State. The Armour Company, which was taxed under this statute, had its packing house at Kansas City and shipped its packed products to various depots in the State, where they were sold and delivered in competition with wholesalers and commission merchants who were not required to pay the tax. The statute was sustained.

In *Quong Wing v. Kirkendall*, *supra*, a statute in Montana imposing a license fee on hand laundries was held not to constitute a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women.

In *Bradley v. Richmond*, 227 U. S. 477, an ordinance imposed a tax on the conduct of various businesses and gave a power of classification to a committee of the council. That committee classified private bankers, placing a tax of one amount on certain of them and of a different amount on others. It appeared that the busi-

ness of those in the one class was that of lending money at high rates upon salaries and household furniture, while that done by the other class was that of lending money upon commercial securities. The classification was held not to offend the constitutional provision for equal protection of the laws.

In *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, an ordinance classified theatres for license fees based on and graded according to the admission charged. It was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller price, and therefore paying lower license fees. This Court held the classification valid.

In *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, there was drawn in question a statute of Alabama which provided that every person, firm or corporation selling or delivering sewing machines in person or through agents should pay a tax of \$50 annually for each county in which they might sell or deliver said articles; and for each wagon and team used in delivering or displaying the same an additional sum in each county of \$25 annually. It exempted merchants selling sewing machines at their regularly established places of business. The Singer Company, a foreign corporation, was engaged in many counties in the State in selling and renting sewing machines, in part from regularly established places of business and in part by means of wagons going from place to place in counties where its stores were located. It attacked the statute on the ground that it involved an arbitrary discrimination between merchants selling at their stores and merchants selling by means of wagons. It was shown that the merchants who sold at their stores usually delivered the articles sold by wagon. This Court sustained the tax, saying with respect to the two kinds of business [p. 315]:

“But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the States necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed.”

In *Rast v. Van Deman & Lewis Co.*, *supra*, a statute placing taxes additional to the usual occupations taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, was attacked as being arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading stamps was a difference in the method of advertising. This Court said, however [p. 357]:

“The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, . . .”

In *Armour & Co. v. Virginia*, 246 U. S. 1, the statute under attack laid a tax on merchants doing business in the State based on the amount of their purchases during the license period, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale in the State. It excluded from its operation domestic manufacturers, taxed on capital, who offered for sale at the place of manufacture goods and merchan-

dise manufactured by them. It applied alike to citizens and residents of Virginia and noncitizens and nonresidents who manufactured in Virginia. The state supreme court held that it applied to Armour & Co., who manufactured part of their products without the State and sold them within it. This Court said [p. 6]:

“In the first place, we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view.”

In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. What was said in *Metropolis Theatre Co. v. Chicago, supra*, [p. 69] is quite applicable here:

“. . . The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action.”

The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of own-

ership. It disregarded the differences shown by the record. They consist not merely in ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that the Constitution requires. *Clark v. Titusville*, 184 U. S. 329; *Magoun v. Illinois Tr. & Savings Bank*, 170 U. S. 283.

Article 1, § 23 of the constitution of Indiana⁴ which the court below held the statute violates, seems to us not to set any different standard than does the Fourteenth Amendment. No decision of the Indiana courts is cited in support of the court's conclusion, and those referred to by appellants demonstrate that the section permits classification for purposes of taxation and that the same principles are applicable as under the Fourteenth Amendment. *Kersey v. Terre Haute*, 161 Ind. 471; 68 N. E. 1027; *Gafill v. Bracken*, 195 Ind. 551; 145 N. E. 312; 146 N. E. 109. Article 10, § 1,⁵ is declared by the Supreme Court of the State to be applicable only to the assessment made under a general levy, and not to occupation or license taxes. *Thomasson v. State*, 15 Ind. 449; *Bright v. McCullough*, 27 Ind. 223; *Gafill v. Bracken*, *supra*. We cannot, therefore, hold the statute repugnant to the clauses of the state constitution on which the appellee relies.

⁴ "The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens."

⁵ "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law."

The judgment of the District Court must be reversed and the cause remanded with instructions to dismiss the bill.

Reversed.

MR. JUSTICE SUTHERLAND, dissenting.

By the statute here under review, the operation of any "store" within the state without a license is made unlawful. The license fees to be paid are graduated according to the number of "stores" to be operated "under the same general management, supervision or ownership." Upon one store, the annual license fee is \$3; upon two or more up to five, \$10 for each additional store; in excess of five but not exceeding ten, \$15 for each additional store; in excess of ten but not exceeding twenty, \$20 for each additional store; and in excess of twenty, \$25 for each additional store.

Upon the face of the statute the sole differentiation on which the graduated and rapidly mounting license fees depend consists in the number of stores operated. But the tax is imposed in respect of a single "store," without regard to kind, value, size, amount invested, amount or character of business done, income derived, or other distinguishing feature. The number of stores is a collateral circumstance used only to determine the amount of the license fee to be exacted in respect of each of them. A retailer pays the same as a wholesaler; the owner of a small corner grocery, operated by him alone, the same as the owner of a large department store employing hundreds of clerks. To determine that a tax of \$25, instead of \$3, \$10, \$15, or \$20, shall be imposed in respect of any store, it is necessary only to have an affirmative answer to the inquiry: Is this store operated by a person who already owns or operates twenty or more stores? These facts are of controlling importance because they give rise to the

point upon which the question of constitutionality depends.

It is settled that the power of the State to classify for purposes of taxation is of wide range and flexibility; but that, while the difference upon which the classification is based need not be great, mere difference is not enough. Classification, to be legitimate, must rest upon some ground of difference having a reasonable and just relation to the object of the legislation. All persons similarly circumstanced must be treated alike. *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37, and cases cited. These principles, repeatedly stated by this Court, are fundamental; and it reasonably cannot be doubted that their application to the present act, unless saved by certain extrinsic circumstances to be considered later, necessarily condemns it as unconstitutional. I am unable to find in any of these circumstances, or in all of them together, justification for a classification which results in distributing the burden of taxation with such evident inequality.

The purpose of the act is to raise revenue, and upon that theory the decision of this Court is based. The contention that the act constitutes an exercise of the police power finds no support in the record and was but faintly urged at the bar. Whether the classification could be justified if the statute were other than a revenue measure, is a question, therefore, with which we are not now concerned. The pertinent and only question is whether between a store constituting one of a series under unified management, supervision or ownership, and a store under single and distinct management, supervision or ownership, there are such differences as to justify putting them in separate categories with the object of imposing, for the sole purpose of revenue, a larger tax in respect of one than in respect of the other. If the differences bear no just and reasonable relation to that object, the classification cannot be sustained, although the same differences

might bear such a relation to some other and different object.

In the State of Indiana there are approximately 44,000 retail stores engaged in the same general lines of business, only eight per cent. of which are so-called "chain stores." Among them are single stores each of greater value than all the stores of appellee combined, and each doing a business in excess of all that done by appellee. For example, there are two large department stores in the City of Indianapolis each doing a business of more than \$8,000,000 per annum, one operating 124 separate departments and the other, 86 separate departments, but each pays a license fee under the statute of only \$3 per annum; while appellee, owning 225 separate stores and doing a total business of approximately \$1,000,000 per annum, pays license fees of \$5,443 per annum—eighteen hundred times as much! Each of several owners of a large number of stores, (145 in one instance) who happens to have only one store in Indiana, pays a license fee of \$3, contrasted with the payment of \$25 for each store over twenty owned by appellee. Appellee, upon 205 of his stores, pays the aggregate sum of \$5,125; while the proprietors of 205 stores, held and operated separately, pay in the aggregate only \$615, although they or some of them may be of equal or greater value, equally well or better located, doing as much or more business, and producing as much or more income. The evidence further shows that a "coöperative volunteer chain" consisting of several hundred stores in Indiana paying an annual license fee of only \$3 each, operates under an association called the Independent Grocers' Alliance. The association carries on coöperative buying and advertising for the benefit of the members of the group; and it seems clear that as to most, if not all, of the advantages said to be enjoyed by the chain stores the volunteer coöperative group occupies a position of equality.

These are obvious and flagrant discriminations which put upon the act the clear stamp of unconstitutionality, unless the differences relied upon are germane to, and reasonably sufficient in substance to sustain, the proposed imposition of license fees of such unequal amounts upon different persons following identical occupations.

What, then, are the differences, or so-called advantages, relied upon to justify the classification? They were, in their strongest aspect, stated by an expert witness called by the appellants in support of the act, as follows: The ability of the chain stores to make large quantity purchases; to pay cash and thus obtain the advantage of discounts; skill in buying so as to avoid either overstocking or understocking; warehousing in, and distribution from, a single warehouse for numerous stores; large capital with the advantages flowing therefrom; certain pricing and sales policies resulting in slightly lower prices on the part of the chain stores as compared with single stores; more rapid turn-over of goods; cheaper and better advertising; superior management; standardization in the matter of display; standardization of store management; and similar elements thought to have a beneficial effect upon the disposition of goods.

But the effect of this enumeration of supposed advantages is completely swept away by the testimony of the same witness on cross-examination, which stands upon the record without dispute, that they are not confined to the chain stores, but are enjoyed as well by such of the favored taxpayers as are engaged in large business, whether in a single establishment or in many establishments.

“Every advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management without respect to whether it is involved in a chain group or in a single store. Good management makes for volume and volume makes for the

possibility of making or acquiring more capital, and more capital makes for the possibility of employing the highest grade of experts, so that there is constant intercommunication or revolving. I would find the same advantage adhering in a large department store over a small one. Every quality that I have enumerated as going to the manner of organization relates itself, primarily, to there being a sufficient capital structure and volume of business to permit it to be carried on and I would add management in that it is an essential part of it.

“Q. So that it does not relate itself to the form of organization—whether they are administering fifty or a hundred stores, or administering one store.

“A. No, no.

“Q. The fact that it is administering multiply-owned stores has nothing to do with it, but it is the fact that it is administering a large business that develops the situation that you have referred to?

“A. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

“Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments?

“A. Yes.

“Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block?

“A. Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing.”

It thus appears that the advantages attributed to the chain store lie not in the fact that it is one of a *number* of stores under the same management, supervision or owner-

ship, but in the fact that it is one of the parts of a *large business*. In other words, the advantages relied upon arise from the aggregate size of the entire business, and not from the number of parts into which it is divided. For the want of a valid ground upon which to stand, therefore, the classification should fall, because it is made to depend not upon size or value or character, amount of capital invested or income received, but upon the mere circumstance—wholly irrelevant so far as any of the advantages claimed are concerned—that the business of one is carried on under many roofs, and that of the other under one only. Reduced to this single detail of difference, what fairly conceivable reason is there in the policies or objects of *taxation* which gives countenance to the requirement that the former shall make an annual contribution to the revenues of the state eighteen hundred times as much as the latter? A classification comparable in principle would be to make the amount of an income tax depend upon the number of sources from which the income is derived, without regard to the character of the sources or the amount of the income itself.

Since the supposed differences thus are reduced to the one of number only, and, since that turns out to be irrelevant and wholly without substance, it follows that the act is a "clear and hostile discrimination" against a selected body of taxpayers, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237—a mere subterfuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced. All of which is to say that the legislature has misapplied its power to classify with the result of reaching an end forbidden by the Fourteenth Amendment.

To this situation the language of Mr. Justice Field in *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, 399, seems peculiarly applicable.

“Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons, from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to this end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world.”

It seems plain enough that we have in the present case “a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result.”

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, this Court held invalid a Pennsylvania statute which imposed a tax upon the gross receipts of a corporation engaged in the general taxicab business, but not upon like receipts of individuals and partnerships engaged in the same business. The differences relied upon as justifying the tax are fairly comparable with those relied upon in the present case. It was said that there were advantages peculiar to the corporate organization not enjoyed by indi-

viduals or partnerships, such as those pointed out in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 162: "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships."

These advantages, although brought sharply to the attention of the Court, were not considered as constituting differences having a reasonable relation to the object of the taxing act, and the tax was held unconstitutional as denying to the corporation the equal protection of the laws. It is hard to see how that conclusion can be reconciled, in principle, with the present decision. See also *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Bethlehem Motors Co. v. Flynt*, 256 U. S. 421; *Kansas City So. Ry. v. Road Imp. Dist. No. 6*, 256 U. S. 658; *Air-Way Corp. v. Day*, 266 U. S. 71, 83, 85; *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37. A long list of illustrative cases which tend to support the view that the act in question is violative of the equal protection clause of the Fourteenth Amendment readily could be added; but nothing would be gained by doing so.

A large number of decisions are cited in support of the act. They, as well as those cited above, demonstrate the impossibility of stating precisely or categorically the distinction between such statutes as fall within, and such as fall without, the ban of the Constitution. The decisions have depended not only upon the varying facts which constituted the background for the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question. Some of the cases press

to the limit fixed by the Constitution; and that fact, while affording no ground for objection to the cases themselves, admonishes us to use caution in applying them to other sets of substantially dissimilar circumstances, lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge. I am unable to discover in any of the prior decisions of this Court, including those cited, anything, which in the light of the facts and circumstances herein set forth, lends support to the claim of validity for the classification here under consideration. To attempt an extended review of the cases thought to do so is not necessary. It will be enough to refer to those which seem to be regarded as most strongly in point.

American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, involved the validity of a license tax upon those carrying on the business of refining sugar and molasses, but exempted planters and farmers grinding and refining their own sugar and molasses. The classification was upheld upon the ground that the steps taken by planters and farmers to perfect their product for the market were an incident to the original growth of the cane; and that this distinction saved the classification from being purely arbitrary, oppressive or capricious. It was, as this Court pointed out in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 561, a tax upon the *business* of refining sugar and molasses, exempting therefrom those who refined only their own sugar and molasses.

In *Cargill Co. v. Minnesota*, 180 U. S. 452, the statute required that the owner of an elevator or warehouse situated on the right of way of a railroad, etc., should procure a license therefor at a nominal fee. The act was assailed because it did not apply to elevators and warehouses not so situated. The Court sustained the classification because the railroad was a public highway, the use of which could be so regulated as to promote the ends for which the corporation was created and thus subserve the interests

of the general public. Moreover, it was neither alleged nor proved in that case that there were in the state any elevators or warehouses not situated upon a railroad right of way.

In *Quong Wing v. Kirkendall*, 223 U. S. 59, the statute involved imposed a license fee on hand laundries, but not upon steam laundries, and exempted from its operation laundries not employing more than two women. The classification was sustained, principally upon the authority of the two cases referred to immediately above.

In *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, a classification of theatres for license fees graded according to the prices of admission was held not to be arbitrary or unreasonable, because, although there might be exceptional cases, there was a natural relation between the price of admission and revenue.

While opinions might differ in respect of the wisdom or fairness of some of the statutes involved, as, for example, the laundry tax statute which taxed the small hand laundry and exempted the large steam laundry, the differences were germane to the object and sufficiently substantial to save the classification in each case from being condemned as purely arbitrary or capricious.

It may be that here the maximum tax of \$25 for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the state to increase the amount to an oppressive extent. This Court frequently has said, and it can not be too often repeated in cases of this character, that the power to tax is the power to destroy; and this constitutes a reason why that power, however moderately exercised in given instances, should be jealously confined to the limits set by the Constitution. Compare *Knowlton v. Moore*, 178 U. S. 41, 60. In *Veazie Bank v. Fenno*, 8 Wall. 533, a tax of ten per cent. imposed on the notes of state banks was upheld, although it "drove out of existence every state

bank of circulation within a year or two after its passage," *Loan Association v. Topeka*, 20 Wall. 655, 663-664. In the face of this decision, and others which might be cited, there does not seem to be any sure comfort in the suggestion, sometimes made, that this Court may be expected to intervene whenever the tax reaches the point of destruction.

For the foregoing reasons, the judgment below should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE BUTLER concur in this opinion.

SMITH v. CAHOON, SHERIFF.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 449. Argued April 22, 1931.—Decided May 25, 1931.

1. When a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. P. 562.
2. This principle does not apply to one who is being criminally prosecuted for failure to procure a license under a statute that, as concerns him, is invalid upon its face. *Id.*
3. A state statute, applicable by its terms (with certain exceptions) to all who operate motor vehicles in the business of transporting persons or property "for compensation or as a common carrier" over public highways in the State, prohibits such persons from so operating without having first obtained from a state commission a certificate of public convenience and necessity; application for such a certificate shall be accompanied by a schedule of tariffs; no certificate shall be valid without the giving of a bond or an insurance policy by the applicant for the protection of the public against injuries resulting from negligence in the operation of such vehicles and for the protection of the persons and property carried; it vests the commission with supervisory authority over

those to whom it applies, and with authority to fix or approve their rates, regulate their service, prescribe their methods of keeping accounts, and generally to make rules governing their operations; and it provides that schedules of their rates shall be open to the public and that all alterations in their tariffs shall be under the commission's control. The statute also lays a mileage tax, in part payable upon the issuance of such certificate, and makes violation of any of its provisions a misdemeanor, punishable by fine or imprisonment, or by both. *Held*:

(1) Since the statute on its face affixes the same conditions, without discrimination, to all who apply for certificates of public convenience and necessity, and embraces in those conditions a scheme of supervision and control which constitutionally can be applied only to common carriers, a private carrier for hire may not constitutionally be arrested under it for failure to procure a certificate and pay the required tax. P. 562.

(2) A section of the statute declaring that if any of its provisions are held unconstitutional the validity of the others shall remain unaffected, cannot serve, in advance of judicial decision, to separate those parts which are constitutionally applicable to private carriers from those that are not. P. 563.

(3) If the statute be regarded as intending to afford one constitutional scheme for common carriers and another for private carriers, it fails to define the constitutional obligations of private carriers with the certainty required of criminal statutes and is therefore void. P. 564.

(4) In a penal prosecution for violation of a state statute, it is a defense that the statute, as applied to defendant, is unconstitutional on its face; and an arrest cannot be upheld upon the ground that, later, when the defendant sought relief by *habeas corpus*, the statute was relieved of its infirmity by a construction placed upon it by the state court. Pp. 564, 565.

(5) The unconstitutionality of the statute in this case is not removed by a decision of the state court declaring that the statutory provisions are severable and that only those that are legally applicable to private carriers are intended to apply to them,—without deciding which are so applicable. P. 565.

4. A state statutory provision which requires those who operate motor vehicles on the highways in the transportation of goods for hire to furnish a bond or insurance policy for the protection of the public against injuries received through negligence in such operation, but which does not apply to those "engaged exclusively

in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products,"—held repugnant to the equal protection clause of the Fourteenth Amendment. P. 566.

99 Fla. 1174; 128 So. 632, reversed.

APPEAL from a judgment reversing a judgment discharging the appellant in habeas corpus.

· *Mr. John W. Davis*, with whom *Messrs. John E. Mathews* and *Charles H. O'Connor* were on the brief, for appellant.

Mr. H. E. Carter argued the cause and *Messrs. Cary D. Landis*, Attorney General of Florida, *Fred H. Davis*, former Attorney General, and *Theo. T. Turnbull* filed a brief, for appellee.

The holding of the Supreme Court of Florida is limited to the proposition that the State had power to require carriers under special contract, who were not common carriers, to secure a certificate of public convenience and necessity, and become subject to regulations appropriate to that kind of carrier, and to pay a special mileage tax, in order to have the privilege of using the highways for the conduct of a private business for compensation.

The State has power to do this, even though it may not compel such private carrier to become a common carrier in order to operate as a private carrier. *Frost v. Railroad Comm.*, 271 U. S. 583; *Southern Motorways, Inc., v. Perry*, 39 F. (2d) 145.

The provisions regulating the business of defendant as a private carrier are separable and can be enforced.

If the Railroad Commission should attempt to apply statutory provisions or rules or regulations inconsistent with the Constitution of the United States to the par-

ticular business of the defendant, his rights as the holder of a certificate of public convenience and necessity can be protected and enforced by appropriate judicial proceedings. *Cargill Co. v. Minnesota*, 180 U. S. 452.

The record does not show that the defendant is being required to comply with any regulation that would make him a common carrier, or with any term of the statute whatsoever other than to procure a certificate of public convenience and necessity and to pay the tax, neither of which is a regulation exclusively applicable to common carriers under the Constitution, *Clark v. Poor*, 274 U. S. 554.

The State has the undoubted right to impose a mileage tax on persons using the public highways for gain in the carriage of goods. *Interstate Bus Corp. v. Blodgett*, 276 U. S. 245; *Sprout v. South Bend*, 277 U. S. 163.

The exceptions in the Act do not make it repugnant to the equal protection clause. One who assails a classification in such law must show that it does not rest upon any reasonable basis, but is essentially arbitrary.

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

The appellant, a private carrier for hire, was arrested upon a warrant charging him with operating vehicles upon the highways in Duval County, Florida, without having obtained the certificate of public convenience and necessity, and without having paid the tax, required by Chapter 13700, Laws of Florida, 1929. At the preliminary hearing, the appellant challenged the validity of the statute, as applied to him, upon the ground that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The appellant was held for trial. Upon return to a writ of *habeas corpus*, the Circuit Court

of the county decided that the statute as applied to the appellant was unconstitutional, and the appellant was discharged from custody. This judgment was reversed by the Supreme Court of the State, which upheld the statute. 99 Fla. 1174; 128 So. 632. The case comes here on appeal.

The statute provides for the regulation, through the State Railroad Commission, of "auto transportation companies." These companies are thus defined in § 1 (h):

"The term 'auto transportation company' when used in this Act means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route; Provided, That the term 'auto transportation company' as used in this Act shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city. . . ."

Every auto transportation company as thus defined is prohibited (§ 2) from operating "any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation." There is an

exception in case of operation exclusively within the limits of an incorporated city or town.

Application for such "certificate of public convenience and necessity" (§ 3) must set forth certain information with respect to the applicant and proposed service. Upon hearing, the Commission may issue the certificate as prayed for, "or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require." The Commission may take into consideration various matters bearing upon the applicant's previous operation and reliability, as well as the effect that the granting of the certificate may have upon "other transportation" facilities and upon "transportation as a whole" within the territory sought to be served, and "any other matters tending to qualify or disqualify" the applicant "as a common carrier." It is further provided that, upon hearing, the certificate shall be granted "as a matter of right" to such auto transportation companies as were operating in good faith on the nineteenth day of April, 1929, over the route for which the certificate is sought, "who shall comply in full with the provisions of this Act." When application is made for a certificate "to operate in a territory or on a line already served by a certificate holder," the Commission shall grant the certificate "only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission."

The following provision as to the giving of a bond in connection with the application for certificate is found in § 4 [pp. 353-4]:

"The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers

and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; . . . The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bond to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Act. And no certificate shall be valid until such bond has been filed and approved. . . .”

With the approval of the Commission, the applicant may file an insurance policy in lieu of bond.

The Commission is empowered (§ 5) “to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company,” to regulate its “service and safety of operations,” to prescribe “a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges,” to require “the filing of annual and other reports and all other data,” and to supervise and regulate it “in all other matters” affecting its relationship with the traveling and shipping public.

Under § 6, every auto transportation company, as defined by the Act, must forthwith file, with its application

for a certificate, " a schedule of its rates and fares, and a time schedule of all motor vehicles operated " which are to be subject to public inspection. Rates and time schedules are to be changed only with the sanction of the Commission, and it is made unlawful for any such company to receive a greater or less charge for any service rendered than that shown by the filed schedules.

Violation of any provision of the Act is made a misdemeanor (§ 13) punishable by fine or imprisonment, or by both.

Section 14 provides for the collection of a tax from every auto transportation company to which has been granted a certificate of public convenience and necessity. This is a mileage tax graded according to the capacity of the vehicle. The tax is to be paid quarterly in advance, beginning with the issue of the certificate. Five per cent. of the moneys collected are to be used to defray the expense of the administration of the Act, and the remainder is to be distributed among the counties in proportion to the use of their highways (§ 15).

Other provisions prohibit discrimination and " free fares " except as stated.

Upon the appeal in this case, the Supreme Court of the State thus construed the statute [p. 1180]:

"The statute applies to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over public highways in this State between fixed termini or over a regular route, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract; but the statute does not require private carriers to become common carriers and the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to corporations or persons who are not common carriers, though engaged in the transpor-

tation to which the statute refers; and the provisions of the statute that are legally applicable to private carriers for compensation, are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are governed by the statute. . . . The requirements as to procuring certificates of convenience and necessity for doing the business on the highways and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes."

The state court gave no indication as to the particular provisions of the statute which were deemed to be "legally applicable" only to common carriers, or as to those which were considered to be legally applicable to private carriers, except that it was decided that the latter were bound to procure certificates and to pay the tax.

There is no controversy with respect to the status of the appellant. The Supreme Court said that "he owned and operated two motor propelled vehicles in the business of transporting property for compensation upon the public highways between fixed termini and over regular routes, all within the State, not as a common carrier but as a private carrier under special contract." From the undisputed evidence upon the preliminary hearing, it appears that the appellant was employed under an exclusive contract with the Atlantic & Pacific Tea Company in hauling its merchandise from Jacksonville to various places in Florida. He has never held himself out as a common carrier.

From statements made at the bar, it would appear that the appellant was engaged in the business above mentioned when the Act was passed and hence that he would

be entitled to a certificate, provided he complied fully with the provisions of the Act. By the terms of the Act such compliance would be necessary. The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Gundling v. Chicago*, 177 U. S. 183, 186; *Lehon v. Atlanta*, 242 U. S. 53, 55, 56; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 553, 554. This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right. In the present instance, the appellant has been arrested and held for trial. He is in jeopardy, and the state court, entertaining his application for discharge, has denied the constitutional right asserted. The question of the validity of the statute, upon which the prosecution is based, is necessarily presented.

The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an application for a certificate of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant for the protection both of the public against injuries and of the persons or property carried. The State Commission was explicitly vested with authority to supervise "every" auto transportation company that was embraced within the definition, to fix or approve its rates and charges, to regulate its service, to prescribe its method

of keeping accounts which should set up adequate depreciation charges, and generally to make rules governing its operations. Schedules of rates of "every such auto transportation company" were to be open to the public and all alterations in tariffs were to be subject to the Commission's control. On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. No separate scheme of regulation can be discerned in the terms of the Act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers. All carriers within the Act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State. See *Michigan Pub. Util. Comm. v. Duke*, 266 U. S. 570, 576-578; *Frost Trucking Co. v. Railroad Comm.*, 271 U. S. 583, 592.

If it be said that the statute contemplated the severability of its requirements in providing (§ 18) that if any of its provisions were held to be unconstitutional, the validity of the remaining portions should remain unaffected, the answer is that no line of severance is indicated in the terms of the Act. The effect of this saving clause is merely that, if one provision is struck down as invalid, others may stand. But until such separation has been

accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left. This was the situation which confronted the appellant when obedience to the statute was demanded and punishment for violation was sought to be inflicted.

If, ignoring the explicit comprehensiveness of their requirements, it could be said that the provisions of the statute should be severed, so as to afford one scheme for common carriers and another for private carriers such as the appellant, the result would be to make the statute, until such severance was determined by competent authority, void for uncertainty. Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him, or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers "no standard of conduct that it was possible to know." *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; *Collins v. Kentucky*, 234 U. S. 634, 638; *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Weeds, Inc., v. United States*, 255 U. S. 109; *Connally v. General Construction Co.*, 269 U. S. 385, 391. It is idle to say that one could take a statute of this sort, establishing requirements binding upon private and common carriers alike, and divide its terms so as to make a valid scheme applicable to private carriers. The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord.

The construction placed upon the statute by the Supreme Court of the State does not avoid the difficulty.

It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope. There is no controversy as to the facts and the appellant has been held liable to the penalties of the Act for his disobedience to it as it stood when it was enacted. He was entitled at that time to assert his constitutional right by virtue of the invalidity of the statute upon its face. Apart from this consideration, the construction of the statute by the state court does not determine what terms of the statute are binding upon private carriers such as the appellant. The court states that "the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to corporations or persons who are not common carriers," and that "the provisions of the statute that are legally applicable to private carriers for compensation are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are covered by the statute." But the court does not point out what provisions are "legally applicable" to private carriers. The decision thus aims to remove the constitutional objection of invalid application only by creating another constitutional objection of lack of appropriate certainty. Had the legislature written into the statute itself that it was binding upon private carriers "only so far as the provisions are legally applicable," it would have transcended the permissible limits of statutory indefiniteness.

Among the provisions of the statute binding upon those who apply for and obtain certificates of public convenience and necessity is one that a bond, or insurance policy, approved by the State Commission, shall be furnished in order to afford security for the public against injuries as well as for the protection of persons and property transported: If we leave on one side the requirement that a

certificate holder, who is a private carrier, shall give a bond or policy for the goods carried by him, irrespective of his contract with his employer whose goods he carries, and if we consider only the provision for the protection of the public with respect to the use of the highways, another constitutional difficulty is encountered, that is, of an unconstitutional discrimination. If the provisions of the Act were treated as severable, and requirements relating to the safety of the public are separately considered, we are brought to the terms of the Act with respect to those who are required to obtain certificates of public convenience and necessity and thus to supply the stipulated security. The Act provides that the term auto transportation company, upon which the obligations of the Act are imposed, shall not include "any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products." The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.

The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court. *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 161; *Miller v. Wilson*, 236 U. S. 373, 382, 384; *Bekins Van Lines v. Riley*, 280 U. S. 80, 82; *Silver v. Silver*, 280 U. S. 117, 123; *Carley & Hamilton v. Snook*, 281 U. S. 66, 73. But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely

arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. "Such a classification is not based on anything having relation to the purpose for which it is made." *Air-Way Corp. v. Day*, 266 U. S. 71, 85; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417; *Truax v. Corrigan*, 257 U. S. 312, 332, 333; *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37.

For these reasons, we hold that the statute was invalid as applied to the appellant, and it is unnecessary to consider the questions that have been raised with respect to the validity of the provision for the mileage tax, separately considered. The judgment is reversed and the

cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

NORTHPORT POWER & LIGHT CO. *v.* HARTLEY,
GOVERNOR OF WASHINGTON, *ET AL.*

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

No. 66. Argued January 23, 1931.—Decided May 25, 1931.

A bill to enjoin state officials from bringing an action in the state courts for the purpose of forfeiting and escheating the plaintiff's land under a law of the State that the plaintiff attacks as repugnant to the Federal Constitution, will not lie in a federal court, since full protection of the plaintiff's rights can be had in the action by the State, if instituted. P. 569.

35 F. (2d) 199, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill for an injunction.

Mr. O. C. Moore, with whom *Mr. W. Lon Johnson* was on the brief, for appellant.

Messrs. John H. Dunbar, Attorney General of Washington, and *John A. Homer*, Assistant Attorney General, were on the brief for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity to enjoin the appellees from bringing or causing to be brought a suit for enforcing against the appellant Section 33, Article II of the Constitution of the State of Washington and an Act of 1921 in pursuance of the same, it being alleged that the Section and Act are repugnant to the commerce and contract

clauses of the Constitution of the United States and also to the Fourteenth Amendment and to the Treaty between the United States and Great Britain. The bill was dismissed by a District Court of three Judges. 35 F. (2d) 199.

The bill alleges that the plaintiff, the appellant, is a corporation of the State of Washington and that it owns rights of way, &c., over which it transmits electrical energy from Canada to points within the State. But the majority of its stock is owned by an alien corporation and, with immaterial exceptions, Section 33, Art. II of the Constitution of the State prohibits the ownership of land by aliens and provides that every corporation of which the majority of the stock is owned by aliens shall be considered an alien for the purposes of the prohibition. This was in force before the appellant acquired its alleged rights. The statute was passed after the acquisition. *State v. Natsuhara*, 136 Wash. 437, 444; 240 Pac. 557. It is alleged that the defendants have threatened and will attempt to forfeit and escheat to the State the plaintiff's rights by prosecuting a suit at law in the Courts of the State as a result of which the plaintiffs will suffer irreparable loss.

Some, at least, of the constitutional objections to the laws of the State are disposed of by *Terrace v. Thompson*, 263 U. S. 197, but before they are reached there arises the objection that no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the State Courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial Court upholds it, still the appellant can protect its rights as fully in the State Courts as elsewhere. As it is put by Mr.

Justice Moody speaking for a unanimous Court, "It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction." *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 285. *Cavanaugh v. Looney*, 248 U. S. 453, 456. These cases relied on by the Court below are sufficient to sustain its conclusion. The exceptions are explained in the cases in which they occur, e. g., *Ter-race v. Thompson*, 263 U. S. 197, 215, 216.

Decree affirmed.

INDIAN MOTOCYCLE CO. *v.* UNITED STATES.

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 5. Argued April 25, 1929. Reargued October 24, 27, 1930.—
Decided May 25, 1931.

1. A certificate from the Court of Claims presenting a question of law suitably distinct and definite, may be entertained although it be apparent that, with the facts as settled by an agreed statement accepted below, a decision of the question, either way, will be decisive of the case. P. 573.
2. The tax laid by § 600 of the Revenue Act of 1924 upon certain specified articles, including motorcycles, "sold . . . by the manufacturer . . ." equivalent to 5% of the price for which they are so sold, the statute requiring the manufacturers to make return of their sales and to pay the tax, is an excise on the sale and not on the manufacture or on the manufacture and sale. P. 573.
3. The principle that the instrumentalities, means and operations whereby the States exert their governmental powers are exempt from taxation by the United States, is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. P. 575.

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Argument for the United States.

4. Where a motoreycle is sold by its manufacturer to a municipal corporation of a State for use by such corporation in its police service, the transaction can not constitutionally be taxed by the United States under § 600 of the Revenue Act of 1924. Pp. 572, 579.
5. In *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 526; *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U. S. 572, 579; and *Willcuts v. Bunn*, 282 U. S. 216, 225, the taxes in question were not laid on transactions involving an exercise of governmental functions, and their bearing on governmental operations was so indirect or remote as to place them outside the principle which is applicable here. P. 579.

RESPONSE to a question certified by the Court of Claims, in a suit to recover money collected as a sales tax.

Mr. Monte Appel, with whom *Mr. Frederick Schwertner* was on the brief, for Indian Motorcycle Co.

Solicitor General Thacher, with whom *Assistant Attorney General Rugg* and *Messrs. Fred K. Dyar* and *H. Brian Holland* were on the brief, for the United States.

The tax is distinguishable from the tax in the *Panhandle Case*. Both are excises; but in this case the tax is imposed on the privilege of manufacturing and thereafter selling a motor cycle, whereas, in the *Panhandle Case*, the tax was imposed on the privilege of sale alone. Cf. *Wheeler Lumber Co. v. United States*, 281 U. S. 572, 579.

The tax was not imposed upon the State, or upon any instrumentality of the State. It was imposed upon the manufacturer with respect to all sales of his product. The manufacturer added the amount of the tax to his bill, but its payment by the City of Westfield was part of the bargain between the parties, and the tax was not in any sense imposed on the City. *Lash's Products Co. v. United States*, 278 U. S. 175; *Snyder v. Bettman*, 190 U. S. 249. Indeed, it may fairly be assumed that the price paid by the City would have been the same if the tax had

been imposed on the manufacture of the motor cycle regardless of its sale.

Nor was the manufacturer an agent or employee of the State or municipality. *Metcalfe & Eddy v. Mitchell*, 269 U. S. 514.

Mr. John E. Hughes filed a brief for the Excelsior Motor Mfg. & Supply Co. as *amicus curiae*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a certificate from the Court of Claims. At a prior term the certificate was dismissed as not in accord with applicable rules and then reinstated, as in *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U. S. 572. It since has been amended, and further argument has been heard.

The facts disclosed in the certificate are: In 1925 the plaintiff, a corporate manufacturer of motorcycles in Massachusetts, sold a motorcycle of its manufacture to the City of Westfield, a municipal corporation of that Commonwealth, for use by the city in its police service. A tax in respect of the sale was assessed and collected from the plaintiff under § 600 of the Revenue Act of 1924, c. 234, 43 Stat. 322. After due but unsuccessful effort to have the same refunded, the plaintiff brought suit in the Court of Claims to recover the money so exacted from it—the tax being assailed as invalid, as it had been in the application for a refund, on the ground that it was imposed in contravention of the constitutional immunity of the State and her governmental agencies from federal taxation. The parties submitted an agreed statement showing the facts here recited, and the Court of Claims then certified to this Court the question (we state its substance), where a motorcycle is sold by its manufacturer to a municipal

corporation of a State for use by such corporation in its police service, can the transaction be taxed under § 600 of the Revenue Act of 1924 consistently with the constitutional immunity of the State and her governmental agencies from federal taxation.

Our jurisdiction to entertain certificates from the Court of Claims, and the limitations on that jurisdiction, are explained in *Wheeler Lumber Bridge & Supply Co. v. United States, supra*. The present certificate when tested by the rules there stated is unobjectionable. It presents a question of law suitably distinct and definite. And while, with the facts settled by an agreed statement accepted below, it is apparent that a decision of the question either way will be decisive of the case, this affords no ground for declining to entertain the certificate. *United States v. Mayer*, 235 U. S. 55, 66, and cases cited.

Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 332, is part of Title VI entitled Excise Taxes. The section provides that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased." Motorcycles are among the articles enumerated and the applicable tax is five per centum of the price for which they are sold. Manufacturers, producers and importers are required severally to make returns of their sales and to pay the tax.

This taxing provision is a reënactment, with minor changes not material here, of a provision which was included in the Revenue Act of 1917, c. 63, § 600, 40 Stat. 300, 316, and repeated in succeeding enactments. It is now § 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 93; U. S. C., Title 26, § 881.

Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as

to the transaction or act on which it is laid. Counsel for the plaintiff insist it is laid on the sale. Counsel for the Government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the Government base their contention on the requirement that the tax be paid by “the manufacturer, producer or importer”; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation. Importation, as such, already was otherwise taxed, c. 356, § 1, par. 369, 42 Stat. 858, 885, U. S. C., Title 19, § 121, par. 369, and in our opinion the words relied on fall short of expressing a purpose to subject it to a further tax.

This view of the tax is not new. The administrative bureau adopted it at the outset and has adhered to it up to the present time. The regulations issued under the Revenue Act of 1917 said on this point: “The tax is on the sale of the articles mentioned,” 20 Tr. Dec. Int. Rev. 365; and this is repeated in the later regulations. 21 Tr. Dec. Int. Rev. 412; 23 Tr. Dec. Int. Rev. 68; 24 Tr. Dec. Int. Rev. 56; 26 Tr. Dec. Int. Rev. 592. Indeed, the tax is frequently spoken of in the regulations as a sales tax. And it is so described in reports of congressional committees dealing with revenue bills in which it was retained. Sen. Rep. No. 398, p. 40, 68th Cong., 1st Sess.; House Rep. No. 1, p. 16, 69th Cong., 1st Sess. While not controlling, this administrative and legislative action

strengthens our conclusion, drawn from the taxing provision, that the tax is laid on the sale, and on that alone.

The cases of *Cornell v. Coyne*, 192 U. S. 418, and *American Mfg. Co. v. St. Louis*, 250 U. S. 459, cited by counsel for the Government, are not pertinent; for both related to taxes distinctly imposed on manufacturing.

With this understanding of the nature of the tax, we come to the question propounded in the certificate.

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector v. Day*, 11 Wall. 113, 125, 127; *Willcuts v. Bunn*, 282 U. S. 216, 224-225. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. *McCulloch v. Maryland*, 4 Wheat. 316, 430; *United States v. Baltimore & Ohio R. Co.*, 17 Wall. 322, 327; *Johnson v. Maryland*, 254 U. S. 51, 55-56;¹

¹ Respecting the immunity from state taxes this Court there said:

"With regard to taxation, no matter how reasonable, or how universal and indiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 525, 526."

Gillespie v. Oklahoma, 257 U. S. 501, 505; *Crandall v. Nevada*, 6 Wall. 35, 44-46.

Of course, the reasons underlying the principle mark the limits of its range. Thus, as to persons or corporations which serve as agencies of government, national or state, and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies;² and, in harmony with this view, it also has been held where a State departs from her usual governmental functions and "engages in a business which is of a private nature," no immunity arises in respect of her own or her agents' operations in that business.³ While these decisions show that the immunity does not extend to anything lying outside or beyond governmental functions and their exertion, other decisions to which we now shall refer show that it does extend to all that lies within that field.

It has been adjudged that bonds of the United States issued to raise money for governmental purposes, and the interest thereon, are immune from state taxation, because such a tax, even though inconsiderable in amount and imposed only on holders of the bonds, would burden the exercise by the United States of its power to borrow money. *Weston v. Charleston*, 2 Pet. 449, 468;⁴ *The Banks v. The Mayor*, 7 Wall. 16; *Home Savings Bank v. Des Moines*, 205 U. S. 503, 513; *Northwestern Ins. Co. v. Wisconsin*, 275 U. S. 136, 140. And this immunity has been held to

² *Thomson v. Pacific Railroad*, 9 Wall. 579, 591; *Railroad Co. v. Peniston*, 18 Wall. 5, 34, 36-37; *Central Pacific R. Co. v. California*, 162 U. S. 91, 125, 126; *Baltimore Ship Building & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 382. *Alward v. Johnson*, 282 U. S. 509. And see *McCulloch v. Maryland*, *supra*, p. 436; *Osborn v. Bank of United States*, 9 Wheat. 738, 867; *Clallam County v. United States*, 263 U. S. 341, 345.

³ *South Carolina v. United States*, 199 U. S. 437.

include bonds of a municipal corporation in a Territory issued to raise money for municipal purposes, the decision being put on the ground that such a corporation is an instrumentality of the United States exercising delegated governmental powers. *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 525. It also has been adjudged that bonds of municipal corporations in the several States issued to raise money for public municipal purposes, and the interest thereon, are immune from federal taxation, and this on the ground that such corporations are representatives of the States and exercise some of their powers, and that under the implications of the Constitution the governmental agencies and operations of the States have the same immunity from federal taxation that like agencies and operations of the United States have from taxation by the States. *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 584-586, 601, 652, 653; s. c. 158 U. S. 601, 618, 693.

It has been further adjudged that the salary of an officer of the United States is immune from state taxation because the salary is the "means by which his services are procured and retained" and its taxation by a State would burden the exertion by the United States of powers belonging to the latter. *Dobbins v. Commissioner of Erie County*, 16 Pet. 435, 448, 449. And "for like reasons" it has been held that the salary of a state officer is immune from federal taxation. *Collector v. Day*, 11 Wall. 113, 124.

Other applications of the principle are shown in cases where it has been ruled that a state excise on the transmission of telegrams is void as to messages sent by officers of the United States on public business, because the excise,

⁴ This Court there said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government."

although exacted only of the telegraph company, is, so far as it is based on the government messages, a tax on the means employed by the United States in carrying its constitutional powers into effect, *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 466; *Williams v. Talladega*, 226 U. S. 404, 418-419; and that bonds exacted by a municipal corporation of a State as a condition to granting licenses the issue of which is committed by the State to such corporation cannot be taxed by the United States, even though the tax be collected only from the licensees, because such a tax would burden the exercise of a function belonging to the State and city in their governmental capacity, *Ambrosini v. United States*, 187 U. S. 1, 8.

In *Panhandle Oil Co. v. Knox*, 277 U. S. 218, this Court was called upon to determine whether a state excise laid on the sale of gasoline, and collected only from the dealer making the sale, could be applied to sales to the United States for the use of its coast guard fleet and its veterans' hospital, and the ruling, made after much consideration, was that the excise could not be so applied consistently with the constitutional principle. The Court there held that while a State may impose a tax on a dealer "for the privilege of carrying on trade that is subject to the power of the State," she may not lay any tax on sales to the United States by which it "secures the things desired for its governmental purposes," and further [p. 222]:

"It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. . . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. [Citing cases.] And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

We think it follows from these decisions, particularly from the one last cited, that the sale of motorcycles to a state agency, such as a municipal corporation, for use in its police service is not subject to taxation by the United States. The maintenance of a police service by such a state agency, like the maintenance of a coast guard service by the United States, is a governmental function; and that function extends—in one instance as much as in the other—to the purchase of equipment and supplies needed to render the particular service efficient. Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The decisions in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 526; *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U. S. 572, 579; and *Willcuts v. Bunn*, 282 U. S. 216, 225 *et seq.*, cited by counsel for the Government, are all distinguishable, for the taxes there in question were not laid on transactions involving an exertion of governmental functions and their bearing on governmental operations was so indirect or remote as to place them outside the principle which is applicable here.

The question propounded in the certificate is answered in the negative.

MR. JUSTICE HOLMES regards *Panhandle Oil Co. v. Knox* as controlling in principle and upon that ground acquiesces in this decision.

MR. JUSTICE STONE, dissenting.

I think the question should be answered in the affirmative. The implied immunity of one government, either national or state, from taxation by the other should not be enlarged. Immunity of the one necessarily involves curtailment of the other's sovereign power to tax. The practical effect of enlargement is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity is invoked. Compare *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-4; *South Carolina v. United States*, 199 U. S. 437, 455; *Railroad Co. v. Peniston*, 18 Wall. 5, 30-31; see also *Missouri v. Gehner*, 281 U. S. 313, 323; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 637.

This is especially the case where, as here, the sole ground of the immunity is that, although the tax is an excise collected by one government from an individual normally subject to it, the incidence of the tax may conceivably be shifted to the other government. In such a case it is not clear how a recovery by the taxpayer would benefit directly the government supposed to be burdened; and the assumption of indirect benefit in the case of a tax of this type necessarily rests upon speculation rather than reality. See *Lash's Products Co. v. United States*, 278 U. S. 175. It is significant that neither the federal nor any state government has appeared by intervention or otherwise to support this claim of immunity in cases in which the taxpayer has urged it upon us.

The court has many times held, and as recently as in *Educational Films Corp. v. Ward*, 282 U. S. 379, that an excise tax, imposed directly on the individual, is not invalid because indirectly it may burden either the state or the national government. See also *Willcuts v. Bunn*, 282 U. S. 216, 225; *Denman v. Slayton*, 282 U. S. 514. A bequest

to the United States or a state may be subjected to an inheritance tax by the other, *United States v. Perkins*, 163 U. S. 625; *Snyder v. Bettman*, 190 U. S. 249; see *Greiner v. Lewellyn*, 258 U. S. 384, although the consequent indirect burden is apparent. Even if it could be said that there is some reason, which the Court has never attempted to state, for the distinction which was made by the decision in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, between an excise on sales to a government and one on legacies, the fact of the shifting of the burden would seem to be at least less apparent in the case of a sale.

In the *Panhandle Oil* case, it was held that this shifting of the burden of a state tax from the seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States, and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result. With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on.¹ In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the producer by the reduction of the producer's price, rather than forward to the consumer by an increase of the seller's price.²

¹ Bastable, *Public Finance* (3rd ed.) pp. 372-377, 387-388, 548, 577-578, 588; Brown, *The Economics of Taxation*, pp. 95-96, 134-135, 326-328; Bye and Hewitt, *Applied Economics*, pp. 453-456; Ely, *Outlines of Economics* (5th ed.) p. 794; Hobson, *Taxation in the New State*, pp. 52-56; Lutz, *Public Finance*, pp. 317-319; Marshall, *Principles of Economics*, (6th ed.) pp. 413-415; Nicholson, *Elements of Political Economy*, pp. 456-460; Seligman, *Shifting and Incidence of Taxation*, (5th ed.) pp. 218-219, 253-254; Shoup, *The Sales Tax in France*, pp. 322-327; *Proceedings, National Tax Association*, 1907, p.

Whatever factors determine whether the burden does in fact shift, I do not think it can be said that a tax paid by the seller in any given case necessarily burdens the purchaser either more or less, because in form laid on the sale, as in the *Panhandle Oil* case, or upon transportation of goods sold f. o. b. destination, as in *Wheeler Lumber Co. v. United States*, 281 U. S. 572, or on manufacture alone of articles intended for sale, see *Cornell v. Coyne*, 192 U. S. 418, or on both manufacture and sale.

These considerations are, to me, persuasive that the broad rule announced in the *Panhandle Oil* case ought not to be extended, even if we were not required by our own decisions to limit it; and that we ought not to strain the words of the statute to bring this case within the authority of that one. It seems to be conceded that if the tax in the present case were levied on manufacture alone, we would be bound to hold it valid, *Cornell v. Coyne, supra*; see *Lash's Products Co. v. United States, supra*.

The rule of the *Panhandle Oil* case has been limited in *Wheeler Lumber Co. v. United States, supra*, holding that a tax on transportation, which in that case was necessary to effect delivery by the seller, was valid because not in terms a tax on the sale, as it was in the former. Even if verbal distinction, unfounded in economic realities, must be made between the two cases so that both may stand as authoritative expositions of the Constitution, consid-

432; *id.*, 1920, pp. 175-176, 179, 212, 266; *id.*, 1922, pp. 108-109; *id.*, 1923, pp. 297-298; *id.*, 1924, pp. 307, 314, 347-349, 354, 355; *id.*, 1929, pp. 271, 406-407; Bulletin, National Tax Association, 1923-1924, p. 170; *id.*, 1929-1930, p. 260; National Industrial Conference Board, General Sales or Turnover Taxation, pp. 52-54. Others, without discussion of those factors which affect and often obscure the fact of shifting, hold the contrary: Comstock Taxation in the Modern State, p. 121; Bulletin, National Tax Association, 1923-1924, p. 174.

² Bastable, pp. 376, 548; Brown, p. 96; Lutz, p. 319; Hobson, p. 54; Marshall pp. 413-414; all *supra* Note 1; Bulletin, National Tax Association, 1923-1924, p. 170.

erations of substance rather than of form should lead us to choose that one which would restrict the doctrine of the *Panhandle Oil* case to the tax imposed in unqualified terms on sales to which it was applied in that case. The present tax is not levied in such terms, exclusively on sales, but is effective only when the seller both manufactures or imports and sells. With respect to the incidence of its burden on the buyer, so far as we can know, it does not differ from a tax on the manufacture of goods, payable when sold. See *Lash's Products Co. v. United States, supra*. I think that the *Wheeler Lumber* case, rather than the *Panhandle Oil* case, should control in determining its validity.

MR. JUSTICE BRANDEIS concurs in this opinion.

MAAS & WALDSTEIN CO. v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 263. Submitted March 12, 1931.—Decided May 25, 1931.

1. Section 1324 (a) of the Revenue Act of 1921, in allowing interest on refunds of internal revenue taxes if the amount refunded was paid by the taxpayer "under a specific protest setting forth in detail the basis of and reasons for such protest," seeks to recoup taxpayers who have been unjustly dealt with. The purpose of the protest is to invite attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once; and meticulous compliance by the taxpayer with the prescribed conditions must appear before he can recover. P. 588.
2. This provision is inapplicable where an excess-profits tax, as returned and paid, was lawfully demanded, but was reduced and in part refunded, not under a protest, but as the result of written requests for a reassessment proportioned to the taxes of other representative concerns engaged in like business. Revenue Act of 1917, §§ 200, 205 (a), 210. *Id.*
68 Ct. Cls. 613; 37 F. (2d) 196, affirmed.

CERTIORARI, 282 U. S. 822, to review a judgment rejecting a claim for interest on a refund of money collected as taxes.

Messrs. George E. Holmes, Valentine B. Havens, W. A. Sutherland, and Donald Havens were on the brief for petitioner.

Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, Special Assistant to the Attorney General, Charles R. Pollard, H. Brian Holland, and Erwin N. Griswold were on the brief for the United States.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The petitioner seeks to recover interest on an overpayment made June 20, 1918, on account of income and excess profits taxes assessed for the year 1917, which was refunded during 1922. The Court of Claims denied relief and we are asked to reverse this action.

The Revenue Act of 1917, 40 Stat. 300, 303, 304, 307, laid an income tax; also a tax upon excess profits equal to designated percentages of the net income, after making deductions therefrom as stated in § 203. The amount of such deductions depended upon invested capital, prewar operations, etc.

The provisions of that Act here specially applicable follow—

“Sec. 205. (a) That if the Secretary of the Treasury, upon complaint finds either (1) that during the prewar period a domestic corporation or partnership, or a citizen or resident of the United States, had no net income from the trade or business, or (2) that during the prewar period the percentage, which the net income was of the invested capital, was low as compared with the percentage, which

the net income during such period of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, was of their invested capital, then the deduction shall be . . .”

“Sec. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the \$3,000 or \$6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus . . .”

Article 52, Treasury Department Regulations 41, promulgated under the Revenue Act of 1917 states—“Section 210 provides for exceptional cases in which the invested capital can not be satisfactorily determined. In such cases the taxpayer may submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210.”

Revenue Act of 1921, c. 136, 42 Stat. 227, 316—

“Sec. 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid. . . .”

The petitioner, a domestic corporation, on March 28, 1918, filed its income and excess profits tax return for the year 1917. From this it appeared that, reckoned

On June 20, 1918, payment was made of the full amount of the tax reckoned upon the March 28 return. This was accompanied by a letter stating "we filed a request dated March 28th for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41. Understanding that these questions will be passed upon at a later date, we shall be pleased to be advised that a hearing will be granted to us." At this time no provision of law permitted recovery of interest upon refunded overpayments.

Excess Profits Tax Returns, we have reduced the value of the tangible assets acquired at the time of our organization to \$100,000. No proper evidence of the actual value of these assets when acquired by the corporation is now in existence, but it is our opinion that their actual value was far in excess of \$100,000. By reason of our organization, it has been possible to make our return in strict accord with the law and the regulations. We believe that this fact places us at a disadvantage with concerns which, by reason of the manner of their organization, and by reason of reorganizations through which they may have passed, are not able to correct their capital account in the manner provided in the regulations.

2. Under paragraph 4, Article 52, our invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income. This arises in part for the reasons specified in the preceding paragraph, and in part for the reason specified under (b) in paragraph 4. About 90% of our total net income was earned through the operation of our gun cotton plant. This plant was erected solely for war purposes to meet the needs of a foreign government and will not be wanted for the purpose of our trade or business after the termination of the war. Under the regulations it has not been possible to properly allow for the amortization and exceptional depreciation of this plant.

Upon the above statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41.

Very truly yours,

Maas & Waldstein Co., Henry V. Walker, President.

December 30, 1921, petitioner filed a formal claim for the refund of excess payment of income and excess-profits tax for 1917.

The petitioner now claims that the contents of its letter of March 28, 1918, reiterated in the later one, were sufficient to meet the requirements of § 1324 (a), Act of 1921—that what was there written amounted to “a specific protest setting forth in detail the basis of and reasons for such protest,” within the meaning of the statute. The Court of Claims held otherwise; and while its opinion cannot be wholly approved, the judgment is correct and must be affirmed.

The general purpose of the petitioner's communications to the Commissioner was to induce the latter to set on foot an investigation of the Company's affairs to the end that, after ascertaining the circumstances and in the exercise of a proper discretion, he might make an assessment duly proportioned to those imposed upon others engaged in like business. There was no challenge of the Commissioner's right then to demand payment according to the general rule—no claim that in view of the facts then before him this would amount to an unlawful imposition. Considering the circumstances disclosed, the Commissioner did nothing unjust or contrary to law when he demanded payment; and if he had concluded to take no further proceedings, the petitioner could have recovered nothing. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551.

In *Girard Trust Company v. United States*, 270 U. S. 163, 170, 173, this Court pointed out that the Act of 1921 is remedial and was passed with the general purpose to “require the Government to recoup the taxpayer unjustly dealt with by paying interest during the whole time the money was detained.” Also, we there said—“A protest is for the purpose of inviting attention of the taxing

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Syllabus.

officers to the illegality of the collection, so that they may take remedial measures at once."

We are unable to conclude that the petitioner's action amounted to a precise objection to an unauthorized exaction within the fair intendment of the statute. Meticulous compliance by the taxpayer with the prescribed conditions must appear before he can recover. *Lucas v. Pilliod Lumber Co.*, 281 U. S. 245, 249.

Affirmed.

PHILLIPS *ET AL.*, EXECUTORS, *v.* COMMISSIONER
OF INTERNAL REVENUE.

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

No. 455. Argued April 23, 1931.—Decided May 25, 1931.

1. Stockholders who have received the assets of a dissolved corporation may be compelled to discharge therefrom the unpaid federal taxes on the income and excess profits of the corporation. P. 592.
2. Under the Revenue Act of 1926, § 280 (a) (1), and Act of May 29, 1928, this liability of the transferee, "at law or in equity," may be enforced summarily in the same manner as that of any delinquent taxpayer, as well as by proceedings to enforce the tax lien or by actions at law or in equity. *Id.*
3. The rule that the United States may collect its internal revenue by summary administrative proceedings if adequate opportunity be afforded for a later determination of legal rights, applies to taxes assessed against transferees of corporate property. P. 593.
4. The procedure provided in § 280 (a) (1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee; (a) he may contest his liability by bringing an action, either against the United States or the Collector, to recover the amount paid; or (b) he may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, and if dissatisfied, may have a further review by the Circuit Court of Appeals and possibly by this Court on certiorari. P. 597.

5. The review by the Board of Tax Appeals and the Circuit Court of Appeals is not to be deemed constitutionally inadequate because the tax may be collected while the case is before that court unless a bond is filed, or because the Board's findings of fact are to be treated by that court as final if there is any evidence to support them. P. 599.
 6. The right of the taxpayer to stay payment pending immediate judicial review, by filing a bond, is a privilege granted by the sovereign as an act of grace. *Id.*
 7. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. P. 600.
 8. The method of assessment and collection permitted by § 280 (a) (1) was intended to apply, and is constitutionally applicable, where the transfer of assets occurred before the enactment of the Revenue Act, of 1926. P. 601.
 9. Assuming that the liability "at law and in equity" of the transferees of corporate assets to meet federal taxes incurred by their corporation may vary according to the laws of the States of incorporation, this does not make the tax provision invalid either as an unconstitutional delegation of federal taxing power to the States or as a departure from the requirement of geographical uniformity. P. 602.
 10. The time within which the summary proceeding to enforce liability for the tax of a corporation may be taken against a stockholder transferee of its assets is determined by the federal Act and not by the state statute of limitations on suits against stockholders. P. 602.
 11. One who receives corporate assets upon dissolution of the corporation is severally liable, to the extent of the assets received, for the payment of income and excess-profits taxes of the corporation. P. 603.
 12. In a summary proceeding under § 280, Revenue Act of 1926, to collect such taxes from one such transferee, the Government is not obliged to join other transferees and marshal the assets of the corporation so as to adjust the rights of the various stockholders. P. 604.
- 42 F. (2d) 177, affirmed.

CERTIORARI, 282 U. S. 828, to review a judgment affirming the action of the Board of Tax Appeals, 15 B. T. A. 1218, in sustaining certain deficiency tax assessments.

Mr. Elkan Turk, with whom *Messrs. Herman Boldman, Benjamin Wiener*, and *Donald Bourne* were on the brief, for petitioners.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Mr. Sewall Key* and *Miss Helen R. Carloss*, Special Assistants to the Attorney General, and *Messrs. Whitney North Seymour, Clarence M. Charest*, General Counsel, and *Allin H. Pierce*, Special Attorney, Bureau of Internal Revenue, were on the brief, for respondent.

Mr. Oscar R. Ewing, and *Messrs. James C. Denton* and *Richard H. Wills*, by special leave of Court, filed briefs as *amici curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1919, the Coombe Garment Company, a Pennsylvania corporation, distributed all of its assets among its stockholders, and then dissolved. Thereafter, the Commissioner of Internal Revenue made deficiency assessments against it for income and profits taxes for the years 1918 and 1919. A small part of these assessments was collected leaving an unpaid balance of \$9,306.36. I. L. Phillips of New York City, had owned one-fourth of the company's stock and had received \$17,139.61 as his distributive dividend. Pursuant to § 280 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61, the Commissioner sent due notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent

to any of the other transferees, and no suit or proceedings for collection was instituted against them. Upon petition by Phillips' executors for a redetermination, the Board of Tax Appeals held that the estate was liable for the full amount. 15 B. T. A. 1218. Its order was affirmed by the United States Circuit Court of Appeals for the Second Circuit. 42 F. (2d) 177. Because of conflict in the decisions of the lower courts¹ a writ of certiorari was granted. 282 U. S. 828.

Stockholders who have received the assets of a dissolved corporation may confessedly be compelled, in an appropriate proceeding, to discharge unpaid corporate taxes. Compare *Pierce v. United States*, 255 U. S. 398. Before the enactment of § 280 (a) (1), such payment by the stockholders could be enforced only by bill in equity or action at law.² Section 280 (a) (1) provides that the liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer.³

The procedure prescribed for collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer. This procedure is now generally known, and some parts of it will later be considered in detail. As applied directly to the taxpayer, its constitutionality is not now assailed. Compare *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716. But it is contended that to apply it to stockholder transferees violates several constitutional guaranties; that

¹ Compare *Owensboro Ditcher & Grader Co. v. Lewis*, 18 F. (2d) 798; *Mid-Continent Petroleum Corp. v. Alexander*, 35 F. (2d) 43; *Routzahn v. Tyroler*, 36 F. (2d) 208. See also *Felland v. Wilkinson*, 33 F. (2d) 961; *Cappellini v. Commissioner*, 14 B. T. A. 1269.

² Such proceedings to obtain payment of corporate income and profits taxes from stockholders or other transferees have been frequently brought. See *United States v. McHatton*, 266 Fed. 602; *Updike v. United States* 8 F. (2d) 913, certiorari denied, 271 U. S. 661; *United States v. Capps Mfg. Co.*, 9 F. (2d) 79, affirmed, 15 F. (2d) 528; *United States v. Fairall*, 16 F. (2d) 328; *United States v.*

additional obstacles are encountered if it is applied to transfers made before the enactment of § 280 (a) (1); that the specific liability here sought to be enforced is governed by the law of Pennsylvania and barred by its statute of limitations; and that, in no event, can the stockholder be held liable for more than his pro rata share of the unpaid corporate tax.

First. The contention mainly urged is that the summary procedure permitted by the section violates the Constitution because it does not provide for a judicial determination of the transferee's liability at the outset. The argu-

Klausner, 25 F. (2d) 608; *United States v. Armstrong*, 26 F. (2d) 227; *United States v. Garbutt*, 27 F. (2d) 1000, modified, 35 F. (2d) 924; *United States v. Pann*, 23 F. (2d) 714, affirmed, 44 F. (2d) 321. Compare *United States v. Boss & Peake Automobile Co.*, 285 Fed. 410, affirmed, 290 Fed. 167; *Dreyfuss Dry Goods Co. v. Lines*, 18 F. (2d) 611, reversed, 24 F. (2d) 29; *United States v. Snook*, 24 F. (2d) 844, reversed, sub. nom. *Austin v. United States*, 28 F. (2d) 677; *United States v. Updike*, 25 F. (2d) 746, affirmed, 32 F. (2d) 1, 281 U. S. 489; *People's Industrial Life Ins. Co. v. United States*, 29 F. (2d) 650.

Where the transferee took property subject to the tax lien of the United States, the lien could be enforced by summary proceeding. Rev. Stat. §§ 3185-3205; *Mansfield v. Excelsior Rfg. Co.*, 135 U. S. 326, 336; *Blacklock v. United States*, 208 U. S. 75, 87. Or by an action in equity. Rev. Stat. 3207. Compare 26 U. S. C. §§ 115, 136; *Heyward v. United States*, 2 F. (2d) 467; *In re Glover-McConnell Co.*, 9 F. (2d) 683, 686. See also *United States v. Capital City Dairy Co.*, 252 Fed. 900, 904; *United States v. Haar*, 27 F. (2d) 250, 251, certiorari denied, 278 U. S. 634.

³ "The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed . . . by any prior income, excess-profits, or war profits tax Act" shall "be assessed, collected, and paid in the same manner . . . as a deficiency in a tax imposed by this title (including the provisions in case of a delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds)." 44 Stat. 61. This remedy is in addition to proceedings to enforce the tax lien or actions at law and in equity. Act of February 26, 1926, c. 27, § 1122

ment is that such liability (except where a lien had attached before the transfer) is dependent upon questions of law and fact which have heretofore been adjudicated by courts; that to confer upon the Commissioner power to determine these questions in the first instance, offends against the principle of the separation of the powers; and that the inherent denial of due process is not saved by the provisions for deferred review in a suit to recover taxes paid, or, in the alternative, for an immediate appeal to the Board of Tax Appeals with the right to review its determination in the courts, because there are limitations and conditions in either method of judicial review.

Section 280(a)(1) provides the United States with a new remedy for enforcing the existing "liability at law or in equity." The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax. *Russell v. United States*, 278 U. S. 181, 186; *United States v. Updike*, 281 U. S. 489, 493-4. The proceeding is one to collect the revenue. That Congress deemed the section necessary in order to make the tax-collecting system more effective, is established not only by the fact of enactment but also by the reports of the committees.⁴

(b), 44 Stat. 9, 121; Act of May 29, 1928, c. 852, § 617 (b), 45 Stat. 791, 877. Compare *United States v. Greenfield Tap & Die Corp.*, 27 F. (2d) 933; *United States v. Updike*, 25 F. (2d) 746, 747, affirmed, 32 F. (2d) 1, 4, 281 U. S. 489.

⁴Conference Report to accompany H. R. 1, H. Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44, states that the section "makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes . . . for procedural purposes the transferee is treated as a taxpayer would be treated." Compare H. Rep. No. 2, 70th Cong., 1st Sess., December 7, 1927, pp. 31-32: "Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion

The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled.⁵ Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham v. United States*, 92 U. S. 85, 88-89; *Springer v. United States*, 102 U. S. 586, 594; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States v. Woo Jan*, 245 U. S. 552; *Ng Fung Ho v. White*, 259 U. S. 276, the statutory prohibition of any "suit for the purpose of restraining the assessment or collection of any tax" postpones redress

through the various favorite methods recognized by everyone prior to the 1926 Act. The enforcement of the liability through court process had been ineffective and the amount of revenue lost through mala fide transfers or through corporate distribution of assets was admittedly large."

⁵ *Cheatham v. United States*, 92 U. S. 85, 89; *State Railroad Tax Cases*, 92 U. S. 575, 615; *Springer v. United States*, 102 U. S. 586, 593; *Dodge v. Osborn*, 240 U. S. 118, 120; *Graham v. du Pont*, 262 U. S. 234, 255. The earliest federal excise tax acts contained provisions for suit, or levy by distraint and sale. *e. g.*, Act of March 3, 1791, c. 15, § 23, 1 Stat. 199, 204; Act of December 21, 1814, c. 15, § 5, 3 Stat. 152, 154; Act of January 9, 1815, c. 21, § 26, 3 Stat. 164, 173; Act of January 18, 1815, c. 22, § 5, 3 Stat. 180, 182; *id.*, c. 23, § 9, 3 Stat. 186, 188. Similarly, a tax lien on lands and chattels was early introduced. Act of July 22, 1813, c. 16, § 19, 3 Stat. 22, 30; Act of January 9, 1815, c. 21, § 24, 3 Stat. 164, 172. Compare Act of March 3, 1815, c. 100, §§ 12-15, 3 Stat. 239, 241.

For the ancient English practise of summary seizure of the property of a debtor of a Crown debtor, by means of an immediate extent in the second degree, see West, *The Law and Practice of Extents*, cc. 1-3, 24; Chitty, *Laws of the Prerogative of the Crown*, pp. 261,

for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue.⁶ *Snyder v. Marks*, 109 U. S. 189; *Dodge v. Osborn*, 240 U. S. 118; *Graham v. du Pont*, 262 U. S. 234. This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, § 604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in § 280, and involving less directly the obligation of the taxpayer, were sustained in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272. It is urged that the decision in the *Murray* case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due

303-07; Price, *Laws and Course of the Exchequer*, c. XIV; Robertson, *Civil Proceedings By and Against the Crown*, c. III, pp. 203-04, 206-07. As to the adoption of the writ in this country, see *Hackett v. Amsden*, 56 Vt. 201, 206-07. Compare *McMillen v. Anderson*, 95 U. S. 41.

⁶ Rev. Stat. § 3224. There is no substantial relaxation of this principle in the provision that, while an appeal is pending before the Board of Tax Appeals, no proceeding by distraint may be taken, and, notwithstanding Rev. Stat. § 3224, such proceeding may be enjoined. Act of February 26, 1926, c. 27, § 274 (a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272 (a), 45 Stat. 791, 852; *Peerless Woolen Mills v. Rose*, 28 F. (2d) 661. For even in such case, if the Commissioner believes the assessment or collection of the tax will be endangered by delay, he may make an immediate jeopardy assessment and collect by distraint unless the taxpayer files a bond. Act of February 26, 1926, c. 27, § 279, 44 Stat. 9, 59; Act of May 29, 1928, c. 852, § 273, 45 Stat. 791, 854; *Salikoff v. McCaughn*, 24 F. (2d) 434. Compare *Burnet v. Chicago Ry. Equip. Co.*, 282 U. S. 295, 303. The paramount right of the United States to require immediate payment, or surety therefor, is not diminished.

process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer v. United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co. v. Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing. Compare *North American Cold Storage Co. v. Chicago*, 211 U. S. 306; *Hutchinson v. Valdosta*, 227 U. S. 303; *Adams v. Milwaukee*, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in war-time. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 566; *Stoehr v. Wallace*, 255 U. S. 239, 245; *United States v. Pfitsch*, 256 U. S. 547, 553. Compare *Miller v. United States*, 11 Wall. 268, 296; *International Paper Co. v. United States*, 282 U. S. 399; *Russian Volunteer Fleet v. United States* 282 U. S. 481. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare *Kohl v. United States*, 91 U. S. 367, 375; *United States v. Jones*, 109 U. S. 513, 518; *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306.⁷

The procedure provided in § 280 (a) (1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. He may contest his liability by bringing an action, either against the United States or the collector, to recover the amount paid. This remedy is available where the transferee does not appeal from the determination of

⁷ The same rule is applied to eminent domain proceedings by a State. *Sweet v. Rechel*, 159 U. S. 380; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557; *Williams v. Parker*, 188 U. S. 491; *Bragg v. Weaver*, 251 U. S. 57, 62; *Hays v. Port of Seattle*, 251 U. S. 233, 238; *Joslin Mfg. Co. v. Providence*, 262 U. S. 666, 677.

the Commissioner, and the latter makes an assessment and enforces payment by distraint; or where the transferee voluntarily pays the tax and is thereafter denied administrative relief. Compare *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 31; *Wickwire v. Reinecke*, 275 U. S. 101, 105; *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 560. Or the transferee may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, since all provisions governing this mode of review are made applicable by § 280. Compare *Routzahn v. Tyroler*, 36 F. (2d) 208, 209. Thus within sixty days after the Commissioner determines that the transferee is liable for an unpaid deficiency, and gives due notice thereof, the latter may file a petition with the Board of Tax Appeals. Act of February 26, 1926, c. 27, § 274 (a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272 (a), 45 Stat. 791, 852. Formal notice of the tax liability is thus given; the Commissioner is required to answer; and there is a complete hearing *de novo* according to the rules of evidence applicable in courts of equity of the District of Columbia. Act of May 29, 1928, c. 852, § 601, 45 Stat. 791, 872. Compare *International Banding Machine Co. v. Commissioner*, 37 F. (2d) 660. This remedy may be had before payment, without giving bond (unless the Commissioner in his discretion deems a jeopardy assessment necessary). The transferee has the right to a preliminary examination of books, papers, and other evidence of the taxpayer; and the burden of proof is on the Commissioner to show that the appellant is liable as a transferee of property, though not to show that the taxpayer was liable for the tax. Act of May 29, 1928, c. 852, § 602, 45 Stat. 791, 873.⁸ A review by the Circuit Court of Appeals of an adverse determination may be had; and assess-

⁸ It is asserted that these latter provisions, added by the Revenue Act of 1928, could not render valid an assessment void under § 280 of the 1926 Act. But as the objection relates only to the remedy and the hearing before the Board was not held until November,

ment and collection meanwhile may be stayed by giving a bond to secure payment. Act of February 26, 1926, c. 27, § 1001, 44 Stat. 9, 109; Act of May 29, 1928, c. 852, § 603, 45 Stat. 791, 873. There may be a further review by this Court on certiorari. These provisions amply protect the transferee against improper administrative action. Compare *Hurwitz v. North*, 271 U. S. 40.

It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed; and also to the rule under which the Board's findings of fact are treated by that court as final if there is any evidence to support them.⁹ As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the tax-

1928, that is, after the 1928 Act was in effect, any alleged defect was cured.

⁹*Avery v. Commissioner*, 22 F. (2d) 6, 7; *Geo. Feick & Sons Co. v. Blair*, 26 F. (2d) 540, 542; *Bishoff v. Commissioner*, 27 F. (2d) 91, 92; *Conklin-Zoone-Loomis Co. v. Commissioner*, 29 F. (2d) 698, 700; *E. G. Robichaux Co. v. Commissioner*, 32 F. (2d) 780, 781; *Meinrath Brokerage Co. v. Commissioner*, 35 F. (2d) 614, 616. The further objection that this mode of review may deprive the taxpayer of a jury trial contrary to the Seventh Amendment, is unfounded. Even in the alternative action to recover taxes alleged to have been illegally collected, the right "to a jury . . . is not to be found in the Seventh Amendment . . . but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law." *Wickwire v. Reinecke*, 275 U. S. 101, 105.

payer.¹⁰ Nor is the second objection of weight. It has long been settled that determinations of fact for ordinary administrative purposes are not subject to review. *Johnson v. Drew*, 171 U. S. 93, 99; *Public Clearing House v. Coyne*, 194 U. S. 497, 508; *United States v. Ju Toy*, 198 U. S. 253, 263; *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 394; *Mutual Film Co. v. Industrial Commission*, 236 U. S. 230, 246. Compare *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 560. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. *Reetz v. Michigan*, 188 U. S. 505, 507; *Lieberman v. Van De Carr*, 199 U. S. 552, 562; *Douglas v. Noble*, 261 U. S. 165, 167; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 443.¹¹ The adequacy of the scope of review offered by the Revenue Act of 1926 in the case of a deficiency determined directly against the taxpayer was assumed in *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716; and this procedure is now thoroughly established.¹² Questions of fact involved in proceedings against transferees are no different or more complex than those often encountered in determining the direct liability of a tax-

¹⁰ See *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 562, Note 7; *Russell v. United States*, 278 U. S. 181, 186-87; *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 721.

¹¹ Compare *Davis v. Massachusetts*, 167 U. S. 43, 48; *Gundling v. Chicago*, 177 U. S. 183, 187; *Fischer v. St. Louis*, 194 U. S. 361, 371.

¹² By November 1, 1930, 644 petitions for review under the Revenue Act of 1926 had been decided by the various circuit courts of appeals, and 671 petitions were pending. See statement of the Chairman of the Board of Tax Appeals in Hearing Before the Subcommittee of House Committee on Appropriations, 71st Cong., 3d Sess., January 7, 1931, pp. 19, 26.

payer.¹³ The alternative judicial review provided is adequate in both cases.

Second. It is urged by *amici curiae* that the method of assessment and collection permitted by § 280 (a) (1) cannot be applied where, as in the case at bar, the transfer of assets, upon which the transferee's liability is based, occurred prior to the enactment of the Revenue Act of 1926; and, moreover, that if applied retroactively to such transfer, the section would be unconstitutional. The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear. Compare *Graham & Foster v. Goodcell*, 282 U. S. 409, 427. It is clear also that Congress intended that the section should be available for enforcing the liability of a transferee in respect to taxes "imposed . . . by any prior income, excess-profits, or war-profits tax Act," irrespective of the time at which the transfer was made. The need for a more effective and expedient remedy was not limited to liabilities of transferees thereafter arising. To have so limited the operation of the section would, at least as to earlier Acts, have seriously impaired the value of the new remedy.¹⁴

¹³ Compare *Lonsdale v. Commissioner*, 32 F. (2d) 537; *Hoosier Casualty Co. v. Commissioner*, 32 F. (2d) 940; *Jacobs v. Commissioner*, 34 F. (2d) 233; *O'Meara v. Commissioner*, 34 F. (2d) 390; *Insurance & Title Guarantee Co. v. Commissioner*, 36 F. (2d) 842; *Penney & Long, Inc., v. Commissioner*, 39 F. (2d) 849; *Barde Steel Products Corp. v. Commissioner*, 40 F. (2d) 412.

¹⁴ There is no suggestion in the Committee Reports on the 1926 Act that § 280 was to be so limited. A contrary intention is perhaps indicated by subdivision (b) (2) which provided that where "the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period," the Commissioner should have six years in which to make an assessment against the transferee, provided he could do so within one year after the enactment of the 1926

Third. It is contended that § 280 (a) (1) is invalid because the liability at law or in equity of a transferee is dependent upon the law of the State of incorporation, and that thus the section improperly delegates the federal taxing power to the state legislatures; and, further, that the tax liability of the transferee, as thus assessed and collected, violates the constitutional requirement of uniformity because differences in state laws may affect such liability. The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Florida v. Mellon*, 273 U. S. 12, 17; *Crooks v. Harrelson*, 282 U. S. 55; *Poe v. Seaborn*, 282 U. S. 101, 117. Compare *Head Money Cases*, 112 U. S. 580, 594; *Clark Distilling Co. v. Western Maryland Ry. Co.* 242 U. S. 311, 327. We have, therefore, no occasion to decide whether the right of the United States to follow transferred assets is limited by any state laws.

Fourth. It is contended that summary proceeding by the United States to enforce the liability for the tax is barred by the six months statute of limitations on suits against stockholders provided by the Pennsylvania statute. Laws 1874, c. 32, § 15; Penn. Stat. (1920) § 5728. The United States is not bound by state statutes of limi-

Act. Moreover, in all cases, an additional period of one year after the expiration of the period for assessing the taxpayer, was given. Compare H. R. Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44. Subdivision (c) provides that in the case of corporations which had been dissolved, the period for assessment of the transferee was to be the same as if such "termination of existence had not occurred." These provisions clearly contemplated a dissolution and transfer of assets prior to the passage of the Act. Compare *United States v. Updike*, 281 U. S. 489, 494. In the case at bar, two assessments against the corporate taxpayer had been made prior to 1926.

tation unless Congress provides that it shall be. *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120; *Chesapeake & Delaware Canal Co. v. United States*, 250 U. S. 123, 125; *E. I. du Pont de Nemours & Co. v. Davis*, 264 U. S. 456, 462. The detailed limitation periods specified in § 280 evidence the intention that they alone shall be applicable to the proceedings therein authorized.

Fifth. It is contended that, even if petitioners are liable, the amount determined is excessive; and that the findings of the Board of Tax Appeals in the present case are insufficient to support an assessment of the entire balance of the deficiencies. It is first urged that the estate of Phillips can be assessed only for its pro rata share of the deficiency, according to the ratio which the stock held by him bore to the total outstanding stock of the corporate taxpayer at the time of dissolution. The argument is that the federal Equity Rules require that all stockholders be brought in as necessary parties and be proportionately subjected to liability. While it is permissible for a respondent to bring in other stockholders or transferees by a cross-bill,¹⁵ this procedure is founded upon the desire not to burden the courts with a multiplicity of suits. Compare *Hatch v. Dana*, 101 U. S. 205, 211. Such rule of convenience is not applicable in summary administrative proceedings like that provided by § 280 (a) (1). One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the payment of taxes of the corporation; and other stockholders or transferees need not be joined.¹⁶

¹⁵ Compare Equity Rules 25, 39, 42; *Watson v. National Life & Trust Co.*, 162 Fed. 7.

¹⁶ *Benton v. American National Bank*, 276 Fed. 368; *McWilliams v. Excelsior Coal Co.*, 298 Fed. 884. Compare *United States v. Boss & Peake Automobile Co.*, 285 Fed. 410, affirmed, 290 Fed. 167; *Capps Mfg. Co. v. United States*, 15 F. (2d) 528; *Pann v. United States*, 44

Non-joinder cannot affect or diminish the several liability of the stockholder or transferee sued. Compare *Benton v. American National Bank*, 276 Fed. 368.¹⁷ The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in § 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.

Petitioners assert also that the finding of the Board that the total assets of the corporation, amounting to \$68,588.35, were paid "to its stockholders between July 25, 1919 and September 27, 1919," is insufficient to support the assessment against the estate of the entire remaining deficiency of \$9,306.36. The argument is that there may have been several distributions within this period; that since there was no finding as to the existence of other creditors, it must be assumed that until the assets had been depleted below the amount due for taxes, the corporation was solvent; and that thus the stockholder-transferees did not become liable until the final \$9,306.36 of assets was distributed. Hence it is claimed

F. (2d) 321. See also *Adams v. Perryman & Co.*, 202 Ala. 469; 80 So. 853; *Singer v. Hutchinson*, 183 Ill. 606, 620; 56 N. E. 388; *Kimbrough v. Davies*, 104 Miss. 722; 61 So. 697; *Bartlett v. Drew*, 57 N. Y. 587.

¹⁷ It was conceded below that if the other stockholders are insolvent, or absent from the jurisdiction, or cannot be ascertained, they need not be joined. Compare *Kennedy v. Gibson*, 8 Wall. 498, 506; *Second National Bank of Erie v. Georger*, 246 Fed. 517, 520; *United States v. Armstrong*, 26 F. (2d) 227, 233.

that Phillips' liability for the tax is limited to a pro rata share of the assets finally distributed, that is, to one quarter of the unpaid deficiency. But the plain import of the findings is that there was a single distribution which took several months to complete; and there is no question that the entire assets were thereby distributed. Moreover, such argument, urged for the first time here, comes too late. For while the burden was on the Commissioner to prove before the Board that Phillips was liable as a transferee, the facts in the case at bar were stipulated; and it was agreed that the date of complete liquidation was September 27, 1919, by which time petitioners' decedent had received his full share of the distributed assets. Since it was stipulated that the final transfers of assets were without consideration; that they completely exhausted the corporate assets; that the balance of the deficiencies, assessed against the corporation, remains unpaid; and that the distributive dividend received by Phillips was in excess of the remaining tax liability, the burden resting upon the Commissioner was sustained.

Affirmed.

UNITED STATES *v.* MACINTOSH.

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

No. 504. Argued April 27, 1931.—Decided May 25, 1931.

1. A petition for naturalization presents a case for the exercise of the judicial power, to which the United States is a proper, and always a possible, adverse party. P. 615.
2. Naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes. *Id.*
3. That admission to citizenship is regarded by Congress as a serious matter is apparent from the conditions and precautions by which it has carefully surrounded the subject. *Id.*

4. In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the *fact* of good character and the *fact* of attachment to the principles of the Constitution as matters of the first importance. P. 616.
5. The statute specifically requires examination of the applicant and witnesses in open court and under oath, and authorizes the Government to cross-examine concerning any matter touching or in any way affecting the right to naturalization, in order that the court and the Government may discover whether the applicant is fitted for citizenship;—and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the Government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be probed by pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude is necessary. P. 616.
6. The applicant in the case at bar is unwilling to take the oath of allegiance, except with these important qualifications: That he will do what he judges to be in the best interests of the country only in so far as he believes it will not be against the best interests of humanity in the long run; that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the Government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propaganda against the prosecution of a war declared and considered justified by the Government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment

- impels him to do so. *Held* that he cannot be admitted to citizenship under the statute. *United States v. Schwimmer*, 279 U. S. 644, 649. P. 619.
7. Whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. P. 623.
 8. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the Acts of Congress; a naturalized citizen can have no greater privilege. *Id.*
 9. It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. If one qualification of the oath be allowed, the door is opened for others, with utter confusion as the probable result. P. 626.
 10. The Naturalization Act is to be construed with definite purpose to favor and support the Government, and the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact. *Id.*
 11. The burden is upon the applicant to show that his views are not opposed to the principle that it is a duty of citizenship, by force of arms when necessary, to defend the country against all enemies, and that his opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act. *Id.*
- 42 F. (2d) 845, reversed; D. C. affirmed.

CERTIORARI, 282 U. S. 832, to review a judgment which reversed a judgment denying a petition for naturalization and directed that the applicant be admitted to citizenship.

Solicitor General Thacher, with whom *Assistant Attorney General Dodds* and *Messrs. Whitney North Seymour* and *Harry S. Ridgley* were on the brief, for the United States.

There is no valid distinction between this case and *United States v. Schwimmer*, 279 U. S. 644.

The assumption in the opinion of the court below that the respondent refused to bear arms in defense of this

country because of conscientious or religious scruples, is hardly justified by the record. The stipulated facts and his answers to questions disclose a willingness to bear arms if he is able to satisfy himself "that the war was morally justified." But he insists upon the reserved right to determine that matter for himself. Thus he is not opposed to all war or combatant service on the ground of conscientious or religious scruples. The position of respondent is merely that of a highly educated man with that deep sense of right and wrong which every applicant for citizenship is presumed to possess, seeking to transfer from Congress to himself, the right to determine whether the defense of this country requires him to bear arms. According to his own record statements, there is no claim of conscientious or religious views that sets him apart from any other applicant for citizenship, and the granting of the right he claims would seem to require that such right be accorded every other otherwise qualified applicant. If this were done, the constitutional power of Congress to declare war and raise and support armies would be seriously affected.

It has been repeatedly held that the right of an alien to acquire citizenship is purely statutory and that citizenship will not be granted unless there has been strict compliance with the statutory requirements. *Maney v. United States*, 278 U. S. 17, 22; *Zartarian v. Billings*, 204 U. S. 170, 175; *United States v. Ginsberg*, 243 U. S. 472, 475; *Luria v. United States*, 231 U. S. 9, 23; *Johannessen v. United States*, 225 U. S. 227, 240; *United States v. Ness*, 245 U. S. 319.

Under the decisions the sole question to be determined is whether the respondent has met the requirements of the statute.

There were two respects in which he failed to do so. He refused to take the oath of allegiance, as required by the Act, without qualification or mental reservation. He also

failed to satisfy the District Court that he was and had been for five years at least, "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same." The oath required by the Naturalization Act, before an alien can be admitted to citizenship, is simple and unambiguous. Congress has not provided that it may be qualified in a particular case because of conscientious or religious scruples, or for any other reason. As an oath it must be taken without mental reservations, for, with them, the sanction implicit in an oath is gone.

The decision of this Court in *Schwimmer v. United States*, 279 U. S. 644, establishes that willingness to bear arms is an essential qualification for citizenship.

If, as said by this Court in the *Selective Draft Law Cases*, 245 U. S. 366, 378, "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it," there is no basis for the contention that a prospective citizen may reserve to himself the right to determine the need or the moral justification for such military service.

The fact that Congress in enacting the Selective Draft Law, or in prior legislation, provided that persons who were already citizens and as members of religious sects had conscientious scruples against military service should be given noncombatant duties, does not indicate a legislative intent in the Naturalization Act that aliens who reserve to themselves the right to determine when military service should be rendered, or the right to determine when war shall receive their moral support, shall be admitted to citizenship. Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest toler-

ance for the individual views of alien applicants which might interfere with full and complete performance of the duties of citizenship. See *In re Roeper*, 274 Fed. 490.

The Naturalization Act requires that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that he has the prescribed qualifications. The District Court was not satisfied with the proof submitted by the respondent and denied him citizenship. It may not be said as a matter of law that the respondent conclusively established his right to admission, and, therefore, the Circuit Court of Appeals was without authority to substitute its judgment for that of the District Court. *In re Clarke*, 152 Atl. 92.

Mr. John W. Davis, with whom *Messrs. Charles E. Clark, Allen Wardwell, and W. Charles Poletti* were on the brief, for respondent.

The sole issue is one of law, namely, whether the respondent, in order to satisfy the requirements of the Naturalization Act, must promise in advance to bear arms in any and all future wars, even against his conscientious religious scruples.

The Constitution and laws of the United States do not require that citizens with conscientious scruples bear arms. A careful study of statutes and constitutions from the earliest Colonial times to the present discloses that it has been the fixed policy of the United States and of the several States to exempt citizens having religious scruples from the duty of bearing arms in violation of those scruples.

It was with the knowledge of the treatment that the Colonies and the original States, not only by their legislation but also by their constitutions, had accorded to persons with conscientious religious scruples, that the delegates to the Constitutional Convention granted to Congress by Article I, § 8, of the Constitution, the power

to raise and support armies. While the constitutional debates show that an unsuccessful attempt was made to limit the size of the federal army in time of peace (Elliot, Debates, Vol. 5, p. 443), and that an amendment was added to the draft of the Constitution submitted by the Committee on Detail to the effect that no appropriation for such purpose should be made for a term longer than two years (*Ibid.*, pp. 510, 511), the debates contain no discussion of the power of the Federal Government even to compel military service in general. It is, therefore, natural that the records should be silent as to the privilege of a citizen religiously scrupulous of bearing arms. Moreover, it was doubted, to say the least, by many members of the Constitutional Convention at the time of the adoption of the Constitution that Congress had been granted the general power to compel military service from its citizens.

Ratifications of the Constitution, however, by the original States, clearly show that it was considered a privilege under our form of government that such a citizen should not be forced to bear arms. In response to the urgent demand of the States that the more fundamental rights of the people should be expressly protected by the Constitution, James Madison, on June 8, 1789, presented to the House a list of amendments including the provision that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." (Annals of Congress, Gales, First Cong., Vol. 1, p. 434.)

As a result of unavoidable compromise in language and of a desire for brevity, the suggestions that the Constitution should expressly protect the "unalienable right to the free exercise of religion, according to the dictates of conscience," "the rights of conscience" and the rights of a "person religiously scrupulous of bearing arms" were merged and incorporated in Article I of the Bill of Rights. Furthermore, it should not be forgotten that Article IX

expressly provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

A review of the legislation and Congressional debates in regard to the raising of a militia and the conscription of soldiers further proves that the Constitution and laws of the United States have always recognized that persons having religious scruples against bearing arms need not do so.

While our Constitution gives the Government the right to compel military service from its citizens (*Selective Draft Cases*, 245 U. S. 366,) the Constitution and laws of the United States recognize that, alongside this general principle, exists an exception—a privilege that persons with conscientious religious scruples need not bear arms.

The decisions of this Court interpreting the First Amendment to the Constitution also support our contention. When Congress incorporated into this Amendment the provision—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"—and when the various States ratified the Amendment, free exercise of religion had for the people a meaning moulded and consecrated by the country's history. *Davis v. Beason*, 133 U. S. 333, 342.

Religion obviously encompasses more than mere belief, faith, sentiment or opinion. By its very force it embraces human conduct expressive of the relation between man and God. This was clearly realized by Thomas Jefferson in the Act Establishing Religious Freedom in Virginia.

What constitutes free exercise of religion cannot perhaps be dogmatically determined. It is a case where this Court must pick out a line, between conscience and a command of the State.

The few adjudicated cases offer reliable guide posts. *Reynolds v. United States*, 98 U. S. 145; *Davis v. Beason*,

133 U. S. 333, 342; *Mormon Church v. United States*, 136 U. S. 1; *Shapiro v. Lyle*, 30 F. (2d) 971; *State v. Hutterische Bruder Gemeinde*, 46 S. D. 189; *Dole v. Allen*, 4 Me. 527, 529-30.

A promise to forego a privilege enjoyed by a native-born citizen under the Constitution and laws of the United States cannot be exacted of an alien as a condition of his naturalization.

The decision of the Circuit Court of Appeals accords with that of this Court in *United States v. Schwimmer*, 279 U. S. 644.

Messrs. Charles P. Howland and Richard W. Hale, by special leave of Court, filed a brief, as *amici curiae*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The respondent was born in the Dominion of Canada. He came to the United States in 1916, and in 1925 declared his intention to become a citizen. His petition for naturalization was presented to the federal district court for Connecticut, and that court, after hearing and consideration, denied the application upon the ground that, since petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution. The Circuit Court of Appeals reversed the decree and directed the district court to admit respondent to citizenship. 42 F. (2d) 845.

The Naturalization Act, § 4, c. 3592, 34 Stat. 596 (U. S. C., Title 8, § 372 *et seq.*), provides that an alien may be admitted to citizenship in the manner therein provided and not otherwise. By § 3 of the same act, jurisdiction to naturalize aliens is conferred upon the district courts of the United States and other enumerated courts of record. U. S. C., Title 8, § 357. The applicant is required to make

and file a preliminary declaration in writing setting forth, among other things, his intention to become a citizen of the United States and to renounce all allegiance to any foreign prince, etc. Section 4 of the act (U. S. C., Title 8, §§ 381, 382) provides:

“Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

“Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, . . .”

Section 9 of the act, 34 Stat. 599 (U. S. C., Title 8, § 398), requires that every final hearing upon a petition for naturalization shall be had in open court; that every final order upon the petition shall be under the hand of the court; and that “upon such final hearing of such petition the applicant and witnesses shall be examined under

oath before the court and in the presence of the court." By § 11, 34 Stat. 599 (U. S. C., Title 8, § 399), it is provided that the United States shall have the right to appear in the proceeding for the purpose of cross-examining the petitioner and witnesses produced in support of the petition "concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

By the petition for naturalization a case is presented for the exercise of the judicial power under the Constitution, to which the United States is a proper, and always a possible, adverse party. *Tutun v. United States*, 270 U. S. 568, 576-577.

Naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes. That Congress regarded the admission to citizenship as a serious matter is apparent from the conditions and precautions with which it carefully surrounded the subject. Thus, among other provisions, it is required that the applicant not only shall reside continuously within the United States for a period of at least five years immediately preceding his application, but shall make a preliminary declaration of his intention to become a citizen at least two years prior to his admission. He must produce the testimony of witnesses as to the facts of residence, moral character and attachment to the principles of the Constitution, and in open court take an oath renouncing his former allegiance and pledging future allegiance to the United States. At the final hearing in open court, he and his witnesses must be examined under oath, and the government may appear for the purpose of cross-examining in respect of "any matter touching or in any way affecting his right to

admission," introduce countervailing evidence, and be heard in opposition.

In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the *fact* of good character and the *fact* of attachment to the principles of the Constitution as matters of the first importance. The applicant's behavior is significant to the extent that it tends to establish or negative these facts.

But proof of good behavior does not close the inquiry. Why does the statute require examination of the applicant and witnesses in open court and under oath, and for what purpose is the government authorized to cross-examine concerning any matter *touching* or in any way *affecting* the right of naturalization? Clearly, it would seem, in order that the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship;— and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant

may be probed by pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude is necessary.

The settled practice of the courts having jurisdiction in naturalization proceedings has, from the beginning, been in accordance with this view. *In re Bodek*, 63 Fed. 813; *In re Meakins*, 164 Fed. 334; *In re Madurri*, 176 Fed. 465, 466; *In re Ross*, 188 Fed. 685; *United States v. Bressi*, 208 Fed. 369, 372; *Schurmann v. United States*, 264 Fed. 917, 920; *In re Sigelman*, 268 Fed. 217. And it finds support in the decisions of this Court. As early as 1830, in *Spratt v. Spratt*, 4 Pet. 393, 407, Chief Justice Marshall, speaking for the Court, said:

“The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact.” *United States v. Schwimmer*, 279 U. S. 644, 649.

With the foregoing statutory provisions and the scope of the powers and duties of the courts of first instance in respect thereof in mind, we come to a consideration of the case now before us. The applicant had complied with all the formal requirements of the law, and his personal character and conduct were shown to be good in all respects. His right to naturalization turns altogether upon the effect to be given to certain answers and qualifying statements made in response to interrogatories propounded to him.

Upon the preliminary form for petition for naturalization, the following questions, among others, appear: “20. Have you read the following oath of allegiance? [which is then quoted]. Are you willing to take this oath in becoming a citizen?” “22. If necessary, are you willing to take up arms in defense of this country?” In response to the questions designated 20, he answered “Yes.” In response to the question designated 22, he answered, “Yes; but I should want to be free to judge of the neces-

sity." By a written memorandum subsequently filed, he amplified these answers as follows:

"20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day.

"It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States 'against all enemies, foreign and domestic.' But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say 'Yes' in answer to these two questions."

Upon the hearing before the district court on the petition, he explained his position more in detail. He said that he was not a pacifist; that if allowed to interpret the oath for himself he would interpret it as not inconsistent with his position and would take it. He then proceeded to say that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the

government had already declared and which it considered to be justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. He did not question that the government under certain conditions could regulate and restrain the conduct of the individual citizen, even to the extent of imprisonment. He recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country; but he did not believe in having his own moral problems solved for him by the majority. The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity. He recognized, in short, the right of the government to restrain the freedom of the individual for the good of the social whole; but was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. He was willing to support his country, even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified.

There is more to the same effect, but the foregoing is sufficient to make plain his position.

These statements of the applicant fairly disclose that he is unwilling to take the oath of allegiance, except with these important qualifications: That he will do what he judges to be in the best interests of the country only in so far as he believes it will not be against the best interests of humanity in the long run; that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might

seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propaganda against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so.

Thus stated, the case is ruled in principle by *United States v. Schwimmer, supra*. In that case the applicant, a woman, testified that she would not take up arms in defense of the country. She was willing to be treated on the basis of a conscientious objector who refused to take up arms in the recent war, and seemed to regard herself as belonging in that class. She was an uncompromising pacifist, with no sense of nationalism, and only a cosmic sense of belonging to the human family. Her objection to military service, we concluded, rested upon reasons other than her inability to bear arms because of sex or age; and we held that her application for naturalization should be denied upon the ground, primarily, that she failed to sustain the burden of showing that she did not oppose the principle making it a duty of citizens, by force of arms when necessary, to defend their country against its enemies. At page 650 we said:

“That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

“The common defense was one of the purposes for which the people ordained and established the Constitution. . . . We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. This Court, in the *Selective Draft Law Cases*, 245 U. S. 366, speaking through Chief Justice White, said (p. 378) that ‘the very concep-

tion of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . .

“Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country’s defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the ‘good order and happiness’ of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.”

And see *In re Roeper*, 274 Fed. 490; *Clarke’s Case*, 301 Pa. 321; 152 Atl. 92.

There are few finer or more exalted sentiments than that which finds expression in opposition to war. Peace is a sweet and holy thing, and war is a hateful and an abominable thing to be avoided by any sacrifice or concession that a free people can make. But thus far mankind has been unable to devise any method of indefinitely prolonging the one or of entirely abolishing the other; and, unfortunately, there is nothing which seems to afford

positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to "provide for the common defense." In express terms Congress is empowered "to declare war," which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and "to raise . . . armies," which necessarily connotes the like power to say who shall serve in them and in what way.

From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams,—“This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.” To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

These are but illustrations of the breadth of the power; and it necessarily results from their consideration that whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. That body, thus far, has seen fit, by express enactment, to relieve from the obligation of armed service those persons who belong to the class known as conscientious objectors; and this policy is of such long standing that it is thought by some to be beyond the possibility of alteration. Indeed, it seems to be assumed in this case that the privilege is one that Congress itself is powerless to take away. Thus it is said in the carefully prepared brief of respondent:

“To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future war, would mean that such an alien would come into our citizenry on an unequal footing with the native born, and that he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so.”

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The

alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native born (*Luria v. United States*, 231 U. S. 9, 22); but he acquires no more. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson v. Massachusetts*, 197 U. S. 11, 29, this Court, speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said:

“. . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.”

The applicant for naturalization here is unwilling to become a citizen with this understanding. He is unwilling to leave the question of his future military service to the wisdom of Congress where it belongs, and where every native born or admitted citizen is obliged to leave it. In effect, he offers to take the oath of allegiance only with the qualification that the question whether the war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion.

When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people (*Holy Trinity Church v. United States*, 143 U. S. 457, 470-471), according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

The applicant here rejects that view. He is unwilling to rely, as every native born citizen is obliged to do, upon the probable continuance by Congress of the long established and approved practice of exempting the honest conscientious objector, while at the same time asserting his willingness to conform to whatever the future law constitutionally shall require of him; but discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the Nation as expressed by Congress to the contrary notwithstanding.

If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of his fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may we hereafter reject another applicant who shall express his willingness to re-

spect any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified? The applicant's attitude, in effect, is a refusal to take the oath of allegiance except in an altered form. The qualifications upon which he insists, it is true, are made by parol and not by way of written amendment to the oath; but the substance is the same.

It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is opened for others, with utter confusion as the probable final result. As this Court said in *United States v. Manzi*, 276 U. S. 463, 467:

“Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.”

The Naturalization Act is to be construed “with definite purpose to favor and support the Government,” and the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact. The burden was upon the applicant to show that his views were not opposed to “the principle that it is a duty of citizenship, by force of arms when necessary, to defend the country against all enemies, and that [his] opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act.” *United States v. Schwimmer, supra*, 649, 650, 653. We are of opinion that he did not meet this requirement. The examiner and the court of first instance who heard and weighed the evidence and saw the applicant and witnesses so concluded. That conclusion, if we were in

doubt, would not be rejected except for good and persuasive reasons, which we are unable to find.

The decree of the court of appeals is reversed and that of the district court is affirmed.

MR. CHIEF JUSTICE HUGHES, dissenting.

I am unable to agree with the judgment in this case. It is important to note the precise question to be determined. It is solely one of law, as there is no controversy as to the facts. The question is not whether naturalization is a privilege to be granted or withheld. That it is such a privilege is undisputed. Nor, whether the Congress has the power to fix the conditions upon which the privilege is granted. That power is assumed. Nor, whether the Congress may in its discretion compel service in the army in time of war or punish the refusal to serve. That power is not here in dispute. Nor is the question one of the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization. That authority, for the present purpose, may also be assumed.

The question before the Court is the narrower one whether the Congress has exacted such a promise. That the Congress has not made such an express requirement is apparent. The question is whether that exaction is to be implied from certain general words which do not, as it seems to me, either literally or historically, demand the implication. I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal

terms, and we should not, by judicial decision, attempt to perform what, as I see it, is a legislative function.

In examining the requirements for naturalization, we find that the Congress has expressly laid down certain rules which concern the opinions and conduct of the applicant. Thus it is provided that no person shall be naturalized "who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specified individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist." Act of June 29, 1906, c. 3592, § 7; 34 Stat. 596, 598; U. S. C. Tit. 8, § 364. The respondent, Douglas Clyde Macintosh, entertained none of these disqualifying opinions and had none of the associations or relations disapproved. Among the specific requirements as to beliefs, we find none to the effect that one shall not be naturalized if by reason of his religious convictions he is opposed to war or is unwilling to promise to bear arms. In view of the questions which have repeatedly been brought to the attention of the Congress in relation to such beliefs, and having regard to the action of the Congress when its decision was of immediate importance in the raising of armies, the omission of such an express requirement from the naturalization statute is highly significant.

Putting aside these specific requirements as fully satisfied, we come to the general conditions imposed by the statute. We find one as to good behavior during the specified period of residence preceding application. No applicant could appear to be more exemplary than Macintosh. A Canadian by birth, he first came to the United

States as a graduate student at the University of Chicago, and in 1907 he was ordained as a Baptist minister. In 1909 he began to teach in Yale University and is now a member of the faculty of the Divinity School, Chaplain of the Yale Graduate School, and Dwight Professor of Theology. After the outbreak of the Great War, he voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to this country, he made public addresses in 1917 in support of the Allies. In 1918, he went again to France where he had charge of an American Y. M. C. A. hut at the front until the armistice, when he resumed his duties at Yale University. It seems to me that the applicant has shown himself in his behavior and character to be highly desirable as a citizen and, if such a man is to be excluded from naturalization, I think the disqualification should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy.

The principal ground for exclusion appears to relate to the terms of the oath which the applicant must take. It should be observed that the respondent was willing to take the oath, and he so stated in his petition. But, in response to further inquiries, he explained that he was not willing "to promise beforehand" to take up arms, "without knowing the cause for which my country may go to war" and that "he would have to believe that the war was morally justified." He declared that "his first allegiance was to the will of God"; that he was ready to give to the United States "all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the Government of any country before allegiance to the will of God." The question then is whether the terms of the oath are to be taken as necessarily implying an assurance of willingness to bear arms, so that one whose conscientious convictions or belief of su-

preme allegiance to the will of God will not permit him to make such an absolute promise, cannot take the oath and hence is disqualified for admission to citizenship.

The statutory provision as to the oath which is said to require this promise is this: "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596, 598; U. S. C. Tit. 8, § 381. That these general words have not been regarded as implying a promise to bear arms notwithstanding religious or conscientious scruples, or as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God, is apparent, I think, from a consideration of their history. This oath does not stand alone. It is the same oath in substance that is required by Act of Congress of civil officers generally (except the President, whose oath is prescribed by the Constitution). The Congress, in prescribing such an oath for civil officers, acts under Article VI, section 3, of the Constitution, which provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States." The general oath of office, in the form which has been prescribed by the Congress for over sixty years, contains the provision "that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion." (R. S. § 1757, U. S. C., Tit. 5, § 16.) It goes without

saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties. The terms of the promise "to support and defend the Constitution of the United States against all enemies, foreign and domestic," are not, I think, to be read as demanding any such result. There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples. I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise. And we also know, in particular, that a promise to engage

in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.

But the naturalization oath is in substantially the same terms as the oath of office to which I have referred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance.

The question of the proper interpretation of the oath is, as I have said, distinct from that of legislative policy in exacting military service. The latter is not dependent upon the former. But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. See citations in the opinion of the Circuit Court of Appeals in the present case. 42 F. (2d) 845, 847, 848. The first constitution of New York, adopted in 1777, in providing for the state militia, while strongly emphasizing the duty of defense, added "That all such of the inhabitants of this state (being of the people called Quakers)

as, from scruples of conscience may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth." Art. XL. A large number of similar provisions are found in other States. The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. *Annals of Congress* (Gales), 1st Congress, vol. I, pp. 434, 436, 729, 731; vol. II, pp. 1818-1827; Acts of February 24, 1864, 13 Stat. 6, 9; January 21, 1903, 32 Stat. 775; June 3, 1916, 39 Stat. 166, 197; May 18, 1917, 40 Stat. 76, 78. I agree with the statement in the opinion of the Circuit Court of Appeals in the present case that "This Federal legislation is indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although as a member of society, he may be obliged to render services of a non-combatant nature."

Much has been said of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those

arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence

that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence.

Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification.

Apart from the terms of the oath, it is said that the respondent has failed to meet the requirement of "attachment to the principles of the Constitution." Here, again, is a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience. What I have said as to the provisions of the oath I think applies equally to this phase of the case.

The judgment in *United States v. Schwimmer*, 279 U. S. 644, stands upon the special facts of that case, but I do not regard it as requiring a reversal of the judgment here. I think that the judgment below should be affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

UNITED STATES *v.* BLAND.

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

No. 505. Argued April 27, 28, 1931.—Decided May 25, 1931.

Decided upon the authority of *United States v. Macintosh*, *ante*,
p. 605.

42 F. (2d) 842, reversed; D. C. affirmed.

CERTIORARI, 282 U. S. 832, to review a judgment which reversed the judgment of the District Court and ordered the applicant admitted to citizenship.

Solicitor General Thacher, with whom *Assistant Attorney General Dodds* and *Messrs. Whitney North Seymour* and *Harry S. Ridgely* were on the brief, for the United States.

Miss Emily Marx for respondent.

Miss Emily Marx, by special leave of Court, filed a brief on behalf of Edward L. Parsons et al. as *amici curiae*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is ruled by the decision just announced in *United States v. Macintosh*, *ante*, p. 605.

The respondent, an applicant for citizenship, was a native of Canada and came to the United States in 1914. She had duly declared her intention to become a citizen. She refused to take the oath of allegiance prescribed by the statute to defend the Constitution and laws of the United States against all enemies, etc., except with the written interpolation of the words, "as far as my conscience as a Christian will allow." It is unnecessary to review her testimony. The only difference between the position she took, and that taken by the respondent in the *Macintosh* case, is that in addition to refusing positively to bear arms in defense of the United States under any

circumstances, she required an actual amendment of the oath as already stated, instead of reserving the point by parol. As we said in the *Macintosh* case, this is a circumstance which has no distinguishing effect. The substance of the oath has been definitely prescribed by Congress. The words of the statute do not admit of the qualification upon which the applicant insists. For the court to allow it to be made is to amend the act and thereby usurp the power of legislation vested in another department of the government.

The examiner reported against the applicant, and the court of first instance, after a full hearing, denied the application. We think its decree was right.

The decree of the court of appeals is reversed and that of the district court is affirmed.

MR. CHIEF JUSTICE HUGHES, dissenting.

What I have said in the case of *United States v. Macintosh*, with respect to the interpretation of the provisions of the naturalization act and of the prescribed oath, I think applies also to this case. The petitioner is a nurse who spent nine months in the service of our Government in France, nursing United States soldiers and aiding in psychiatric work. She has religious scruples against bearing arms. I think that it sufficiently appears that her unwillingness to take the oath was merely because of the interpretation that had been placed upon it as amounting to a promise that she would bear arms despite her religious convictions. It was the opinion of the Circuit Court of Appeals that the appellant may properly take the oath according to its true significance and should be permitted to take it. 42 F. (2d) 842, 844, 845. I think that the judgment below should be affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

FETTERS, U. S. MARSHAL, *v.* UNITED STATES
EX REL. CUNNINGHAM.

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

No. 720. Argued April 16, 1931.—Decided May 25, 1931.

1. In proceedings under § 1014, R. S., the inquiry is limited to the question whether there is probable cause to believe the prisoner guilty, so as to justify his commitment and removal for trial. P. 641.
2. When the indictment is produced before the committing magistrate it is received not as a pleading, but as evidence establishing or tending to establish the commission of an offense; and the magistrate has authority to pass upon it only in that aspect. He has no authority to determine its sufficiency as a pleading. P. 641.
3. The magistrate in removal proceedings has no power to hold the facts pleaded in an indictment insufficient to charge an offense, when that question is reasonably open to a difference of opinion. Doubtful questions of law relating to the sufficiency of the indictment or the validity of the statute upon which the indictment is based, as well as all doubtful questions of fact, are matters to be left for the trial court to determine. P. 641.

District Court reversed.

CERTIORARI, *post*, p. 812, to review an order of the District Court discharging the relator Cunningham in habeas corpus. The relator was in custody of a U. S. Marshal for removal for trial under an indictment in the District of Columbia. See also 26 F. (2d) 272; 33 *id.* 261; 279 U. S. 597; 282 *id.* 802.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher* and *Mr. Erwin N. Griswold* were on the brief, for petitioner.

Mr. Ruby R. Vale, with whom *Messrs. John W. Dickerson, Otto Kraus, Jr., and Benjamin M. Golder* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On April 20, 1928, an indictment was returned by a grand jury in the Supreme Court of the District of Columbia, charging the respondent Cunningham with a violation of § 102, R. S.,* (U. S. C., Title 2, § 192), in having refused to answer pertinent questions put to him by a committee of the United States Senate. It is not necessary to reproduce the indictment. For present purposes, the facts pleaded therein sufficiently appear in the opinion of this court in *Barry v. U. S. ex rel. Cunningham*, 279 U. S. 597. After indictment, respondent was arrested in Pennsylvania upon a warrant issued under § 1014, R. S. (U. S. C., Title 18, § 591), and taken before a United States district judge sitting as a committing magistrate. Section 1014 provides:

“For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.”

* Sec. 102. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

That section further provides for the removal of the offender, if committed, to the district where the offense is to be tried.

At the hearing before the district judge the government, to show probable cause, introduced in evidence a certified copy of the indictment, and rested. Respondent challenged the sufficiency of the indictment upon the ground that the questions set forth therein, which he had refused to answer, were not pertinent to the committee's inquiry, and introduced a transcript of the proceedings before the committee. The district judge ordered respondent's commitment and his removal to the District of Columbia. Respondent, thereupon, sought his discharge from the custody of the United States Marshal, and filed a petition for a writ of *habeas corpus* to that end in the federal district court presided over by the same judge. That court held the indictment sufficient to support the commitment and removal and dismissed the petition. 26 F. (2d) 272. On appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was reversed on the ground that the indictment disclosed that the questions propounded to respondent were not pertinent to the inquiry, and, therefore, there was not probable cause for respondent's commitment and removal to another district for trial. 33 F. (2d) 261.

After our decision in the *Barry* case, *supra*, the court of appeals granted a rehearing, but, upon consideration, adhered to its former decision. Thereupon, the United States Marshal applied to this court for a writ of certiorari, which was granted, but with an order vacating the judgments of both lower courts and remanding the cause to the district court with directions to dismiss the proceeding as abated. *Matheus v. U. S. ex rel. Cunningham*, 282 U. S. 802. This was done because the United States Marshal named in the petition had gone out of office and no substitution had been made within the statutory

period. Respondent then surrendered himself to United States Marshal Fetters, who was then in office, and filed a new *habeas corpus* petition; and upon that petition, after a hearing, the district court ordered the respondent to be discharged, deeming itself bound by the opinion of the court of appeals upon the former appeal. It is this last order which is now here for review, this court having granted a writ of certiorari pending the disposition of an appeal therefrom to the court below.

In proceedings under § 1014, R. S., the inquiry is limited to the question whether there is probable cause to believe the prisoner guilty, so as to justify his commitment and removal for trial. This inquiry may take place in advance of indictment or without the production of the indictment if one has been returned. When the indictment is produced before the committing magistrate it is received not as a pleading, but as evidence establishing or tending to establish the commission of an offense; and the magistrate has authority to pass upon it only in that aspect. He has no authority to determine its sufficiency as a pleading. *Morse v. United States*, 267 U. S. 80, 83, and cases cited.

Whether the indictment in this case properly could be held sufficient by the trial court upon demurrer, we have no occasion to consider. Without going into particulars, we think it clearly sufficient for removal purposes. The most that can be said is that the question whether the indictment is sufficient to put the respondent on trial is fairly debatable. It was never intended by § 1014 that an examining magistrate should have the power in removal proceedings to hold the facts pleaded in an indictment insufficient to charge an offense when that question is reasonably open to a difference of opinion. Doubtful questions of law relating to the sufficiency of the indictment or the validity of the statute upon which the indict-

ment is based, as well as all doubtful questions of fact, are matters to be left for the trial court to determine. *Parker v. United States*, 3 F. (2d) 903, 904, and cases cited.

In *Hughes v. Gault*, 271 U. S. 142, this court, after pointing out that the proceedings under § 1014, R. S., were intrusted not only to judges and commissioners of the United States and judges of state courts, but to any "mayor of a city, justice of the peace, or other magistrate, of any State where [the accused] may be found," said (p. 150):

"Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice."

A rule in respect of the power of one of the magistrates named in the statute, of course, applies to all.

And see *Rodman v. Pothier*, 264 U. S. 399, 402; *Henry v. Henkel*, 235 U. S. 219, 229.

The first order of commitment and removal made by the district judge was proper and should have been sustained. In the trial court the accused will have every opportunity to test the sufficiency of the indictment, since there it is not evidence, but "the very foundation of the charge." *Benson v. Henkel*, 198 U. S. 1, 12.

The judgment of the district court must be reversed and the cause remanded to that court for further proceedings in conformity with this opinion.

Reversed.

Statement of the Case.

FEDERAL TRADE COMMISSION *v.* RALADAM CO.

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

No. 484. Argued April 24, 1931.—Decided May 25, 1931.

1. The Federal Trade Commission ordered the respondent to cease from representing his "obesity cure" as a scientific method of treating obesity, or as being the result of scientific research, or the formula as a scientific one; and from representing the preparation as a remedy for obesity, unless accompanied by the statement that it could not be taken safely except under medical direction. There were findings, supported by evidence, warranting the conclusion that the preparation could not be used generally without danger to health, except under medical advice. *Held* beyond the jurisdiction of the Commission. P. 646.
 2. A method, to come within the jurisdiction of the Commission, must not only be unfair and such that a proceeding for its prevention appears to be in the public interest, but it must also be a method of competition in commerce. The Commission has no jurisdiction where no substantial competition, present or potential, is shown by proof or appears by necessary inference, to have been injured, or to be clearly threatened with injury to a substantial extent, by the use of the unfair methods complained of. Pp. 646, 648.
 3. While it is at least generally true that statements made by members of Congress in debate cannot be used as aids to the construction of a statute, yet the fact that throughout the consideration of legislation there was common agreement in the debate as to its purpose may properly be taken into consideration in determining what that purpose was and what were the evils sought to be remedied. P. 650.
 4. If as a result of an inquiry by the Federal Trade Commission it turns out that the preliminary assumption of competition, upon which the order was based, was without foundation, jurisdiction to make a desist order fails, and the proceeding must be dismissed by the Commission. P. 654.
- 42 F. (2d) 430, affirmed.

CERTIORARI, 282 U. S. 829, to review a decree reversing an order of the Federal Trade Commission.

Assistant to the Attorney General O'Brian for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch* and *Charles H. Weston*, Special Assistants to the Attorney General, *Hammond E. Chaffetz*, *Robert E. Healy*, Chief Counsel, Federal Trade Commission, and *Martin A. Morrison*, Assistant Chief Counsel, were also on the brief.

Mr. Lewis W. McCandless, with whom *Messrs. Thomas G. Long* and *Rockwell T. Gust* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Under § 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, § 45), the relevant parts of which are copied in the margin,* the Commission issued its complaint charging the respondent with using unfair methods of competition in interstate commerce.

Respondent manufactures a preparation for internal use, denominated an "obesity cure." The complaint charges that this preparation is sold by respondent in and throughout the several States, generally to wholesalers who resell to retailer dealers, and these, in turn, to consumers; that it is offered for sale and sold in competition with other persons who are engaged "in offering for sale,

* That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a

and selling, printed professional advice, books of information and instruction, and other methods and means and certain remedies and appliances for dissolving or otherwise removing excess flesh of the human body"; that respondent advertises in newspapers, etc., circulated generally in the United States, and in printed labels, etc., that the preparation is the result of scientific research, knowledge and accuracy, that it is safe and effective and may be used without discomfort, inconvenience or danger of harmful results to health. Among the ingredients is "desiccated thyroid," which, it is alleged, cannot be prescribed to act with reasonable uniformity on the bodies of all users, or without impairing the health of a substantial portion of them, etc., or with safety, without previous consultation with, and continuing observation and advice of, a competent medical adviser. The complaint further avers that many persons are seeking obesity remedies, and respondent's advertisements are calculated to mislead and deceive the purchasing public into the belief that the preparation is safe, effective, dependable, and without danger of harmful results. By way of conclusion, it is said that "the acts and practices of the respondent are all to the prejudice of the public and of competitors of respondent, . . . and constitute unfair methods of competition."

place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

Respondent answered and hearings were had before an examiner. The Commission found against respondent and issued a cease and desist order. The findings in general follow the language of the complaint. There was no finding of prejudice or injury to any competitor, but the conclusion was drawn from the findings of fact that the practice of respondent was to the prejudice of the public and respondent's competitors, and constituted an unfair method of competition.

The court of appeals reviewed the action of the Commission upon respondent's petition, and reversed the order. 42 F. (2d) 430. We brought the case here by certiorari, limiting the briefs and argument to the question of the jurisdiction of the Commission.

In substance the Commission ordered the respondent to cease and desist from representing that its preparation is a scientific method for treating obesity, is the result of scientific research, or that the formula is a scientific formula; and from representing its preparation as a remedy for obesity, unless accompanied by the statement that it cannot be taken safely except under medical advice and direction. Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed. But this is not all.

By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are *unfair*; (2) that they are methods of *competition* in commerce; and (3) that a proceeding by the Commission to

prevent the use of the methods appears to be in the *interest of the public*. We assume the existence of the first and third of these requisites; and pass at once to the consideration of the second.

Section 5 of the Trade Commission Act is supplementary to the Sherman Anti-Trust Act and the Clayton Act. *Federal Trade Comm. v. Beech-Nut Co.*, 257 U. S. 441, 453. The latter was discussed and passed at the same session of Congress. The Sherman Act deals with contracts, agreements and combinations which tend to the prejudice of the public by the undue restriction of competition or the undue obstruction of the due course of trade, *United States v. American Tobacco Co.*, 221 U. S. 106, 179; and which tend to "restrict the common liberty to engage therein." *United States v. Patten*, 226 U. S. 525, 541.

The Clayton Act, so far as it deals with the subject, was intended to reach in their incipency agreements embraced within the sphere of the Sherman Act. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 355-357. The object of the Trade Commission Act was to stop in their incipency those methods of competition which fall within the meaning of the word "unfair." "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain." *Federal Trade Comm. v. Sinclair Co.*, 261 U. S. 463, 476. All three statutes seek to protect the public from abuses arising in the course of competitive interstate and foreign trade. In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are "unfair," and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and "the common liberty to engage therein." The paramount aim of the act is the

protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance. Compare *International Shoe Co. v. Federal Trade Comm.*, 280 U. S. 291, 297-299.

The bill which was the foundation of the Act, as it first passed the Senate, declared "unfair competition" to be unlawful. Debate apparently convinced the sponsors of the legislation that these words, which had a well settled meaning at common law, were too narrow. When the bill came from conference between the two Houses, these words had been eliminated and the words "unfair methods of competition" substituted. Undoubtedly the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called "the gradual process of judicial inclusion and exclusion." *Davidson v. New Orleans*, 96 U. S. 97, 104. The question is one for the final determination of the courts and not of the Commission. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427; *Federal Trade Comm. v. Beech-Nut Co.*, *supra*, p. 453.

The authority of the Commission to proceed, if that body believes that there has been or is being used any unfair method of competition in commerce, was then qualified in conference by the further requirement, not in the original bill,—“and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.” By these additional words, protection to the public interest is made of paramount importance, but, nevertheless, they are not sub-

stantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding. Thus, the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the Commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial. *Federal Trade Comm. v. Klesner*, 280 U. S. 19, 28. Unfair trade methods are not *per se* unfair methods of competition.

It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

The foregoing view of the powers of the Commission under the Act finds confirmation, if that be needed, in the committee reports and the statements of those in charge of the legislation, as well as in the debate which took place in the Senate, extending over weeks of time and covering hundreds of pages in the Congressional Record.

In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words "unfair methods" was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which destroys competition and establishes monopoly. These and similar statements run through the debate from beginning to end. Although protection to the public interest was recognized as the ultimate aim, comparatively little was said about it.

It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied. In *Ho Ah Kow v. Nunan*, 5 Sawy. 552, it appeared that the Board of Supervisors of San Francisco had adopted an ordinance which provided that every male person imprisoned in the county jail, etc., should immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof." The ordinance was attacked as being hostile and discriminating legislation against the Chinese, and in order to demonstrate this, in spite of the general terms of the ordinance, statements of supervisors made in debate were

put in evidence. Mr. Justice Field, speaking for himself and Judge Sawyer, said (p. 560):

“The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied.”

While it is impossible from the terms of the act itself, and in the light of the foregoing circumstances leading up to its passage, reasonably to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors, it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or potential substantial competition, which is shown by proof, or appears by necessary inference, to have been injured, or to be clearly threatened with injury, to a substantial extent, by the use of the unfair methods complained of.

In *Federal Trade Comm. v. Winsted Co.*, 258 U. S. 483, it appeared that a manufacturer engaged in selling underwear and other knit goods made partly of wool, labeled them as “natural merino,” “natural wool,” “Australian wool,” etc. It was shown that a substantial part of the consuming public and some buyers and retailers understood the words used in the labels to mean that the underwear was all wool. Part of the public was thereby misled into selling or into buying, as all wool, underwear which was in large part cotton. The labels were false and calculated to deceive, and did in fact deceive, a substantial portion of the purchasing public. This court, after saying that the facts show that a proceeding to stop the practice was in the interest of the public, added (page 493):

"And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest."

And again, at page 494, after reaffirming the existence of the public interest, the court said:

". . . since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; . . ."

The court below thought that the trade to be protected "was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition." There is much force in this conception of the act, and the language just quoted from the *Winsted* case seems inferentially to lend it support. Certainly, it is hard to see why Congress would set itself to the task of devising means and creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another. In the present case, however, we do not find it necessary further to consider the merits of this view or to determine whether the facts are such as to bring the case within it.

Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor or

of competitors generally, whether legitimate or not. None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business. The only evidence as to the existence of competitors comes from medical sources not engaged in making or selling "obesity cures," and consists in the main of a list of supposed producers and sellers of "anti-fat remedies" compiled from the files and records of the Bureau of Investigation of the American Medical Association, a list which appears to have been gathered mainly from newspapers and advertisements. The only specific evidence was that of a witness who said that he had purchased in drug stores in Chicago five different anti-fat treatments and could have purchased a sixth. How long they had been in stock, what was their nature, whether they were intended to be used internally, or in what way they competed or could compete with respondent's preparation, does not appear. Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them. It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market. All this was left without proof and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission.

Whether the respondent, in what it was doing, was subjecting itself to administrative or other proceeding under the statute relating to the misbranding of foods and drugs we need not now inquire for the administration of that statute is not committed to the Federal Trade Commission.

A proceeding under § 5 is not one instituted before the Commission by one party against another. It is instituted by the Commission itself, and is authorized whenever the Commission has reason to believe that unfair methods of competition in commerce are being used, and that a proceeding by it in respect thereof would be to the interest of the public. Acting upon its belief, the Commission issues charges and enters upon an inquiry which, of course, it has jurisdiction to make. But one of the facts necessary to support jurisdiction to make the final order to cease and desist, is the existence of competition; and the Commission cannot, by assuming the existence of competition, if in fact there be none, give itself jurisdiction to make such an order. If, as a result of the inquiry, it turn out that the preliminary assumption of competition is without foundation, jurisdiction to make that order necessarily fails, and the proceeding must be dismissed by the Commission. Compare *Federal Trade Comm. v. Klesner*, *supra*, pp. 29-30. That course should have been followed here.

The decree of the court below is

Affirmed.

LEWIS-SIMAS-JONES CO. *v.* SOUTHERN PACIFIC
CO.

CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST
APPELLATE DISTRICT, OF CALIFORNIA.

No. 520. Argued April 28, 29, 1931.—Decided May 25, 1931.

1. The Interstate Commerce Act applies to so much only of the transportation of a through shipment from a foreign country as takes place in this country. P. 660.

2. Where it is alleged that the joint through rate exacted for such a shipment was unreasonable and was charged in violation of the Act, the Commission has jurisdiction to entertain the complaint and if it finds that the through charge was unreasonable, and if no other and reasonable rate for the service performed by the American carrier was available to the shipper, it may award reparation for the resulting damage. *News Syndicate Co. v. New York Central R. Co.*, 275 U. S. 179. Pp. 659, 662.
3. The collection by a common carrier of exorbitant charges is a tort; and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges over their connecting lines. P. 660.
4. Where a carrier in this country joins with a foreign carrier in exacting an excessive through rate for an international shipment, while offering no reasonable rate for the domestic part of the service, it is liable for the damage to a shipper, without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. P. 660.
5. A prior finding by the Commission that the rate charged was unreasonable and of the amount overcharged is a condition precedent to an action for reparation; but the action is not based on the Commission's award, as such. P. 660.
6. In the case of an unreasonable joint international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate, participated in by the American carrier, and its violation of the Act in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate. P. 661.
7. To a claim based on an unreasonable charge for a through international carload shipment, it is not a defense that the American carrier offered a separate, reasonable rate from the international boundary, if the separate rate was not applicable to the through carload as brought by the foreign carrier, but only to shipments originating at the boundary and involving extra terminal service there. P. 663.

106 Cal. App. 437; 289 Pac. 643, reversed.

CERTIORARI, 282 U. S. 833, to review a judgment which affirmed the dismissal of an action for damages caused by the exaction of excessive freight charges.

Mr. Robert E. Quirk, with whom *Messrs. Ernest Clewe* and *E. W. Hollingsworth* were on the brief, for petitioner.

Mr. J. R. Bell, with whom *Messrs. G. H. Muckley, H. C. Booth, James E. Lyons*, and *Burton Mason* were on the brief, for respondent.

Mr. Robert E. Quirk, by special leave of Court, filed a brief on behalf of The American Cyanamid Co., as *amicus curiae*.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner sued respondent in the superior court of the city and county of San Francisco, California, to recover damages alleged to have been caused by the exaction of freight charges which had been found excessive by the Interstate Commerce Commission in a reparation case. 102 I. C. C. 245. A jury being waived, the court made findings of fact, stated its conclusions of law and dismissed the case on the ground that the Commission's findings and order were void for lack of jurisdiction. The district court of appeal affirmed, 106 Cal. App. 437; 289 Pac. 643; the state supreme court declined to hear the case, and this court granted a writ of certiorari.

Defendant is an interstate carrier by railroad. Its lines connect with a line of a Mexican common carrier by rail extending from Navojoa, Sonora, to the international boundary at Nogales, Arizona. In 1923 defendant, in conjunction with the foreign line, transported three carloads of cow peas from Navojoa to San Francisco. The shipments moved at different times on through bills of lading issued by the foreign line. The rate charged was \$1.33 per hundred pounds, stated in a tariff joined in by the carriers and filed with the Interstate Commerce Commission and the Department of Communications and

Public Works of Mexico. The carriers agreed to divide the rate, 63.175 cents to the foreign line and 69.825 cents to the defendant.

The cow peas were transported by the foreign line 377 miles to the boundary, thence by defendant 1,036 miles to destination. The defendant collected from plaintiff \$3,828.74 as freight charges and that amount was divided in accordance with the divisions agreement. The average yield on these shipments was 90 cents per car mile and 18.8 mills per ton mile for the entire distance, 1,413 miles. The average yield to the foreign line was \$1.60 per car mile and to defendant 64.6 cents.

The trial court found that defendant, by tariff filed with the Interstate Commerce Commission, maintained a rate of \$1.14½ applicable to carload shipments of cow peas destined to San Francisco "originating at Nogales," "originating at the point where the lines" of the foreign carrier and of defendant touch the boundary or "loaded into cars at any point upon or adjacent to said international boundary line, within the limits of defendant's railroad yards at Nogales." The court found that the cow peas were in sacks and readily could have been transported, by means other than a railroad, to Nogales there to be loaded into cars for transportation over defendant's lines to San Francisco at the rate of \$1.14½, that the Commission had made no finding in respect of such rate, and that it was "reasonable and lawful for application upon carload shipments of cow peas from Nogales, Arizona, including such shipments as might be loaded at any and all places within the railroad yard limits at that point, destined to San Francisco, California."

It was not found, and it does not appear from the record, that the defendant established or made available to shippers any rate applicable to the transportation over its lines from the boundary to San Francisco of cow peas in car loads originating at Navojoa or elsewhere in Mexico

and delivered to defendant at such boundary point by a connecting railroad for transportation to San Francisco. The record does not disclose what, if any, rate was available for the transportation of the cow peas as a local shipment from Navojoa to Nogales. And it may not reasonably be assumed that the charges of the foreign carrier for such transportation would be less than the amount it was entitled to have out of the joint through rate under its agreement with defendant. Indeed, under the principles ordinarily applied in making divisions agreements, in the absence of a special allowance or arbitrary differential, the foreign carrier's share of the through rate would be less than its local rate.

If defendant's local rate of \$1.14½ be deemed to be applicable to the American part of the through transportation and the foreign carrier's proportion, 63.175 cents, of the joint rate be taken as the local rate from Navojoa to the boundary, the sum of the locals would amount to slightly more than \$1.77½ as against the joint through rate of \$1.33. There is nothing in the record to indicate that there was available for the transportation of such cow peas any rate or combination of rates less than the rate of \$1.33.

The Commission found that at the time the cow peas were being transported defendant concurred in a rate of 94 cents per hundred pounds on garbanzos (a kind of pea) from Navojoa to San Francisco; that the rate of \$1.33 for the transportation of the cow peas was unreasonable to the extent that it exceeded the 94 cent rate; that the shipments moved as described; that plaintiff paid and bore the freight charges; that so far as defendant participated in such transportation and rates it was a tort-feasor and that it should make reparation for the damage to complainant in the sum of \$1,122.72 with interest. And by its order the Commission authorized and directed defendant to pay complainant that sum.

Defendant having refused to make reparation, plaintiff brought this action and in its complaint alleged the transportation, the unreasonableness of the rate as found by the Commission, showed the charges paid by it to defendant, made the Commission's report and order a part of the complaint and prayed judgment for the amount of damages found by the Commission.

Defendant's answer admitted the transportation, the rate exacted and the charges collected. It alleged that defendant maintained a rate applicable on cow peas in carloads from the international boundary at Nogales to San Francisco but it did not specify that rate or state that it was reasonable. It averred that the Commission had not found such rate unjust, unreasonable or otherwise in violation of law and that the Commission had no jurisdiction to order the defendant to pay any reparation or damages.

The opinion of the district court of appeal differentiates this case from *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 179, on the ground that it there appeared that the carrier violated the Act by failing to maintain a rate to cover the transportation from the international boundary to destination thereby compelling the shipper to pay the excessive joint through rate and that, for the determination of damages, it was necessary for the Commission to determine the reasonableness of such rate. But the court said that in this case defendant published and maintained a rate on shipments from the boundary to destination which was not found unreasonable by the Commission and plaintiff was not compelled to pay the joint through rate by reason of any violation of the Act on the part of the defendant.

We are of opinion that the record shows that the Commission had jurisdiction to determine the reasonableness of the joint through international rate.

The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States.* The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1 (1) (c), (2) and (5), 6 (1), (7) and 8.

The Act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent evasion of the rule that every charge for transportation shall be just and reasonable. The collection by a common carrier of exorbitant charges is a tort (*Smith v. Chicago & Northwestern Ry. Co.*, 49 Wis. 443, 448; 5 N. W. 240) and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines. *Louisville & N. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 232-233. Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, 187-188

The Act does not create a cause of action based on the Commission's findings and reparation order for the recov-

* The Act does not authorize or forbid the making of joint through international rates. The Commission, recognizing that they are of great convenience to carriers and shippers, does not object to their maintenance if shown, together with the agreed divisions, in tariffs filed in compliance with requirements prescribed by it. Tariff Circular 18A, Rule 72, adopted November 22, 1909, addition adopted March 7, 1910. *Publication of Rates Between United States and Canada*, 147 I. C. C. 778.

ery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.

Section 16 (2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the district court of the United States "or in any state court of general jurisdiction" a petition setting forth briefly "the causes for which he claims damages and the order of the Commission," and that the suit in the United States court shall proceed in all respects "like other civil suits for damages" except that the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The section contains nothing relating to evidence or procedure in state courts. It is clear that the action is not on the award as such. *Meeker & Co. v. Lehigh Valley R. Co.*, 236 U. S. 412, 430. But no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable. The reasons upon which this rule rests have been fully stated in our decisions. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444. *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 510. Cf. *Baltimore & Ohio R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 498. *Great Northern Ry. v. Merchants Elev. Co.*, 259 U. S. 285, 291-292.

There is no essential difference in this respect between a claim arising out of interstate transportation and the one under consideration. The Act applies to the interstate rate, and an excessive charge for the transportation covered by it is a direct and immediate violation. While

the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate.

The complaint before the Commission alleged that the joint through rate was unreasonable and was charged in violation of the Act. It was undoubtedly sufficient to invoke the jurisdiction of the Commission. The only requirement (§ 13) is that it "shall briefly state the facts." Reparation proceedings before the Commission properly may be and frequently are quite informal. Many claims on account of excessive charges are dealt with and finally disposed of, without formal pleading or proof, by means of correspondence carried on by the Commission with claimants and carriers respectively. Rule III (b). Defendant did not apply to the Commission for authority to make the reparation claimed. It moved to dismiss the complaint alleging that the Commission lacked jurisdiction over rates from points in an adjacent foreign country to points in the United States. The motion was denied on the authority of *International Nickel Co. v. Director General*, 66 I. C. C. 627. The record does not show the contents or substance of defendant's answer referred to in the order. It does not appear what, if any, issue was joined as to the facts. It is the duty of the Commission, if there appears "any reasonable ground for investigating" the complaint, to investigate the matters complained of "in such manner and by such means as it shall deem proper." § 13. The report shows that the case was presented under shortened procedure and, having regard to the rules of practice, this implies that there was a formal complaint but no oral hearing. Rule X-A. The evidence referred to in

the report fully sustains the finding that the joint through rate of \$1.33 was unreasonable to the extent that it exceeded the 94 cent rate contemporaneously applied to like transportation of garbanzos.

The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate applicable to the transportation of such shipment over its lines from the international boundary to destination.

The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the Act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co. v. New York Cent. R. Co.*, *supra*. That case controls this one.

Judgment reversed.

DEFOREST RADIO CO. v. GENERAL ELECTRIC CO.

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

No. 630. Argued May 1, 4, 1931.—Decided May 25, 1931.

1. Patent No. 1,558,436, to Langmuir, for a high-vacuum discharge tube, used as a detector and as an amplifier in radio communication and telephony, and for the process of making it,—*held* invalid for want of invention and because of prior use. Pp. 676, 678, 682.
The tube in question corresponds structurally with earlier, low-vacuum tubes, used as detectors and amplifiers; and, as a device or product, its only essential difference from them is in its higher vacuum, produced in the course of manufacture by mechanical exhaustion aided by heat and electronic bombardment. In consequence of this removal of gas, the tube is not subject to the gas-ionization which renders the other tubes uncertain and inefficient, especially when they are used as amplifiers, but is capable, within its limits, of producing a stable discharge when operated at a fixed voltage, and will operate at much higher voltages than the earlier tubes. This tube is an important improvement over the earlier ones; but the patent can not be sustained, because, as the District Court found and as the evidence shows, the process for creating high vacua in tubes was well-known and practised in the art, and the fact that the ill effects of ionization in such electric discharge devices could be removed by increase of vacuum was so known and disclosed in science that the application of that means for improving the earlier devices involved, not invention, but only the expected skill of the art.
2. The question is not whether the prior art had made a practicable high-vacuum tube, but whether it showed how one could be made, and demonstrated and disclosed the relationship of the discharge to the reduced pressure. P. 682.
3. The evidence does not establish that the flow of current is due, in a low-vacuum tube, to the conductivity of ionized gas, and, in a high-vacuum tube, to something else—pure electron discharge; nor does it appear that the patentee thought there was such a distinction, or relied upon it to remove ionization effects, rather than upon the simple expedient of removing the gas known to be responsible for them. P. 684.

4. A scientific explanation of a known method and device is not patentable. P. 684.
 5. Value and general use of a device can not sustain a patent if the lack of invention is clear. P. 685.
 6. The resort to the high-vacuum tube of the patent, and its present utility, are explained as the natural development of a new art through the adaptation to it of scientific knowledge that had been accumulated through investigation and experiment. *Id.*
 7. The prior use of an invention that will invalidate a patent need not have been accompanied by knowledge of the scientific principles involved in the invention. P. 686.
- 44 F. (2d) 931, reversed.

CERTIORARI, 282 U. S. 836, to review a decree holding a patent valid and infringed, and reversing a decree of the District Court, 23 F. (2d) 698, which had dismissed the bill upon the grounds of want of invention, prior invention and prior use. The court below, by an unreported *per curiam* opinion of October 3, 1929, had at first affirmed the dismissal upon the opinion of the District Judge. The contrary decree here under review was rendered after a reargument.

Messrs. Thomas G. Haight and Samuel E. Darby, Jr., with whom Messrs. Carl A. Richmond and William R. Ballard were on the brief, for petitioner.

The patent discloses nothing new or patentable over the prior art. Long before Langmuir's earliest claimed date of conception, the art was fully familiar with pure electron discharge devices claimed by the patent, as well as all of the methods and means for producing the high vacuum necessary for such tubes. Indeed, the prior art structures are admittedly identical with those of the Langmuir patent, and the only difference therefrom asserted by respondent is in the degree of evacuation of said devices. The invention at the most, therefore, is merely for a difference in degree, which this Court has from the earliest times held is unpatentable.

The majority opinion of the court below sustained the patent on an untrue definition of the alleged invention. After respondent abandoned its original claim that the invention was a new method of producing high vacuum, it thereafter advanced in the Patent Office and in the courts several different definitions of the invention; always seeking to escape the legal effect of a finding that the invention was merely a difference in the degree of vacuum. Finally, after the District Court had decided that the patent was invalid, and the Circuit Court of Appeals had affirmed that decision, respondent brought forth an entirely new definition different from anything that it had theretofore suggested. This definition the majority of the court below, on reargument, accepted, and its decision is based thereon. The new definition is unsupported by the evidence and is contradicted by the testimony of the patentee himself.

If the subject-matter of the patent in suit involves patentable invention, then Dr. Arnold was the first inventor and not Dr. Langmuir, the patentee.

The patent is invalid because of prior knowledge and use. The claims variously describe the patent as a tube capable of operating without harmful effects of ionization with an impressed voltage of 40 volts or more. The uncontradicted testimony is that Dr. DeForest, while employed by the Federal Telegraph Company in California in 1911 and 1912, used tubes as amplifiers, employing voltages considerably in excess of 40 volts without harmful ionization. The use of such tubes with such voltage as amplifiers would be impossible if ionization in any appreciable amount existed. The preparation and use of the tubes with this vacuum was deliberate and intentional on the part of Dr. DeForest.

The present majority decision of the Court of Appeals has reversed the dispositive findings of fact of the trial court without expressing any reason therefor, and without

mention of those facts. Either prior inventorship or prior knowledge and use—both questions of fact—was a complete defense to this suit. The rule is that where a question of fact depends upon conflicting testimony, or upon the credibility of witnesses, the finding of the judge who saw the witnesses will be treated as “unassailable,” unless clearly wrong.

The patent is invalid because of double patenting. Respondent caused to be issued to it, on October 31, 1916, a patent covering an invention made by one of its engineers, Dr. Coolidge, claiming the same invention now asserted for the Langmuir patent, which respondent likewise caused to be issued to itself. The Coolidge application was filed before the Langmuir application and the Coolidge patent issued before the Langmuir patent. The later patent is therefore invalid.

Mr. Ralph B. Evans, with whom *Messrs. Hubert Howson, Paxson Deeter*, and *Albert G. Davis* were on the brief, for respondent.

The definition of the invention adopted by the majority of the court below is the definition which is found in the specification and the claims of the patent. It is not, as petitioner asserts, a new definition advanced for the first time on the motion for reargument. On the contrary, it is the definition which respondent urged at the trial and in the argument before the trial court, and in the brief originally filed with the Circuit Court of Appeals.

In the practical prior-art devices, the conduction of current depended upon gas ionization; the art moreover believed that unless there was enough gas to act as a conductor no current could flow and the tube would not work, and experience seemed to confirm this belief. In simple language, Langmuir's invention consisted in taking out the gaseous conductor upon which the prior art relied and putting nothing in its place.

The invention is not merely a DeForest Audion capable of operating at higher voltages. The essential difference is that at any voltage the tubes of the patent are stable and reproducible, as contrasted with the Audion which was always erratic and nonreproducible. The invention is not a vacuum or degree of vacuum; the vacuum is important only as one of the elements of a combination which produces a new, useful and unexpected result. Such a tube was new in the art and required new and different vacuum technique to produce it. The old tubes operated on the old principle of ionic or gaseous conduction; the new tubes operate on the new principle of pure electron discharge.

The Audions relied upon to prove the defense of prior use were gaseous tubes operating by gas ionization. The fact that a tube may amplify at 40 volts or more is no indication that it is a pure electron-discharge tube; and the uncontradicted evidence shows that the tubes in question were gaseous tubes. DeForest had no idea of a pure electron-discharge; his own statements show that what he wanted was a gassy tube,—a tube exhausted to a particular optimum gas pressure in order to utilize the maximum useful effect of ionization.

The question of priority was decided by the Patent Office tribunals in favor of Langmuir in a contest between the respondent and the American Telephone and Telegraph Company, which has openly defended the present case on this issue. The case for the patent has been strengthened, not weakened, by the evidence in the present suit. Langmuir made the invention when he made and operated a pure electron-discharge tube in August, 1912, more than two months before Arnold's alleged date of conception. Arnold's whole idea was to take a DeForest Audion and, by pumping a better vacuum, to extend the range of operation to somewhat higher voltages without modifying the essential nature of that operation. This is

not the invention. His conception and disclosure were inadequate in that they did not include any adequate idea of means. The inadequacy of his conception is evidenced by his inconsistent statements and by his inability to make good tubes until after Langmuir's invention was disclosed to the public.

The testimony on the defense of prior use was taken by deposition and not before the trial judge. The issue of priority depends, not upon questions of fact, but upon inferences to be derived from facts which are substantially undisputed. The rule that the finding of the trial judge on disputed issues of fact will be treated as unassailable has no application.

The defense of double patenting has not been sustained by any judge who has heard this case, and is utterly without merit.

Messrs. John F. Neary, Ramsay Hoguet, and Martin Fisher, by special leave of Court, filed a brief on behalf of The Chemical Foundation, Inc., et al., as *amici curiae*.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari was granted, 282 U. S. 836, to review a judgment of the Court of Appeals for the Third Circuit, holding the Langmuir Patent, No. 1,558,436, granted October 20, 1925, for "electrical discharge apparatus and process of preparing and using the same," valid, and infringed by petitioners. The District Court for Delaware, in which respondent, the assignee of the patent, brought suit for infringement, held the patent invalid for want of invention, and because of prior use and prior invention, and gave judgment dismissing the complaint, 23 F. (2d) 698, which the Appellate Court at first affirmed, and then, on reargument, reversed. 44 F. (2d) 931.

Infringement is conceded if the claims of the patent are valid. It is known as a high vacuum tube patent, and

the alleged invention is exemplified in high vacuum tubes of familiar use as detectors or amplifiers in the art of radio communication and telephony. Correct appreciation of the contentions made requires, at the outset, an understanding and some exposition of the scientific principles which it is agreed are brought into play in the high vacuum tube, or which at least are accepted as working hypotheses accounting for its operation.

A radio tube of the audion or three electrode type consists of a bulb, within which a vacuum has been created, enclosing a filament, which is a negative electrode, or cathode; a plate, which is a positive electrode, or anode; and a third electrode, known as a grid, located between the filament and the plate. The grid is connected with an input circuit, over which electrical radio activity, actuated at the sending station, is gathered from the ether and passes to the grid. When the tube is used as an amplifier, the plate is connected in circuit with a telephone receiver or loud speaker. In operation, the filament is heated to incandescence by passing an electric current through it. In its incandescent state, electrons, or negative charges of electricity, are developed at the filament and pass to the plate, attracted to it by its positive potential, and cause a flow of electricity through the plate-loud-speaker circuit. The sounds given out by the loud speaker are produced by variations in the current passing to it. Radio amplification depends on producing in the more powerful current of the loud speaker circuit, variations exactly corresponding to the variations in the weaker input or voice current which are actuated by the sending station.

In the vacuum tube of the three electrode type, this is accomplished by passing the input or voice current over the grid. Variations in that current produce variations in potential of the grid which, by reason of its location between the filament and plate, effects like variations in the

effective potential of the plate with corresponding variations in the loud speaker circuit. The number of electrons emitted by the filament is determined by its temperature. But the current passing through the plate loud speaker circuit depends on the number of electrons drawn from the filament to the plate, and this in turn depends on the voltage of the current passing to the filament. When it is high enough to force all the electrons emitted by the filament to pass from filament to plate, increase in the voltage at the filament will not produce an increase in current in the loud speaker circuit and the tube is then said to be "saturated." As successful operation of the tube depends on the response of the loud speaker current to changes in voltage effected by the voice or input current, the tube is most efficiently operated at a voltage of a range below saturation, and a current within this range is known as the "space current."

Of critical importance in the present controversy is the effect of the presence of gas within the tube. As in the practical art of bulb manufacture no scientifically perfect vacuum can be attained, air or other gas is always present within the vacuum tube. This consists of a small amount of residual gas, after the vacuum is created by pumping out the tube in the process of manufacture. There is also gas in the walls of the bulb and the electrodes, described as "occluded," which, if not expelled from them and removed in the course of manufacture, is later freed in varying amounts when the tube is in use, by the action of the heat of the filament and the electrons generated there.

The passage of electrons from filament to plate at certain voltages produces changes in the gas, known as "ionization." Ionization is the manifestation of a rearrangement of the constituent electrons of the gas atoms which occurs, in low vacuum tubes, if other factors of causation remain constant, at known voltages within a

range of from 20 to 30, but varying somewhat with different gases. The atom, according to present day scientific theory, is composed of an electrically positive nucleus, around which revolve at high speeds electrically negative electrons. In its normal state, the atom, whose nucleus and electrons are in electrical balance, exhibits no electrical effects; but within a thermionic tube, the impact upon the gas atoms of the electrons, passing from cathode to anode at velocities induced by ionization voltages, forces off negative electrons from the atoms. The atoms from which the electrons have thus been detached are then electrically positive and are known as ions. Ionization, which begins at the ionization voltage, is increased with increasing voltages as the tube approaches saturation, when extreme ionization takes place; and, for reasons which need not be elaborated here, the tube then ceases to function as a radio tube, a condition visibly manifested by a blue glow within it.

Gas ionization in the vacuum tube is of great practical importance because of its effect on the current passing from filament to plate. Ionization, when it occurs, may operate within the range of the space current to increase "conductivity" of the tube, that is, the discharge from filament to plate, above what it would be at the same voltage in the absence of ionization, through the development of the positive ions, which pass to the cathode, and of the negative electrons, which pass to the anode. The ions facilitate the flow of electrons from cathode to anode and increase their number by impact on the former, which raises its temperature. The result is that, in low vacuum tubes, saturation with the blue glow effect is reached, other factors remaining constant, at lower voltages than in high vacuum tubes. Hence, in the range of voltage above ionization and below saturation, within which the tube is commonly operated, a low vacuum tube, because of the increase of current due to

ionization, is more responsive to slight changes in voltage produced by the operation of the grid or input current. In consequence, the low vacuum tube is more sensitive both as a detector and as an amplifier than a tube of high vacuum.

But this advantage is accompanied by a serious disadvantage, especially when the tube is used for amplification, in that ionization produces variations in the electronic discharge from filament to plate, which correspondingly affect the current passing through the loud speaker circuit. Ionization is affected by the amount of gas in the tube, and hence by the degree of vacuum and the amount of occluded gas freed in operation by heat and bombardment. Since the discharge varies with the amount of ionization, the effective current in the loud speaker circuit varies with different tubes and with the same tube at different times; and critical adjustments of the current flowing to the filament are necessary to improve operation.

From what has been said, it is apparent that the problem of securing evenness or regularity of discharge from filament to plate and hence of current flowing through the loud speaker circuit is dependent upon the reduction of ionization in the tube, and this in turn is dependent, within certain ranges of limits, upon a number of variables, the more important of which are (1) the geometry of the tube, that is, its size and shape and the location of electrodes, (2) heat of the filament, (3) voltage of the filament, and (4) of vital importance here, amount of gas, that is, pressure within the tube. With the other variables controlled so as to remain approximately constant, as is practicable, reduction of pressure reduces ionization and increases steadiness of current and in turn raises the saturation point of the tube, permitting its use with higher than ionization voltages.

As in the low vacuum tube regularity or evenness of the loud speaker current was more or less imperfectly se-

cured by varying the voltage at the filament with different tubes and at different times with the same tube, the desired result may also be attained, and far more effectively, by reducing the pressure in the tube and keeping other factors constant. When a vacuum is produced of as low a pressure as a few hundredths of a micron (a micron is equal to 1/1000 of a millimeter of mercury in terms of barometric pressure), the discharge is independent of the degree of vacuum, when the tube is used with appropriate space charge. The discharge then passing from cathode at constant temperature to anode, varies directly with the $3/2$ power (square root of the cube) of the voltage imposed on the cathode. This is equivalent to saying that steadiness of current through the loud speaker circuit is obtained, with an increase in power, until saturation, in known relationship to the increase of the imposed voltage. While the effectiveness of the low vacuum tube begins to diminish, in the upper range of ionization voltages, with high vacuum tubes, currents of much higher voltages may be used without loss of effectiveness.

The desired reduction of pressure in the tube involves the use of methods for producing a high vacuum and reducing to a minimum the effects of occluded gas. By evacuating the tube by pump or other suitable means, and at the same time freeing it of occluded gas by heating tube and electrodes, and also, as may be done, by passing a current through the filament, causing "bombardment" of the electrodes by electrons, a high vacuum tube is produced. By such procedure, the disturbing influence of ionization may be removed, with consequent stability of discharge. The result is of great importance, since by adaptation of the procedure to manufacturing methods, tubes giving uniform stability of current may be commercially produced, suitable for use in the complex mod-

ern radio receiving sets employing multiple tubes, without necessity for the critical adjustments of the filament circuit necessary with low vacuum tubes.

It is the high vacuum tube of this type which respondent says embodies the Langmuir invention. As a product or structure it differs from the low vacuum tube, of which the Fleming valve and De Forest audion are well known types, only in that the pressure has been reduced to such a point that there is no appreciable ionization, with the resulting constancy of current in the amplifier circuit.

In the light of the explanation given of the operation of the vacuum tube, we now examine the claims of the patent. The application, filed October 16, 1913, was pending for twelve years before it was issued October 20, 1925, a period which witnessed the most important beginnings and many of the chief developments of the radio art. The original application was for a process or method patent only. It contained five claims covering methods of obtaining a high vacuum in vacuum tubes and expelling occluded gas from them. These claims were all ultimately canceled. Other process claims, substituted by amendment, of which four only survived in the patent as issued, were amplifications of the original method and process claims. Late in 1913 Langmuir first made claim to invention of the tube as a structure or device, in four claims, all of which were amended one or more times. All but the third, which was amended four times, were canceled in 1925, the year the patent issued. There are twenty-eight claims for the structure or device in the patent as issued. Of these one was filed by amendment in 1913, one in 1917, nine in 1919, three in 1921, and fourteen in 1925. During the twelve years the patent was pending, there were sixty-seven amendments of specifications, of which forty-five were in 1925. Amended

claims filed, and additions and cancellations of them made, number one hundred in all, of which forty-two were in 1925.

The process claims cover methods of creating the high vacuum tube in the manner already described, that is, freeing the tube of occluded gas by heating tubes and electrodes and by electronic bombardment, at the same time evacuating the tube of air or gas by approved methods, such as the use of the Gaede molecular pump or chemical means. The court below did not rest its holding of validity of the patent on these claims, and respondent does not seriously urge their validity here. It suffices to say that an examination of the prior art discloses that, long before the earliest date claimed for Langmuir, the necessity for removing occluded gas from tubes or other electrical discharge devices in order to procure a high vacuum, and the methods of doing it by heating and electronic bombardment, were well known, as was the procedure for constructing the high vacuum tube by expelling occluded gas while evacuating the tube. An article by Duncan, *American Electrician*, May, 1896; one by Doane, *Electrical World and Engineer*, of May 21, 1904; the Dwyer Patent, No. 496,694, January 4, 1898, for a process for producing high vacuum in incandescent lamps or similar receptacles during their manufacture; the Soddy Patent, No. 859,021, July 2, 1907, for the employment of certain reagents in the process of producing high vacuum; the Thatcher Patent, No. 1,028,636, June 4, 1912, application filed March 30, 1910, for method of exhausting vessels; and an article by Lilienfeld in 1910, to be mentioned later, disclosed before Langmuir the essentials for producing a high vacuum, described in the present process claims. They were in use in laboratory practice by Millikan and others before 1911.

It was upon the claims for the high vacuum tube structure or device that the court below based its decision,

and they are urged upon us here as the grounds for sustaining the patent. They put forward, in a great variety of forms, claims for an electrical discharge device consisting of a tube with cathode and anode within it, with relation of parts and degree of evacuation (vacuum) such that the device is capable of operation with higher than ionization voltages in a range below saturation, substantially unaffected by ionization. Claim 2, which respondent selects as typical, reads:

"2. A discharge tube having a cathode adapted to emit electrons and an anode adapted to receive said emitted electrons, the tube walls being fashioned or shaped to permit the direct passage of a useful proportion of said electrons from cathode to anode, the gas content or residue of said tube and the relation of the parts of the tube being such that the tube is capable of being so operated in a range below saturation and materially above ionization voltages that the space current is governed or limited by the electric field of said electrons substantially unaffected by positive ionization."

But this claim, as well as all others of the Langmuir patent, must be read in the light of the fact, fully accepted by the parties to this litigation, that electrical discharge devices such as the Fleming valve and the De Forest audion, patents on the latter of which expired in 1925, which were well known before Langmuir, comprise all the elements of the combination claimed except the presence within it of a high vacuum. It is conceded that if the requisite high vacuum be created in a De Forest audion, it becomes the high vacuum tube of the patent and is an infringing device if the patent is valid. The degree of the vacuum within the tube is therefore the crucial feature of the invention claimed. Langmuir, in describing in his patent the method of producing the device, says: "The evacuation of the device should be preferably carried to a pressure as low as a few hundredths of a micron,

or even lower, but no definite limits can be assigned." In at least 13 of the claims, the device claimed is one in which the gas within the tube, or the pressure, is sufficiently reduced, or the vacuum raised high enough, (all of which are synonymous), to produce the desired result, that is, a discharge unaffected by ionization when the tube is operated by the appropriate space current, which may be of higher voltage than that for the low vacuum tube.

The characteristics of the discharge named by the inventor in the specifications "in order to distinguish electron discharge devices made in accordance with my invention from the prior art" are the following: (1) gas ionization absent or negligible; (2) cathode not heated by the discharge; (3) no blue glow or visible evidence of discharge; (4) $3/2$ power relation of current to voltage; (5) discharge independent of degree of vacuum within intended limit for particular tube; (6) regularity and reproducibility. But all these characteristics may be summed up in the simple statement that in the tube of the patent, there must be an absence of harmful ionization; and since, as already indicated, harmful ionization disappears when the requisite vacuum is attained, the device or structure of the patent is one in which such a vacuum has been produced.

That the high vacuum tube was an improvement over the low vacuum tube of great importance, is not open to doubt. Even though the improvement was accomplished by so simple a change in structure as could be brought about by reducing the pressure in the well known low vacuum tube by a few microns, still it may be invention. Whether it is or not depends upon a question of fact, whether the relationship of the degree of vacuum within the tube, to ionization, and hence to the stability and effectiveness of discharge passing from cathode to anode, was known to the art when Langmuir began his experiments. If that relationship was then known, it re-

quired no inventive genius to avoid ionization and secure the desired result by creating the vacuum in a DeForest tube or other form of low vacuum discharge device.

That this relationship was known was the fact found by the District Court and not challenged by the opinion of the Court of Appeals. In 1910 Lilienfeld, in a paper published in *Annalen der Physik*, Vol. 32, on "The Conduction of Electricity," made a complete and explicit disclosure of the essentials of all the structures and methods of the Langmuir patent. The paper described methods of obtaining the "extreme vacuum" desired by freeing electrical discharge devices of occluded gas in the manner already described and at the same time evacuating the tube. He described the space charge effect, not mentioned in Langmuir's original specification, but later recited in the claims of the patent, in the following language: "One can formulate more generally the conditions for high voltage and large current density as follows: The production of a state in which the volume density of the electrons carrying the current is as large as possible compared with the density of gas molecules in which there exists therefore a tendency for the formation of the maximum possible space charge in the path of the current." To one skilled in the art, this could only mean that increased effectiveness of an electrical discharge device, to which a suitable current is applied, could be obtained by raising the vacuum in the manner which the writer had described. He also stated that "from a definite maximum density of the gas downwards, the discharge phenomena are independent of the gas density in the region investigated," a statement equivalent to the fifth characteristic of the discharge in the Langmuir specification, namely, that it is independent of degree of vacuum within the intended limit for the particular tube.

Lilienfeld also deduced from meter readings and stated, the $3/2$ power relation of current to voltage, as Langmuir

later stated it in his patent. From this the conclusion is inescapable that Lilienfeld knew and stated, in terms which could be understood by those skilled in the art, that in a high vacuum the current produced is under control, stable, and reproducible; and, as he employed high voltages, that high power levels of the discharge may be obtained by the employment of a high voltage in a high vacuum tube. Space charge effect was also described by Lilienfeld in *Physikalische Zeitschrift*, in 1908, in which he pointed out that by raising the vacuum there is an increase in the number (volume density) of the negative electrons, and said: "The higher the vacuum, the greater the current density, the more pronounced this new kind of discharge becomes."

The very fact that Lilienfeld knew and described the methods of the patent for obtaining high vacuum carries with it as a necessary corollary that the device itself, apart from its functioning and use, is lacking in patentable novelty. Hence, invention, if any there be, is embraced in the discovery of the principle that discharges above ionization voltages can be produced without substantial ionization if the vacuum be sufficiently high, and the disclosure that the device of the claims constitutes suitable means for putting the principle into practice. But Lilienfeld, in his paper of 1910, disclosed that he obtained discharges free from the effects of ionization, as Langmuir testified in interference proceedings in the Patent Office, and that he accomplished this through the attainment of high vacua by the very methods later described in the Langmuir patent.

Fleming, the inventor of the Fleming valve, in a paper read before the Royal Society on the conversion of electric oscillations into continuous current by means of a vacuum valve, February 9, 1905, pointed out the possibility of creating "an ideal and perfect rectifier for electric oscillations" by enclosing within a tube a hot carbon fila-

ment and a cold metal anode "in a very perfect vacuum"; and he described a method of procuring the vacuum by exhausting the bulb while freeing it of occluded air. In his Patent, No. 803,634, November 7, 1905, he describes the method of securing a high vacuum within the bulb by freeing it of occluded gas by heating the bulb and filaments to incandescence and at the same time evacuating it. In an article in "The Scientific American," supplement for January 20, 1906, on "electric conductivity of a vacuum," he defined a high vacuum as one reduced to "one hundred-millionth of an atmosphere," which is less than the 1/100 of a micron, the pressure in the tube of the patent; and he disclosed not only that electrons are emitted by hot cathodes in a high vacuum, but also "that a high vacuum may be a very good conductor, provided the negative electrode is rendered incandescent." Thus Fleming knew, and stated, the advantages of the high vacuum, its definition, and the method of procuring it. The state of the art and the progress of scientific knowledge in this field was accurately summed up in the statement of the law examiner in the Patent Office who passed on the Langmuir claims:

"It is apparent after a review of the record that there is no single element which is broadly novel in the assemblage of elements making up an electron discharge device of the character defined in the issue. An evacuated tube having therein an incandescent electron emitting cathode and an anode was old prior to the filing of Langmuir's application, and methods of attaining high vacua, sufficient to give a relatively pure electron discharge in a properly designed tube were also well known and available to persons skilled in the art."

The narrow question is thus presented whether, with the knowledge disclosed in these publications, invention was involved in the production of the tube, that is to say, whether the production of the tube of the patent, with the

aid of the available scientific knowledge that the effect of ionization could be removed by increasing the vacuum in an electric discharge device, involved the inventive faculty or was but the expected skill of the art. The question is not, as respondent argues, whether Lilienfeld or others made a practical high vacuum tube, but whether they showed how it could be made and demonstrated and disclosed the relationship of the discharge to reduced pressure, and how to reduce it. See *Corona Co. v. Dovan Corp.*, 276 U. S. 358, 384. That the production of the high vacuum tube was no more than the application of the skill of the art to the problem in hand is apparent when it is realized that the invention involved only the application of this knowledge to the common forms of low vacuum discharge devices such as the Fleming and De Forest tubes. Once known that gas ionization in the tube caused irregularity of current which did not occur in a high vacuum, it did not need the genius of the inventor to recognize and act upon the truth that a better tube for amplifying could be made by taking out the gas. Arnold, who was skilled in the art, and who had made studies of electrical discharges in high vacua, when shown a DeForest audion for the first time on November 14, 1912, immediately recognized and said that by increasing the vacuum the discharge would be sufficiently stable and have adequate power levels to enable the tube to be employed as a relay device in transcontinental telephony. The very fact that all of significance in the Langmuir improvement was obvious to one skilled in the art as soon as he saw the unimproved tube, as the District Court said, "lies athwart a finding of invention."

Respondent recognizes the force of this objection to patentability, but seeks to avoid it by insisting that the invention claimed is not as we have described it, but that "Langmuir's invention consisted in taking out [of the tube] the gaseous conductor upon which the prior art

relied, and putting nothing [a vacuum] in its place." It adopts also the statement in the opinion of the court below, upon which its decision turned, "a vacuum, or, indeed, change of vacuum, isolated and standing by itself, is not the Langmuir invention, but it is a working tube in which all the elements, cathode, plate, vacuum, so coordinate and interwork that the current flow is not affected by gas," a statement which, as we have already pointed out, takes no account of the scientific knowledge, available before Langmuir, that increase of vacuum in well known devices was all that was necessary to produce the desired result. Respondent elaborates, by saying that "in the practical prior art devices [that is to say, low vacuum tubes] the conduction of current depended upon gas ionization; the art, moreover, believed that unless there was enough gas to act as a conductor no current could flow and the tube would not work." It says that the high vacuum tube of the patent works on a different principle, that of the "pure electron discharge" and it was the recognition of this scientific truth and the adaptation of the device to it in which the invention consists.

But if Langmuir's invention is so to be defined, it is not the invention claimed by the patent. Respondent puts forth as sustaining this definition, statements in the specifications of the patent, to the effect that in the device of the patent, in which gas ionization is absent, the discharge is "distinct in its characteristics" from the described discharge taking place in an ionized gas, and again that it is "characterized by regularity and reproducibility with given conditions." But, while these and many other statements in the patent indicate that high vacuum was an effective means of producing in the old tubes of the art the stable current which could not be produced in the presence of ionization, they do not suggest any discovery of a scientific truth that essentially different principles control the discharge in low vacuum tubes from those

which operate in high, other than that ionization, present when gas is present, has certain effects, notably on stability of current in a low vacuum, which is absent in the high, when ionization is absent, as Lilienfeld and others had disclosed.

If it were necessary to a decision we could not find that any such scientific truth is established by this record. Respondent, to support the contention, does not rely on evidence, but on a collection of more or less casual statements by various writers, made before 1915, to the effect that the gas or ionized gas of the low vacuum tube is a conductor. Before the development of the electron theory, "conductivity" of substances was a convenient expression for explaining the flow of electric currents. Fleming, in a statement in 1906, already quoted, referred to the high vacuum as a good "conductor" if a hot cathode was used. The present tendency is to ascribe the flow of current from a hot cathode through both high and low vacua to the flow or discharge of electrons. Millikan the eminent physicist testified that this theory was generally accepted before 1912. Langmuir himself so explained the flow of current in a gaseous tube in his specifications. The known truth is that current flows through both low and high vacua and is unfavorably affected by ionization in the former; but that the flow is due to conductivity of the ionized gas in one and to something different, pure electron discharge, in the other, is not established by the evidence before us. There is some testimony to the contrary. Nor is our attention directed to anything which suggests that Langmuir thought there was such a difference, or relied upon it to remove ionization effects, rather than upon the simple expedient of removing the gas known to be responsible for them.

Even if the asserted difference were established, it is no more than the scientific explanation of what Lilienfeld and others knew, before Langmuir, of the effect of the high vacuum on the discharge, and the methods and devices for procuring the vacuum. It is method and de-

vice which may be patented and not the scientific explanation of their operation. See *LeRoy v. Tatham*, 14 How. 156, 174-6.

Only when invention is in doubt may advance made in the art be thrown in the scale to support it. If we were to assume that invention here was doubtful, we can find little to suggest that the high vacuum tube when produced satisfied a long felt want or that its present utility is indicative of anything more than the natural development of an art which has passed from infancy to its present maturity since Langmuir filed his application. There was little or no practical use for a high vacuum tube in 1913. The De Forest audion was not in general use and Langmuir did not see one until that year. The many amendments of Langmuir's application during its long pendency, disclosing his uncertainty as to what he had invented, and the exhibits in this case, constitute a history of the development of the art, which indicate unmistakably that the resort to the high vacuum tube for discharges above ionization voltages was but the adaptation to the natural development of the art, by those skilled in it, of the scientific knowledge which had been accumulated by investigation and experimentation. When the need became apparent, De Forest and Arnold, as well as Langmuir, found ready at hand the knowledge which would enable one skilled in the art to satisfy it.

The court below, contenting itself with finding invention, said nothing of the finding of prior use by the District Court. We hold that this finding of the District Court was supported by the evidence and should have been given effect. As we have concluded that the Langmuir patent did not involve invention, we refer only briefly to the facts which establish prior use. In 1911 and until September of 1912, De Forest was in the employ of the Federal Telegraph Co. of California, then engaged in the commercial transmission and reception of radio messages, in which audion detectors as well as

audion amplifiers were used. * August 20, 1912, the earliest date claimed for Langmuir, was rejected, rightly, we think, by the District Court, which held that Langmuir was anticipated by Arnold in November, 1912. But before the earlier date De Forest sought and obtained a high vacuum in the audions used as amplifiers, and observed that when the vacuum was too low the blue glow effect occurred at from 15 to 20 volts. In order to secure higher voltages from the audions used as amplifiers and to procure the requisite high vacuum, he had some of the bulbs re-exhausted while super-heated. By August, 1912, the Telegraph Company used De Forest amplifying audions at 54 volts and, by November, they were used by another at 67½ volts. This was possible only because the tubes had thus been exhausted of gas, which would otherwise have ionized with blue glow at from 20 to 30 volts. The vacuum was lower than that obtained by later and improved methods; but the effect of high vacuum upon voltages above the point of ionization was then known, and the knowledge was thus availed of in practice. Whether De Forest knew the scientific explanation of it is unimportant, since he did know and use the device and employ the methods, which produced the desired results, and which are the device and methods of the patent.

Reversed.

MR. JUSTICE McREYNOLDS concurs in the result.

GREAT NORTHERN RAILWAY CO *v.* DELMAR CO.

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

No. 563. Argued April 30, May 1, 1931.—Decided May 25, 1931.

An interstate rail tariff offering a through rate between points which are connected by two routes of the carrier, one more circuitous than the other, should be construed as applicable only to the shorter

* The opinion is here printed as amended by an order of Oct. 19, 1931, which will appear in Vol. 284.

route, if the through rate is less than the rates applicable from the same point of origin to intermediate points on the longer route so that application of the through rate to the longer route would involve the carrier in breaches of the long-and-short-haul clause (§ 4) of the Interstate Commerce Act. P. 690.

43 F. (2d) 780, reversed.

CERTIORARI, 282 U. S. 836, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court awarding reparations against the Railway Company for charges made on shipments of grain.

Mr. R. J. Hagman, with whom *Mr. F. G. Dorety* was on the brief, for petitioner.

Mr. Fred W. Putnam, with whom *Messrs. Frank W. Shaw, Orren E. Safford, Wilbur D. Shaw, and Sam W. Campbell* were on the brief, for respondent.

Messrs. Daniel W. Knowlton and E. M. Reidy, by special leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Interstate Commerce Commission awarded Delmar Company reparation against the Great Northern Railway Company for certain charges made on shipments of grain.¹ Suit was brought on the award and judgment rendered against the railway by the District Court. On appeal to the Circuit Court of Appeals that judgment was affirmed.² This Court granted certiorari.³

The pertinent facts are that numerous shipments of grain originated at points on the line of the railway in Minnesota, North Dakota and South Dakota. They were originally billed to Minneapolis. After arrival there they were reconsigned by the Delmar Company, in the same cars, to Superior, Wis., where delivery was made. The entire movement from the points of origin to Supe-

¹ 120 I. C. C. 530.

² 43 F. (2d) 780.

³ 282 U. S. 836.

rior was over the rails of the Great Northern. The shorter route from the places of shipment to Superior is via Willmar. The longer, which the cars in question traveled,—via Minneapolis,—involves passage through the congested railroad terminals in that city, with incident traffic difficulties and delays not encountered on the more direct one. The difference between the two in mileage from the shipping points to Superior varies by from 12 to 23 per cent. The carrier collected its local rates from origin points to Minneapolis, plus a proportional rate of 6.5 cents beyond. The combinations of rates so exacted were higher than the through rates specified in the tariffs for the transportation of grain from these points to Superior.

The Commission found that it had previously been the custom to apply the through rate only upon shipments via the direct route, and to apply the proportional rate beyond Minneapolis to such as were reconsigned at that point. The advantage to the Delmar Company of originally consigning to that city and reconsigning to Superior is that the former is a grain market, and the grain may be sold en route and delivered at Minneapolis pursuant to such sale, or reconsigned if not sold on its arrival.

It is conceded that the shipper had the right of reconsignment without additional charge for that privilege, and that the situation is the same as if the shipments had originally been billed to Superior via Minneapolis.

The Commission sustained the contention of the Delmar Company that the quoted through rates from points of origin to Superior applied to shipments routed via Minneapolis, since the tariff did not expressly restrict their application to the shorter and more direct route via Willmar. This finding was the basis of the award of reparation.

The railway maintains that in the circumstances here presented the tariff may not be so construed as to render the specified through rate applicable to shipments by way of Minneapolis. This would be contrary to established

custom and would occasion violation of the long-and-short-haul clause of the Interstate Commerce Act.

The Commission has repeatedly decided that where two or more routes are "open," which means that in the judgment of the Commission none of them is unreasonably circuitous, the shipper has the option as to route, at the quoted rate, in the absence of a contrary statement in the tariff. *Van Dusen Harrington Co. v. Chicago, M. & St. P. Ry. Co.*, 47 I. C. C. 59; *Meeds L. Co. v. Director General*, 59 I. C. C. 243; *Freeman Grain Co. v. Director General*, 68 I. C. C. 559; *Baker-Reid L. Co. v. Baltimore & Ohio R. Co.*, 74 I. C. C. 489; *Steinhardt & Kelly v. Erie R. Co.*, 96 I. C. C. 229; *Scott County Farm Bureau v. Alabama & V. Ry. Co.*, 101 I. C. C. 357; *Browne-Hinton Wholesale Grocery Co. v. Great Northern Ry. Co.*, 102 I. C. C. 237; *Northwestern Fruit Exchange v. Great Northern Ry. Co.*, 128 I. C. C. 538; *Atwood Davis Sand Co. v. Chicago N. W. Ry. Co.*, 136 I. C. C. 471. Here the difference is, in no instance, more than 23 per cent. It is claimed that the longer route is more burdensome, due to congestion at Minneapolis, but there is no definite evidence and no finding on this point. We cannot say that there was error in the Commission's conclusion that the longer route was not unreasonably circuitous.

It is undisputed that there are destinations on the railway's line between Minneapolis and Superior as to which the rate from the points of origin, consisting of the local rate to Minneapolis plus the proportional rate beyond that city, is greater than the quoted through rate from such points to Superior. Consequently if shipments should be made to Superior via Minneapolis at the through rate, they will be carried for less than would be charged for similar shipments to these intermediate destinations. The railway insists that this would result in violations of § 4 of the Interstate Commerce Act.⁴ That section is in part:

⁴ U. S. C., Tit. 49, § 4 (1).

“ It shall be unlawful for any common carrier . . . to charge or receive any greater compensation in the aggregate for the transportation . . . of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance: . . . ”

The Commission decided that while the facts recited would render the railway liable for the penalties prescribed by the Act, the tariff rate must be applied. The Circuit Court of Appeals, under what we think was a misapprehension of the facts, held no violation of § 4 would result. It said:

“ That section applies to ‘ the same line or route in the same direction, the shorter *being included within* the longer distance.’ As to these shipments, the shorter haul is not included within the longer distance.”

The quotation indicates a failure to note the fact that the comparison of rates is made between points which are all upon the longer of the two routes, and that the shorter distance on that line is included within the longer distance to Superior. The Commission filed a brief in this Court taking issue with the conclusion of the Court of Appeals on this feature of the case.

The railway can transport the shipments over the shorter and customary route without violating § 4; but if the tariff is construed to require it to take them over the longer route it must violate that section and incur the resulting penalties. In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two

routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. Compare *Wilson v. Rousseau*, 4 How. 646, 685; *Hobbs v. McLean*, 117 U. S. 567, 576; *In re Rose Co.*, 275 Fed. 409; *Northern Pac. Ry Co. v. St. Paul & Tacoma Lumber Co.*, 4 F. (2d) 359.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

CHOTEAU *v.* BURNET, COMMISSIONER OF
INTERNAL REVENUE.

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

No. 81. Argued January 28, 29, 1931.—Decided May 25, 1931.

1. The income received from the United States by an Indian, a member of the Osage Tribe, as his share of the royalties from oil and gas leases made by the tribe and approved by the Secretary of the Interior, under the Act of June 28, 1906, is subject to federal income tax, under the Revenue Act of 1918.

So *held*, where the Indian had received a certificate of competency; where his allotted lands, except the homestead, were taxable and alienable; and where the income, (derived from leases of lands which had been purchased for the tribe with tribal funds and subsequently allotted, reserving the oil and gas to the tribe,) belonged to him without restriction. Pp. 693, 694.

2. Such income is not a gift; nor is it immune from the federal tax as an instrumentality of government. P. 696.

38 F. (2d) 976, affirmed.

CERTIORARI, 281 U. S. 714, to review a judgment affirming a decision of the Board of Tax Appeals, 14 B. T. A. 1254, which sustained a determination of deficiency in income taxes.

Mr. T. J. Leahy, with whom *Messrs. C. S. Macdonald, James H. Maxey, F. W. Files, and Louis N. Stivers* were on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, Sewall Key* and *A. H. Conner*, Special Assistants to the Attorney General, *Clarence M. Charest*, General Counsel, Bureau of Internal Revenue, and *Ellis W. Manning*, Special Attorney, were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner is a member of the Osage tribe of Indians, duly enrolled as such under the Act of June 28, 1906,¹ and holds a certificate of competency issued March 5, 1910, pursuant to that Act. He owns his own original allotment of the tribal lands, and has inherited from a deceased member a one-half interest in the latter's allotment, but nothing in this case turns on his ownership of these lands. He also owns his own original share in the tribal revenues, and, by inheritance from a deceased member, one-half of the interest in those revenues to which that member would be entitled if living.

In the years 1918, 1919 and 1920 petitioner's entire income was received from these one and one-half shares in the tribal income from oil and gas leases made by the tribe under the authority of the Act. The leases were on a portion of the lands bought by the United States with money belonging to the tribe, thereafter held in trust for it, and subsequently allotted to its members as directed by the Act. But in the division or allotment of the tribal lands the oil, gas and other minerals therein were expressly reserved to the tribe for a period of twenty-

¹ c. 3572, 34 Stat. 539.

five years,² now extended to April 8, 1958.³ Provision was made for the leasing of such minerals by the tribal council, with the approval of the Secretary of the Interior,⁴ and the income from such leases is to be placed in the Treasury of the United States to the credit of the members of the tribe and distributed among them quarterly.⁵ This was the source of the petitioner's income.

The petitioner paid income taxes in each of the years mentioned. Upon the receipt of a deficiency letter from the Commissioner of Internal Revenue he instituted a proceeding before the Board of Tax Appeals in which he claimed that he owed no deficiencies, but was entitled to a refund of the amounts theretofore paid because he was exempt from income tax on the sums received. The Board's decision was for respondent,⁶ and was affirmed by the Circuit Court of Appeals.⁷ This court granted certiorari.⁸

The petitioner urges several arguments in support of the claim that he is not liable for tax under the Revenue Act of 1918. These may conveniently be grouped into two main contentions: First, that the statute evidences no intent to tax petitioner on such income, and second, that if its language is broad enough to cover his case, his status, or the nature of the income, requires a holding that he is exempt.

The language of §§ 210 and 211 (a)⁹ subjects the income of "every individual" to tax. Section 213 (a)¹⁰

¹ § 3, Act of 1906, *supra*.

² 45 Stat. 1478.

⁴ § 3, Act of 1906, *supra*.

⁵ § 4, First and Second, and § 6, Act of 1906, *supra*.

⁶ 14 B. T. A. 1254.

⁷ 38 F. (2d) 976.

⁸ 281 U. S. 714.

⁹ 40 Stat. 1062.

¹⁰ 40 Stat. 1065.

includes income "from any source whatever." The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.

But it is said that as to the income here taxed petitioner is exempt because of his status as an Indian. This assertion requires a reference to the policy of the government with respect to the Indians. No provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property. The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes.¹¹ Pursuant to this policy the Act of 1906 directed the allotment to each member of the Osage tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee. After setting apart such homestead to each, the surplus lands were all to be equally divided and allotted amongst the members. Section 2, Seventh, of the Act provides that the Secretary of the Interior, after due investigation, may issue certificates of competency to members of the tribe. It declares that "upon the issuance of such certificate of competency

¹¹ See *United States v. Nice*, 241 U. S. 591, 598; *United States v. Waller*, 243 U. S. 452, 459; *McCurdy v. United States*, 246 U. S. 263, 269; *Shaw v. Oil Corp.*, 276 U. S. 575, 579.

the lands of such member (except his or her homestead) shall become subject to taxation, and such member (with exceptions not here material) shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."¹² Since 1910, when he received his certificate, petitioner has therefore been taxable upon his allotted lands, except his homestead, and they have been freely alienable.

There are provisions in the Act of 1906 with respect to the holding, payment and administration of the royalty shares of members who do not have certificates of competency, but with these we are not concerned. The shares of royalty of those holding such certificates are to be paid to them quarterly.

The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. His share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. (Compare *United States v. Waller, supra.*) It is true, as petitioner

¹² Section 4 of the Act of February 27, 1925, c. 359, 43 Stat. 1008, authorizes the revocation of a certificate held by one of more than one-half Indian blood, if the Secretary of the Interior shall find that the holder is squandering or misusing his or her funds. The revocation is not to affect the legality of any transactions theretofore made by reason of the issuance of a certificate, and all debts existing at the time of revocation are to be paid by the Secretary or his representative out of the income of the member. This section has no bearing upon the present case.

asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammelled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. *Work v. Mosier*, 261 U. S. 352; *Work v. Lynn*, 266 U. S. 161. The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by §§ 210 and 211 (a) must fail.

It remains to consider whether there is anything in the nature of the income itself making it necessary to exempt it from the broad language of the Revenue Act. It is suggested by petitioner that the sums received were gifts and not income. In view of the facts above recited this argument is without substance. It is further insisted that since the royalties are not taxable, so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. (See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601.) Royalties received by the government from mineral leases of Indian lands have been held to be beyond a State's taxing power (*Gillespie v. Oklahoma*, 257 U. S. 501; *Shaw v. Oil Corp.*, 276 U. S. 575) on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter. *Heiner v. Colonial Trust Co.*, 275 U. S. 232; *Shaw*

v. *Oil Corp., supra.* But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax. (Compare *McCurdy v. United States*, 246 U. S. 263.) There is, therefore, nothing in the nature of the income which excepts it from the effect of § 213 (a) of the Revenue Act of 1918.

Affirmed.

NEAR v. MINNESOTA EX REL. OLSON, COUNTY ATTORNEY.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 91. Argued January 30, 1931.—Decided June 1, 1931.

1. A Minnesota statute declares that one who engages "in the business of regularly and customarily producing, publishing," etc., "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty of a nuisance, and authorizes suits, in the name of the State, in which such periodicals may be abated and their publishers enjoined from future violations. In such a suit, malice may be inferred from the fact of publication. The defendant is permitted to prove, as a defense, that his publications were true and published "with good motives and for justifiable ends." Disobedience of an injunction is punishable as a contempt. *Held* unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State. Pp. 704, 709, 712, 722.
2. Liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. P. 707.
3. Liberty of the press is not an absolute right, and the State may punish its abuse. P. 708.
4. In passing upon the constitutionality of the statute, the court has regard for substance, and not for form; the statute must be tested by its operation and effect. P. 708.

5. Cutting through mere details of procedure, the operation and effect of the statute is that public authorities may bring a publisher before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular, that the matter consists of charges against public officials of official dereliction—and, unless the publisher is able and disposed to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship. P. 713.
6. A statute authorizing such proceedings in restraint of publication is inconsistent with the conception of the liberty of the press as historically conceived and guaranteed. P. 713.
7. The chief purpose of the guaranty is to prevent previous restraints upon publication. The libeler, however, remains criminally and civilly responsible for his libels. P. 713.
8. There are undoubtedly limitations upon the immunity from previous restraint of the press, but they are not applicable in this case. P. 715.
9. The liberty of the press has been especially cherished in this country as respects publications censuring public officials and charging official misconduct. P. 716.
10. Public officers find their remedies for false accusations in actions for redress and punishment under the libel laws, and not in proceedings to restrain the publication of newspapers and periodicals. P. 718.
11. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct. P. 720.
12. Characterizing the publication of charges of official misconduct as a “business,” and the business as a nuisance, does not avoid the constitutional guaranty; nor does it matter that the periodical is largely or chiefly devoted to such charges. P. 720.
13. The guaranty against previous restraint extends to publications charging official derelictions that amount to crimes. P. 720.
14. Permitting the publisher to show in defense that the matter published is true and is published with good motives and for justifiable ends does not justify the statute. P. 721.
15. Nor can it be sustained as a measure for preserving the public peace and preventing assaults and crime. Pp. 721, 722.
179 Minn. 40; 228 N. W. 326, reversed.

APPEAL from a decree which sustained an injunction abating the publication of a periodical as malicious, scandalous and defamatory, and restraining future publication. The suit was based on a Minnesota statute. See also s. c., 174 Minn. 457; 219 N. W. 770.

Mr. Weymouth Kirkland, with whom *Messrs. Thomas E. Latimer, Howard Ellis, and Edward C. Caldwell* were on the brief, for appellant.

Messrs. James E. Markham, Assistant Attorney General of Minnesota, and *Arthur L. Markve*, Assistant County Attorney of Hennepin County, with whom *Messrs. Henry N. Benson*, Attorney General, *John F. Bonner*, Assistant Attorney General, *Ed. J. Goff*, County Attorney, and *William C. Larson*, Assistant County Attorney, were on the brief, for appellee.

Appellant's argument is based upon an entirely erroneous construction of Chapter 285, Laws of 1925. He construes it as authorizing the court to prohibit appellant from conducting a newspaper under the name of the Saturday Press, even though such newspaper may be entirely innocent. The law does not permit of such a construction nor did the Supreme Court of the State so construe it.

Conceding *arguendo* that the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press, (*sed v. Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev., p. 431,*) the term does not include the unrestricted right to publish everything. The guaranty is not absolute. *Gitlow v. New York*, 268 U. S. 652; *Toledo Newspaper Co. v. United States*, 247 U. S. 402; *Robertson v. Baldwin*, 165 U. S. 275; *Patterson v. Colorado*, 205 U. S. 454; *Fox v. Washington*, 236 U. S. 273; *Schenck v. United States*, 249 U. S. 47; *Frohwerk v. United States*, 249 U. S. 204; *Debs v. United States*, 249 U. S. 211; *Schaefer v. United States*, 251 U. S. 466; *Gilbert v. Minnesota*, 254

U. S. 325; *Whitney v. California*, 274 U. S. 357; *Tyomico Publishing Co. v. United States*, 211 Fed. 385.

The courts have power to restrain by injunction the publication of defamatory matter. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Toledo Newspaper Co. v. United States*, 247 U. S. 402.

The Minnesota statute merely prohibits engaging in the business of regularly or customarily producing, publishing or circulating a malicious, scandalous and defamatory newspaper. No attempt is made to abridge the freedom of the press or prevent one from engaging in a lawful calling. It is not directed against the incidental publication, distribution, or circulation of defamatory matter. *Olson v. Guilford*, 174 Minn. 457, s. c. 179 Minn. 40.

If it could be construed as prohibiting appellant from ever engaging in the publication of a newspaper, and if that construction raises doubt of its constitutionality, this Court should interpret it in such a way as to eliminate the doubt. *Fox v. Washington*, 236 U. S. 273, 277.

If the language of the injunction is not justified by the statute, appellant cannot take advantage of this under the record as it stands. He made no suggestion to the trial court that the terms of the injunction were not authorized by the law; nor do his assignments of error in the state court or in this Court raise that point. *Milwaukee Publishing Co. v. Burlison*, 255 U. S. 407; *Fiske v. Kansas*, 274 U. S. 380.

The power of a state legislature to forbid an innocent calling upon the ground that certain evils exist, incident to the calling, which can not be prevented without preventing the exercise of the calling itself, has been often sustained against attack under the due process clause as respects the taking of property. *Murphy v. California*, 225 U. S. 623; *Booth v. Illinois*, 184 U. S. 425; *Otis v. Parker*, 187 U. S. 606; *Mugler v. Kansas*, 123 U. S. 623.

The Act is a legitimate exercise of the police power. *Jacobson v. Massachusetts*, 197 U. S. 11, 26; *Lawton v.*

Steele, 152 U. S. 133, 140; *Phalen v. Virginia*, 8 How. 163; Cooley, Const. Lim., 8th ed., Vol. 2, p. 1223; *State v. Pitney*, 79 Wash. 608; *People v. Weiner*, 271 Ill. 74; *People v. Robertson*, 302 Ill. 442; *State v. Morse*, 84 Vt. 387; *State v. Superior Court*, 103 Wash. 409.

Newspapers that are largely given to scandalous matter have in some States been declared to be criminal publications. *State v. McKee*, 73 Conn. 18; *State v. Van Wye*, 136 Mo. 227; *Re Banks*, 56 Kan. 243; *United States v. Harmon*, 45 Fed. 416; *Re Rapier*, 143 U. S. 110, 134. See also, *State v. Pioneer Press Co.*, 100 Minn. 173; *State v. Holm*, 139 Minn. 267; *State v. Gilbert*, 126 Minn. 95.

The evil which the Act seeks to suppress is a nuisance in fact. 3 Blackstone's Comm., c. 13, p. 216; 20 R. C. L. 384, § 7; *Vegehn v. Gunther*, 167 Mass. 92; *Sherry v. Perkins*, 147 Mass. 212; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Oehler v. Levy*, 234 Ill. 595; Wood on Nuisances, 3d ed., Vol. 1, p. 92, § 70; 20 R. C. L. 428; *Davis v. Sawyer*, 133 Mass. 289; *State v. Graham*, 3 Sneed 134; *Commonwealth v. Oaks*, 113 Mass. 8; *Tanner v. Trustees*, 5 Hill 121; *Regina v. Foxby*, 6 Mod. 213; *Commonwealth v. Mohn*, 52 Pa. St. 243; *Mohr v. Gault*, 10 Wis. 513; *Gifford v. Hulett*, 62 Vt. 342; *State v. Diamant*, 73 N. J. L. 131; *New Jersey v. Martin*, 77 N. J. L. 652; *State v. Guilford*, 174 Minn. 457; *Eilenbecker v. District Court*, 134 U. S. 31; *Munn v. Illinois*, 94 U. S. 114; *Booth v. Illinois*, 184 U. S. 425, 431; *Bonnard v. Perryman* (1891), LXV Law Times (N. S.) 506; 18 Halsbury's Laws of England, 733.

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

Chapter 285 of the Session Laws of Minnesota for the year 1925¹ provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory news-

¹ Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3.

paper, magazine or other periodical." Section one of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action."

Section two provides that whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or upon like failure or refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the State to enjoin

perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it

appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September

24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, "any future editions of said *The Saturday Press*" and "any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457; 219 N. W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested, without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The District Court made findings of fact, which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles," concerning the individuals named. The court further found that the defendants through these publications "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40; 228 N. W. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment and that the lower court had not been asked to modify it. The court added that it saw no reason "for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield," that the allegations of the complaint had been

found to be true, and, though this was an equitable action, defendants had not indicated a desire "to conduct their business in the usual and legitimate manner."

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 666; *Whitney v. California*, 274 U. S. 357, 362, 373; *Fiske v. Kansas*, 274 U. S. 380, 382; *Stromberg v. California*, ante, p. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases*, 116 U. S. 307, 331; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*, 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed

to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros. v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525, 560, 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*, *supra*; *Stromberg v. California*, *supra*. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson v. Mayor*, 92 U. S. 259, 268; *Bailey v. Alabama*, 219

U. S. 219, 244; *United States v. Reynolds*, 235 U. S. 133, 148, 149; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter.² The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and

² Mason's Minn. Stats. 10112, 10113; *State v. Shipman*, 83 Minn. 441, 445; 86 N. W. 431; *State v. Minor*, 163 Minn. 109, 110; 203 N. W. 596.

for justifiable ends. It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.³

³It may also be observed that in a prosecution for libel the applicable Minnesota statute (Mason's Minn. Stats., 1927, §§ 10112, 10113), provides that the publication is justified "whenever the matter charged as libelous is true and was published with good motives and for justifiable ends," and also "is excused when honestly made, in

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in

belief of its truth, and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of a person in respect to public affairs." The clause last mentioned is not found in the statute in question.

addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a

new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press.⁴ The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an

⁴ May, Constitutional History of England, vol. 2, chap. IX, p. 4; DeLolme, Commentaries on the Constitution of England, chap. IX, pp. 318, 319

undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U. S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ubi sup.*; 4 Bl. Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by

state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado, supra; Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419.⁵ In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too

⁵ See *Huggonson's Case*, 2 Atk. 469; *Respublica v. Oswald*, 1 Dallas 319; *Cooper v. People*, 13 Colo. 337, 373; 22 Pac. 790; *Nebraska v. Rosewater*, 60 Nebr. 438; 83 N. W. 353; *State v. Tugwell*, 19 Wash. 238; 52 Pac. 1056; *People v. Wilson*, 64 Ill. 195; *Storey v. People*, 79 Ill. 45; *State v. Circuit Court*, 97 Wis. 1; 72 N. W. 193.

broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.⁶ On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 439." *Schenck v. United States*, *supra*. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.⁷

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial

⁶ Chafee, *Freedom of Speech*, p. 10.

⁷ See 29 *Harvard Law Review*, 640.

period and with the efforts to secure freedom from oppressive administration.⁸ That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts: "Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights" it was said:⁹ "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:¹⁰

⁸ See Duniway "The Development of Freedom of the Press in Massachusetts," p. 123; Bancroft's History of the United States, vol. 2, 261.

⁹ Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108.

¹⁰ Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

“In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had ‘Sedition Acts,’ forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?”

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and

conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.¹¹

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and

¹¹ *Dailey v. Superior Court*, 112 Cal. 94, 98; 44 Pac. 458; *Jones, Varnum & Co. v. Townsend's Admx.*, 21 Fla. 431, 450; *State ex rel. Liversey v. Judge*, 34 La. 741, 743; *Commonwealth v. Blanding*, 3 Pick, 304, 313; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 275, 277; 96 Pac. 127; *Howell v. Bee Publishing Co.*, 100 Neb. 39, 42; 158 N. W. 358; *New Yorker Staats-Zeitung v. Nolan*, 89 N. J. Eq. 387; 105 Atl. 72; *Brandreth v. Lane*, 8 Paige 24; *New York Juvenile Guardian Society v. Roosevelt*, 7 Daly 188; *Ulster Square Dealer v. Fowler*, 111 N. Y. Supp. 16; *Star Co. v. Brush*, 170 *id.* 987; 172 *id.* 320; 172 *id.* 851; *Dopp v. Doll*, 9 Ohio Dec. Rep. 428; *Respublica v. Oswald*, 1 Dall. 319, 325; *Respublica v. Dennie*, 4 Yeates 267, 269; *Ex parte Neill*, 32 Tex. Cr. 275; 22 S. W. 923; *Mitchell v. Grand Lodge*, 56 Tex. Civ. App. 306, 309; 121 S. W. 178; *Sweeney v. Baker*, 13 W. Va. 158, 182; *Citizens Light, Heat & Power Co. v. Montgomery Light & Water Co.*, 171 Fed. 553, 556; *Willis v. O'Connell*, 231 Fed. 1004, 1010; *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 485.

property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of

public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado, supra.*

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends

to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct."¹² There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 89 N. J. Eq. 387, 388; 105 Atl. 72: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b)

¹²Madison, *op. cit.* p. 549.

of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

Confessedly, the Federal Constitution prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech or press against state action. *Barron v. Baltimore*, 7 Pet. 243, 250. *Fox v. Ohio*, 5 How. 410, 434. *Smith v. Maryland*, 18 How. 71, 76. *Withers v. Buckley*, 20 How. 84, 89-91. Up to that time the right was safeguarded solely by the constitutions and laws of the States and, it may be added, they operated adequately to protect it. This Court was not called on until 1925 to decide whether the "liberty" protected by the Fourteenth Amendment includes the right of free speech and press. That question has been finally an-

swered in the affirmative. Cf. *Patterson v. Colorado*, 205 U. S. 454, 462. *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 538, 543. See *Gitlow v. New York*, 268 U. S. 652. *Fiske v. Kansas*, 274 U. S. 380. *Stromberg v. California*, ante, p. 359.

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice.¹

¹ The following articles appear in the last edition published, dated November 19, 1927:

“FACTS NOT THEORIES.

“‘I am a bosom friend of Mr. Olson,’ snorted a gentleman of Yiddish blood, ‘and I want to protest against your article,’ and blah, blah, blah, ad infinitum, ad nauseam.

“I am not taking orders from men of Barnett faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

“It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have ‘pulled’ practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett’s ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett’s place of ‘business’ that the ‘13 dollar Jew’ found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. It was Mose Barnett, a

The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to

Jew, who boasted that he held the chief of police of Minneapolis in his hand—had bought and paid for him.

“ It is Jewish men and women—pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today.

“ Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW.

“ Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a ‘ bosom friend ’ of Mr. Olson.

“ I find in the mail at least twice per week, letters from gentlemen of Jewish faith who advise me against ‘ launching an attack on the Jewish people.’ These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:

“ When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting business men; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity, that I refuse to back up a single step from that ‘ issue ’—if they choose to make it so.

“ If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call ‘ Jews ’ they can easily do so BY THEMSELVES CLEANING HOUSE.

“ I’m not out to cleanse Israel of the filth that clings to Israel’s skirts. I’m out to ‘ hew to the line, let the chips fly where they may.’

“ I simply state a fact when I say that ninety per cent. of the crimes committed against society in this city are committed by Jew gangsters.

“ It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro

the inquiry whether, having regard to the points properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law.

and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:

“ It is Jew, Jew, Jew, as long as one cares to comb over the records.

“ I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

“ Either Mr. Guilford or myself stand ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews want to battle.

“ Both of us have some mighty loyal friends among the Jewish people but not one of them comes whining to ask that we ‘ lay off ’ criticism of Jewish gangsters and none of them who comes carping to us of their ‘ bosom friendship ’ for any public official now under our journalistic guns.”

“ GIL’S [Guilford’s] CHATTERBOX.

“ I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead and won a bed for myself in St. Barnabas Hospital for six weeks. . . .

“ Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis’ law enforcement league or the K. K. K. hammers the eagle’s beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem.

“ All of which has nothing to do with the present whereabouts of Big Mose Barnett. Methinks he headed the local delegation to the new Palestine-for-Jews-only. He went ahead of the boys so

This Court should not reverse the judgment below upon the ground that in some other case the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment. *Castillo v. McConnico*, 168 U. S. 674, 680. *Williams v. Mississippi*, 170 U. S. 213, 225. *Yazoo & Miss. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 219–220. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544–546.

This record requires the Court to consider the statute as applied to the business of publishing articles that are in fact malicious, scandalous and defamatory.

The statute provides that any person who “shall be engaged in the business of regularly or customarily producing, publishing or circulating” a newspaper, magazine or other periodical that is (a) “obscene, lewd and lascivious” or (b) “malicious, scandalous and defama-

he could do a little fixing with the Yiddish chief of police and get his twenty-five per cent. of the gambling rake-off. Boys will be boys and ‘ganefs’ will be ganefs.”

“GRAND JURIES AND DITTO.

“There are grand juries, and there are grand juries. The last one was a real grand jury. It acted. The present one is like the scion who is labelled ‘Junior.’ That means not so good. There are a few mighty good folks on it—there are some who smell bad. One petty peanut politician whose graft was almost pitiful in its size when he was a public official, has already shot his mouth off in several places. He is establishing his alibi in advance for what he intends to keep from taking place.

“But George, we won’t bother you. [Meaning a grand juror.] We are aware that the gambling syndicate was waiting for your body to convene before the big crap game opened again. The Yids had your dimensions, apparently, and we always go by the judgment of a dog in appraising people.

“We will call for a special grand jury and a special prosecutor within a short time, as soon as half of the staff can navigate to advantage, and then we’ll show you what a real grand jury can do. Up to the present we have been merely tapping on the window. Very soon we shall start smashing glass.”

tory" is guilty of a nuisance and may be enjoined as provided in the Act. It will be observed that the qualifying words are used conjunctively. In actions brought under (b) "there shall be available the defense that the truth was published with good motives and for justifiable ends."

The complaint charges that defendants were engaged in the business of regularly and customarily publishing "malicious, scandalous and defamatory newspapers" known as the Saturday Press, and nine editions dated respectively on each Saturday commencing September 25 and ending November 19, 1927, were made a part of the complaint. These are all that were published.

On appeal from the order of the district court overruling defendants' demurrer to the complaint the state supreme court said (174 Minn. 457, 461; 219 N. W. 770):

"The constituent elements of the declared nuisance are the customary and regular dissemination by means of a newspaper which finds its way into families, reaching the young as well as the mature, of a selection of scandalous and defamatory articles treated in such a way as to excite attention and interest so as to command circulation. . . . The statute is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends. . . . In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. . . . It was never the intention of the constitution to afford protec-

tion to a publication devoted to scandal and defamation. . . . Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous and defamatory printed matter."

The case was remanded to the district court.

Near's answer made no allegations to excuse or justify the business or the articles complained of. It formally denied that the publications were malicious, scandalous or defamatory, admitted that they were made as alleged, and attacked the statute as unconstitutional. At the trial the plaintiff introduced evidence unquestionably sufficient to support the complaint. The defendant offered none. The court found the facts as alleged in the complaint and specifically that each edition "was chiefly devoted to malicious, scandalous and defamatory articles" and that the last edition was chiefly devoted to malicious, scandalous and defamatory articles concerning Leach (mayor of Minneapolis), Davis (representative of the law enforcement league of citizens), Brunskill (chief of police), Olson (county attorney), the Jewish race and members of the grand jury then serving in that court; that defendants in and through the several publications "did thereby engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper."

Defendant Near again appealed to the supreme court. In its opinion (179 Minn. 40; 228 N. W. 326) the court said: "No claim is advanced that the method and character of the operation of the newspaper in question was not a nuisance if the statute is constitutional. It was regularly and customarily devoted largely to malicious, scandalous and defamatory matter. . . . The record presents the same questions, upon which we have already passed."

Defendant concedes that the editions of the newspaper complained of are "defamatory *per se*." And he says: "It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. . . . The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance*, though he is subject to responsibility therefor *afterwards*." The record, when the substance of the articles is regarded, requires that concession here. And this Court is required to pass on the validity of the state law on that basis.

No question was raised below and there is none here concerning the relevancy or weight of evidence, burden of proof, justification or other matters of defense, the scope of the judgment or proceedings to enforce it or the character of the publications that may be made notwithstanding the injunction.

There is no basis for the suggestion that defendants may not interpose any defense or introduce any evidence that would be open to them in a libel case, or that malice may not be negatived by showing that the publication was made in good faith in belief of its truth, or that at the time and under the circumstances it was justified as a fair comment on public affairs or upon the conduct of public officers in respect of their duties as such. See Mason's Minnesota Statutes, §§ 10112, 10113.

The scope of the judgment is not reviewable here. The opinion of the state supreme court shows that it was not reviewable there, because defendants' assignments of error in that court did not go to the form of the judgment, and because the lower court had not been asked to modify the judgment.

The Act was passed in the exertion of the State's power of police, and this court is by well established rule required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 79. *Gitlow v. New York*, *supra*, 668-669. *Corporation Commission v. Lowe*, 281 U. S. 431, 438. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 257-258.

The publications themselves disclose the need and propriety of the legislation. They show:

In 1913 one Guilford, originally a defendant in this suit, commenced the publication of a scandal sheet called the *Twin City Reporter*; in 1916 Near joined him in the enterprise, later bought him out and engaged the services of one Bevens. In 1919 Bevens acquired Near's interest, and has since, alone or with others, continued the publication. Defendants admit that they published some reprehensible articles in the *Twin City Reporter*, deny that they personally used it for blackmailing purposes, admit that by reason of their connection with the paper their reputation did become tainted and state that Bevens, while so associated with Near, did use the paper for blackmailing purposes. And Near says it was for that reason he sold his interest to Bevens.

In a number of the editions defendants charge that, ever since Near sold his interest to Bevens in 1919, the *Twin City Reporter* has been used for blackmail, to dominate public gambling and other criminal activities and as well to exert a kind of control over public officers and the government of the city.

The articles in question also state that, when defendants announced their intention to publish the *Saturday Press*, they were threatened, and that soon after the first pub-

lication Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence and was not unprepared to repel it. There is much more of like significance.

The long criminal career of the Twin City Reporter—if it is in fact as described by defendants—and the arming and shooting arising out of the publication of the Saturday Press, serve to illustrate the kind of conditions, in respect of the business of publishing malicious, scandalous and defamatory periodicals, by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.

In his work on the Constitution (5th ed.) Justice Story, expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," said (§ 1880):

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow-citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the inno-

cent; might prejudice all a man's civil, and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassination and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, *that every man shall be at liberty to publish what is true, with good motives and for justifiable ends.* And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form." (Italicizing added.)

The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the *previous restraints* referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152): "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [of 1688], is to subject all free-

dom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”²

Story gives the history alluded to by Blackstone (§ 1882):

“The art of printing soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king’s proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books; and during the Commonwealth (such is human frailty and the love of power even in republics!) they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree of 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force; but it was

² May, Constitutional History of England, c. IX. Duniway, Freedom of the Press in Massachusetts, cc. I and II. Cooley, Constitutional Limitations (8th ed.) Vol. II, pp. 880-881. Pound, Equitable Relief against Defamation, 29 Harv. L. Rev. 640, 650 et seq. Madison, Letters and Other Writings (1865 ed.) Vol. IV, pp. 542, 543. *Respublica v. Oswald*, 1 Dall. 319, 325. Rawle, A View of the Constitution (2d ed. 1829) p. 124. Paterson, Liberty of the Press, c. III.

so strongly resisted by Parliament that it expired in 1694, and has never since been revived."

It is plain that Blackstone taught that under the common law liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published. And, as above shown, Story defined freedom of the press guaranteed by the First Amendment to mean that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends." His statement concerned the definite declaration of the First Amendment. It is not suggested that the freedom of press included in the liberty protected by the Fourteenth Amendment, which was adopted after Story's definition, is greater than that protected against congressional action. And see 2 Cooley's Constitutional Limitations, 8th ed., p. 886. 2 Kent's Commentaries (14th ed.) Lect. XXIV, p. 17.

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. The controlling words are "All persons guilty of such nuisance may be enjoined, as here-

inafter provided. . . . Whenever any such nuisance is committed . . . an action in the name of the State" may be brought "to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, *from further committing, conducting or maintaining any such nuisance.* . . . The court may make its order and judgment permanently enjoining . . . defendants found guilty . . . from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. . . ." There is nothing in the statute³ purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.

³ § 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

* * * * *

In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report [resort] to issues or editions of periodicals taking place more than three months before the commencement of the action.

§ 2. Whenever any such nuisance is committed or is kept, maintained, or exists, as above provided for, the County Attorney of any

The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined it is hard to understand why the one resulting from a regular business of malicious defamation may not.

It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious

county where any such periodical is published or circulated . . . may commence and maintain in the District Court of said county, an action in the name of the State of Minnesota . . . to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, from further committing, conducting, or maintaining any such nuisance. . . .

§ 3. The action may be brought to trial and tried as in the case of other actions in such District Court, and shall be governed by the practice and procedure applicable to civil actions for injunctions.

After trial the court may make its order and judgment permanently enjoining any and all defendants found guilty of violating this Act from further committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated.

The court may, as in other cases of contempt, at any time punish, by fine of not more than \$1,000, or by imprisonment in the county jail for not more than twelve months, any person or persons violating any injunction, temporary or permanent, made or issued pursuant to this Act.

assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.

The judgment should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

UNITED STATES *v.* EQUITABLE TRUST COMPANY OF NEW YORK ET AL.

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

No. 21. Argued December 1, 2, 1930.—Decided June 1, 1931.

1. It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. P. 744.
2. A full-blood Creek Indian who was insane and under an Oklahoma guardian, owned an allotment which under the Act of May 27, 1908, was subject to restrictions against "alienation, contract to sell, power of attorney, or any other encumbrance." It was leased by the guardian, with the approval of the probate court and the Secretary of the Interior, for oil and gas extraction. A large fund, accumulated from the lease royalties, came into the hands of the Secretary, in trust for the Indian, and was subsequently distributed upon a written request in the name of the Indian and bearing his thumb-mark, but which he was incapable of understanding and which was procured by fraud. Unable to induce remedial action by the Secretary and the Attorney General, the guardian, as next friend of the Indian, brought a suit, in which the Department of Justice at length took part, and which resulted in recovery of a large part of the fund. *Held:*

(1) That the next friend and attorneys for the Indian were entitled to reasonable allowances for services and expenses, even if the statutory restrictions upon the land applied to the fund. P. 745.

(2) The United States, by its intervention and participation, impliedly consented to such allowances. P. 745.

(3) The allowances to attorneys should not extend to services in other litigation, and should be adjusted to the hazard of the case, the nature and extent of the services, the amount recovered and the special protection due to a mental incompetent. P. 746.

34 F. (2d) 916, modified and affirmed.

CERTIORARI, 280 U. S. 550, to review a decree which sustained, with reductions, allowances made by the District Court for services and expenses in a suit to recover a fund belonging to an Indian. See also, 21 F. (2d) 325; 26 *id.* 350; 278 U. S. 626.

Assistant Attorney General Richardson, with whom *Attorney General Mitchell* and *Messrs. Nat M. Lacy* and *Pedro Capo-Rodriguez* were on the brief, for the United States.

Mr. John W. Davis argued the cause and filed a brief for respondents. *Messrs. Carroll G. Walter*, *Rayburn L. Foster*, *Almond D. Cochran*, and *Harrison Tweed* also filed briefs for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This writ brings under review a supplemental decree making allowances for attorney fees, expenses, etc., in a suit, instituted by a next friend, to recover and preserve a trust fund belonging to Jackson Barnett, an incompetent Creek Indian, and directing that the allowances be paid from that fund. The allowances are challenged by the United States as in conflict with existing restrictions on the disposal of the trust fund, and as excessive.

Barnett is a full-blood Creek Indian, so enrolled, who received an allotment out of the Creek tribal lands when they were divided in severalty pursuant to congressional

legislation.¹ By that legislation and an amendatory act² his right and title under the allotment and the ensuing patent were subjected to restrictions against "alienation, contract to sell, power of attorney, or any other encumbrance" prior to April 26, 1931,³ save in virtue of a full or partial removal of the restrictions by the Secretary of the Interior, and against leasing for oil, gas or other mining purposes, save with the approval of that officer.

In 1912 the probate court of the county of Barnett's residence, in Oklahoma, adjudged him a mental incompetent and appointed a guardian of his estate. Later in that year Barnett and the guardian (the former described as "an incompetent,") with the approval of that court and of the Secretary of the Interior, executed to one Bartlett an oil and gas lease of the land allotted to Barnett. The lease required that the royalties be paid to a local representative of the Secretary of the Interior and held for Barnett's benefit.

Royalties came in rapidly. In 1920 they had produced in the hands of the Secretary's local representative a fund of about \$1,000,000, after various small sums had been turned over to the Oklahoma guardian for Barnett's support. Near that time the accumulated fund was taken over by the Secretary, invested in U. S. Liberty Bonds and held by him for Barnett's use.

News of Barnett's wealth became widespread and, thereafter, as was found by the district court, he was kidnapped by an adventuress who took him to two States other than that of his residence and had him go through a marriage ceremony with her in both; was harassed and annoyed by her attorneys and their allies; and on De-

¹ Acts March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500.

² Act May 27, 1908, c. 199, 35 Stat. 312.

³ Extended to April 26, 1956, by Act May 10, 1928, c. 517, 45 Stat. 495.

ember 15, 1922, was induced by them to put his thumb mark upon an instrument, not understood by him, requesting the Secretary of the Interior to distribute the greater part of the trust fund in the latter's custody by giving \$550,000 in Liberty Bonds to the wife, and a like sum in such bonds to the American Baptist Home Mission Society on condition that it pay for his use \$20,000 a year during the remainder of his life. Barnett was then about 73 years of age and the designated annuity was less than the yearly interest on the bonds to be given to that society.

On February 1, 1923, the Secretary of the Interior approved that instrument, and soon after approving it he distributed the \$1,100,000 in Liberty Bonds as requested.

After the distribution was effected the wife took Barnett to California, and on her application a court of that State, in 1924, adjudged him an incompetent, incapable of caring for his person or estate, and appointed a guardian.

The Oklahoma guardian, on learning of the distribution, invoked the assistance of reputable attorneys with a view to asserting and protecting Barnett's interest in the bonds thus separated from his trust fund. These attorneys acquainted themselves with Barnett's mental incompetency and the other facts bearing on the validity of the distribution, brought the facts to the attention of the Secretary of the Interior and earnestly and repeatedly requested that officer to take steps to secure a restoration of the bonds to the trust fund. The Secretary declined to take such action, insisted the distribution was valid and must stand, and refused to permit any moneys under his control and belonging to Barnett to be used in an effort to recover the bonds. The attorneys then laid the matter before the Department of Justice and urged the institution of suits on the part of the United States for the revocation of the distribution and the return of the bonds,

but this request, like that to the Secretary of the Interior, failed.

Thereafter, on January 22, 1925, the attorneys brought a suit in equity in the name of Barnett, by Elmer S. Bailey as next friend, against the American Baptist Home Mission Society and others to cancel the gift to that society and to protect and preserve Barnett's interest in the bonds so given and the income therefrom. Bailey, the next friend, was the Oklahoma guardian who had invoked the assistance of the attorneys. The suit was brought in the United States District Court for the Southern District of New York. Other suits relating to the other bonds were brought elsewhere, but they are without bearing here.

After the suit was begun the Secretary of the Interior continued to oppose the effort to annul the distribution—and this notwithstanding he was advised in a letter of February 9, 1925, from the then Attorney General, Mr. Stone, to whom he had stated his opposition two days before, that the distribution appeared to be entirely unauthorized and that the Government was in duty bound to use its best efforts to assist in recovering the bonds. Mr. Stone retired from the office of Attorney General soon after the date of that letter, and thus was unable to carry his view into effect.

On January 20, 1926, the succeeding Attorney General, at the solicitation of the next friend and his attorneys, sought and obtained leave for the United States to intervene in the suit and thereby participate in the effort to effect a recovery of the bonds and their income for Barnett's benefit. After the intervention was accomplished the attorneys for the next friend and the solicitors for the United States harmoniously prosecuted the cause to a successful conclusion. All rendered commendable service, but in many particulars the leading part and major burden fell to the attorneys for the next friend.

On the final hearing the court found that Barnett was illiterate and so stunted and undeveloped mentally that he was incapable of managing his own affairs or of understanding a transaction like the one in question; that the wife and her attorneys and allies, with selfish motives, induced him to place his thumb mark on the instrument requesting the distribution; and that he did this without any real comprehension or knowledge of what he was doing. The court also ruled that the Secretary of the Interior could not by his approval give validity to a gift which the apparent donor by reason of mental incompetency was incapable of understanding or making; that the defendants, although blameless, acquired no property or beneficial interest through the purported gift and must be regarded as holding the bonds and the income therefrom as the property of Barnett; and that as the bonds were wrongly taken from the trust fund in the custody of the Secretary of the Interior, they and the income from them (less such allowances as the court should require to be paid therefrom for services and disbursements connected with the recovery) should be restored to that fund and there held for Barnett agreeably to applicable laws of Congress.⁴ A decree to that effect was entered and an attempted appeal by one of the defendants proved of no avail.⁵

The court later on, pursuant to a reservation in the decree, took up the question of what, if any, allowances should be made for services and disbursements. Applications for such allowances were made by the attorneys for the defendants, by the next friend and by his attorneys. All were opposed by the United States. The court rejected the application of the attorneys for the defendants and by a supplemental decree allowed to the next friend \$7,500 for his services and allowed to his at-

⁴ 21 F. (2d) 325.

⁵ 26 F. (2d) 350; 278 U. S. 626.

torneys \$184,881.08 for their services and \$4,282.93 to reimburse them for out-of-pocket expenses. There were also directions that these allowances be paid out of the fund which had been the subject of the litigation and that the fund as thus reduced be restored to the custody of the Secretary of the Interior conformably to the prior decree. On an appeal by the United States the Circuit Court of Appeals reduced the allowance for the services of the attorneys for the next friend to \$100,000 and sustained the other allowances.⁶ This Court then granted a petition by the United States for a further review on a writ of certiorari.

It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. "Such a rule of practice," it has been said, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress."⁷

Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court, by charging the fund with the costs and expenses and requiring their payment therefrom, would be disposing of a part of the fund in violation of applicable restrictions.

⁶ 34 F. (2d) 916.

⁷ 36 N. J. Eq. 456, 458; 1 Daniell's Chancery Pl. & Pr., 6th Am. ed., *pp. 69, 79. And see *Trustees v. Greenough*, 105 U. S. 527, 532, *et seq.*; *Central Railroad & Banking Co. v. Pettus*, 113 U. S. 116, 123.

We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees; but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust*, such as Barnett was shown to be.

The refusal of the Secretary of the Interior, and the failure of the Department of Justice, to take any steps to correct the wrong amply justified the institution, in 1925, of the suit in the name of Barnett by the next friend. The United States intervened only after the suit had proceeded for a full year. Its purpose in intervening, as shown by the record, was not to supplant or exclude the next friend and his attorneys, but to aid in establishing and protecting Barnett's interest in the fund in question. In its petition of intervention it prayed that this fund "after deducting the reasonable expenses of this litigation" be restored to the custody of the Secretary of the Interior. Later on it acquiesced in an order allowing the next friend's attorneys \$3,000 from the fund to meet expenses about to be incurred. In all the proceedings which followed the intervention it coöperated with the next friend to the single end that the diverted fund be recovered for Barnett's benefit. And both were satisfied with the main decree when it was rendered.

When all is considered, we are brought to the conclusion that the United States by its intervention and participation in the suit consented, impliedly at least, that reasonable allowances be made from the fund, under the

rule before stated, for the services and expenses of the next friend and his attorneys.⁸

We come then to the question whether the allowances were excessive. Counsel for the United States now confine their criticism to the one for the attorneys' services.

The District Court apparently included some services in other litigation, particularly in Oklahoma. But the Circuit Court of Appeals excluded them, and we think its action was right. The nature of the other litigation was such that it could neither disturb the prosecution of this suit nor affect the outcome.

While the Circuit Court of Appeals reduced the allowance to \$100,000, it stated that \$50,000 would have been enough but for the hazard. We think the hazard was small and that the allowance should have been \$50,000. The material facts were few and demonstrable; and the applicable legal principles were fairly certain. Of course, there was need for intelligent research and action; but otherwise there was not much hazard. While the record shows that these attorneys did their part well, it also shows that, after the intervention of the United States, the attorneys of the latter contributed much helpful service. The fund which was recovered was large, and of course this had a bearing on what was reasonable, but it gave no license to go further.

The fund belonged to an Indian who was mentally incompetent. He had no voice in selecting the attorneys and could have none in fixing their fees. Thus, justice to him required that special care be taken to confine the fees to what was reasonable. And by applying that standard, justice would also be done to the attorneys.

As before indicated, we think the allowance of \$100,000 unreasonably high and that to bring it within the standard of reasonableness it should be reduced to \$50,000.

⁸ *The Siren*, 7 Wall. 152, 154; *United States v. The Thekla*, 266 U. S. 328, 339-340. And see *New York Dock Co. v. The Poznan*, 274 U. S. 117, 121.

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Statement of the Case.

The supplemental decree is modified accordingly and as so modified is affirmed.

Decree modified and affirmed.

MR. JUSTICE STONE did not participate in the consideration or decision of this case.

MOTT *v.* UNITED STATES.

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

No. 78. Argued December 2, 1930.—Decided June 1, 1931.

1. The United States may sue in behalf of an Indian ward for the purpose of asserting and enforcing his interest in property diverted from a trust fund while being administered by the Government's officers. P. 750.
2. Authority of the Secretary of the Interior to withhold his approval, necessary to make good a lease of a restricted Indian allotment, includes the lesser authority to give his approval upon condition that the royalties from the lease shall be paid to a representative of the Secretary in trust for the Indian and shall be disbursed only with the Secretary's sanction. P. 751.
3. A fund held by the Secretary of the Interior for a full-blood Creek Indian, which was derived from royalties on the lease of the Indian's restricted allotment (Act of May 27, 1908) and which is held by the Secretary in trust for the Indian and not to be disbursed without the Secretary's consent, is not subject to be disposed of by the Secretary merely at his own volition. P. 751.
4. Where the Secretary disbursed such a fund upon a written request which purported to come from the Indian but which the Indian was mentally incompetent to make or understand, the disbursement was unauthorized. P. 752.
5. In such a case, there is no ground for contending that the Secretary could supply the necessary intent for the incompetent or that there is in the transaction an implied finding of competency that may not be questioned in the courts. P. 752.

37 F. (2d) 860, affirmed.

CERTIORARI, 281 U. S. 714, to review a decree which reversed a decree, 33 F. (2d) 340, dismissing the bill in a

suit by the United States to recover certain bonds on behalf of an Indian.

Mr. Charles B. Rogers for petitioner.

Solicitor General Thacher, Assistant Attorney General Richardson, and Messrs. Nat M. Lacy and Paul D. Miller were on the brief for the United States.

Messrs. John W. Davis, Hugh H. O'Bear, Carroll G. Walter, Rayburn L. Foster, and Almond D. Cochran, by special leave of Court, filed a brief as amici curiae.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit brought by the United States on behalf of Jackson Barnett, a full-blood Creek Indian, to recover certain United States bonds, charged to have been wrongly diverted from a trust fund held for him, or their proceeds or value if they have been converted.

A second amended bill of complaint was tendered for filing, to which the defendant objected on the ground that it did not state a cause of action. The court, treating the objection as if it were a motion to dismiss the tendered complaint after filing, held that no cause of action was stated and dismissed the suit.¹ On appeal the Circuit Court of Appeals held that a cause of action was adequately stated and reversed the decree with directions to permit the complaint to be filed.² Certiorari was then granted by this Court.

The suit arises out of the same transactions that were the basis of the litigation described in *United States v. Equitable Trust Co.*, *ante*, p. 738.

The case stated in the tendered complaint is as follows. Barnett received an allotment from the lands of

¹ 33 F. (2d) 340.

² 37 F. (2d) 860.

the Creek tribe. His title was in fee simple, but by reason of his being a full-blood Creek was subject to restrictions against alienation and leasing, except with the approval of the Secretary of the Interior.³ Besides being under that disability, he was and still is by reason of mental infirmity incapable of managing his own affairs, comprehending the nature or extent of his property or understanding any kind of business transaction. Because of his mental infirmity he was adjudged an incompetent and subjected to guardianship by the probate court of the county of his residence in Oklahoma.

Apart from the approval of the lease about to be mentioned, the restrictions incident to his status as a full-blood Creek have never been removed or qualified.

In 1912 Barnett, with his guardian joining therein, executed a lease of his land for oil and gas purposes, the lease being approved by both the probate court and the Secretary of the Interior. The lease and the Secretary's regulations, which were made part of the lease, required that the royalties be paid to a local representative of the Secretary in trust for Barnett and disbursed only with the Secretary's sanction. In time the royalties yielded a large fund, which the Secretary invested for Barnett's benefit in United States bonds.

In February, 1923, the Secretary, at Barnett's request, distributed the larger part of the bonds in gifts. One gift was to Barnett's purported wife and included \$550,000 of the bonds. His request that the gifts be made was in the form of a written instrument on which he placed a thumb mark signature—he being then incapable, by reason of his mental infirmity, of comprehending or understanding the nature, import or effect of the instru-

³ Acts March 1, 1901, c. 676, 31 Stat. 861; June 30, 1902, c. 1323, 32 Stat. 500; May 27, 1908, c. 199, 35 Stat. 312. And see Act May 10, 1928, c. 517, 45 Stat. 495.

ment. The Secretary approved the request by an endorsement on the instrument and then transferred the bonds to the designated donees.

The wife immediately delivered \$150,000 of the bonds to one McGugin, and he thereupon passed \$15,000 of them to the defendant, Marshall L. Mott. Both McGugin and Mott at the time had full knowledge that the wife received the bonds as a gift out of Barnett's trust fund, that that fund represented royalties from the oil and gas lease of his restricted land, and that by reason of mental infirmity he was without capacity to initiate or make a gift or disposal of the bonds.

Mott has refused and still refuses to return the bonds so received by him to the United States or to account for their proceeds or value.

The prayer of the complaint is that Mott be required to surrender into court the bonds, or their proceeds or value if they have been converted, to the end that they may be restored to the fund from which they were diverted and there held for Barnett's use and benefit.

We are of opinion that the facts thus shown are such as to entitle the United States to the equitable relief which it seeks. Its right to sue in behalf of an Indian ward for the purpose of asserting and enforcing his interest in property diverted from a trust fund while being administered by the Government's officers is obvious. Barnett is such a ward, for he is a full-blood Creek Indian who has not been relieved from the restrictions we have described. The approval by the Secretary of the Interior of the oil and gas lease did not terminate them. It made the lease effective, but otherwise left the restrictions in full force. Besides, it subjected the royalties to restrictions similar to those applying to the leased land from which the royalties would come. This was accomplished by a provision in the lease whereby, agreeably to the

Secretary's regulations, the royalties were to be paid to a representative of the Secretary in trust for Barnett and disbursed only with the Secretary's sanction. The authority of the Secretary to withhold his approval includes the lesser authority to give his approval upon condition that the royalties be thus conserved and protected.⁴

But while the Secretary is authorized to prevent improvident alienation or leasing by restricted Creek allottees, he is not authorized to alien or lease in their stead and right. This is plainly the effect of the statutory provisions which we quote in the margin.⁵ If an allottee chooses to alien or lease, the Secretary, if not satisfied that the transaction will be of benefit to the Indian, can prevent it by not approving it. But, if the allottee chooses not to alien or lease, the Secretary cannot do so for him, even though it appears that the Indian would be benefited. And of course the Secretary cannot merely

⁴*Sunderland v. United States*, 266 U. S. 226, 235; *Starr v. Campbell*, 208 U. S. 527, 533; *United States v. Thurston County*, 143 Fed. 287, 291; *National Bank of Commerce v. Anderson*, 147 Fed. 87. 90.

⁵The Act of May 27, 1908, c. 199, 35 Stat. 312, provides:

"Sec. 1. . . . That . . . all allotted lands of enrolled full-bloods . . . shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance . . . except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. . . ."

"Sec. 2. That all lands other than homesteads . . . from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

of his own volition make gifts or donations of the Indian's restricted land.

Like principles apply to restricted funds such as that arising from Barnett's royalties. That fund was his individual property and as such was within the protective guaranties of the Constitution.⁶ No statute purported to give any authority for taking it from him. Nor was there anything in the Secretary's regulations indicative of an assumption of such authority. On the contrary, they contemplated that such funds would be held, conserved and protected for the benefit of their Indian owners.

We need not inquire, as the Circuit Court of Appeals appears to have done, whether, had Barnett been mentally competent, the gifts named in his purported request could have been made from his trust fund. That is not this case. Barnett, according to the complaint, was mentally incompetent to a degree which made him wholly incapable of understanding, intending or making such a request. Therefore the instrument, although bearing his thumb mark, was not his act and could not bind him. With it eliminated, the gift in question stood as if made by the Secretary merely on his own volition. This was beyond his authority.

The suggestion that his approval supplied the necessary intent on the part of Barnett is but another way of saying that the Secretary could make the gift merely of his own volition. The further suggestion that he must be presumed to have found Barnett free from disability and that this determination cannot be questioned in the courts is without merit. If good as to a mental incompetent, it would be good as to an Indian under age or

⁶ *Choate v. Trapp*, 224 U. S. 665, 677. And see *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 113.

even an infant. The suggestion has been disapproved by the Circuit Court of Appeals for the Eighth Circuit.⁷

Decree affirmed.

MR. JUSTICE STONE did not participate in the consideration or decision of this case.

HILARY HALBERT, JR., ET AL. *v.* UNITED STATES.

RICH HALBERT *v.* SAME.

VERNON SIDNEY HALBERT *v.* SAME.

SIDNEY E. HALBERT *v.* SAME.

PICKERNOLL ET AL. *v.* SAME.

LULU M. ELLIOTT ET AL. *v.* SAME.

PETIT ET AL. *v.* SAME.

BARICHIO ET AL. *v.* SAME.

EDNA MAY ELLIOTT ET AL. *v.* SAME.

CHAS. G. ELLIOTT, JR., ET AL. *v.* SAME.

RUBENS ET AL. *v.* SAME.

WALKOWSKY ET AL. *v.* SAME.

ROLFSON ET AL. *v.* SAME.

PROVOE ET AL. *v.* SAME.

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

Nos. 141-154. Argued March 11, 12, 1931.—Decided June 1, 1931.

1. Indians of the Chehalis, Chinook and Cowlitz Tribes, not allotted elsewhere, are among those who, under the Act of March 4, 1911, are entitled to take allotments on the Quinalt Reservation in the State of Washington. P. 760.
2. Personal residence on the reservation is not essential to the right of allotment. P. 762.

⁷ *Jennings v. Wood*, 192 Fed. 507.

3. The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership ends. P. 762.
4. Under the operation of this rule an Indian woman loses her tribal membership when she marries a white man, separates from the tribe and lives with him among white people; but it is the separation from the tribe, rather than the marriage, which puts an end to the membership, the marriage usually serving to explain the separation and illustrate that it is intentional and permanent. P. 763.
5. But where the Indian woman, after her marriage with a white, remains in the tribal environment and continues the tribal affiliation, the membership is not affected. P. 763.
6. If the husband be a citizen of the United States, the woman by marriage becomes also a citizen; but there is no incompatibility between tribal membership and United States citizenship. *Id.*
7. The children of a marriage between an Indian woman and a white man usually take the status of the father; but if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother. P. 763.
8. Whether grandchildren of such a marriage have tribal membership depends on the status of the father or mother as the case may be, and not on that of a grandparent. P. 763.
9. As to marriages occurring before June 7, 1897, (as the marriages here did) between a white man and an Indian woman, who was Indian by blood rather than by adoption—and who on June 7, 1897, or at the time of her death, was recognized by the tribe,—the children have the same right to share in the division or distribution of the property of the tribe of the mother as any other member of the tribe; but this is in virtue of the Act of June 7, 1897. *Id.*
10. The Court will decline to consider questions not raised by the assignment of errors and as to which there is no appropriate assurance that the record contains all the evidence material to their decision. P. 764.

38 F. (2d) 795, 799, 805, 806, reversed.

District Court affirmed.

CERTIORARI, 282 U. S. 818, 819, to review decrees reversing decrees recovered by the plaintiffs in suits under the

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Opinion of the Court.

Act of February 6, 1901, to establish and enforce rights to allotments on an Indian reservation.

Mr. Webster Ballinger argued the cases, and *Messrs. Overton G. Ellis, Stuart H. Elliott, H. G. Rowland, and Dix H. Rowland* filed a brief, for petitioners.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher* and *Messrs. Pedro Capo-Rodriguez* and *Paul D. Miller* were on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

These suits were brought in the District Court for the Western District of Washington to establish and enforce asserted rights to allotments, each of 80 acres, in the Quinaielt Indian Reservation in the southwestern part of that State. Authority for bringing the suits is found in the statute providing that any person who is "in whole or in part of Indian blood or descent" and claims to be entitled to an allotment of land under any law of Congress may prosecute a suit against the United States to determine and give effect to such right.¹ The suits were heard together in the District Court, where decrees were given for the plaintiffs, and again in the Circuit Court of Appeals, where those decrees were reversed.² The cases are here on certiorari.

The plaintiffs are all of Indian blood and descent, but none is a full-blood Indian. Some are members of the Chehalis, Chinook and Cowlitz tribes, and the question is presented whether these tribes are among those whose members are entitled to allotments from lands within

¹ Act of February 6, 1901, c. 217, 31 Stat. 760.

² 38 F. (2d) 795, 799, 805, 806.

the Quinaielt Reservation. Many do not personally reside on the reservation, and we are asked to decide whether this defeats their claims. Some are the issue, either children or grandchildren, of a marriage between an Indian woman and a white man, and whether this is an obstacle to allowing their claims is a further question.

In 1855 the Quinaielt, Quillehute (also called Quileute), Chehalis, Chinook and Cowlitz Indians were neighboring tribes in the southwesterly section of what is now the State of Washington. They were all known as "fish-eating Indians" and lived in small villages adjacent to the Pacific coast and the lower reaches of the Columbia River. The Quits and Ozettes were also fish-eating tribes living in coast villages a little north of the others, the Ozettes being farther north than the Quits.

During the early part of 1855 negotiations were had between a representative of the United States and representatives of the Quinaielt, Quillehute, Chehalis, Chinook, Cowlitz and Quit tribes looking towards a cession by these tribes of much territory and their consolidation within a single reservation. These negotiations failed of their full purpose, but resulted in a treaty between the United States and the Quinaielts and Quillehutes which was signed on July 1, 1855, and January 25, 1856.³ By this treaty the Quinaielts and Quillehutes ceded a large district to the United States, and the latter engaged to reserve for their use and occupancy a tract "sufficient for their wants," to which when established they were to remove. There were also provisions in the treaty securing to the Indians the right of taking fish "at all usual and accustomed grounds and stations," in common with all citizens of that section, and of erecting temporary houses to be used in that connection; authorizing the President, at his discretion, to survey the whole or any

³ 12 Stat. 971.

part of the reserved lands and assign the same to such individuals or families "as are willing to avail themselves of the privilege and will locate on the same as a permanent home"; and consenting that the President might "consolidate" the Quinaielts and Quillehutes and "other friendly tribes," whenever in his opinion the public interest and the welfare of the Indians would be promoted by it.

Under the treaty a reservation of about 10,000 acres at the mouth of the Quinaielt River was provisionally selected and its boundaries surveyed. Some years later the local superintendent reported that the reservation, by reason of being small and containing but a small amount of agricultural and pasture lands, had proved unattractive to the Indians; that the Chehalis, Chinook and other coastal tribes in southwestern Washington, like the Quinaielts and Quillehutes, who were parties to the treaty, were all "emphatically fish-eaters," drawing their subsistence almost wholly from the water, and that all of these fish-eating tribes should be collected on a single reservation, including suitable fisheries. To that end he recommended that the existing reservation be greatly enlarged and designated the territory which he believed should be included in it. This recommendation led to an order of November 4, 1873, by the President, the material parts of which are as follows:⁴

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856, and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory . . . be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, . . ."

⁴Executive Orders Relating to Indian Reservations (1912), p. 206.

This enlarged reservation contained about 200,000 acres and included the prior provisional reservation of 10,000 acres.

By an Act of March 4, 1911,⁵ Congress directed the Secretary of the Interior to make allotments on the Quinaielt Reservation under the provisions of the allotment laws "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty [before named] and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." This direction was followed by a proviso declaring, "The allotments authorized herein shall be made from the surplus lands of the Quinaielt Reservation after the allotments to the Indians thereon have been completed." The reference to "other reservations" may be sufficiently explained by stating that some small reservations⁶ had been set aside theretofore for particular villages of the Hoh, Quileute, Ozette, Quit, Chehalis and other fish-eating tribes, but that these reservations were in some instances limited to 640 acres and were in no instance large enough to provide allotments to more than a small fraction of the Indians thereon.

When the bill which became the Act of March 4, 1911, was introduced in Congress it contained a direction that allotments be made to "all members of the Hoh, Quileute and Ozette tribes of Indians in Washington who may elect" etc., and said nothing about other tribes; but in the course of its passage this provision was amended so as to read: "to all members of the Hoh, Quileute,⁷ Ozette or other tribes of Indians in Washington who are

⁵ c. 246, 36 Stat. 1345.

⁶ Executive Orders Relating to Indian Reservations (1912), pp. 172-175, 195, 200, 205, 206 (Shoalwater).

⁷ Through some oversight the amendment placed the Quileute tribe on both sides of the affiliation.

affiliated with the Quinaielt and Quileute⁷ tribes in the treaty [before named] and who may elect," etc. This shows that Congress intended to include tribes not included in the original provision; and it shows further that they were to be tribes having, like the Hoh and Ozette tribes, some affiliation with the Quinaielt and Quileute tribes "in the treaty." Probably "in" was used in the sense of "under" or "through." Strictly speaking there was no affiliation in the treaty. But the treaty did contain a provision under which affiliation might be brought about. It authorized the President to consolidate the Quinaielt and Quileute tribes with other friendly tribes. Under this provision he made the order establishing the enlarged reservation for the use, not only of the Quinaielt and Quileute tribes, but also of the Hoh, Quit and other coastal tribes of fish-eating Indians "in that locality," evidently meaning in that section of the Territory of Washington.

That was a step towards consolidation. Other steps followed, one being that in 1905 the Indian Bureau began making allotments to members of all of these tribes. This work was carried on under the treaty, the executive order and the general allotment law, and it had progressed prior to the Act of 1911 to the point where over 750 allotments had been completed, more than half of which were to members of the various fish-eating tribes in that section other than the Quinaielt and Quillehute. It therefore was altogether appropriate at that time to speak of these other tribes as affiliated with the Quinaielt and Quillehute under the treaty.

The action of the administrative officers under the Act of 1911 has been almost uniformly in accord with the view just stated. In 1913 a bill was introduced in Congress to amend the Act of 1911 by specifically including the Cowlitz and some other fish-eating tribes in southwestern Washington not before named in the Act; and in a letter

responding to an inquiry about the need for the bill the Indian Bureau said: "It is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary." The Solicitor for the Department of the Interior so construed the treaty, executive order and Act of 1911 in an opinion rendered to the Secretary of the Interior, and that opinion was accepted as a guide in making further allotments. Possibly it was not followed when the administrative officers were dealing with the applications of the plaintiffs in these suits. As to that we are not advised. The record contains a stipulation showing that the applications were rejected but not disclosing the grounds of that ruling.

Our conclusion on the first question presented is that the Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere. The Circuit Court of Appeals held otherwise in some of the suits and in this we think it erred.

The Act of 1911 does not purport to make the right to an allotment dependent on a personal residence on the reservation. It is a special act relating only to this reservation. The land within the reservation is generally covered with a heavy growth of timber and is difficult of clearing. As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land. The treaty secures to them the right of taking fish at all usual and accustomed grounds. Most of them are fishermen, but a few find employment in lumber camps. Most of them have for many years resided in small villages outside the reservation. Some of the villages are within small reservations made by executive orders; but the majority of the Indians have always lived outside any reservation. When the Act of 1911 was passed more than 750 had been given allot-

ments. Of these not more than 1 out of 5 had ever resided on the reservation. It is probable that Congress was advised of the situation of these Indians when the special act was passed and carefully refrained from placing anything in the act indicative of a purpose to make personal residence on the reservation an element of the right to an allotment.

These Indians are not the usual reservation Indians. They never were placed on the reservation or required to live within its limits. Their situation is quite like that of the Walla Walla tribe which at one time engaged the attention of this Court.⁸ *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 408-12. A special act directed the allotment of the lands of that tribe. In its title the act was described as providing for allotments to the Indians "residing upon" the reservation, and in its first sentence there was a direction that allotments be made to members of the tribe "residing upon" the reservation. After stating the situation to which the act was to be applied this Court said:

"When such a large percentage of allottees upon this reservation resided, as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed was intended to limit the right to an allotment to those actually residing on the reservation to the exclusion of a majority of the members of the different bands or tribes. The fact of such non-residence is presumed to have been known to Congress, and the act should be construed with reference to that knowledge. . . . The purpose would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation."

While the Act of 1911 provides that the allotments shall be made under the "allotment laws of the United

⁸ And see *Bonifer v. Smith*, 166 Fed. 846.

States," we think this provision hardly could have been intended to make any provision in those laws requiring residence applicable to the situation we have described. The Act of 1911 is not merely silent respecting residence; it directs that allotments be made to "all members" of the tribes designated who elect to take allotments upon the Quinaielt Reservation rather than on "the reservations set aside for these tribes." These words are indicative of a purpose to exclude a residential requirement.

The record shows that the officers administering the Act did not confine the allotments to Indians actually residing on this reservation or one of the small ones, and also that they informed applicants that residence was not required. Counsel for the government admit that such has been the practice, and they set forth in their brief a letter of June 13, 1930, from the Secretary of the Interior to the Attorney General, reading as follows:

"The matter of residence upon the reservation was not insisted upon as a prerequisite to allotment, either before or after the passage of the Act of March 4, 1911 (36 Stat. L., 1345) so far as the Quinaielt and other Indians mentioned in the Act or those who were affiliated with the Quinaielt in the Treaty of 1855 and 1856 are concerned. A number of allotments have been made to those who have resided away from the reservation."

These considerations require, as we think, that personal residence on the reservation be held not essential under the Act of 1911 to the right to an allotment. The Circuit Court of Appeals took and applied the opposite view and in this we think it erred.

We come then to the question respecting the status of the issue, either children or grandchildren, of a marriage between an Indian woman and a white man.

The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share

in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.⁹ Under the operation of this rule an Indian woman loses her tribal membership where she marries a white man, separates from the tribe and lives with him among white people. But it is the separation from the tribe rather than the marriage which puts an end to the membership. The marriage usually serves to explain the separation and illustrate that it is intentional and permanent. But where the woman remains in the tribal environment and continues the tribal affiliation the membership is not affected. If the husband be a citizen of the United States, the woman by the marriage becomes also a citizen,¹⁰ but there is no incompatibility between tribal membership and United States citizenship.

The children of a marriage between an Indian woman and a white man usually take the status of the father; but if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother.

Whether grandchildren of such a marriage have tribal membership or otherwise depends on the status of the father or mother as the case may be, and not on that of a grandparent.

As to marriages occurring before June 7, 1897, (as the marriages here did) between a white man and an Indian woman, who was Indian by blood rather than by adoption,—and who on June 7, 1897, or at the time of her death, was recognized by the tribe,—the children have

⁹ *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307; *Gritts v. Fisher*, 224 U. S. 640, 642; *Sizemore v. Brady*, 235 U. S. 441, 446; *La Roque v. United States*, 237 U. S. 62, 66; *Oakes v. United States*, 172 Fed. 304, 307.

¹⁰ Act August 9, 1888, c. 818, 25 Stat. 392.

the same right to share in the division or distribution of the property of the tribe of the mother as any other member of the tribe, but this is in virtue of the Act of June 7, 1897.¹¹

So far as can be determined from the record the District Court rightly applied the rules stated in this opinion. The record does not purport to contain, and evidently does not contain, all the evidence that was produced on the hearing. The statement of it was prepared by counsel for the Government and the certificate is that the statement contains "all the evidence essential to the decision of the questions presented by the appeal of the defendant." The assignment of errors, which was then before the District Court, does not challenge the decision of any question of fact, but only rulings on questions of law. It is thus rather plain that the statement of evidence contains only so much of the evidence as was deemed essential to the decision of the latter. We now are asked to consider questions not raised by the assignment of errors and which cannot be properly decided without appropriate assurance that the record contains all the evidence that is material to their decision. We must decline to consider them.

Decrees of Circuit Court of Appeals reversed.

Decrees of District Court affirmed.

¹¹ c. 3, 30 Stat. 90. Other modifications of the general rule are found in the Acts of March 3, 1875, c. 131, § 15, 18 Stat. 420; February 8, 1887, c. 119, § 6, 24 Stat. 390; August 9, 1888, *supra*, § 2; May 8, 1906, c. 2348, 34 Stat. 182. And see Act June 2, 1924, c. 233, 43 Stat. 253.

Syllabus.

GEORGIA PUBLIC SERVICE COMMISSION *ET AL.* *v.*
 UNITED STATES *ET AL.*

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

No. 555. Argued April 30, 1931.—Decided June 1, 1931.

1. After a full hearing on the interstate rates on certain commodities, in connection with a complaint that corresponding intrastate rates were prejudicial to persons and localities in interstate commerce, the Interstate Commerce Commission fixed the interstate scale, found that there was no transportation reason for intrastate rates on a different basis, and left it to the state rate-fixing body, a party to the proceedings, to authorize a revision of the intrastate rates in harmony with the interstate adjustment. This not having been done, and the carriers having reopened the case before the Commission to determine whether the prescribed intrastate rates would result in undue prejudice to persons and localities in interstate commerce and in unjust discrimination against such commerce,—*held* that it was not necessary, under § 13 (4) of the Interstate Commerce Act, that the Commission should consider anew the reasonableness of the interstate rates, in the absence of evidence to show that conditions affecting them had changed since they were prescribed. P. 769.
2. An order of the Interstate Commerce Commission requiring carriers to establish intrastate rates not lower, distance considered, than those “contemporaneously applicable” to interstate transportation on the same commodities, etc., *construed* as referring to the interstate rates as maintained and applicable at the date of the order and not to such as might be made by the carriers in the future. P. 770.
3. An order of the Interstate Commerce Commission is to be construed in the light of its accompanying report. P. 771.
4. Possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order of the Interstate Commerce Commission affecting rates, otherwise valid and practicable of operation over a wide territory. P. 772.
5. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of

the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. P. 772.

6. Such specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. *Id.*
 7. Findings of the Commission as to undue disparity between intrastate and interstate rates *held* sufficient to support an order, state-wide in operation, and governing many intrastate rates. P. 773.
 8. In a proceeding under § 13 (4) involving the examination and readjustment of scales of intrastate rates, state-wide in scope and applicable to shipments between hundreds of points of origin and destination, general findings may be made from typical instances. P. 774.
 9. Whether the Commission should conform to its own previous decisions respecting the relation of rates to distance and to single and joint-line hauls, is a matter of administrative discretion not reviewable by a court. P. 774.
- 42 F. (2d) 467, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill to enjoin an order of the Interstate Commerce Commission. See also, 39 F. (2d) 167.

Mr. John S. Burchmore, with whom *Messrs. Luther M. Walter* and *Nuel D. Belnap* were on the brief, for the Georgia Public Service Commission et al., appellants.

Mr. Edgar Watkins, with whom *Mr. Mac Asbill* was on the brief, for the State Highway Board et al., appellants.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Mr. E. M. Reidy*, Assistant Chief Counsel, was on the brief, for the United States and the Interstate Commerce Commission, appellees.

Mr. Robert C. Alston, with whom Messrs. Frank W. Gwathmey and W. N. McGehee were on the brief, for the Atlantic Coast Line R. Co. et al., appellees.

Messrs. Moultrie Hitt, G. Kibby Munson, and Ben B. Cain, by special leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Rates on Chert, Clay, Sand, and Gravel Within State of Georgia, 122 I. C. C. 133, was a proceeding under § 13, paragraphs (3) and (4), of the Interstate Commerce Act in which the Commission was petitioned to determine whether certain intrastate carload rates on these products, prescribed by the Georgia Public Service Commission, were unduly prejudicial to persons or localities engaged in interstate commerce. Several related cases, arising out of complaints concerning interstate rates on like products between points in the southern territory, were heard on the same record and dealt with in the same report.¹ Therein, the Interstate Commerce Commission prescribed certain distance scales as a maximum reasonable for interstate single-line and joint-line rates between points in Georgia and points in other States; and found that there was no transportation reason for the maintenance of a different basis of intrastate carload rates for these commodities within the State of Georgia. It did not then enter an order in respect to the intrastate rates, because it

¹The original report embraced eight cases. It was followed by a further report (140 I. C. C. 85) which, after a further hearing, prescribed scales for certain specific points of origin and destination in Florida. In some respects all these orders are involved in the suit at bar.

believed "that the Georgia commission will cooperate in authorizing such revisions as might be necessary to bring their rates into harmony with the interstate adjustment herein approved." 122 I. C. C. 169-170.²

Thereafter the carriers applied to the Georgia Public Service Commission for leave to establish the same distance scales for intrastate traffic. The state Commission refused the application and directed them to establish a scale differing from that applicable to interstate traffic. With that direction the carriers complied; but they petitioned the federal Commission to re-open its proceedings and to determine whether the prescribed intrastate rates result, and will result, in undue prejudice to persons or localities in interstate commerce and in unjust discrimination against such commerce. The petition to re-open the case was granted; the state authorities were again given due notice; and various parties intervened to oppose or support the contested intrastate rates. Upon the supplemental hearing, the Interstate Commerce Commission found that such prejudice and discrimination had resulted, and will result, from the rates prescribed by the Georgia Commission; and ordered the carriers to establish intrastate rates "which shall not be

² In 1917 the Georgia Commission had undertaken to revise all intrastate class and commodity rates, but because of intervening federal control its order never became effective. After extensive hearings between 1921 and 1925, intrastate commodity rates for Georgia were prescribed. On April 1, 1925, these rates were revised on the commodities here involved. As a result of this order, eight carriers filed the petition which initiated the present proceeding. 122 I. C. C. 140.

In the original hearing, the federal Commission found that the prescribed 1925 intrastate rates had not theretofore been unjustly discriminatory against interstate traffic, but that existing interstate distance scales were virtually broken down by the maintenance of so-called depressed rates which were almost wholly unrelated to distance, and that comprehensive interstate distance scales should be established. 122 I. C. C. 154, 163, 169.

lower, distance considered, than the rates contemporaneously applicable" to the interstate commerce. 160 I. C. C. 309, 326.

To enjoin and set aside that order of the Interstate Commerce Commission, and to restrain the carriers from establishing intrastate rates pursuant thereto, two suits (now consolidated) were brought, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, in the federal court for northern Georgia. The plaintiffs are the Public Service Commission and the State Highway Board of Georgia; the defendants, the United States and the Interstate Commerce Commission. Carriers operating in Georgia and shippers intervened as defendants. The cases were heard by the District Court on an application for an interlocutory injunction, the bills and answers alone being introduced. The injunction was denied. *Georgia Public Service Comm. v. United States*, 39 F. (2d) 167. After final hearing on the full record of the proceedings before the Interstate Commerce Commission, the consolidated bill was dismissed. 42 F. (2d) 467. This appeal is from the final decree.

First. Appellants contend that the order of the Interstate Commerce Commission is void, because it was entered without the full hearing prescribed by § 13 (4). The argument is this. Paragraph 4 prescribes that "Whenever . . . the Commission, after full hearing, finds" a state rate to be unlawful because it causes undue prejudice or unjust discrimination, "it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged." Act of February 28, 1920, c. 91, § 416, 41 Stat. 456, 484, amending Act of February 4, 1887, c. 104, § 13, 24 Stat. 379, 383. The claim is that there was no "full hearing" before entry of the challenged order, because the Commission limited the supplemental hearing to the question of prejudice and discrimination, and refused to consider anew

the question of the reasonableness of the interstate scales. It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. *State Corporation Comm. v. Aberdeen & Rockfish R. Co.*, 136 I. C. C. 173, 180. But the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings; and at those hearings the Georgia Commission and the Highway Board were represented. Nearly eighteen months had elapsed since the original order,³ but no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate rates were prescribed as to require reconsideration of the issue. The appellants' objection to the procedure is unfounded.⁴

Second. Appellants contend that while the order prescribes a minimum and a maximum basis for intrastate rates, the minimum basis is so vague and uncertain as to

³ This order, establishing the so-called 17517 scales, was entered on January 21, 1927, and rates under it became effective October 1, 1927. The supplementary order of the Georgia Public Service Commission was entered March 13, 1928. The proceedings before the federal Commission were reopened on June 4, 1928.

⁴ The Commission stated: "For the purpose of determining whether or not this [the alleged discrimination] is the fact, the proceedings were reopened and the further hearing had. The scope of the further hearing was properly limited to the question indicated. If the contention made . . . in this regard were sound, then our efforts to secure coöperative action in situations such as here presented, instead of bringing about that result, could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely." 160 I. C. C. 313. Compare *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 591.

render the entire order void. The order requires the carriers to establish intrastate rates "which shall not be lower, distance considered, than those contemporaneously applicable to interstate transportation of the same commodities, in straight or mixed carloads, between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the Appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads." The claim is that this language leaves it doubtful whether the word "contemporaneously" refers only to rates in force at the time of the effective date of the original order, or also to such rates as may be made by the carriers from time to time thereafter, thereby raising or lowering future intrastate rates without the full hearing provided for by § 13 (4). We think it clear from the terms of the order that the interstate rates referred to are those now applicable and maintained. Compare *Shreveport Case*, 234 U. S. 342, 346-347; *Alabama v. United States*, 279 U. S. 229. When the order is read, as must be done, in the light of the report, *American Express Co. v. Caldwell*, 244 U. S. 617, 627, this and other alleged uncertainties are removed.⁵

⁵ Two other ambiguities are charged. It is urged that the phrase, "distance considered," is not complete since it does not indicate whether the distance of joint-line or single-line haul is meant. Under the original order establishing the 17517 scales, the rate is determined by the distance scale comprised in the shortest route over which carload traffic can be moved without transfer of lading, irrespective of whether such route necessitates a single or joint-line haul. This formula is readily applicable to intrastate shipments. It is also argued that since several carriers are charging less than the 17517 scales, the order is uncertain because it does not indicate whether the minimum intrastate scale is to be determined by the prescribed interstate scale or by the actual departures from it.

The order here challenged is state-wide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. *American Express Co. v. Caldwell*, 244 U. S. 617, 627. Such specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. Compare *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 591; Interstate Commerce Commission Rules of Practice, Rule XV (c); and the practice in *State Corporation Comm. v. Aberdeen & Rockfish R. Co.*, 136 I. C. C. 173; 161 I. C. C. 273, 286; 165 I. C. C. 31; 169 I. C. C. 728; Southern Class-Rate Investigation, 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I. C. C. 567; Eastern Class-Rate Investigation, 164 I. C. C. 314; 171 I. C. C. 481. It is true that the Georgia Public Service Commission petitioned the federal Commission for an interpretation of the order now challenged. But its petition, which occupies fourteen pages of the printed record, was in effect a petition for rehearing of the state-wide order.⁶ Compare *New England Divisions Case*, 261 U. S. 184, 204.

⁶ The state Commission requested a rehearing or a further order that the carriers file, within a definite time, complete intrastate schedules so that specific objection might be made. Since there were

Third. The appellants contend that the order is void because there are no adequate findings of undue disparity between the rates charged for intrastate transportation in Georgia and the rates actually in force for interstate transportation; and also because there was no finding that the intrastate rates imposed an undue burden upon the carriers' interstate revenues or that the alteration of the intrastate rates would produce additional revenue. The findings in the report are definite and comprehensive. There are, moreover, illustrative specific findings which confirm the general ones and show that in a real sense, and to a substantial degree, undue prejudice and discrimination to interstate shippers and localities have resulted and will result.⁷ The requirement of definiteness, to which attention was called in *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 86 and in *Florida v. United States*, 282 U. S. 194, 208, is also met.

hundreds of shipping and receiving points, every local municipality and county being a potential customer for these roadbuilding products, the enforcement of this request would have involved a complete reopening of the proceedings. A few specific difficulties in application were outlined in the state Commission's petition, but these were offered, not for definite rulings, but merely by way of illustrating defects in the order.

⁷ The findings as to prejudice to interstate shippers embraced almost all of the commodities considered and included large-scale producers which were able to absorb rate differentials in some parts of the State but could not compete in all parts. Moreover, rate differences were found to be highly detrimental because the commodities here involved are among the lowest valued for shipment, and the cost of transportation is a relatively large, and often conclusive, factor in the cost to consumers. The Commission compiled from the exhibits a series of tables which indicated that the rates prescribed by the state Commission were, within the usual intrastate traffic distances, either equal to or less than the 17517 scales for single-line hauls, and uniformly less than the interstate scales for joint-line hauls. 160 I. C. C. 314, 316. Similarity of operating and transportation conditions was clearly established and found.

Fourth. The appellants contend that the findings are unsupported by the evidence. When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579. Compare *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 83. While the order relates only to a few commodities, the scales of rates are state-wide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief. Compare *New England Divisions Case*, 261 U. S. 184; *Railroad Commission v. Chicago, B. & Q. R. Co.*, *loc. cit. supra*. The evidence was comprehensive in scope. It occupies 556 pages of the printed record; and there were besides 337 exhibits.⁸ The proof of the discrimination against interstate commerce was specific and typical, and was clearly sufficient to establish the undue prejudice to interstate shippers. Compare *Nashville, C. & St. L. Ry. Co. v. Tennessee*, 262 U. S. 318; *United States v. Illinois Cent. R. Co.*, 263 U. S. 515.

Fifth. Appellants contend that the order was an arbitrary exercise of the Commission's limited power over intrastate rates and that it constitutes an invasion of the sovereign rights of the State. It is urged, among other things, that while the findings require intrastate rates no lower, distance considered, than those contemporaneously applicable on interstate traffic, the Commission had theretofore consistently held that distance is not the sole controlling factor in rates;⁹ and also that

⁸ By stipulation these, and the various tariff schedules, were not reprinted but were brought here in their original form.

⁹ It is pointed out that where traffic density varies or transportation conditions are different, the Commission has recognized that distance

the Commission's allowance of higher rates for joint-line hauls is inconsistent with uniform scales established by it in other decisions.¹⁰ The argument is, in effect, an appeal to this Court to review the exercise of administrative discretion. It is not our province to enquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases. *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271. The facts to which our attention is called furnish no support for the charge of arbitrariness or of invasion of the sovereign rights of the State. Compare *Shreveport Case*, 234 U. S. 342, 354; *American Express Co. v. Caldwell*, 244 U. S. 617, 625.

Affirmed.

alone should not be a controlling factor. But the cost elements involved in the movement of the low grade commodities here concerned were adequately considered in the first hearing in which the reasonableness of the 17517 distance scales was determined. Those rates took "fully into consideration the very low values of these commodities and all characteristics, transportation and otherwise, which entitle them to relatively low rates. It will be a scale, in our opinion, from which the carriers ought not to depart." 122 I. C. C. 148. In part as a result of the order then entered and in part by voluntary extensions by the carriers, these scales were put into force throughout most of the southern territory, and were also adopted intrastate in four States. The further finding as to the similarity in transportation conditions in interstate and intrastate shipments was amply sustained by the evidence.

¹⁰ It is argued that the federal Commission has never permitted dual scales in similar cases; that even where allowed, the two scales have merged after relatively short distances; and that the evidence and findings in either report are insufficient to support a higher joint-line scale for the class of commodities here in question.

Counsel for Parties.

ALABAMA ET AL. v. UNITED STATES ET AL.

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

No. 513. Argued April 28, 1931.—Decided June 1, 1931.

Order of the Interstate Commerce Commission fixing intrastate rates on fertilizers to correspond with interstate rates, *sustained* over the objections that the action taken was arbitrary; that there was not a full hearing; that the issue determined was not the issue pleaded or heard; that there was no finding showing a competitive relationship of any rates interstate with any rates intrastate and no definite finding justifying the regulation of all intrastate rates; that there was no evidence to sustain any such findings, and none to sustain the finding and order which prescribed like rates for joint and single line hauls; and, finally, that the rates prescribed intrastate are not in harmony with the interstate rates. Cf. *Georgia Public Service Commission v. United States*, ante, p. 765. P. 779.

42 F. (2d) 469, affirmed.

APPEAL from a decree dismissing a bill to set aside an order of the Interstate Commerce Commission fixing intrastate rates on fertilizers. See also, 279 U. S. 229.

Mr. Edgar Watkins, with whom *Messrs. Thomas E. Knight, Jr.*, Attorney General of Alabama, *Hugh White*, President, Alabama Public Service Commission, and *Mac Asbill* were on the brief, for appellants.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Mr. E. M. Reidy*, Assistant Chief Counsel, was on the brief, for the Interstate Commerce Commission, appellee.

Mr. Frank W. Gwathmey, with whom *Messrs. W. N. McGehee* and *W. A. Northcutt* were on the brief, for Alabama Carriers, appellees.

Solicitor General Thacher submitted for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, in the federal court for the northern district of Alabama. That State and its Public Service Commission seek to set aside the order of the Interstate Commerce Commission issued October 3, 1927, and modified on December 22, 1927, by which the Atlantic Coast Line Railroad and other steam carriers were required to establish and maintain intrastate rates in Alabama for fertilizers and fertilizing material not lower, for corresponding distances, than the interstate rates theretofore prescribed by the Commission. *Fertilizers and Fertilizer Materials Between Southern Points*, 113 I. C. C. 389; 123 I. C. C. 193; 129 I. C. C. 215. The United States and the carriers were made defendants. The Commission intervened. The decree of the District Court denying an application for a preliminary injunction was affirmed by us, at the October Term, 1928, on the ground that the order was within the general powers of the Commission; that it had been made upon full enquiry; and that the court was not shown to have abused its discretion in denying interlocutory relief. We accordingly remanded the case to the lower court for final disposition on the merits, 279 U. S. 229. The case was then heard on final hearing by three other judges on precisely the same evidence; and they dismissed the bill, 42 F. (2d) 469. The case is now here on direct appeal from the final decree.

The order complained of was entered in an extensive investigation, instituted by the Interstate Commerce Commission on its own motion in 1924, into the rates on fertilizers and fertilizer material in the southern territory.¹ With that proceeding there was consolidated, among others, a complaint theretofore filed by steam railroads

operating in Alabama, charging that the State Commission had entered an order which required them to establish intrastate rates on fertilizers and fertilizer material lower than those permitted or required by the interstate traffic; and that the observance by the carriers of the order of the Alabama Commission would result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce.² The Alabama Commission refused to permit the intrastate rates to be increased to the level which the federal Commission found to be necessary to prevent such discrimination, whereupon the order challenged was entered.³ It is contended that this action was arbitrary;

¹ Both the interstate and intrastate rates on these commodities, of which two-thirds of the total United States production is used in the southern territory (113 I. C. C. 392), had theretofore been before the Commission in a great many cases. See *Royster Guano Co. v. Atlantic Coast Line R. Co.*, 31 I. C. C. 458; 38 I. C. C. 190; 50 I. C. C. 34; *Freight Adjustment Steering Committee v. Same*, 53 I. C. C. 506; *Goldsboro Chamber of Commerce v. Same*, 91 I. C. C. 315. Compare *Mount Pleasant Fertilizer Co. v. Louisville & Nashville R. Co.*, 50 I. C. C. 253; *Meridian Traffic Bureau v. Southern Ry. Co.*, 60 I. C. C. 5, 24; *Meridian Rate Case*, 66 I. C. C. 179, 186; *Fertilizer to Montezuma*, 74 I. C. C. 657; *Fertilizers from New Orleans*, 100 I. C. C. 64. See also *Fertilizer Rates in South Carolina*, 147 I. C. C. 178.

² Similar petitions were filed by the carriers seeking relief from intrastate rates prescribed by the South Carolina and Georgia commissions on these commodities. 113 I. C. C. 391. Compare *Fertilizer Rates in South Carolina*, 147 I. C. C. 178, 179.

³ The procedure was substantially the same as that in *Georgia Public Service Comm. v. United States*, ante, p. 765. No order concerning intrastate rates was entered in the original proceedings because it was "believed that the respective State commissions will cooperate in authorizing such revisions as may be necessary." 113 I. C. C. 435. Thereafter the railroads operating in Alabama petitioned the state Commission to establish intrastate rates in harmony with the interstate rates established by the federal Commission. This relief was denied on July 18, 1927. On September 3, 1927,

that there was not a full hearing; that the issue determined was not the issue pleaded or heard; that there was no finding showing a competitive relationship of any rates interstate with any rates intrastate and no definite finding justifying the regulation of all intrastate rates; that there was no evidence to sustain any such findings; and none to sustain the finding and order which prescribed like rates for joint and single line hauls; and, finally, that the rates prescribed intrastate are not in harmony with the interstate rates.

The findings of the Interstate Commerce Commission are definite; they afford a sufficient basis for the order; and they are supported by evidence. None of the objections of the appellant is well taken. The comprehensive investigation of the Interstate Commerce Commission appears to have been conducted with great care and thoroughness.⁴ The Alabama Commission, as well as the reg-

these same carriers requested the federal Commission to enter an order raising the intrastate rates on these commodities in Alabama. On the basis of its former hearings and findings, the Commission issued, without further hearing, the order here attacked. It was also stipulated that a general petition for rehearing was filed by the Alabama Commission after the announcement of the findings in the original investigation.

⁴ The present case differs from *Georgia Public Service Comm. v. United States*, *supra* Note 3, in that the question of discrimination against interstate commerce was examined only in the initial hearing and not also in a supplemental hearing. In the original hearing and report, the percentage of intrastate as against interstate traffic, the similarity in transportation conditions, the location of interstate and intrastate shippers, and the reasons for and against the allowance of joint-line differentials were thoroughly canvassed. Whether such differentials should not be allowed in rates on fertilizers, a relatively high value commodity, even though they are permitted, as in the Georgia case, on low value commodities, is a matter wholly within the informed discretion of the Commission, provided the question was considered and appropriate findings, supported by evidence, were made. *Georgia Public Service Comm. v. United States*, *supra*

ulatory bodies of five contiguous States, were represented at the hearings and took an active part in developing the record. A report proposed by the Examiner was served upon their counsel who took exceptions which were considered by the Commission. Some modification was made in the report. All the objections to the order now urged were twice presented to, and passed upon by, the District Court. They were, in part, considered by this Court on the appeal from the decree denying an interlocutory injunction. Nothing could be gained by further discussion. The decree of the District Court is

Affirmed.

DECISIONS PER CURIAM, FROM FEBRUARY 26,
1931, TO AND INCLUDING JUNE 1, 1931 *

No. —, original. EX PARTE VITALE. Submitted February 25, 1931. Decided March 2, 1931. Motion for leave to file petition for writ of habeas corpus and for leave to proceed *in forma pauperis* denied. *Mr. Frank J. Vitale, pro se.*

No. —, original. EX PARTE BENJAMIN. Submitted February 25, 1931. Decided March 2, 1931. Motion for leave to file petition for writ of habeas corpus and for leave to proceed *in forma pauperis* denied. *Mr. Jehudah Benjamin, pro se.*

No. —, original. EX PARTE DIAL. Submitted February 25, 1931. Decided March 2, 1931. Motion for leave to file petition for writ of mandamus denied. *Mr. Frank Dial, pro se.*

No. 217. HARGIS, COMMISSIONER OF LABOR AND INDUSTRIAL INSPECTION, *v.* BRADFORD. Appeal from the District Court of the United States for the Western District of Missouri. Return to rule to show cause submitted February 25, 1931. Decided March 2, 1931. *Per Curiam:* Upon consideration of the return of the appellant to the rule issued January 19, 1931, to show cause why the interlocutory decree of the specially constituted District Court of the United States for the Western District of Missouri, entered herein March 15, 1930, should not be vacated and the cause remanded to that court with directions to dismiss the case as moot,

* For decisions on applications for certiorari, see *post*, pp. 811, 818.

It is now here ordered that the interlocutory decree of the said specially constituted District Court entered in this cause March 15, 1930, be, and the same is hereby, vacated, and the cause is remanded to that court with directions to dismiss the case as moot, without costs to either party. *United States v. Hamburg American Co.*, 239 U. S. 466, 475; *Berry v. Davis*, 242 U. S. 468, 470; *Commercial Cable Co. v. Burlison*, 250 U. S. 360; *Heitmuller v. Stokes*, 256 U. S. 359; *Brownlow v. Schwartz*, 261 U. S. 216; *Norwegian Co. v. Tariff Commission*, 274 U. S. 106, 112; *United States v. Anchor Coal Co.*, 279 U. S. 812. *Messrs. Walter E. Sloat and Stratton Shartel* for appellant. No appearance for appellee. Reported below: 45 F. (2d) 223.

No. 316. *McKISSICK ET AL. v. TALBOT ET AL.* Appeal from the Supreme Court of Illinois. Argued February 27, 1931. Decided March 2, 1931. *Per Curiam*: The appeal herein 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; *Wall v. Bankers Life Co.*, 282 U. S. 808; *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657; *Polk v. Mutual Reserve Fund Life Assn.*, 207 U. S. 310. *Mr. Leslie G. Pefferle*, with whom *Messrs. Thomas W. Hoopes, Charles W. Lyon, and Frank C. Smith* were on the brief, for appellants. *Messrs. George G. Perrin, Nelson C. Pratt, Edward Sonnenschein, Herbert M. Lautmann, Henry S. Moser, and Isaac E. Ferguson* were on the brief for appellees. Reported below: 338 Ill. 441; 170 N. E. 735.

No. 535. *BURNET, COMMISSIONER OF INTERNAL REVENUE, v. NORTHERN TRUST Co., EXECUTOR.* Certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued February 27, 1931. Decided March 2, 1931.

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Per Curiam: The question in this case is that of the construction of § 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278, a provision similar to that of § 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, which has already been construed by this Court, and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the Circuit Court of Appeals for the Seventh Circuit is affirmed upon the authority of *May v. Heiner*, 281 U. S. 238. *Mr. Walter E. Hope*, Assistant Secretary of the Treasury, with whom *Solicitor General Thacher* and *Messrs. Clarence M. Charest*, General Counsel, and *Prew Savoy*, Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner. *Mr. Edward H. Blanc* argued the cause, and *Messrs. Theodore Schmidt, John W. Davis, Russell L. Bradford*, and *Frederic Ullmann* filed a brief, for respondent. *Messrs. John E. Hughes* and *Raymond M. White*, by special leave of Court, filed briefs as *amici curiae*. *Mr. Seth T. Cole*, by special leave of Court, filed a brief on behalf of the Tax Commission of the State of New York et al. as *amici curiae*. Reported below: 41 F. (2d) 732.

No. 581. MORSMAN, ADMINISTRATOR, v. BURNET, COMMISSIONER OF INTERNAL REVENUE. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. Argued February 27, 1931. Decided March 2, 1931. *Per Curiam:* The question in this case is that of the construction of § 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304, a provision similar to that of § 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, which has already been construed by this Court, and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with

respect to transfers or trusts of the sort here involved, the judgment of the Circuit Court of Appeals for the Eighth Circuit is reversed upon the authority of *May v. Heiner*, 281 U. S. 238. *Mr. Edward H. Blanc*, with whom *Messrs. Edgar M. Morsman, Jr.*, and *Russell L. Bradford* were on the brief, for petitioner. *Solicitor General Thacher*, and *Messrs. Walter E. Hope*, Assistant Secretary of the Treasury, *Claude R. Branch*, and *Clarence M. Charest*, General Counsel, *William T. Sabine, Jr.*, and *Prew Savoy*, Special Attorneys, Bureau of Internal Revenue, submitted for respondent. Reported below: 44 F. (2d) 902.

No. 542. *MCCORMICK ET AL., EXECUTORS, v. BURNET, COMMISSIONER OF INTERNAL REVENUE.* Certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued February 27, 1931. Decided March 2, 1931. *Per Curiam:* The question in this case is that of the construction of § 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278, a provision similar to that of § 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, which has already been construed by this Court, and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the Circuit Court of Appeals for the Seventh Circuit is reversed upon the authority of *May v. Heiner*, 281 U. S. 238. *Mr. George T. Rogers*, with whom *Messrs. Horace Kent Tenney, Henry F. Tenney, Roger Sherman*, and *Robert N. Miller* were on the brief, for petitioners. *Assistant Attorney General Youngquist*, with whom *Solicitor General Thacher*, and *Messrs. Sewall Key* and *J. Louis Monarch*, Special Assistants to the Attorney General, *Erwin N. Griswold* and *Clarence M. Charest*, General Counsel, and *Prew Savoy*, Special Attorney, Bu-

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reau of Internal Revenue, were on the brief, for respondent. Reported below: 43 F. (2d) 277.

No. 64. DIRECTOR OF THE LANDS OF THE PHILIPPINE ISLANDS *v.* VILLA-ABRILLE ET AL. Certiorari to the Supreme Court of the Philippine Islands. Argued February 27, March 2, 1931. Decided March 2, 1931. *Per Curiam*: In view of the facts disclosed upon the oral argument of this case, the writ of certiorari is dismissed as improvidently granted. *Mr. William Cattron Rigby*, with whom *Messrs. Delfin Jaranilla*, Attorney General of the Philippine Islands, *W. A. Graham*, *A. R. Stallings*, *Grant T. Trent*, and *Edward A. Kreger* were on the brief, for petitioner. *Mr. H. Mason Welch*, with whom *Mr. Michael J. Lane* was on the brief, for respondents.

No. 607. ALDRICH ET AL. *v.* CITY OF NEW YORK ET AL. Appeal from the Supreme Court of New York, New York County. Jurisdictional statement submitted March 2, 1931. Decided March 9, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Zucht v. King*, 260 U. S. 174, 176; *Sauer v. City of New York*, 206 U. S. 536, 548. *Mr. Anthony J. Ernest* for appellants. *Messrs. Arthur J. W. Hilly*, *Frank Nevius*, *Asa B. Kellogg*, and *Harvey D. Jacob* for appellees. Reported below: 253 N. Y. 558; 171 N. E. 782.

No. 622. NASHVILLE, CHATTANOOGA & ST. LOUIS RY. CO. *v.* CARROLL COUNTY ET AL. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted March 2, 1931. Decided March 9, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160; *Hooker v. Burr*, 194 U. S. 415; *Ohio*

v. *Akron Park District*, 281 U. S. 74, 81. *Mr. Fitzgerald Hall* for appellant. *Mr. Joseph W. Byrns* for appellees. Reported below: 161 Tenn. 581; 33 S. W. (2d) 69.

No. 623. NASHVILLE, CHATTANOOGA & ST. LOUIS RY. Co. v. BENTON COUNTY ET AL. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted March 2, 1931. Decided March 9, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160; *Hooker v. Burr*, 194 U. S. 415; *Ohio v. Akron Park District*, 281 U. S. 74, 81. *Mr. Fitzgerald Hall* for appellant. *Mr. Joseph W. Byrns* for appellees. Reported below: 161 Tenn. 588; 33 S. W. (2d) 68.

No. 625. PHILADELPHIA ELECTRIC Co. v. PHILADELPHIA. Appeal from the Supreme Court of Pennsylvania. Jurisdictional statement submitted March 2, 1931. Decided March 9, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Missouri & Kansas Interurban Ry. Co. v. City of Olathe*, 222 U. S. 187, 190; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632. *Mr. Francis B. Bracken* for appellant. *Messrs. G. Coe Farrier, Ernest Lowengrund, and Augustus Trask Ashton* for appellee. Reported below: 152 Atl. 23.

No. 134. NORTH BEND STAGE LINE, INC., v. DENNEY, DIRECTOR, ET AL. Appeal from the Supreme Court of Washington. Argued March 4, 5, 1931. Decided March 9, 1931. *Per Curiam*: It appearing that the order of the Department of Public Works is supported by the evidence, the judgment of the Supreme Court of Washington is affirmed. *Mr. Thomas E. DeWolfe* argued

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the cause, and *Messrs. C. K. Poe, A. J. Falknor, Judson F. Falknor, and DeWolfe Emory* filed a brief, for appellant. *Mr. Hance H. Cleland*, with whom *Mr. Raymond W. Clifford* was on the brief, for the Washington Motor Coach Co., appellee. *Messrs. John H. Dunbar*, Attorney General of Washington, and *John C. Hurspool*, Assistant Attorney General, filed a brief for the Department of Public Works of Washington, appellee. Reported below: 153 Wash. 439; 279 Pac. 752.

No. 165. *WOODRUFF ET AL. v. LOS ANGELES*. Appeal from the District Court of Appeal, Second Appellate District, of California. Argued March 5, 6, 1931. Decided March 9, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480; *Thorington v. City Council*, 147 U. S. 490, 492, 493; *Tripp v. Santa Rosa Street R. Co.*, 144 U. S. 126. *Mr. J. A. Coleman*, with whom *Messrs. J. Edward Keating and Edward Fitzpatrick* were on the brief, for appellants. *Messrs. Erwin P. Werner*, City Attorney of Los Angeles, *Frederick von Schrader*, Assistant City Attorney, and *Loren A. Butts*, Deputy City Attorney, were on the brief, for appellee. Reported below: 102 Cal. App. 299; 294 Pac. 764.

No. 218. *NEKOOSA EDWARDS PAPER Co. v. RAILROAD COMMISSION OF WISCONSIN*. Appeal from the Supreme Court of Wisconsin. Argued March 11, 1931. Decided March 16, 1931. *Per Curiam*: In view of the findings of fact by the state court, supported by the evidence, the judgment is affirmed. *Portland Railway Light & Power Co. v. Railroad Commission of Oregon*, 229 U. S. 397, 412; *Miedreich v. Lauenstein*, 232 U. S. 236, 243, 244; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 593. *Messrs. Ray B. Graves and Theodore W. Brazeau*, with

whom *Mr. B. R. Goggins* was on the brief, for appellant. *Messrs. John W. Reynolds*, Attorney General of Wisconsin, *Herbert H. Naujoks*, Assistant Attorney General, and *H. A. Minahan* were on the brief for appellee. Reported below: 201 Wis. 40, 228 N. W. 144; 229 N. W. 631.

No. 264. *GEORGE E. BREECE LUMBER CO. ET AL. v. ASPLUND, STATE COMPTROLLER*. Appeal from the Supreme Court of New Mexico. Submitted March 12, 1931. Decided March 16, 1931. *Per Curiam*: The judgment herein is affirmed. *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648, 649. *Mr. Clarence M. Botts* was on the brief for appellants. *Messrs. E. K. Neumann*, Attorney General of New Mexico, *Frank H. Patton*, Assistant Attorney General, *E. R. Wright*, and *Donovan N. Hoover* were on the brief for appellee. Reported below: 34 N. M. 643; 287 Pac. 699.

No. 2, original. *NEW MEXICO v. TEXAS*. March 23, 1931.

DECREE.

On consideration of the report of Samuel S. Gannett, the Commissioner heretofore selected to run, locate and mark the boundary between the State of New Mexico and the State of Texas in the Valley of the Rio Grande River extending southwardly from the parallel of 32° north latitude to the parallel of 31° 47' on the international boundary between the United States of America and the United States of Mexico, which report was presented herein October 6, 1930; and no objection or exception to such report being presented, although the time therefor has expired;

It is now adjudged, ordered and decreed as follows:

1. The said report is in all things confirmed;

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2. The boundary line delineated and set forth in the said report and on the accompanying maps is established and declared to be the true boundary between the States of New Mexico and Texas in the Valley of the Rio Grande River from the parallel of 32° north latitude to the parallel of 31° 47' on the international boundary between the United States of America and the United States of Mexico;

3. As it appears that the said Commissioner has completed his work conformably to the decree of this Court of April 9, 1928 (276 U. S. 558), the said Commissioner is hereby discharged.

4. The Clerk of this Court shall transmit to the Chief Magistrates of the States of New Mexico and Texas copies of this decree, duly authenticated under the seal of this Court, together with copies of the report of the Commissioner and of the accompanying maps;

5. The Clerk of this Court shall distribute and deliver to the Chief Magistrates of the States of New Mexico and Texas and to the Secretary of the Interior of the United States, all copies of the report of the Commissioner, with the accompanying maps, now in his hands, save that he shall retain three copies of each for such purposes as may arise in his office;

6. The costs in this cause shall be borne and paid in equal parts by the States of New Mexico and Texas. [See also, 275 U. S. 279; 276 U. S. 557, 558.]

No. 12, original. CONNECTICUT *v.* MASSACHUSETTS.
March 23, 1931.

DECREE.

This cause came on to be heard upon the pleadings, evidence, and the exceptions filed by the complainant to the Report of the Special Master, and was argued by counsel. The Court now being fully advised in the prem-

ises and for the purpose of carrying into effect the conclusions set forth in the opinion of this Court announced February 24, 1931,

It is now here ordered, adjudged and decreed as follows:

First that the Bill of Complaint herein be and the same hereby is, dismissed without prejudice to the right of the complainant to maintain a further suit against the defendant at any time in the future when it shall appear that substantial interests of the State of Connecticut are in fact being injured, or are about to be injured, through a material increase of the amount of the waters of the Ware River and of the Swift River diverted or to be diverted by, or under the authority of, the Commonwealth of Massachusetts, over and above the quantities authorized to be diverted by the provisions of Chapter 375 of the Acts of 1926 and by Chapter 321 of the Acts of 1927 of the General Court of the Commonwealth of Massachusetts, as said quantities have heretofore been limited by two certain findings of the Secretary of War of the United States, acting upon the recommendation of the Chief of Engineers of the United States Army, dated respectively March 14, 1928, and May 11, 1929, and more fully set out in Appendix B and Appendix C of the Reprint of the Answer of the Defendant herein, filed January 20, 1930, and of Record in this cause.

Second that each party shall pay its own costs, together with one-half of the expenses incurred by the Special Master, Charles W. Bunn, Esquire, of St Paul, Minnesota, and one-half of the amount fixed by the Court as the compensation of the Special Master. [See 282 U. S. 660.]

No. —, original. EX PARTE EASTERN TRANSPORTATION Co. ET AL. Submitted March 16, 1931. Decided March 23, 1931. The motion for leave to file petition for writ

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of mandamus or prohibition is denied. *Mr. Charles R. Hickox* for petitioners.

No. 313. *WALKER ET AL. v. MENSI ET AL.* Appeal from the Supreme Court of Tennessee. Argued March 17, 1931. Decided March 23, 1931. *Per Curiam*: The appeal herein is dismissed for the want of jurisdiction. *Haseltine v. Central Bank of Springfield, Missouri (No. 1)*, 183 U. S. 130, 131; *Louisiana Navigation Co., Ltd., v. Oyster Commission*, 226 U. S. 99, 101, 102; *Northern Cedar Co. v. Gloyd*, 270 U. S. 625. *Mr. W. B. Rosenfield*, with whom *Mr. William P. Metcalf* was on the brief, for appellants. *Messrs. Edward B. Klewer, Hugh Stanton, L. D. Bejach, and Walter Chandler* were on the brief for appellees. Reported below: 160 Tenn. 468; 26 S. W. (2d) 132.

No. 8, original. *LOUISIANA v. MISSISSIPPI.* April 13, 1931.

DECREE.

This cause coming on for hearing by this Court upon the report of Thomas G. Haight, Special Master appointed by this Court, and herein filed, and upon the exceptions filed herein by the State of Mississippi, defendant, to said report of the Special Master, including the findings of fact, conclusions of law, and recommendations for a decree, and also upon all pleadings and exhibits thereto heretofore filed by both complainant and defendant, and also upon all depositions of witnesses and documentary and record evidence adduced, preferred, filed, and submitted both by complainant and defendant and upon all briefs of counsel both for complainant and defendant heretofore filed and submitted; and thereupon, on February 2nd, A. D. 1931, this Court having rendered

an opinion sustaining all the findings and recommendations of the Special Master, and directing that a decree should be entered as recommended by the Special Master; and the Court being fully advised in the premises:

It is thereupon considered, and now ordered, adjudged and decreed by this Court, as follows, to wit:—

1. That the bill of complaint has been sustained by sufficient and legal evidence, and that complainant, the State of Louisiana, is at law and in equity entitled to the relief prayed for.

2. That the report of Thomas G. Haight, Special Master, be and the same is hereby approved, sustained, and confirmed by this Court, and that the exceptions to said report filed by the State of Mississippi be and the same are hereby overruled.

3. That immediately prior to the avulsion of 1912-1913 the boundary line between the State of Louisiana and the State of Mississippi between latitude $32^{\circ} 39'$ on the North and the division line between Issaquena and Warren Counties, Mississippi, (as extended westward), on the South, was at the place and line which was the thread of the main channel of the Mississippi River as it then ran; and that, the current having since ceased to flow in part of said channel as it existed prior to said avulsion, because of the new channel produced thereby, at this time the true boundary line between the State of Louisiana and the State of Mississippi, in that part and so much of the above area as was affected by the avulsion (between said North and South points), is the middle of the navigable channel of the Mississippi River as said channel was located at the time when the current ceased to flow therein because of the new channel produced by the avulsion of 1912-1913.

4. That Samuel S. Gannett, geodetic and astronomic engineer, of Washington, D. C., is hereby named and appointed as commissioner, with power, authority and in-

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structions to run, locate, plat, and mark by suitable permanent boundary markers said boundary line, as above defined, by the use of the most accurate method now known to science and applicable in that locality, between said States between said North and South points, and to make and file in this Court as soon as practicable a full and accurate report of his findings, survey, and plat, and that the same be submitted to this Court for confirmation. And he shall file with his report the field notes of his survey, showing the method used by him in ascertaining and locating the line of the boundary, and a map showing the boundary line as run and marked by him; also 10 copies of his report and map. Said line when ascertained and located in accordance with this decree and approved and confirmed by the Court, is the boundary line between the State of Louisiana and the State of Mississippi between the North and South points hereinabove mentioned.

5. Before entering upon his work the commissioner shall take and subscribe his oath to perform his duties faithfully and impartially. He shall prosecute the work with diligence and dispatch, and shall have authority to employ such assistants as may be needed therein; and he shall include in his report a statement of the work done, the time employed, and the expenses incurred.

6. The work of the commissioner shall be subject in all its parts to the approval of the Court. One copy each of the commissioner's report and map shall be promptly transmitted by the clerk to the Governors of the two States; and exceptions or objections to the commissioner's report, if there be such, shall be presented to the Court, or, if it be not in session, filed with the clerk, within forty days after the report is filed.

7. That the sum to be allowed the commissioner hereby appointed, in payment of his services and reimbursement of his expenses, shall be fixed and allowed after the sub-

mission to this Court and confirmation by it of his report, findings, survey and plat.

8. If, for any reason, there occurs a vacancy in the commission when the Court is not in session, the same may be filled by the designation of a new commissioner by the Chief Justice.

[The remaining paragraphs deal with the compensation and expenses of the special master and the taxation of costs. See 282 U. S. 458.]

No. 54. *CARBICE CORPORATION OF AMERICA v. AMERICAN PATENTS DEVELOPMENT CORP. ET AL.* Submitted March 16, 1931. Decided April 13, 1931. The petition for a rehearing is granted limited to the question of the validity of patent No. 1,595,426. See *ante*, pp. 27, 420.

No. —, original. *EX PARTE SMITH ET AL.* Submitted March 23, 1931. Decided April 13, 1931. The motion for leave to file a petition for writ of mandamus is denied. *Mr. Eliot C. Lovet* for petitioners.

No. 24, original. *EX PARTE MADDEN BROTHERS, INC.* Submitted April 13, 1931. Decided April 20, 1931. On consideration of the motion for leave to file petition for writ of mandamus, and of the petition for writ of mandamus herein, it is ordered that a rule issue to the Honorable Joseph W. Molyneaux, Judge of the District Court of the United States for the District of Minnesota, returnable on Monday, May 18 next, to show cause why a writ of mandamus should not issue to him in accordance with the prayer of the petition. *Mr. Abbot P. Mills* on behalf of *Mr. E. W. MacPherran* for petitioner. See *post*, p. 807.

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NO. 721. PHILLIPS, COLLECTOR, *v.* DIME TRUST & SAFE DEPOSIT Co., EXECUTOR. Certificate from the Circuit Court of Appeals for the Third Circuit. Submitted April 13, 1931. Decided April 20, 1931. *Per Curiam*: The joint motion to bring up the entire record and cause is granted. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, J. Louis Monarch, Clarence M. Charest, and William T. Sabine, Jr.,* for Phillips. *Mr. Charles C. Lark* for the Dime Trust & Safe Deposit Co.

NO. 837. ADAMS *v.* PARK, JUDGE. Appeal from the Supreme Court of Georgia. Submitted April 13, 1931. Decided April 20, 1931. *Per Curiam*: The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of a substantial federal question. *Malloy v. South Carolina*, 237 U. S. 180, 183, 185; *Wabash R. Co. v. Flannigan*, 192 U. S. 29; *Erie R. Co. v. Solomon*, 237 U. S. 427; *Zucht v. King*, 260 U. S. 174; *Sugarman v. United States*, 249 U. S. 182; *C. A. King & Co. v. Horton*, 276 U. S. 600; *Bank of Indianola v. Miller*, 276 U. S. 605; *Roe v. Kansas*, 278 U. S. 191. *Mr. Benjamin E. Pierce* for appellant. *Messrs. George M. Napier and T. R. Gress* for appellee. Reported below: 156 S. E. 235.

NO. 838. MEYERS *v.* WHITTLE, SHERIFF. Appeal from the Supreme Court of Georgia. Submitted April 13, 1931. Decided April 20, 1931. *Per Curiam*: The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of a substantial federal question. *Malloy v. South Carolina*, 237 U. S. 180, 183, 185; *Wabash R. Co. v. Flannigan*, 192 U. S. 29; *Erie R. Co. v. Solomon*, 237 U. S. 427; *Zucht v. King*, 260

U. S. 174; *Sugarman v. United States*, 249 U. S. 182; *C. A. King & Co. v. Horton*, 276 U. S. 600; *Bank of Indianola v. Miller*, 276 U. S. 605; *Roe v. Kansas*, 278 U. S. 191. *Mr. Benjamin E. Pierce* for appellant. *Messrs. George M. Napier and T. R. Gress* for appellee. Reported below: 156 S. E. 120.

No. 306. SPURRIER ET AL. *v.* MITCHELL IRRIGATION DISTRICT ET AL. Appeal from the Supreme Court of Nebraska. Argued April 16, 17, 1931. Decided April 20, 1931. *Per Curiam*: The appeal herein is dismissed for the want of jurisdiction, § 237 (a) Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code as amended, 43 Stat. 936, 938, certiorari is denied for want of a substantial federal question. *Wabash R. Co. v. Flannigan*, 192 U. S. 29; *Erie R. Co. v. Solomon*, 237 U. S. 427; *Zucht v. King*, 260 U. S. 174; *Sugarman v. United States*, 249 U. S. 182; *C. A. King & Co. v. Horton*, 276 U. S. 600; *Bank of Indianola v. Miller*, 276 U. S. 605; *Roe v. Kansas*, 278 U. S. 191. *Mr. J. M. Fitzgerald*, with whom *Mr. L. L. Raymond* was on the brief, for appellants. *Messrs. Thomas M. Morrow and William Morrow* were on the brief for Mitchell Irrigation District, appellee. *Messrs. J. G. Mothersead, Roscoe T. York, Floyd E. Wright, and Wm. H. Wright* were on the brief for Gering & Ft. Laramie Irrigation District, appellee. Reported below: 119 Neb. 401; 229 N. W. 273.

No. 94. RAMSEY & GATLIN CONSTRUCTION CO. ET AL. *v.* VINCENNES BRIDGE Co. Certificate from the Circuit Court of Appeals for the Sixth Circuit. Argued April 15, 1931. Decided April 20, 1931. *Per Curiam*: As it ap-

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pears from statements at the bar that the contract herein and the bond given pursuant thereto were made and the obligations thereof were to be performed within the State of Kentucky, and as the bond should be construed in accordance with the law of that state, and it appearing that, since the certification herein, the Court of Appeals of Kentucky has construed the bond in question and decided that one in the position of the appellee in the court below, as a subcontractor, was entitled to avail itself of the provision in the bond and maintain its action (*Aetna Casualty & Surety Co. v. Wheeler & Putnam Co.*, decided March 27, 1931, 239 Ky. 247) the Court is of opinion that there is no occasion for an answer by the Court to the question propounded in the certificate. *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 381; *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100; *Globe Indemnity Co. v. Southern Pacific Co.*, 30 F. (2d) 580, 583; *Federal Surety Co. v. City of Staunton*, 29 F. (2d) 9, 11; *Community Building Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680; *Black Diamond S. S. Corp. v. Fidelity & Deposit Co.*, 33 F. (2d) 767, 768. The certificate is, accordingly, dismissed. *Mr. W. Braxton Dew*, with whom *Messrs. Henderson R. Dysard* and *John L. Smith* were on the brief, for Ramsey & Gatlin Construction Co. *Mr. Frank C. Malin*, with whom *Mr. Seymour Riddle* was on the brief, for Vincennes Bridge Co.

No. 1002. *FIELD ET AL. v. POWELL ET AL.* April 27, 1931. Appeal from the Supreme Court of Appeals of Virginia allowed, and Nellie Field Burwell, sole executrix, substituted as a party appellant in place of Samuel B. Field, deceased. *Mr. James E. Heath* for appellants. *Mr. Wm. M. Williams* for appellees.

No. 361. NOACK ET AL. *v.* ZELLERBACH ET AL. Appeal from the District Court of the United States for the Northern District of California. Submitted March 17, 1931. Decided April 27, 1931. *Per Curiam*: Decree affirmed. California Act of April 2, 1931, amending California Penal Code, § 634 (Stats. of California, 1931, c. 101); *Svenson v. Engelke*, 81 Cal. Dec. 237, 383; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31. *Messrs. Marshall B. Woodworth and Roger O'Donnell* were on the brief for appellants. *Messrs. Eugene D. Bennett and Ralph W. Scott* were on the brief for appellees.

No. 290. WESTERN LAND & RECLAMATION CO. *v.* RECLAMATION BOARD OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. Submitted April 20, 1931. Decided April 27, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Guaranty Trust Co. v. New York & Queens County Ry. Co.*, 282 U. S. 803; *Ennis Water Works v. City of Ennis*, 233 U. S. 652, 658; *Wabash R. Co. v. Flannigan*, 192 U. S. 29; *Erie R. Co. v. Solomon*, 237 U. S. 427; *Zucht v. King*, 260 U. S. 174; *Sugarman v. United States*, 249 U. S. 182; *C. A. King & Co. v. Horton*, 276 U. S. 600; *Bank of Indianola v. Miller*, 276 U. S. 605; *Roe v. Kansas*, 278 U. S. 191. *Messrs. Eddy Knapp, W. H. Metson, and E. B. Mering* were on the brief for appellant. *Mr. Stephen W. Downey* was on the brief for appellees. Reported below: 208 Cal. 661; 284 Pac. 66.

No. 423. SANCHEZ *v.* BORRAS. Certiorari to the Circuit Court of Appeals for the First Circuit. Argued April 20, 1931. Decided April 27, 1931. *Per Curiam*: As it does not appear, upon an examination of the record, that the decision of the Circuit Court of Appeals, upon the

facts disclosed, is in conflict with the decisions of the Supreme Court of Porto Rico, the writ of certiorari granted herein is dismissed. *Mr. Nelson Gammans* for petitioner. *Mr. Henry G. Molina*, with whom *Messrs. Sidney P. Simpson* and *Archie O. Dawson* were on the brief, for respondent. Reported below: 41 F. (2d) 914.

No. 457. DUQUESNE STEEL FOUNDRY Co. v. BURNET, COMMISSIONER OF INTERNAL REVENUE. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued April 23, 1931. Decided April 27, 1931. *Per Curiam*: Judgment affirmed. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551. *Mr. William S. Moorhead*, with whom *Mr. William F. Knox* was on the brief, for petitioner. *Assistant Attorney General Rugg* argued the cause, and *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Sewall Key* and *Andrew D. Sharpe*, Special Assistants to the Attorney General, *Paul D. Miller*, *Clarence M. Charest*, General Counsel, Bureau of Internal Revenue, and *Stanley Suydam*, Special Attorney, filed a brief for respondent. *Messrs. William Cogger* and *John E. Hughes*, by special leave of Court, filed a brief on behalf of *Moody & Waters Co.*, as *amicus curiae*. Reported below: 41 F. (2d) 995.

No. 489. ENAMELED METALS Co. v. BURNET, COMMISSIONER OF INTERNAL REVENUE. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued April 23, 1931. Decided April 27, 1931. *Per Curiam*: Judgment affirmed. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551. *Messrs. S. Leo Ruslander* and *Clarence N. Goodwin*, with whom *Messrs. George R. Beneman* and *Samuel Kaufman* were on the brief, for petitioner. *Assistant Attorney General Rugg* argued the

cause and *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Sewall Key* and *Andrew D. Sharpe*, Special Assistants to the Attorney General, *Paul D. Miller*, *Clarence M. Charest*, General Counsel, Bureau of Internal Revenue, and *James K. Polk*, Special Attorney, filed a brief for respondent. Reported below: 42 F. (2d) 213.

No. 748. NORWOOD ET AL. *v.* BENNETT, ATTORNEY GENERAL, ET AL. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted April 20, 1931. Decided May 4, 1931. *Per Curiam*: Decree affirmed. *Lehon v. Atlanta*, 242 U. S. 53, 55, 56; *Gundling v. Chicago*, 177 U. S. 183, 186; *Brazee v. Michigan*, 241 U. S. 340; *Hall v. Geiger-Jones Co.*, 242 U. S. 539. *Mr. Sidney S. Bobbe* for appellants. No appearance for appellees. Reported below: 46 F. (2d) 312.

No. 698. LIBERTY CENTRAL TRUST CO. ET AL., TRUSTEES, *v.* GREENBRIER COLLEGE ET AL. Appeal from the District Court of the United States for the Southern District of West Virginia. Argued April 27, 1931. Decided May 4, 1931. *Per Curiam*: Decree affirmed. *Dohany v. Rogers*, 281 U. S. 362, 366; *Bragg v. Weaver*, 251 U. S. 57, 62; *Sweet v. Rechel*, 159 U. S. 380, 402; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568. *Messrs. J. S. McWhorter*, *S. M. Austin*, and *W. Chapman Revercomb* submitted for appellants. *Mr. W. Elliott Nefflen*, Assistant Attorney General of West Virginia, with whom *Messrs. Howard B. Lee*, Attorney General, and *R. A. Blessing*, Assistant Attorney General, were on the brief, for appellees.

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No. 624. WOLFE ET AL. *v.* HURLEY, SECRETARY OF WAR, ET AL. Appeal from the District Court of the United States for the Western District of Louisiana. Argued May 1, 1931. Decided May 4, 1931. *Per Curiam*: Decree affirmed. *Dohany v. Rogers*, 281 U. S. 362, 366; *Bragg v. Weaver*, 251 U. S. 57, 62; *Sweet v. Rechel*, 159 U. S. 380, 402; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568. Mr. Hugh Tullis, with whom Mr. Charles F. Borah was on the brief, for appellants. Solicitor General Thacher and Mr. W. Marvin Smith were on the brief for Hurley et al., appellees. Messrs. Jeff B. Snyder, James H. Gilford, Jr., Philip Watson, and F. G. Hudson, Jr., were on the brief for Board of Commissioners of the Fifth Louisiana Levee District et al., appellees. Reported below: 46 F. (2d) 515.

No. —, original. WASHINGTON *v.* OREGON. Submitted May 4, 1931. Decided May 18, 1931. The motion for leave to file bill of complaint herein is granted. Messrs. John H. Dunbar, Attorney General of Washington, and John C. Hurspool, Assistant Attorney General, for complainant. No appearance for defendant.

No. 14, original. UNITED STATES *v.* UTAH. May 18, 1931.

DECREE

This cause came on to be heard by this Court, upon the exceptions of the parties hereto, to the report of the Special Master.

Now, therefore, for the purpose of carrying into effect the conclusions of the Court, as stated in its opinion, dated April 13, 1931, it is ordered, adjudged, and decreed that:

1. The Bill of Complaint, in so far as it relates to the Green River, is dismissed. The Green River, from a point

where the river crosses the township line between townships 23 and 24 South, Range 17 East, Salt Lake Base and Meridian, to the confluence of the Grand (Colorado) River, is now and at all times on and after January 4, 1896, has been, a navigable river, and the title to the bed thereof vested in the State of Utah upon its admission into the Union on January 4, 1896, except so far as the United States of America may theretofore have made grants thereof. The United States of America is forever enjoined from asserting any estate, right, title, or interest in and to said river bed, or any part thereof, adverse to the State of Utah, or its grantees; and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof by the State of Utah, or its grantees.

2. The Bill of Complaint, in so far as it relates to the Grand (Colorado) River, is dismissed. The Grand (Colorado) River, from a point located at the mouth of Castle Creek to the confluence of the Grand (Colorado) River with the Green River, is now and at all times on and after January 4, 1896, has been, a navigable stream, and title to the bed thereof vested in the State of Utah upon its admission into the Union on January 4, 1896, except so far as the United States of America may theretofore have made grants thereof. The United States of America is forever enjoined from asserting any estate, right, title, or interest in and to said river bed, or any part thereof, adverse to the State of Utah or its grantees, and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof by the State of Utah or its grantees.

3. The Bill of Complaint, so far as it relates to the Colorado River, from the confluence of the Green River and the Grand (Colorado) River to Mile 212.15 above Lees Ferry, Arizona, and from Mile 176 above Lees Ferry, Arizona, to the Utah-Arizona Boundary Line, is dismissed.

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Said stretches of said river and each of them are now and at all times on and after January 4, 1896, have been navigable, and title to the beds of said last-mentioned stretches of river and each of them vested in the State of Utah upon its admission into the Union on January 4, 1896, except so far as the United States of America may theretofore have made grants thereof. The United States of America is forever enjoined from asserting any estate, right, title, or interest in and to said beds of said last-mentioned stretches of river or in or to any portion of said last-mentioned beds, or either of them, adverse to the State of Utah or its grantees, and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof by the State of Utah or its grantees.

4. The Colorado River from Mile 212.15 above Lees Ferry, Arizona, to Mile 176 above Lees Ferry, Arizona, is not a navigable river and the title to the bed of said last-mentioned stretch of river is vested in the United States of America, except as to lands heretofore granted, and the State of Utah is forever enjoined from asserting any estate, right, title, or interest in and to said bed of said last-mentioned stretch of river or in and to any part of said last-mentioned bed, adverse to the United States of America, or its grantees; and from in any manner disturbing or interfering with the possession, use, and enjoyment thereof, by the United States of America, or its grantees.

5. The San Juan River, from the mouth of Chinle Creek to the confluence of the San Juan and Colorado Rivers, is not a navigable river, and the title to the river bed is vested in the United States of America, except as to lands heretofore granted, and the State of Utah is forever enjoined from asserting any estate, right, title, or interest in and to said river bed, or any part thereof, adverse to the United States of America, or its grantees; and from

in any manner disturbing or interfering with the possession, use, and enjoyment thereof, by the United States of America, or its grantees.

6. The United States of America shall in nowise be prevented from taking any such action in relation to said rivers, or any of them, as may be necessary to protect and preserve the navigability of any navigable waters of the United States of America.

7. It is further adjudged and decreed by the Court that each party hereto pay its own costs and that each party hereto pay one-half of the expenses incurred by the Special Master, and also one-half of the amount to be fixed by the Court as the compensation of the Special Master. [See *ante*, p. 64.]

No. 632. BRADY *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of West Virginia. Argued May 4, 1931. Decided May 18, 1931. *Per Curiam*: The decree of dismissal by the specially constituted District Court is affirmed. *Standard Oil Company (Indiana) v. United States*, *ante*, p. 235; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Interstate Commerce Comm. v. Delaware, Lackawanna & Western R. Co.*, 220 U. S. 235, 251; *Interstate Commerce Comm. v. Illinois Central R. Co.*, 215 U. S. 452, 470; *Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 494. Mr. George T. Bell, with whom Mr. Samuel T. Spears was on the brief, for appellant. Solicitor General Thacher, Assistant to the Attorney General O'Brian, Mr. Charles H. Weston, Special Assistant to the Attorney General, and Messrs. Daniel W. Knowlton, Chief Counsel, and E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Charles R. Webber and Eugene S. Williams, were on the brief for the United States et al. Reported below: 43 F. (2d) 847.

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No. 16, original. NEW JERSEY *v.* NEW YORK ET AL.
May 25, 1931.

DECREE

This cause came on to be heard by this Court upon the exceptions filed by the complainant and defendants to the report of the Special Master, and was argued by counsel for the States of New Jersey, New York, Pennsylvania and the City of New York.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, as follows:

1. That the injunction prayed for by the State of New Jersey so far as it would restrain the State of New York or City of New York from diverting from the Delaware River or its tributaries to the New York City water supply the equivalent of 440 million gallons of water daily be, and the same is hereby, denied, but is granted to restrain the said State and City from diverting water in excess of that amount. The denial of the injunction as above is subject to the following conditions.

(a) Before any diversion shall be made an efficient plant for the treatment of sewage at Port Jervis, New York, shall be constructed and the sewage of Port Jervis entering the Delaware or Neversink Rivers shall be treated to such an extent as to effect a reduction of 85% in the organic impurities. And the effluent from such plant shall be treated with a chemical germicide, or otherwise, so that the *B. coli* originally present in the sewage shall be reduced by 90%.

Untreated industrial waste from plants in said town of Port Jervis shall not be allowed to enter the Delaware or Neversink Rivers, and the treatment of such industrial wastes shall be such as to render the effluent practically free from suspended matter and non-putrescent; and said

treatment of sewage and industrial waste shall be maintained so long as any diversion is made from the Delaware River or its tributaries.

(b) At any time the stage of the Delaware River falls below .50 c. s. m. at Port Jervis, New York, or Trenton, New Jersey, or both (.50 c. s. m. being equivalent to a flow of 1535 c. f. s. at Port Jervis and 3400 c. f. s. at Trenton), water shall be released from one or more of the impounding reservoirs of New York City in sufficient volume to restore the flow at Port Jervis and Trenton to .50 c. s. m., provided, however, that there is not required to be released at any time water in excess of 30% of the diversion area yield, and the diversion area yield having been ascertained to be 2.2 c. s. m., the maximum release required shall be 30% of that amount, or .66 cubic feet per second per square mile of the areas from which water is diverted.

In determining the quantity of water to be released so as to add to the flow of the Delaware River, the Neversink River shall be treated as if it flowed into the Delaware River above Port Jervis, and the number of second feet of water released from the impounding reservoir on the Neversink River shall be added to the number of second feet of water released from other reservoirs, so as to determine whether the quantity of water, required by this decree to be released, has been released.

(c) That the State of New Jersey and the Commonwealth of Pennsylvania, through accredited representatives, shall at all reasonable times have the right to inspect the dams, reservoirs and other works constructed by the City of New York and to inspect the diversion areas and the inflow, outflow and diverted flow of said areas, and to inspect the meters and other apparatus installed by the City of New York and to inspect all records pertaining to inflow, outflow and diverted flow.

2. The diversion herein allowed shall not constitute a prior appropriation and shall not give the State of New

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York and City of New York any superiority of right over the State of New Jersey and Commonwealth of Pennsylvania in the enjoyment and use of the Delaware River and its tributaries.

3. The prayer of the intervener, Commonwealth of Pennsylvania, for the present allocation to it of the equivalent of 750 million gallons of water daily from the Delaware River or its Pennsylvania tributaries is denied without prejudice.

4. The prayer of the Commonwealth of Pennsylvania for the appointment of a river master is denied without prejudice.

5. This decree is without prejudice to the United States and particularly is subject to the paramount authority of Congress in respect to navigation and navigable waters of the United States, and subject to the powers of the Secretary of War and Chief of Engineers of the United States Army in respect to navigation and navigable waters of the United States.

6. Any of the parties hereto, complainant, defendants or intervener, may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy.

7. The costs of the cause shall be divided and shall be paid by the parties in the following proportions: State of New Jersey 35 per cent, City of New York 35 per cent, State of New York 15 per cent, Commonwealth of Pennsylvania 15 per cent. [See *ante*, p. 336.]

No. 24, original. EX PARTE MADDEN BROS., INC. Return to rule submitted May 18, 1931. Decided May 25, 1931. *Per Curiam*: Upon consideration of the return of the Honorable Joseph W. Molyneaux to the rule, hereto-

fore issued to him, to show cause why a writ of mandamus should not issue directing and commanding him to vacate, annul, and set aside the order and decree of August 9, 1930, dismissing the bill of complaint in the case of *Madden Bros., Inc., v. Railroad & Warehouse Commission of Minnesota et al.*, and to call to his assistance two other judges and proceed in the said cause according to and in compliance with the provisions of § 266 of the Judicial Code in order to hear and determine the application for an interlocutory injunction in said cause;

It is now here ordered that the said rule be, and the same is hereby, made absolute. *Mr. E. W. MacPherran* for petitioner. *Messrs. Henry N. Benson, Charles E. Phillips, and John F. Bonner* for respondent.

No. 686. *LEACH v. CALIFORNIA*. Appeal from the District Court of Appeal, Second Appellate District, of California. Submitted May 18, 1931. Decided May 25, 1931. *Per Curiam*: The appeal herein is dismissed. *Stratton v. Stratton*, 239 U. S. 55; *Andrews v. Virginian Ry. Co.*, 248 U. S. 272, 275; *Matthews v. Huwe*, 269 U. S. 262, 265, 266; *American Railway Express Co. v. Levee*, 263 U. S. 19, 20. *Mr. Jesse I. Miller* for appellant. *Mr. U. S. Webb*, Attorney General of California, for appellee. *Messrs. Raymond Benjamin and Henry P. Goodwin*, by special leave of Court, filed a brief as *amici curiae*. Reported below: 290 Pac. 631.

No. 841. *SMITH ET AL. v. ILLINOIS BELL TELEPHONE Co.* Appeal from the District Court of the United States for the Northern District of Illinois. Jurisdictional statement submitted May 18, 1931. Decided May 25, 1931. *Per Curiam*: The appeal herein is dismissed. The order of the District Court merely reinstated the interlocutory injunction pursuant to the opinion of this Court. The

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parties should proceed with the trial of the cause upon the merits as this Court has directed. *Messrs. Oscar E. Carlstrom, Samuel A. Ettelson, George I. Haight, Benjamin F. Goldstein, Edmund D. Adcock, and Francis X. Busch* for appellants. *Messrs. Horace Kent Tenney, Charles M. Bracelen, William H. Thompson, Kenneth F. Burgess, R. A. Van Orsdel, and Leslie N. Jones* for appellee. [See 282 U. S. 133.]

NO. 842. NEW ORLEANS LAND CO. *v.* BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted May 18, 1931. Decided May 25, 1931. *Per Curiam*: Judgment affirmed. *Wolfe v. Hurley, ante*, p. 801; *Sweet v. Rechel*, 159 U. S. 380; *Clark v. Nash*, 198 U. S. 361, 369; *Strickley v. Gold Boy Mining Co.*, 200 U. S. 527, 531; *Offield v. New York, New Haven & Hartford R. Co.*, 203 U. S. 372, 377. *Messrs. Arthur A. Moreno, Gustave Lemle, and J. D. Dresner* for appellant. *Mr. James Wilkinson* for appellee. Reported below: 132 So. 121.

NO. 854. LOFTUS ET AL. *v.* DEPARTMENT OF AGRICULTURE OF IOWA ET AL. Appeal from the Supreme Court of Iowa. Jurisdictional statement submitted May 18, 1931. Decided May 25, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Adams v. Milwaukee*, 228 U. S. 572, 582, 583; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306. *Mr. Edward J. McVann* for appellants. *Messrs. John Fletcher and Earl F. Wisdom* for appellees. Reported below: 232 N. W. 412.

NO. 193. MISSOURI PACIFIC R. CO. *v.* NORWOOD, ATTORNEY GENERAL, ET AL. Appeal from the District Court of the United States for the Western District of Arkansas.

June 1, 1931. The judgment herein is modified so that the judgment clause will appear in the mandate as follows:

On consideration whereof, it is ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed with costs without prejudice to any application to the District Court to amend the pleadings or otherwise. [See *ante*, p. 249.]

No. 807. *MOYE v. NORTH CAROLINA ET AL.* Appeal from the Supreme Court of North Carolina. Jurisdictional statement submitted May 25, 1931. Decided June 1, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a properly presented substantial federal question. *El Paso & South Western R. Co. v. Eichel & Weikel*, 226 U. S. 590; *Reinman v. Little Rock*, 237 U. S. 171; *Standard Oil Co. v. City of Marysville*, 279 U. S. 582. *Mr. Robert H. McNeill* for appellant. No appearance for appellees. Reported below: 200 N. C. 11; 156 S. E. 130.

No. 813. *SCHOOL DISTRICT No. 7, MUSKOGEE COUNTY, ET AL. v. HUNNICUT, COUNTY SUPERINTENDENT.* Appeal from the District Court of the United States for the Eastern District of Oklahoma. Jurisdictional statement submitted May 25, 1931. Decided June 1, 1931. *Per Curiam*: The decree herein is affirmed. *Ex parte Collins*, 277 U. S. 576; *Ex parte Public Bank*, 278 U. S. 101. *Messrs. J. J. Bruce, J. Bernard Smith, and O. B. Jefferson* for appellants. No appearance for appellee.

No. 839. *CLYNE v. OHIO.* Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted May 25, 1931. Decided June 1, 1931. *Per Curiam*: The ap-

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peal herein is dismissed. *Farson, Son & Co. v. Bird*, 248 U. S. 268. *Mr. Henry A. Williams* for appellant. *Mr. Ray T. Miller* for appellee. Reported below: 174 N. E. 767.

No. 869. WESTERN & ATLANTIC R. CO. *v.* GRAY. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted May 25, 1931. Decided June 1, 1931. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co. v. Flannigan*, 192 U. S. 29; *Erie R. Co. v. Solomon*, 237 U. S. 427; *Zucht v. King*, 260 U. S. 174; *Sugarman v. United States*, 249 U. S. 182; *C. A. King & Co. v. Horton*, 276 U. S. 600; *Bank of Indianola v. Miller*, 276 U. S. 605; *Roe v. Kansas*, 278 U. S. 191. *Mr. Fitzgerald Hall* for appellant. No appearance for appellee. Reported below: 157 S. E. 482.

DECISIONS GRANTING CERTIORARI, FROM FEBRUARY 26, 1931, TO AND INCLUDING JUNE 1, 1931

No. 618. UNITED STATES EX REL. McLENNAN *v.* WILBUR, SECRETARY OF THE INTERIOR;

No. 676. UNITED STATES EX REL. SIMPSON *v.* WILBUR, SECRETARY OF THE INTERIOR ET AL.;

No. 704. UNITED STATES EX REL. BARTON *v.* WILBUR, SECRETARY OF THE INTERIOR; and

No. 743. UNITED STATES EX REL. PYRON *v.* WILBUR, SECRETARY OF THE INTERIOR, ET AL. March 2, 1931. Petitions for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Lewis Edwin Hoffman* and *Chester I. Long* for McLennan. *Messrs. Homer R. Hendricks* and *Donald V. Hunter* for Simpson. *Mr. James Conlon* for Barton. *Messrs. John*

W. Fisher, James G. Leovy, and A. W. Gregg for Pyron. *Solicitor General Thacher, Assistant Attorney General Richardson, and Messrs. Aubrey Lawrence, Claude R. Branch, and Paul D. Miller* for respondents. Reported below: 47 F. (2d) 217, 224.

No. 663. *PERMUTIT Co. v. GRAVER CORPORATION*. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Drury W. Cooper, Graham Sumner, Allan C. Bakewell, and George A. Chritton* for petitioner. *Messrs. George L. Wilkinson and Charles L. Byron* for respondent. Reported below: 43 F. (2d) 898.

No. 678. *SMOOT SAND & GRAVEL CORP. v. WASHINGTON AIRPORT, INC.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Thomas D. Thacher, G. A. Everson, Paul W. Kear, and Seth W. Richardson* for petitioner. *Mr. Louis Titus* for respondent. Reported below: 44 F. (2d) 342.

No. 720. *FETTERS, U. S. MARSHAL, v. UNITED STATES EX REL. CUNNINGHAM*. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher and Messrs. Claude R. Branch and Harry S. Ridgely* for petitioner. *Messrs. Benjamin M. Golder and Ruby R. Vale* for respondent.

Nos. 687, 688, 689, 690. *CUMBERLAND COAL Co. v. BOARD OF REVISION OF TAX ASSESSMENTS*;

No. 691. *PHILLIPS v. SAME*;

No. 692. *PIEDMONT COAL Co. v. SAME*; and

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No. 693. GREENE COUNTY COAL CO. *v.* SAME. March 9, 1931. Petition for writs of certiorari to the Supreme Court of Pennsylvania granted. *Messrs. William A. Seifert, Samuel McClay, W. J. Kyle, and Carl E. Glock* for petitioners. *Mr. Ambrose Bradley* for respondent. Reported below: 152 Atl. 755.

No. 733. VIRGINIAN RAILWAY CO. *v.* CHAMBERS;

No. 734. SAME *v.* FITZGERALD; and

No. 735. SAME *v.* HYLTON. March 9, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. John R. Pendleton and W. H. T. Loyall* for petitioner. *Mr. Russell S. Ritz* for respondents. Reported below: 46 F. (2d) 20.

No. 709. HANDY & HARMAN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. March 16, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William C. Breed* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and John Henry McEvers* for respondent. Reported below: 47 F. (2d) 184.

No. 711. IOWA-DES MOINES NATIONAL BANK *v.* STEWART, CHAIRMAN OF THE BOARD OF SUPERVISORS; and

No. 712. CENTRAL STATE BANK *v.* SAME. March 16, 1931. Petitions for writs of certiorari to the Supreme Court of Iowa granted. *Messrs. J. G. Gamble and A. B. Howland* for petitioners. *Messrs. Eskil C. Carlson, Charles Hutchinson, George A. Wilson, and Maxwell A. O'Brien* for respondent. Reported below: 232 N. W. 445.

No. 730. CROWELL, DEPUTY COMMISSIONER, *v.* BENSON; and

No 731. CROWELL, DEPUTY COMMISSIONER, ET AL. *v.* SAME. March 16, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher*, and *Messrs. J. Frank Staley* and *W. Clifton Stone* for Crowell, petitioner. *Mr. Palmer Pillans* for Knudson, petitioner. *Mr. Vincent F. Kilborn* for respondent. Reported below: 45 F. (2d) 66.

No. 685. DELAVAL STEAM TURBINE CO. *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Court of Claims granted. *Messrs. John S. Flannery*, *George C. Holton*, *Frank F. Nesbit*, and *George F. Losche* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Mr. Claude R. Branch* for the United States. Reported below: 70 Ct. Cls. 51.

No. 759. UNITED STATES *v.* KIRBY LUMBER CO. April 20, 1931. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Mr. Paul D. Miller* for the United States. *Mr. Robert Ash* for respondent. Reported below: 44 F. (2d) 885.

No. 773. MOORE, TRUSTEE IN BANKRUPTCY, *v.* BAY. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles F. Hutchins* for petitioner. No appearance for respondent. Reported below: 45 F. (2d) 449.

No. 779. SUN INSURANCE OFFICE *v.* SCOTT;

No. 780. NORWICH UNION FIRE INSURANCE SOCIETY, LTD., *v.* SAME; and

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No. 781. HOME INSURANCE Co. *v.* SAME. April 20, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Roland M. Edmonds* for petitioners. *Messrs. Elwood Murphy* and *F. S. Monnett* for respondent. Reported below: 46 F. (2d) 10.

No. 790. MECON, ADMINISTRATOR, *v.* FITZSIMMONS DRILLING Co., INC., ET AL. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. S. J. Montgomery* for petitioner. *Messrs. George F. Short, Horace H. Hagan, Hal C. Thurman, Ray S. Fellows,* and *Thomas R. Freeman* for respondents. Reported below: 47 F. (2d) 28.

Nos. 797 and 798. CHESAPEAKE & OHIO RY. Co. *v.* KUHN. April 20, 1931. Petition for writs of certiorari to the Supreme Court of Ohio and to the Court of Appeals of Pike County, Ohio, granted. *Messrs. David H. Leake* and *Henry Bannon* for petitioner. *Mr. George D. Nye* for respondent.

No. 822. STRONG *v.* UNITED STATES. April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. William H. Lewis* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 46 F. (2d) 257.

No. 899. SOUTHERN RY. Co. *v.* WALTERS. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. H. O'B. Cooper, S. R. Prince, Rudolph J. Kramer, Bruce A. Camp-*

bell, and *L. E. Jeffries* for petitioner. No appearance for respondent. Reported below: 47 F. (2d) 3.

No. 849. UTAH *v.* UNITED STATES; and

No. 877. CARBON COUNTY LAND CO. *v.* UNITED STATES ET AL. May 18, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. George P. Parker* and *Mahlon E. Wilson* for Utah. *Mr. Samuel A. King* for Carbon County Land Co. *Solicitor General Thacher*, *Assistant Attorney General Richardson*, and *Messrs. Claude R. Branch*, *Nat M. Lacy*, and *Paul D. Miller* for the United States.

No. 866. SOUTHERN RAILWAY CO. *v.* MOORE, ADMINISTRATOR. May 18, 1931. Petition for writ of certiorari to the Supreme Court of South Carolina granted. *Messrs. S. R. Prince*, *H. O'B. Cooper*, *Frank G. Tompkins*, and *L. E. Jeffries* for petitioner. No appearance for respondent. Reported below: 158 S. E. 446; 155 S. E. 740.

No. 889. UNITED STATES *v.* RYAN. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. John J. Byrne* and *Paul D. Miller* for the United States. No appearance for respondent. Reported below: 44 F. (2d) 951.

No. 896. WESTERN PACIFIC CALIFORNIA R. CO. *v.* SOUTHERN PACIFIC CO. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. F. M. Angellotti* and *Harriet P. Tyler* for petitioner. *Messrs. C. O. Amonette*, *H. C.*

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Booth, C. W. Durbrow, and Guy V. Shoup for respondent. Reported below: 46 F. (2d) 729.

No. 906. VAN HUFFEL *v.* HARKELRODE, TREASURER. May 25, 1931. Petition for writ of certiorari to the Court of Appeals of Trumbull County, Ohio, granted. *Mr. H. H. Hoppe* for petitioner. *Mr. G. H. Birrell* for respondent.

No. 907. VAN HUFFEL *v.* HARKELRODE, TREASURER. May 25, 1931. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Mr. H. H. Hoppe* for petitioner. *Mr. G. H. Birrell* for respondent.

No. 931. GREEN STAR STEAMSHIP CO., LTD. *v.* ARMOUR & CO. ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John C. Crawley* for petitioner. *Messrs. D. Roger Englar and Leonard J. Matteson* for respondents. Reported below: 47 F. (2d) 874.

No. 935. WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. VINDICATOR CONSOLIDATED GOLD MINING Co.; and

No. 936. SAME *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORP. May 25, 1931. Petition for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher, Assistant Attorney General Richardson, and Mr. Whitney North Seymour* for petitioner. *Messrs. Edgar Watkins and J. C. Trimble* for Vindicator Consolidated Gold Mining Co. *Messrs. Marion Smith, Edgar Watkins, and Mac Asbill* for Chestatee Pyrites & Chemical Corp. Reported below: 47 F. (2d) 422, 424.

No. 915. UNITED STATES *v.* CAMPBELL. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher*, and *Messrs. J. Frank Staley, W. Clifton Stone, and Paul D. Miller* for the United States. *Mr. David F. Lee* for respondent. Reported below: 47 F. (2d) 227.

No. 917. CHICAGO & NORTH WESTERN RY. CO. *v.* BOLLE. June 1, 1931. Petition for writ of certiorari to the Appellate Court of Illinois, Second District, granted. *Messrs. Ray N. Van Doren and Samuel H. Cady* for petitioner. *Mr. Joseph D. Ryan* for respondent. Reported below: 258 Ill. App. 545.

DECISIONS DENYING CERTIORARI, FROM FEBRUARY 26, 1931, TO AND INCLUDING JUNE 1, 1931

No. 740. WHITSON, ADMINISTRATOR, *v.* DELAWARE, LACKAWANNA & WESTERN R. Co. March 2, 1931. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. James B. Sheean* for petitioner. No appearance for respondent. Reported below: 150 Atl. 344.

No. 620. PARMAGINI *v.* UNITED STATES; and

No. 660. LEVIN *v.* SAME. March 2, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Louis Titus and Otto Christensen* for Parmagini. *Mr. Robert B. McMillan* for Levin. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely, and W. Marvin Smith* for the United States. Reported below: 42 F. (2d) 721.

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No. 626. UNITED STATES *v.* RACHMIL. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Thacher*, and *Messrs. William H. Ramsey* and *Paul D. Miller* for the United States. No appearance for respondent. Reported below: 43 F. (2d) 878.

No. 631. SNIDER ET AL. *v.* UNITED STATES. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Walter Cocks* for petitioners. *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch*, *John J. Byrne*, and *Paul D. Miller* for the United States. Reported below: 45 F. (2d) 161.

No. 645. BELL ET AL. *v.* UNITED STATES STEEL PRODUCTS Co.; and

No. 654. CALIFORNIA PACKING CORP. *v.* SAME. March 2, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Ralph W. Brown* for Bell et al. *Messrs. Leonard J. Matteson* and *T. Catesby Jones* for California Packing Corp. *Messrs. Charles S. Haight*, *Kenneth B. Halstead*, and *John W. Griffin* for respondent. Reported below: 43 F. (2d) 958.

No. 646. BLANKENBURG *v.* MASSACHUSETTS. March 2, 1931. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts, County of Suffolk, denied. *Mr. Asa P. French* for petitioner. *Mr. Joseph E. Warner* for respondent. Reported below: 172 N. E. 209.

No. 648. VINSON, ADMINISTRATOR, ET AL. *v.* GRAHAM ET AL. March 2, 1931. Petition for writ of certiorari to

the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chester I. Long, W. E. Stanley, Peter Q. Nyce, Austin M. Cowan, Malcolm E. Rosser, and Thomas H. Owen* for petitioners. *Messrs. John H. Brennan and Elmer J. Lundy* for respondents. Reported below: 44 F. (2d) 772.

No. 650. *YELLAND v. BANKERS RESERVE LIFE CO.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel B. Bassett* for petitioner. *Messrs. George B. Thatcher, Wm. Woodburn, and Thomas F. Ryan* for respondent. Reported below: 41 F. (2d) 684.

No. 651. *ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILROAD v. DOYLE, ADMINISTRATOR.* March 2, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Roy W. Rucker* for petitioner. *Mr. Jesse W. Barrett* for respondent. Reported below: 31 S. W. (2d) 1010.

No. 653. *UNITED STATES v. TAYLOR ET AL.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Thacher, Assistant Attorney General Richardson, and Messrs. Claude R. Branch and Nat M. Lacy* for the United States. No appearance for respondents. Reported below: 44 F. (2d) 531.

No. 655. *LUXENBERG v. UNITED STATES.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Nelson T. Hartson, Frank J. Hogan, and Sam T. Spears* for petitioner. *Solicitor General Thacher, and Messrs. Claude*

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R. Branch, Harry S. Ridgely, and Paul D. Miller for the United States. Reported below: 45 F. (2d) 497.

No. 657. SPOKANE, PORTLAND & SEATTLE R. Co. *v.* CROSS, ADMINISTRATRIX. March 2, 1931. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. Charles H. Carey, Charles A. Hart, and Charles E. McCulloch* for petitioner. No appearance for respondent. Reported below: 291 Pac. 336.

No. 658. O. H. INGRAM Co. *v.* WISCONSIN TAX COMMISSION ET AL. March 2, 1931. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. P. M. Beach* for petitioner. *Mr. John W. Reynolds* for respondents. Reported below: 231 N. W. 160.

No. 659. MACON, DUBLIN & SAVANNAH R. Co. *v.* GENERAL REDUCTION Co. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles Akerman* for petitioner. *Mr. George S. Jones* for respondent. Reported below: 44 F. (2d) 499.

No. 661. JAMES RICHARDSON & SONS, LTD., ET AL. *v.* JENKINS STEAMSHIP Co. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles W. Greenfield* for petitioners. *Messrs. Sherwin A. Hill and Thomas H. Garry* for respondent. Reported below: 44 F. (2d) 759.

No. 666. DASHIELL MOTOR Co. *v.* UNITED STATES. March 2, 1931. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles H. Pegler* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, John J. Byrne, and W. Marvin Smith,* for the United States.

No. 668. DELAWARE & HUDSON Co. *v.* DUNNIGAN. March 2, 1931. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Joseph Rosch* for petitioner. *Mr. Walter A. Fullerton* for respondent. Reported below: 230 App. Div. 749; 243 N. Y. S. 792.

No. 669. STRANAHAN *v.* COMMISSIONER OF INTERNAL REVENUE. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas O. Marlar and E. J. Marshall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and John H. McEvers* for respondent. Reported below: 42 F. (2d) 729.

No. 670. LONG ET AL. *v.* METZGER ET AL. March 2, 1931. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Andrew G. Smith* for petitioners. *Messrs. Wm. A. Schnader and Penrose Hertzler* for respondents. Reported below: 152 Atl. 572.

No. 672. OKLAHOMA-ARKANSAS TELEPHONE Co. *v.* SOUTHWESTERN BELL TELEPHONE Co. March 2, 1931. Petition for writ of certiorari to the Circuit court of Appeals for the Eighth Circuit denied. *Messrs. James B. McDonough, Joseph W. House, James B. McDonough, Jr.,*

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and *Joseph R. Brown* for petitioner. *Messrs. Edward B. Downie, Claude Nowlin, and Joseph W. Jamison* for respondent. Reported below: 45 F. (2d) 995.

No. 673. *CRAWFORD v. WHITE ET AL.* March 2, 1931. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, denied. *Mr. Thornton Hardie* for petitioner. *Messrs W. W. Turney, A. H. Culwell, and Wm. H. Burges* for respondents. Reported below: 25 S. W. (2d) 629.

No. 674. *MONCURE, FORMERLY COLLECTOR OF INTERNAL REVENUE, v. ATLANTIC LIFE INSURANCE CO.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Sewall Key, Hayner M. Larson, and Paul D. Miller* for petitioner. *Mr. Andrew D. Christian* for respondent. Reported below: 44 F. (2d) 167.

No. 677. *DAVIS v. UNITED STATES.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Bynum E. Hinton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, S. Dee Hanson, and Clarence M. Charest* for the United States.

No. 680. *LISENA v. UNITED STATES.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank B. Bozza* for petitioner. *Solicitor General Thacher, and Messrs.*

Claude R. Branch, Harry S. Ridgely, and W. Marvin Smith for the United States. Reported below: 44 F. (2d) 1023.

No. 681. *HYNEY v. UNITED STATES*. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Elvin Swarthout* for petitioner. *Solicitor General Thacher, and Messrs. Claude R. Branch, Harry S. Ridgely, and W. Marvin Smith* for the United States. Reported below: 44 F. (2d) 134.

No. 682. *HOLT v. UNITED STATES*. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Wattawa* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, John J. Byrne, and W. Marvin Smith* for the United States. Reported below: 45 F. (2d) 392.

No. 684. *KILMER ET AL. v. NORFOLK & WESTERN RY. CO.* March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Harry K. Byrer* for petitioners. *Mr. F. M. Rivinus* for respondent. Reported below: 45 F. (2d) 532.

No. 694. *ADAMS ET AL. v. HOSKINS ET AL.* March 2, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs James M. Hays and John T. Hays* for petitioners. *Messrs. Almond D. Cochran, Edgar T. Noble, and Robert B. F. Hummer* for respondents. Reported below: 290 Pac. 1104.

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No. 701. KANSAS CITY SOUTHERN RY. CO. *v.* SANFORD. March 2, 1931. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. F. H. Moore, James B. McDonough, A. F. Smith, and Samuel W. Moore* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 31 S. W. (2d) 963.

No. 706. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., *v.* DEAN. March 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Shepard Bryan* for petitioner. *Mr. John M. Slaton* for respondent. Reported below: 44 F. (2d) 524.

No. 628. McCAUGHN, FORMERLY COLLECTOR OF INTERNAL REVENUE, *v.* CARNILL, EXECUTRIX. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Thacher* for petitioner. *Mr. Joseph L. McAleer* for respondent. Reported below: 43 F. (2d) 69.

No. 644. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HODGKINS, EXECUTRIX. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Thacher* for petitioner. No appearance for respondent. Reported below: 44 F. (2d) 43.

No. 679. PACIFIC SOUTHWEST TRUST & SAVINGS BANK, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank H. McCulloch and Hugh W. McCulloch* for

petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, J. Louis Monarch, Clarence M. Charest, and Prew Savoy* for respondent. Reported below: 45 F. (2d) 773.

No. 567. DENVER & SALT LAKE R. CO. *v.* BOARD OF COUNTY COMMISSIONERS OF ROUTT COUNTY; and

No. 568. SAME *v.* BOARD OF COUNTY COMMISSIONERS OF MOFFAT COUNTY. March 9, 1931. Petition for writs of certiorari to the Supreme Court of Colorado denied. *Mr. Elmer L. Brock* for petitioner. *Mr. Thomas M. Woodward* for respondents. Reported below: 291 Pac. 1020, 1022.

No. 627. RANDALL ET AL. *v.* UNITED STATES. March 9, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. M. Walton Hendry* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch and John E. Hoover* for the United States. Reported below: 71 Ct. Cls. 152.

No. 697. FIELD & START, INC., *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry T. Dorrance and J. G. Korner, Jr.*, for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, A. H. Conner, Clarence M. Charest, and Dewitt M. Evans* for respondent. Reported below: 44 F. (2d) 1014.

No. 700. MOFFETT ET AL., ADMINISTRATRICES, *v.* MOFFETT ET AL. March 9, 1931. Petition for writ of cer-

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tiorari to the Supreme Court of Kansas denied. *Mr. Martin J. O'Donnell* for petitioners. *Messrs. John W. Davis* and *Russell L. Hazzard* for respondents. Reported below: 131 Kan. 582; 292 Pac. 947.

No. 702. UNITED STATES EX REL. CARDASHIAN *v.* SNYDER, U. S. MARSHAL, ET AL. March 9, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Joseph C. Fehr* and *Marion DeVries* for petitioner. *Solicitor General Thacher* and *Mr. J. Frank Staley* for respondent. Reported below: 44 F. (2d) 895.

No. 707. SEABOARD AIR LINE RY. CO. *v.* D'AVIGNON. March 9, 1931. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Messrs. James F. Wright* and *W. W. Dykes* for petitioner. *Mr. John S. Barbour* for respondent. Reported below: 41 Ga. App. 263; 153 S. E. 96.

No. 708. PENNSYLVANIA RAILROAD CO. *v.* SHINDLE-DECKER. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. D. McKenney, John Spalding Flannery, George Bowdoin Craighill,* and *Harold W. Fraser* for petitioner. *Mr. Ralph D. Cole* for respondent. Reported below: 44 F. (2d) 162.

No. 710. GRIDLEY ET AL. *v.* UNITED STATES. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John M. Dunham* and *W. D. Jamieson* for petitioners. *Solicitor General Thacher,* and *Messrs. Harry S. Ridgely* and *W.*

Marvin Smith for the United States. Reported below: 44 F. (2d) 716.

No. 716. *TOY ET AL. v. UNITED STATES*. March 9, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Carey Van Fleet* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carlross, and Messrs. Sewall Key and Clarence M. Charest* for the United States. Reported below: 45 F. (2d) 1.

No. 719. *SIXTY-SEVEN SOUTH MUNN, INC., v. BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL.* March 9, 1931. Petition for writ of certiorari to the Supreme Court of New Jersey denied. *Mr. Merrit Lane* for petitioner. *Mr. William H. Speer* for respondents. Reported below: 147 Atl. 735; 152 Atl. 920.

No. 718. *BANDLER v. MAYERS, OSTERWALD & MUEHLFELD, INC.* March 16, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Marion DeVries, Jesse P. Crawford, and H. Kennedy McCook* for petitioner. *Mr. Addison S. Pratt* for respondent.

No. 656. *CONTINENTAL PRODUCTS CO. v. UNITED STATES*. March 16, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. W. R. Brown, Spencer Gordon, and J. Harry Covington* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Mr. Claude R. Branch* for the United States. Reported below: 44 F. (2d) 257.

No. 675. WISCONSIN CENTRAL RY. CO. *v.* UNITED STATES. March 16, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. John L. Erdall* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 41 F. (2d) 870.

No. 703. T. J. MOSS TIE CO. ET AL. *v.* TANNER ET AL. March 16, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edward J. Grove*, *John London*, *George W. Yancey*, and *Walter Brower* for petitioners. *Solicitor General Thacher*, and *Messrs. Claude R. Branch*, *J. Frank Staley*, *W. Clifton Stone*, and *William H. Riley, Jr.*, for respondent Crowell. No appearance for respondent Tanner. Reported below: 44 F. (2d) 928.

No. 715. NEW YORK, ONTARIO & WESTERN RY. CO. *v.* WYATT. March 16, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas Watts* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 45 F. (2d) 705.

No. 717. UNION CENTRAL LIFE INSURANCE CO. *v.* HARVEY. March 16, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alva M. Lumpkin* for petitioner. *Rena Harvey, pro se.* Reported below: 45 F. (2d) 78.

No. 736. NEW YORK LIFE INSURANCE CO. *v.* ROSITZKY. March 16, 1931. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ralph T. Finley, James C. Jones, Lon O. Hocker, James C. Jones, Jr., Frank H. Sullivan, and Louis H. Cooke* for petitioner. *Mr. K. B. Randolph* for respondent. Reported below: 45 F. (2d) 758.

No. 786. O'LEARY ET AL. *v.* UNITED STATES. March 23, 1931. 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. Philip A. McHugh* for petitioners. No appearance for the United States.

No. 664. ASSOCIATED FURNITURE CORP. *v.* UNITED STATES. March 23, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert H. Montgomery, Thomas G. Haight, and J. Marvin Haynes* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch and W. Marvin Smith* for the United States. Reported below: 44 F. (2d) 78.

No. 705. UNITED STATES EX REL. STEFANO *v.* PULVER, U. S. MARSHAL, ET AL. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Antonio di Stefano, pro se. Mr. Eugene E. Kelly* for respondents. Reported below: 46 F. (2d) 310.

No. 713. SAN DIEGO *v.* ATCHISON, TOPEKA & SANTA FE RY. Co. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. M. W. Conkling* for petitioner. *Messrs.*

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Robert O. Brennan and *E. E. McInnis* for respondent.
Reported below: 45 F. (2d) 11.

No. 722. *PIG STAND Co. v. DIXIEPIG CORP. ET AL.* March 23, 1931. Petition for writ of certiorari to the Court of Civil Appeals, 5th Supreme Judicial District, of Texas, denied. *Mr. John Davis* for petitioner. No appearance for respondents. Reported below: 31 S. W. (2d) 325.

No. 723. *NORTHWESTERN LUMBER Co. v. WISCONSIN TAX COMMISSION ET AL.* March 23, 1931. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. P. M. Beach* for petitioner. *Mr. John W. Reynolds* for respondents. Reported below: 231 N. W. 865.

No. 724. *JOHN S. OWEN LUMBER Co. v. WISCONSIN TAX COMMISSION ET AL.* March 23, 1931. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. P. M. Beach* for petitioner. *Mr. John W. Reynolds* for respondents. Reported below: 231 N. W. 872. See also, 233 N. W. 96.

No. 725. *RUST-OWEN LUMBER Co. v. WISCONSIN TAX COMMISSION ET AL.* March 23, 1931. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. P. M. Beach* for petitioner. *Mr. John W. Reynolds* for respondents. Reported below: 231 N. W. 870.

No. 726. *NEW DELLS LUMBER Co. v. WISCONSIN TAX COMMISSION ET AL.* March 23, 1931. Petition for writ of certiorari to the Supreme Court of Wisconsin denied.

Mr. P. M. Beach for petitioner. *Mr. John W. Reynolds* for respondents. Reported below: 231 N. W. 873.

No. 727. *TINKOFF v. MELLON*. March 23, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. John E. Bennett* and *Paysoff Tinkoff* for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch, J. Frank Staley*, and *Paul D. Miller* for respondent.

No. 729. *KENMOTSU v. NAGLE, U. S. COMMISSIONER*. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Carol W. King* for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for respondent. Reported below: 44 F. (2d) 953.

No. 732. *CRAIG, TRUSTEE IN BANKRUPTCY, v. INDUSTRIAL ACCEPTANCE CORP.* March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Allen McReynolds* for petitioner. *Mr. Walter E. Beebe* for respondent. Reported below: 45 F. (2d) 19.

No. 741. *WINGERT ET AL., EXECUTORS, v. HAGERSTOWN BANK ET AL.* March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioners. No appearance for respondents. Reported below: 43 F. (2d) 1023.

No. 742. *SMITH v. UNITED STATES*. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Ap-

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peals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch, J. Frank Staley, and William H. Riley, Jr.*, for the United States.

No. 746. *RANDOLPH v. FRICKE*. March 23, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. John C. Grover* for petitioner. *Messrs. S. J. Jones and Major J. Lilly* for respondent. Reported below: 35 S. W. (2d) 912.

No. 749. *PATENT VULCANITE ROOFING CO., INC., v. TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE*. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Arthur W. Clement and Oscar R. Houston* for petitioner. *Mr. Homer L. Loomis* for respondent. Reported below: 44 F. (2d) 1018. See also, 32 F. (2d) 213.

No. 760. *INGRAM-DAY LUMBER Co. v. SCHULTZ, ADMINISTRATRIX*. March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William H. Armbrrecht* for petitioner. *Messrs. Michael F. Gallagher and Samuel M. Rinaker* for respondent. Reported below: 45 F. (2d) 359.

No. 765. *W. H. SHENNERS Co. v. LAKE WORTH REALTY & BUILDING Co.* March 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edgar L. Wood* for petitioner. *Messrs. Charles B. Quarles and Maxwell H. Herriott* for respondent. Reported below: 45 F. (2d) 297.

No. 728. UNITED STATES EX REL. EMPIRE & SOUTHEASTERN RY. CO. *v.* INTERSTATE COMMERCE COMMISSION. April 13, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Paysoff Tinkoff and John E. Bennett* for petitioner. *Messrs. Daniel W. Knowlton and Nelson W. Thomas* for respondent. Reported below: 45 F. (2d) 293.

No. 737. MISSOURI-KANSAS-TEXAS R. CO. *v.* HIGHFILL. April 13, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Joseph M. Bryson, Charles S. Burg, and Maurice D. Green* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 293 Pac. 182.

No. 747. SIMONS BRICK CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. April 13, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John H. Brennan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, John G. Remey, and W. Marvin Smith* for respondent. Reported below: 45 F. (2d) 57.

No. 755. CRIDER BROTHERS COMMISSION CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. April 13, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Levi Cooke, J. Walter Farrar, and George R. Beneman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, William Cutler Thompson, and William H. Riley, Jr.,* for respondent. Reported below: 45 F. (2d) 974.

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Nos. 784 and 785. *ROGERS & HUBBARD v. HARTFORD & NEW YORK TRANSPORTATION Co.* April 13, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Mr. John W. Griffin* for respondent. Reported below: 47 F. (2d) 189.

No. 306. *SPURRIER ET AL. v. MITCHELL IRRIGATION DISTRICT ET AL.* See same case, *ante*, p. 796.

No. 859. *STRANG v. UNITED STATES.* April 20, 1931. 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. Charles T. Rowland* for petitioner. No appearance for the United States. Reported below: 45 F. (2d) 1006.

No. 745. *BURNET, COMMISSIONER OF INTERNAL REVENUE, v. NEVIN, EXECUTOR.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Thacher, Assistant Attorney General Youngquist*, and *Mr. Patrick J. Ryan* for petitioner. *Messrs. Maurice Bower Saul and J. Marvin Haynes* for respondent. *Mr. Norman McLeod*, Administrator, and *Mary B. Warburton*, by special leave of Court, filed a brief as *amici curiae*. Reported below: 47 F. (2d) 478.

No. 695. *SHIP CONSTRUCTION & TRADING Co., INC., v. UNITED STATES.* April 20, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. A. Hayne de Yampert* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch and William W. Scott* for the United States.

No. 696. CONGRESSIONAL COUNTRY CLUB *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Edward F. Colladay, Benjamin B. Pettus, and H. B. McCawley* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, Ralph C. Williamson, and William H. Riley, Jr.,* for the United States. Reported below: 44 F. (2d) 266.

No. 699. LLOYD-SMITH, RECEIVER, *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. George R. Shields* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, Charles R. Pollard, H. Brian Holland, and William H. Riley, Jr.,* for the United States. Reported below: 44 F. (2d) 990.

No. 738. BANKERS RESERVE LIFE CO. *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. A. K. Shipe and Charles Kerr* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch and William H. Riley, Jr.,* for the United States. Reported below: 44 F. (2d) 1000.

No. 750. WEST DISINFECTING Co. *v.* UNITED STATES PAPER MILLS, INC., ET AL. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Clarkson Seward* for petitioner. *Messrs. Clarence B. Des Jardins, Herbert J. Jacobi, and William J. Jacobi* for respondent. Reported below: 44 F. (2d) 803.

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Nos. 751 and 752. MOFFAT TUNNEL IMPROVEMENT DISTRICT ET AL. *v.* DENVER & SALT LAKE RY. Co. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Horace N. Hawkins, Norton Montgomery, and Erskine R. Myer* for petitioners. *Messrs. Gerald Hughes, Clayton C. Dorsey, and Elmer L. Brock* for respondent. Reported below: 45 F. (2d) 715.

No. 757. WEINSTEIN *v.* BLACK DIAMOND STEAMSHIP CORP. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank I. Finkler* for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch and J. Frank Staley* for respondent. Reported below: 40 F. (2d) 590. See also, 31 F. (2d) 519.

No. 758. GREATER NEW YORK LIVE POULTRY CHAMBER OF COMMERCE ET AL. *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles Dickerman Williams* for petitioners. *Solicitor General Thacher, Assistant to the Attorney General O'Brian, and Mr. Claude R. Branch* for the United States. Reported below: 47 F. (2d) 156.

No. 761. SKINNER ET AL. *v.* EATON, COLLECTOR OF INTERNAL REVENUE. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. F. Donaghoe* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, A. G. Divet, Whitney North Seymour, and William H.*

Riley, Jr., for respondent. Reported below: 45 F. (2d) 568.

No. 763. *ATCHISON, TOPEKA & SANTA FE RY. Co. v. McCOMB*. April 20, 1931. Petition for writ of certiorari to the District Court of Appeal, First Appellate District, of California, denied. *Messrs. Robert O. Brennan, E. E. McInnis, and Edward W. Camp* for petitioner. *Mr. James F. Brennan* for respondent. Reported below: 294 Pac. 81.

No. 764. *DELAWARE BAY & RIVER PILOTS' ASSOCIATION v. UNITED STATES*. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Otto Wolff, Jr.*, for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch, J. Frank Staley, Whitney North Seymour, and William H. Riley, Jr.*, for the United States. Reported below: 44 F. (2d) 1.

No. 766. *GRAND TRUNK WESTERN RY. Co. v. PIPAL*. April 20, 1931. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Louis L. Dent and Charles Y. Freeman* for petitioner. *Mr. Joseph D. Ryan* for respondent. Reported below: 341 Ill. 320; 173 N. E. 372.

No. 767. *SOKOL v. UNITED STATES*. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Max V. Schoonmaker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch, Mahlon D. Kiefer, F. Cadmus Damrell, and W. Marvin Smith* for the United States. Reported below: 44 F. (2d) 163.

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No. 768. THIRTY-FIRST INFANTRY POST EXCHANGE ET AL. *v.* POSADAS, COLLECTOR OF INTERNAL REVENUE. April 20, 1931. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Arthur W. Brown and Mark E. Guerin* for petitioners. *Messrs. James S. Easby-Smith and Francis W. Hill, Jr.*, for respondent.

No. 769. MORRIS-CUMINGS DREDGING CO. *v.* HENRY STEERS, INC. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leonard J. Matteson* for petitioner. *Mr. William F. Purdy* for respondent. Reported below: 44 F. (2d) 1015.

No. 770. QUITT *v.* STONE, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph A. Cantrel* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Mahlon D. Kiefer, and W. Marvin Smith* for respondents. Reported below: 46 F. (2d) 405.

No. 771. DAVIDOFF *v.* THOMAS A. EDISON, INC. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Borris M. Komar* for petitioner. *Mr. Roger Hinds* for respondent. Reported below: 45 F. (2d) 565.

No. 772. NATIONAL TANK & EXPORT CO. *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Eliot C. Lovett and Elisha Hanson* for petitioner.

Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, Norman D. Keller, Whitney North Seymour, and William H. Riley, Jr., for the United States. Reported below: 45 F. (2d) 1005.

No. 774. JAMES W. HUBBELL, ADMINISTRATOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE;

No. 775. GROVER C. HUBBELL *v.* SAME;

No. 776. WACHTMEISTER *v.* SAME; and

No. 777. F. C. HUBBELL *v.* SAME. April 20, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. G. Gamble* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Sewall Key, John Henry McEvers, and W. Marvin Smith* for respondent. Reported below: 46 F. (2d) 446.

No. 778. DIAL *v.* UNITED STATES. April 20, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank Dial, pro se. Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch and Louis R. Mehlinger* for the United States.

No. 782. CONRAD *v.* NEW YORK LIFE INSURANCE CO. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lovick P. Miles* for petitioner. *Messrs. Earl King, Caruthers Ewing, and Louis H. Cooke* for respondent. Reported below: 47 F. (2d) 885.

No. 783. RUPERT, ADMINISTRATRIX, *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. April 20, 1931.

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Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Joseph Very Quarles* for petitioner. *Messrs. O. W. Dynes, Rodger Murphy Trump, C. S. Jefferson, and Walter Bender* for respondent. Reported below: 232 N. W. 550.

No. 788. *McGARRY, ADMINISTRATRIX, v. CENTRAL RAILROAD Co.* April 20, 1931. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Harry Lane and Clement K. Corbin* for petitioner. *Messrs. Edwin F. Smith and Charles E. Miller* for respondent. Reported below: 153 Atl. 474. See also, 105 N. J. L. 590, 147 Atl. 472.

No. 789. *MIAMI VALLEY FRUIT CO. ET AL. v. UNITED STATES.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. L. Smith* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and Andrew D. Sharpe* for the United States. Reported below: 45 F. (2d) 303.

No. 791. *BIERNACKI, ADMINISTRATRIX, v. PENNSYLVANIA RAILROAD Co.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney A. Syme* for petitioner. *Messrs. Roscoe H. Hupper and Morton L. Fearey* for respondent. Reported below: 45 F. (2d) 677.

No. 792. *BOWLES v. LAWS ET AL.* April 20, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. T. Morris Wampler* for

petitioner. No appearance for respondents. Reported below: 45 F. (2d) 669.

No. 803. *ALKER ET AL. v. UNITED STATES*. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Karl Knox Gartner* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, William Cutler Thompson, and William H. Riley, Jr.,* for the United States. Reported below: 47 F. (2d) 229.

No. 808. *DETROIT, TOLEDO & IRONTON R. CO. v. HAHN*. April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Clifford B. Longley and Wallace R. Middleton* for petitioner. *Mr. R. B. Newcomb* for respondent. Reported below: 47 F. (2d) 59.

No. 812. *JONES ENGINEERING & CONSTRUCTION CO., INC., ET AL. v. LAMBERT LUMBER CO.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John T. Harding, David A. Murphy, and Edward S. Bailey* for petitioners. *Mr. Harris L. Moore* for respondent. Reported below: 47 F. (2d) 74.

No. 814. *STALEY ET AL. v. ESPENLAUB ET AL.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Simeon A. Handy* for petitioners. *Mr. Howard F. Bresee* for respondents. Reported below: 43 F. (2d) 98.

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No. 831. *MAYTAG Co. v. MEADOWS MANUFACTURING Co.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wallace R. Lane, Edward S. Rogers, and William J. Hughes* for petitioner. *Mr. Hal M. Stone* for respondent. Reported below: 45 F. (2d) 299.

No. 847. *ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL. v. CONSOLIDATED CUT STONE Co.* April 20, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Joseph M. Bryson, Maurice D. Green, C. C. Hine, and Charles S. Burg* for petitioners. *Mr. Karl Knox Gartner* for respondent. Reported below: 47 F. (2d) 226.

No. 739. *DUNBAR & SULLIVAN DREDGING Co. v. UNITED STATES.* April 27, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Dana B. Hellings* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, Whitney North Seymour, P. M. Cox, and William H. Riley, Jr.,* for the United States. Reported below: 70 Ct. Cls. 76.

No. 762. *DIAL v. UNITED STATES.* April 27, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank Dial, pro se. Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, J. F. Mothershead, and William H. Riley, Jr.,* for the United States.

No. 794. *EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., v. DURKEE.* April 27, 1931. Petition for writ of certiorari

to the Industrial Accident Commission of California denied. *Mr. M. C. Sloss* for petitioner. *Mr. J. M. Chamberlin* for respondent.

No. 795. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. April 27, 1931. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. M. C. Sloss* for petitioner. *Mr. J. M. Chamberlin* for respondents.

No. 796. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. April 27, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. M. C. Sloss* for petitioner. *Mr. J. M. Chamberlin* for respondents.

No. 806. UNITED STATES FIDELITY & GUARANTY Co. *v.* HARDY ET AL. April 27, 1931. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Mr. Wilmer S. Hunt* for petitioner. No appearance for respondents. Reported below: 24 S. W. (2d) 462.

No. 809. READING Co. *v.* GEARY. April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Alexander Armstrong* and *Eugene S. Williams* for petitioner. *Messrs. Saul Praeger, Roszel C. Thomsen, and Walter L. Clark* for respondent. Reported below: 47 F. (2d) 142.

No. 810. JOY CHEMICAL Co. *v.* MOSS, SUPERVISOR OF PERMITS, ET AL; and

NO. 811. SELKOW *v.* CAMPBELL, FORMER FEDERAL PROHIBITION ADMINISTRATOR, ET AL. April 27, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Dickerman Williams and John Fletcher Caskey* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Mahlon D. Kiefer, and Paul D. Miller* for respondents. Reported below: 46 F. (2d) 1015; 45 *id.* 971.

NO. 816. FIRST NATIONAL BANK, ADMINISTRATOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Rhodes S. Baker and Alex. F. Weisberg* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, J. Louis Monarch, Whitney North Seymour, William H. Riley, Jr., Clarence M. Charest, and Prew Savoy* for respondent. Reported below: 45 F. (2d) 509.

NO. 817. MUNN *v.* BOWERS, EXECUTOR. April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Livingston Platt, John G. Jackson, and Eli J. Blair* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, William Cutler Thompson, and W. Marvin Smith* for respondent. Reported below: 47 F. (2d) 204.

Nos. 818, 819, and 820. KING *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE; and

NO. 821. RUZEK *v.* SAME. April 27, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the

Tenth Circuit denied. *Mr. Harry O. Glasser* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, Hayner N. Larson, and W. Marvin Smith* for respondent. Reported below: 46 F. (2d) 235.

No. 824. *GADDIS ET AL. v. JUNKER ET AL.* April 27, 1931. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Mr. W. D. Gordon* for petitioners. *Mr. Will E. Orgain* for respondents. Reported below: 29 S. W. (2d) 911.

No. 826. *BANK OF ITALY v. BURNET, COMMISSIONER OF INTERNAL REVENUE.* April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ralph W. Smith* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, J. Louis Monarch, and John Henry McEvers* for respondent. Reported below: 46 F. (2d) 629.

No. 827. *FIRST NATIONAL BANK v. BURNET, COMMISSIONER OF INTERNAL REVENUE.* April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ralph W. Smith* for petitioner. *Solicitor General Thacher* for respondent. Reported below: 46 F. (2d) 631.

No. 834. *ERIE RAILROAD CO. v. O'DELL, ADMINISTRATRIX.* April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Benjamin D. Holt and E. A. Foote* for petitioner. *Mr. John Ruffalo* for respondent. Reported below: 46 F. (2d) 300.

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No. 835. *GREENE ET AL. v. UNIACKE*. April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George C. Bedell* for petitioners. *Messrs. Peter O. Knight and A. G. Turner* for respondent. Reported below: 46 F. (2d) 916.

No. 888. *RADIO CORPORATION OF AMERICA v. DEFOREST RADIO Co.* April 27, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis, Thurlow M. Gordon, Manton Davis, Stephen H. Philbin, and Porter R. Chandler* for petitioner. *Mr. Samuel E. Darby, Jr.*, for respondent. Reported below: 47 F. (2d) 606.

No. 756. *NORTH STAR CHEMICAL WORKS, INC., v. UNITED STATES*. May 4, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, Paul D. Miller, William W. Scott, and H. Brian Holland* for the United States. Reported below: 71 Ct. Cls. 342.

No. 823. *MAHUTGA v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. Co.* May 4, 1931. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Samuel A. Anderson* for petitioner. *Messrs. Henry S. Mitchell and John E. Palmer* for respondent. Reported below: 234 N. W. 474.

No. 825. *WROE v. BASS, COLLECTOR OF INTERNAL REVENUE*. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. John D. Cofer for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, W. Marvin Smith, and Miss Helen R. Carloss,* for respondent. Reported below: 44 F. (2d) 1023; 46 *id.* 1023.

No. 829. FARMERS & MERCHANTS STATE BANK *v.* KOENEKE, BANK COMMISSIONER. May 4, 1931. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. A. C. Crane* for petitioner. *Mr. Lee Bond* for respondent.

No. 830. ST. LOUIS-SAN FRANCISCO RY. CO. ET AL. *v.* BRIDGES. May 4, 1931. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Alexander P. Stewart, Edward T. Miller, David W. Houston, Sr., and John W. Canada* for petitioners. No appearance for respondent. Reported below: 131 So. 99. See also, 156 Miss. 206; 125 So. 423.

No. 832. LIPPMAN'S, INC., *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Charles H. Sachs and Louis Caplan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, John G. Remy, Whitney North Seymour, and William H. Riley, Jr.,* for respondent. Reported below: 46 F. (2d) 1016.

No. 840. PORT ANGELES WESTERN R. CO. *v.* CLALLAM COUNTY, WASHINGTON, ET AL. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the

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Ninth Circuit denied. *Mr. Alexander C. Shaw* for petitioner. *Mr. John H. Dunbar* for respondents. Reported below: 44 F. (2d) 28.

No. 844. UNDERHILL *v.* UNITED STATES. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Cornelius Hardy* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch*, *Mahlon D. Kiefer*, *F. Cadmus Damrell*, and *W. Marvin Smith* for the United States. Reported below: 47 F. (2d) 891.

No. 855. MISSOURI PACIFIC R. Co. *v.* GUILLORY. May 4, 1931. Petition for writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, of Texas, denied. *Messrs. W. T. Henry* and *Frank W. Wozencraft* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 28 S. W. (2d) 282.

No. 870. GOOD, RECEIVER, *v.* DERR. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William R. Bagley* for petitioner. *Mr. James E. Trask* for respondent. Reported below: 46 F. (2d) 411.

No. 898. FREUND ET AL. *v.* JOHNSON, TRUSTEE. May 4, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. Frank Michels* for respondent. Reported below: 46 F. (2d) 272.

No. 828. STACY-VORWERK Co. *v.* BUCK ET AL. May 18, 1931. Petition for writ of certiorari to the Supreme Court

of Wyoming denied. *Mr. Michael A. Rattigan* for petitioner. No appearance for respondent. Reported below: 291 Pac. 809.

No. 843. SOUTHERN TRANSPORTATION CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION. May 18, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Karl Knox Gartner* for petitioners. *Messrs. Daniel W. Knowlton and Nelson Thomas* for respondent. Reported below: 47 F. (2d) 411.

No. 848. CHICAGOFF EXTENSION GOLD MINING CO. *v.* ALASKA HANDY GOLD MINING CO. May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. H. Metson and A. H. Ricketts* for petitioner. *Messrs. F. W. Clements and Lawrence H. Cake* for respondent. Reported below: 45 F. (2d) 553.

No. 850. BAUER BROTHERS CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Homer C. Corry* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, John G. Remey, and William H. Riley, Jr.,* for respondent. Reported below: 46 F. (2d) 874.

No. 851. SALIBO *v.* UNITED STATES. May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Howard McCaleb, Jr.,* for petitioner. *Solicitor General Thacher, As-*

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sistant Attorney General Youngquist, and Messrs. Claude R. Branch, Mahlon D. Kiefer, and W. Marvin Smith for the United States. Reported below: 46 F. (2d) 790.

No. 853. PALMER *v.* AEOLIAN CO. May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. G. Bush* for petitioner. *Mr. Joe R. Lane* for respondent. Reported below: 46 F. (2d) 746.

No. 856. MISSOURI-KANSAS-TEXAS R. CO. *v.* HEMP KINS. May 18, 1931. Petition for writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, of Texas, denied. *Messrs. Joseph M. Bryson, C. C. Huff, C. S. Burg, and H. E. Howell* for petitioner. No appearance for respondent. Reported below: 30 S. W. (2d) 661.

Nos. 857 and 858. BONNER *v.* UNITED STATES. May 18, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George W. Dodd* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Mahlon D. Kiefer, A. E. Gottschall, and W. Marvin Smith* for the United States. Reported below: 46 F. (2d) 619.

No. 862. WRIGHT ET AL. *v.* FEDERAL RESERVE LIFE INSURANCE CO. ET AL. May 18, 1931. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Thomas F. Doran and Frank Doster* for petitioners. *Mr. J. H. Brady* for respondents. Reported below: 131 Kan. 601; 293 Pac. 945.

No. 876. *CHAMP SPRING CO. v. UNITED STATES*. May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Walter R. Mayne* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, S. Dee Hanson, William H. Riley, Jr., and Clarence M. Charest* for the United States. Reported below: 47 F. (2d) 1.

No. 885. *TODD v. CITIZENS GAS CO. ET AL.*; and

No. 886. *COTTER ET AL. v. SAME*. May 18, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frederick E. Matson, Earl B. Barnes, William L. Taylor, and Walter T. Kinder* for petitioners. *Messrs. W. H. Thompson, Henry H. Hornbrook, and Albert L. Rabb* for respondents. Reported below: 46 F. (2d) 855.

No. 892. *SOUTHERN RY. CO. v. VARNELL*. May 18, 1931. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. S. R. Prince, H. O'B. Cooper and L. E. Jeffries* for petitioner. *Mr. William Shelton Pritchard* for respondent. Reported below: 131 So. 803.

No. 897. *ROGERS v. WATSON ET AL.* May 18, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Otto Gresham* for petitioner. *Messrs. William L. Taylor, Arthur L. Gilliom, and Albert Ward* for respondents. Reported below: 46 F. (2d) 753.

No. 964. *SMITH v. DANIEL*. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for

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the Sixth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Minnie D. Smith, pro se*. No appearance for respondent. Reported below: 46 F. (2d) 740.

No. 966. NICHOLS *v.* UNITED STATES. May 25, 1931. 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. Claude Nichols, pro se*. No appearance for the United States.

No. 799. CHARLES D. JAFFEE *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE;

No. 800. LOUIS J. JAFFEE *v.* SAME;

No. 801. JULIUS SCHWARTZ *v.* SAME; and

No. 802. HARRY H. SCHWARTZ *v.* SAME. May 25, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harvey L. Rabbitt and Harry T. Lore* for petitioners. *Solicitor General Thacher, Assistant Attorney General Younquist, and Messrs. Claude R. Branch, Sewall Key, John G. Remy, Whitney North Seymour, and William H. Riley, Jr.*, for respondent. Reported below: 45 F. (2d) 679.

No. 860. AUSTIN, RECEIVER, *v.* OSBORNE ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. C. Ray* for petitioner. *Mr. William J. Berne* for respondents. Reported below: 46 F. (2d) 956.

No. 861. McELROY ET AL. *v.* BOROUGH OF FORT LEE. May 25, 1931. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Third Circuit denied. *Mr. William H. Carey* for petitioners. *Mr. Howard Mackay* for respondent. Reported below: 46 F. (2d) 777.

No. 868. ST. LOUIS-SAN FRANCISCO RY. CO. ET AL. *v.* BISHOP, ADMINISTRATRIX. May 25, 1931. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Alexander P. Stewart, Edward T. Miller,* and *Edward L. Westbrooke* for petitioners. *Messrs. Frank Pace* and *G. L. Grant* for respondent. Reported below: 33 S. W. (2d) 383.

No. 874. DIAL *v.* UNITED STATES. May 25, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank Dial, pro se.* *Solicitor General Thacher,* *Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *John E. Hoover* for the United States.

No. 878. MISSISSIPPI VALLEY TRUST CO., ADMINISTRATOR, ET AL. *v.* BUDER ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. M. Pierce* for petitioners. No appearance for respondents. Reported below: 47 F. (2d) 507.

No. 879. HARTFORD ELECTRIC SUPPLY CO. *v.* SACHS ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter F. Murray* for petitioner. *Messrs. Oscar W. Jeffery* and *Harry G. Kimball* for respondents. Reported below: 47 F. (2d) 743.

No. 880. BYRAM ET AL. *v.* MINER ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Ap-

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peals for the Eighth Circuit denied. *Messrs. Arthur C. Erdall and F. W. Root* for petitioners. *Messrs. Mortimer H. Boutelle and Frederick M. Miner* for respondents. Reported below: 47 F. (2d) 112.

No. 881. SEABOARD CITIZENS NATIONAL BANK *v.* HOFHEIMER, EXECUTOR. May 25, 1931. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. James Mann* for petitioner. *Mr. James E. Heath* for respondent. Reported below: 154 Va. 392; 153 S. E. 656; 156 *id.* 581.

No. 882. RYAN, ADMINISTRATRIX, *v.* ATCHISON, TOPEKA & SANTA FE RY. Co. May 25, 1931. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Charles Stephens and Charles W. Steiger* for petitioner. No appearance for respondent. Reported below: 131 Kan. 706; 293 Pac. 763.

No. 883. KELLAR *v.* UNITED STATES. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Alfred E. Roth* for petitioner. • *Solicitor General Thacher*, and *Messrs. Claude R. Branch, Harry S. Ridgely, and W. Marvin Smith* for the United States.

No. 884. KANSAS EX REL. BOYNTON, ATTORNEY GENERAL, *v.* BOARD OF COUNTY COMMISSIONERS OF SHAWNEE COUNTY ET AL. May 25, 1931. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Thomas F. Doran, Roland Boynton, and Frank Doster* for petitioner. No appearance for respondents. Reported below: 132 Kan. 233; 294 Pac. 915.

No. 887. *OSAKA SHOSEN KAISHA v. OLIVIER STRAW GOODS CORP.* May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Messrs. Henry N. Longley and Ezra G. Benedict Fox* for respondent. Reported below: 47 F. (2d) 878.

No. 891. *DANA v. SEARIGHT ET AL.* May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. James M. Beck and Malcolm E. Rosser* for petitioner. *Messrs. Ed. J. Fleming, H. A. Tallman, Randolph Shirk, H. F. Aby, and W. F. Tucker* for respondents. Reported below: 47 F. (2d) 38.

No. 893. *CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. TROUT.* May 25, 1931. Petition for writ of certiorari to the Court of Appeals of Kansas City, Missouri, denied. *Messrs. M. L. Bell, W. F. Dickinson, Luther Burns, Henry S. Conrad, and Lisbon E. Durham* for petitioner. *Mr. M. J. Henderson* for respondent.

No. 894. *BANK OF UNITED STATES v. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.* May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioner. *Mr. Samuel Blumberg* for respondent. Reported below: 47 F. (2d) 210.

No. 900. *ALBERT PICK & Co. v. PEOPLES BANK OF BUFFALO ET AL.* May 25, 1931. Petition for writ of certiorari to the County Court of Erie County, New York, denied. *Mr. Alfred M. Saperston* for petitioner. *Mr.*

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George W. Offutt for respondents. Reported below: 255 N. Y. 598; 175 N. E. 329.

No. 903. *ERIE RAILROAD Co. v. IRONS*. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clement K. Corbin* for petitioner. *Messrs. Thomas G. Haight* and *Charles Hershenstein* for respondent. Reported below: 48 F. (2d) 60.

No. 908. *STANDARD OIL Co. (N. J.) v. GLENDOLA STEAMSHIP CORP.*; and

No. 909. *GLENDOLA STEAMSHIP CORP. v. STANDARD OIL Co. (N. J.)*. May 25, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. McGrann* for Standard Oil Co. *Messrs. Horace M. Gray* and *Sanford H. E. Freund* for Glendola Steamship Corp. Reported below: 47 F. (2d) 206.

No. 927. *COMMERCIAL STEVEDORING COMPANY, INC., v. DOWDELL, ADMINISTRATRIX*. May 25, 1931. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Clarence E. Mellen* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 231 App. Div. 830; 246 N. Y. S. 742.

No. 928. *HAYNES, ADMINISTRATOR, v. UNION CARBIDE & CARBON CORP.* May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Conrad Wolf* and *Earl B. Barnes* for petitioner. *Messrs. Henry H. Hornbrook, George A. Cooke,* and *Paul Y. Davis* for respondent. Reported below: 46 F. (2d) 4.

No. 929. NEW YORK, NEW HAVEN & HARTFORD R. Co. v. PASCUCCI. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John M. Gibbons* for petitioner. *Mr. Clifford H. Byrnes* for respondent. Reported below: 46 F. (2d) 969.

No. 930. BRIEF ENGLISH SYSTEMS, INC., v. OWEN ET AL. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edgar M. Kitchin* and *William St. John Tozer* for petitioner. *Mr. O. Ellery Edwards* for respondents. Reported below: 48 F. (2d) 555.

No. 954. W. E. HEDGER Co., INC., v. F. S. ROYSTER GUANO Co. May 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace T. Atkins* for petitioner. *Messrs. Charles R. Hickox* and *Robert S. Erskine* for respondent. Reported below: 48 F. (2d) 86.

No. 754. A. D. CUMMINS & Co. v. UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. The motion to remand to the Court of Claims for further findings is also denied. *Mr. F. E. Scott* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Mr. Claude R. Branch* for the United States. Reported below: 70 Ct. Cls. 1.

Nos. 918 and 919. PACIFIC NORTHWEST CANNING Co. v. SKOOKUM PACKERS' ASSN. June 1, 1931. Petition for writs of certiorari to the Court of Customs and Patent Appeals denied for want of jurisdiction. Section 240,

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Judicial Code; § 347, U. S. Code, Title 28; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693. Messrs. Charles E. Townsend and Wm. A. Loftus for petitioner. Messrs. Karl Fenning, Eugene E. Stevens, and William C. De Lacy for respondent. Reported below: 45 F. (2d) 912, 914.

No. 960. W. W. DAVIS ET AL. *v.* UNITED STATES; and

No. 998. JOE DAVIS *v.* SAME. June 1, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Husty v. United States*, 282 U. S. 694, 702. Mr. W. Cleveland Davis for W. W. Davis et al. Mr. Hiram P. Whitacre for Joe Davis. Solicitor General Thacher, Assistant Attorney General Youngquist and Messrs. Claude R. Branch, Mahlon D. Kiefer, and W. Marvin Smith for the United States. Reported below: 49 F. (2d) 267, 269.

No. 845. RUDOLPH WURLITZER Co. *v.* UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. Mr. Robert C. Cooley for petitioner. Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, J. H. Sheppard, and William H. Riley, Jr., for the United States. Reported below: 71 Ct. Cls. 774.

No. 846. BIRKEL MUSIC Co. *v.* UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. Mr. Robert C. Cooley for petitioner. Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch, J. H. Sheppard, and William H. Riley, Jr., for the United States. Reported below: 71 Ct. Cls. 774.

No. 863. *PARLEX HOLDING CORP. v. NEW YORK CITY*. June 1, 1931. Petition for writ of certiorari to the Supreme Court of New York County, New York, denied. *Mr. Martin Conboy* for petitioner. *Mr. Arthur J. W. Hilly* for respondent.

No. 864. *MEYERSDALE FUEL CO. v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. R. Lester Moore* and *Frank K. Nebeker* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch* and *Ralph C. Williamson* for the United States. Reported below: 44 F. (2d) 437.

No. 867. *COLUMBIA STEEL & SHAFTING CO. v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Edward B. Burling*, *William A. Seifert*, and *Newell W. Ellison* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch*, *Charles R. Pollard*, *H. Brian Holland*, and *William H. Riley, Jr.*, for the United States. Reported below: 44 F. (2d) 998.

No. 871. *CLAYTON v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. R. C. Fulbright* and *John C. White* for petitioner. *Solicitor General Thacher*, *Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch*, *Charles R. Pollard*, and *William H. Riley, Jr.*, for the United States. Reported below: 44 F. (2d) 427.

No. 875. *MANN v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Court of Claims denied.

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Messrs. Robert Ash and Thomas J. Reilly for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, and Messrs. Claude R. Branch and George H. Foster* for the United States. Reported below: 44 F. (2d) 1005.

No. 902. STEWART, SHERIFF AND TAX COLLECTOR, ET AL. *v.* EDWARD HINES YELLOW PINE TRUSTEES ET AL. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Fleet C. Hathorn and E. C. Sharp* for petitioners. *Messrs. Wm. S. Bennett, T. W. Davis, and T. J. Wills* for respondents. Reported below: 46 F. (2d) 910.

No. 904. MARSHALL *v.* WILBUR, SECRETARY OF THE INTERIOR. June 1, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Walter Edmund Burke and Lucius Q. C. Lamar* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson, and Messrs. Whitney North Seymour and E. C. Finney* for respondent. Reported below: 47 F. (2d) 421.

No. 905. CRIMORA MANGANESE CORP. ET AL. *v.* WILBUR, SECRETARY OF THE INTERIOR. June 1, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Walter Edmund Burke and Lucius Q. C. Lamar* for petitioners. *Solicitor General Thacher, Assistant Attorney General Richardson, and Messrs. Whitney North Seymour and E. C. Finney* for respondent. Reported below: 47 F. (2d) 417.

No. 913. UNITED STATES *v.* PACIFIC GAS & ELECTRIC CO. June 1, 1931. Petition for writ of certiorari to the Circuit

Court of Appeals for the Ninth Circuit denied. *Solicitor General Thacher, Assistant Attorney General Richardson, and Mr. Aubrey Lawrence* for the United States. *Mr. Wm. B. Bosley* for respondent. Reported below: 45 F. (2d) 708.

No. 914. *PACIFIC GAS & ELECTRIC CO. v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. B. Bosley* for petitioner. *Solicitor General Thacher and Assistant Attorney General Richardson* for the United States. Reported below: 45 F. (2d) 708.

No. 916. *CAHAN v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George B. Webster* for petitioner. *Solicitor General Thacher, and Messrs. Claude R. Branch, Harry S. Ridgely, and W. Marvin Smith* for the United States. Reported below: 47 F. (2d) 604.

No. 920. *TAYLOR OIL & GAS CO. ET AL. v. BURNET, COMMISSIONER OF INTERNAL REVENUE*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George E. Shelley* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and S. Dee Hanson* for respondent. Reported below: 47 F. (2d) 108.

Nos. 923 and 924. *GERLING v. DANKERS, EXECUTOR, ET AL.* June 1, 1931. Petition for writs of certiorari to the Supreme Court of Nebraska denied. *Messrs. Willis E. Reed and Frank E. Edgerton* for petitioner. *Mr. Ora S.*

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Spillman for respondents. Reported below: 233 N. W. 923.

No. 925. *WABASH RY. Co. v. LINDLEY*. June 1, 1931. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. Homer Hall, Nat S. Brown, and F. D. McKinney* for petitioner. *Mr. John G. Parkinson* for respondent. Reported below: 233 N. W. 450. See also, 231 N. W. 812.

No. 932. *ART METAL CONSTRUCTION Co. v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Dana B. Hellings* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and Andrew D. Sharpe* for the United States. Reported below: 47 F. (2d) 558.

No. 933. *ZELLER ET AL. v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Dana B. Hellings* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, and Andrew D. Sharpe* for the United States. Reported below: 46 F. (2d) 1023.

No. 937. *DUNCAN v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. D. C. Lewis* for petitioner. *Solicitor General Thacher, Assistant to the Attorney General O'Brian, and Messrs. Claude R. Branch, Charles H. Weston, and Paul D. Miller* for the United States. Reported below: 48 F. (2d) 128.

No. 939. SCHWEINHAUT, TRUSTEE IN BANKRUPTCY, *v.* FLAHERTY. June 1, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat* for petitioner. No appearance for respondent. Reported below: 60 App. D. C. —; 49 F. (2d) 533.

No. 940. BALLARD BROTHERS FISH CO., INC., ET AL. *v.* STEPHENSON, TRUSTEE. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. P. J. McCumber* for petitioners. *Messrs. Tazewell Taylor, James Mann, and S. Heath Tyler* for respondent. Reported below: 49 F. (2d) 581.

No. 941. MERKLE *v.* UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, A. W. Henderson, and W. Marvin Smith* for the United States.

No. 942. LAY ET AL. *v.* MITCHELL, INSURANCE COMMISSIONER. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioners. No appearance for respondent. Reported below: 49 F. (2d) 79.

No. 946. NIAGARA FALLS GAS & ELECTRIC LIGHT CO. *v.* PRENDERGAST ET AL.;

No. 947. U. S. LIGHT & HEAT CORP. ET AL. *v.* SAME; and

No. 948. NIAGARA FALLS *v.* U. S. LIGHT & HEAT CORP. ET AL. June 1, 1931. Petitions for writs of certiorari to

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the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harry D. Williams and Lawrence G. Williams* for Niagara Falls Gas & Electric Light Co. *Messrs. Alan V. Parker and John J. Bennett, Jr.*, for U. S. Light & Heat Corp. et al. *Mr. Basil Robillard* for City of Niagara Falls. *Mr. Charles G. Blakeslee* for Prendergast et al. Reported below: 47 F. (2d) 567.

No. 951. *SHORE v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. E. Leahy and James F. Reilly* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, John J. Byrne, and W. Marvin Smith* for the United States. Reported below: 60 App. D. C. —; 49 F. (2d) 519.

No. 957. *HENRY H. CROSS CO. v. RICE, TRUSTEE*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis L. Dent* for petitioner. *Messrs. Ben F. Heaton and Dan C. Flanagan* for respondent. Reported below: 45 F. (2d) 940.

No. 969. *BROWNS' "SHAMROCK" LINENS, LTD., v. BOWERS, EXECUTOR*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas G. Haight and Robert H. Montgomery* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, Sewall Key, W. Cutler Thompson, and Paul D. Miller* for respondent. Reported below: 48 F. (2d) 103.

No. 977. *BONAMICO v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Louis Bonamico, pro se. Solicitor General Thacher, Assistant Attorney General Dodds, and Messrs. Claude R. Branch and William H. Riley, Jr., for the United States.* Reported below: 47 F. (2d) 1082.

No. 986. *GENERAL TALKING PICTURES CORP. ET AL. v. STANLEY CO.* June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel E. Darby, Jr., for petitioners. Mr. Charles Neave for respondent.* Reported below: 47 F. (2d) 817.

No. 995. *DARLING v. COMMISSIONER OF INTERNAL REVENUE*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Winston Read for petitioner. Solicitor General Thacher, Assistant Attorney General Youngquist, and Mr. Claude R. Branch for respondent.* Reported below: 49 F. (2d) 111.

No. 997. *MYERS v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Raymond Gordon for petitioner. Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch and Paul D. Miller for the United States.* Reported below: 49 F. (2d) 230.

No. 1000. *MILLER v. UNITED STATES*. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Louis Halle for*

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petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, and Messrs. Claude R. Branch, W. Marvin Smith, and A. W. Henderson for the United States.* Reported below: 49 F. (2d) 368.

No. 1007. FALL *v.* UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Frank J. Hogan, Wilton J. Lambert, and Wm. E. Leahy for petitioner.* No appearance for the United States. Reported below: 60 App. D. C. —; 49 F. (2d) 506.

No. 1011. LANE *v.* UNITED STATES. June 1, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Howard McCaleb, Jr., for petitioner.* No appearance for the United States. Reported below: 47 F. (2d) 894.

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No. 205. ROSE, COLLECTOR OF INTERNAL REVENUE, *v.* GRANT. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 2, 1931. Dismissed with costs, on motion of *Solicitor General Thacher* for the petitioner. *Messrs. John M. Slaton and Richard H. Wilmer* for respondent. Reported below: 39 F. (2d) 338.

No. 206. ROSE, COLLECTOR OF INTERNAL REVENUE, *v.* GRANT ET AL. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 2, 1931. Dismissed with costs, on motion of *Solicitor General Thacher* for the

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petitioner. *Messrs. John M. Slaton and Richard H. Wilmer* for respondents. Reported below: 39 F. (2d) 340.

No. 615. *MARTY ET AL. v. NAGLE*, COMMISSIONER OF IMMIGRATION. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 9, 1931. Dismissed with costs, per stipulation of counsel. *Mr. John L. McNab* for petitioners. *Solicitor General Thacher* for respondent. Reported below: 44 F. (2d) 695.

No. 621. *TRI-STATE FERRY CO. v. BIRNEY*. Appeal from the Court of Appeals of Kentucky. March 9, 1931. Dismissed with costs, per stipulation of counsel. *Mr. J. G. Wheeler* for appellant. *Mr. R. M. Shelbourne* for appellee. Reported below: 235 Ky. 540; 31 S. W. (2d) 932.

No. 895. *GOLDMAN v. KORMAN*. Appeal from the Superior Court of the County of Los Angeles, California. April 20, 1931. Docketed and dismissed on motion of *Mr. Israel J. Mendelson* for the appellee.

AMENDMENT OF RULES

ORDER

1. It is ordered by this Court that § 6 of Rule 32 of this Court be amended by striking therefrom the words "For docketing a case and filing and indorsing the transcript of the record, five dollars," and inserting in lieu thereof the words "For docketing a case and filing and indorsing the transcript of the record, ten dollars."

2. Also, by striking therefrom the words "For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, four cents per folio of each one hundred words," and inserting in lieu thereof the words "For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, eight cents per folio of each one hundred words," but leaving therein unchanged the words "but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision."

3. Also, by striking therefrom the words "For filing briefs, three dollars for each party appearing," and inserting in lieu thereof the words "For filing briefs, five dollars for each party appearing."

This order shall apply to causes filed here on or after July 1, 1931, but not to causes filed prior to that date.

JUNE 1, 1931.

AMENDMENT OF RULES IN BANKRUPTCY

ORDER

It is ordered that Rule XLVI of the General Orders in Bankruptcy, promulgated January 13, 1930 (280 U. S. 617), be amended by striking out from the last sentence the words "not less than two per cent per annum" and by inserting the word "such" before the words "local rule" at the end of the Rule, and thus amended the Rule will read as follows:

"Whenever a custodian, receiver, or trustee is a banking institution designated and qualified pursuant to § 61 of the Act to act as depositary for money, said banking institution may, if authorized by rule of the local Bankruptcy Court approved by a majority of the Circuit Judges of the Circuit, keep on deposit with itself money received by it as custodian, receiver, or trustee, if said banking institution under the local laws of the State of its domicile is permitted to keep on deposit with itself money collected and received by it acting as receiver or trustee under the appointment of any court. Such local rule shall contain such provisions for the supervision and control of such deposits as the court may deem adequate, and on all sums of money not less than \$100 so kept on deposit interest shall be allowed by such banking institution at such rate as may from time to time be directed by such local rule."

JUNE 1, 1931.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1928, 1929, AND 1930

	ORIGINAL			APPELLATE			TOTALS		
	1928	1929	1930	1928	1929	1930	1928	1929	1930
Total cases on docket...	21	21	24	947	963	1,015	968	984	1,039
Total cases disposed of during term.....	3	3	8	822	791	892	825	794	900
Total cases remaining on docket.....	18	18	16	125	172	123	143	190	139

	TERMS		
	1928	1929	1930
Distribution of cases disposed of during terms:			
Original cases.....	3	3	8
Appellate cases on merits.....	274	232	326
Petitions for certiorari.....	548	559	566
Cases remaining on docket:			
Petitions for certiorari.....	41	53	47
Cases on merits.....	84	119	76

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

STATE OF NEW YORK
IN SENATE
JANUARY 15, 1907.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE
IN ANSWER TO A RESOLUTION PASSED BY THE SENATE
MAY 10, 1906.

ALBANY:
J. B. LIPPINCOTT COMPANY, PRINTERS,
1907.

THE STATE OF NEW YORK
OFFICE OF THE COMMISSIONERS OF THE LAND OFFICE,
ALBANY, N. Y., JANUARY 15, 1907.

SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Your obedient servant,
COMMISSIONER OF THE LAND OFFICE.

Very truly yours,
[Signature]

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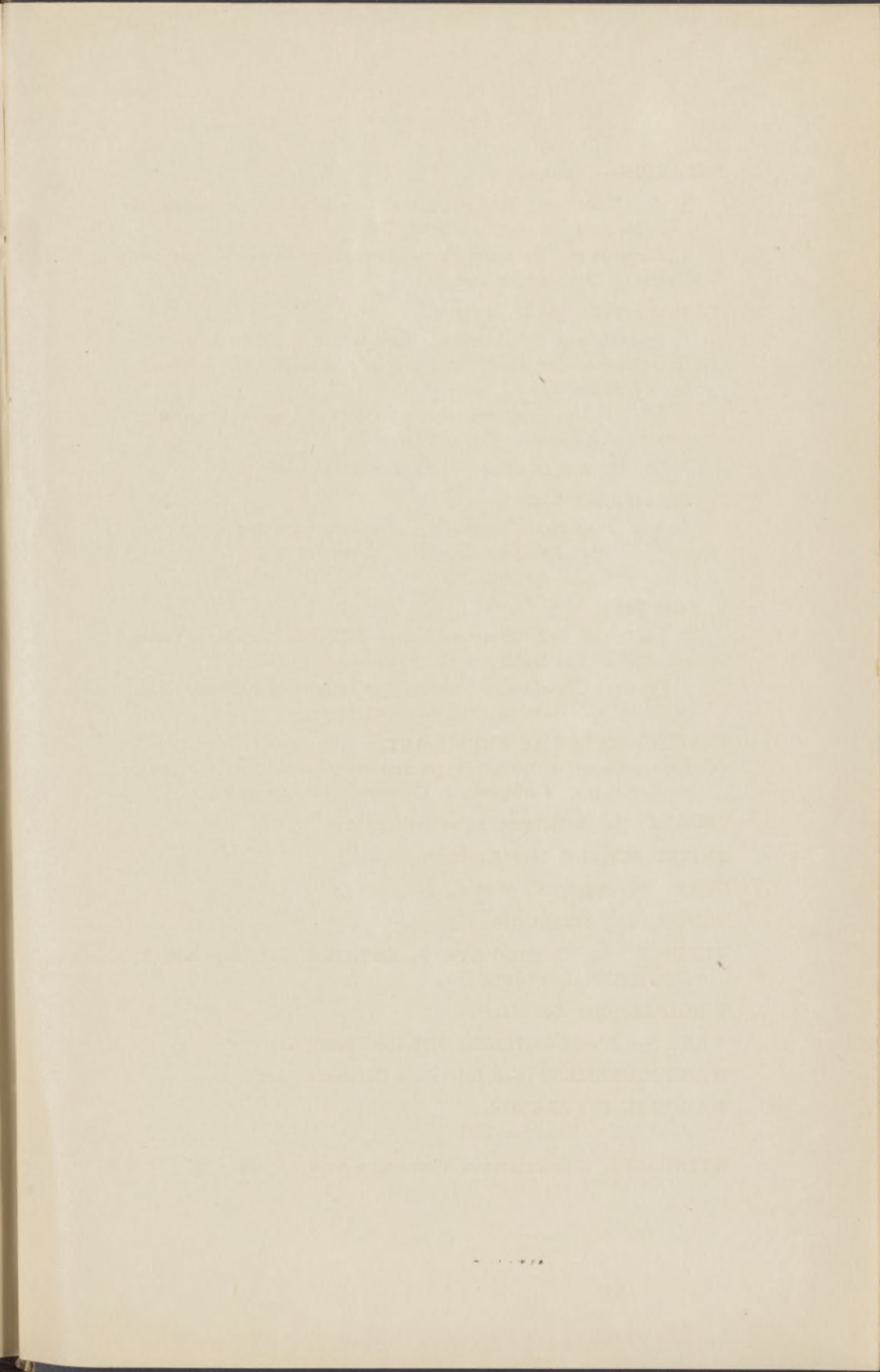
WAR. See **Aliens**, 2; **Trading with the Enemy Act**.

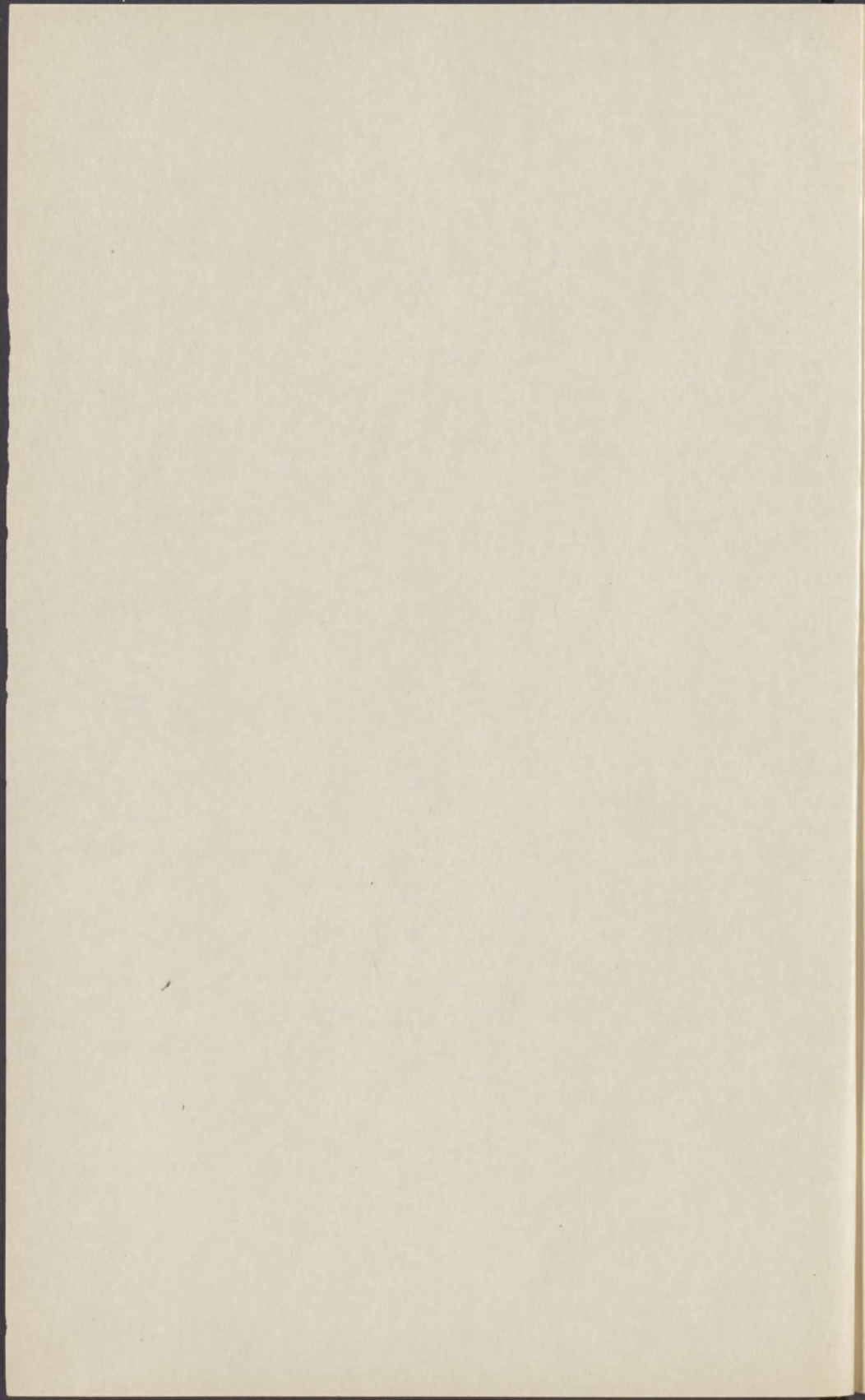
WAREHOUSEMEN. See **Interstate Commerce Acts**, 2.

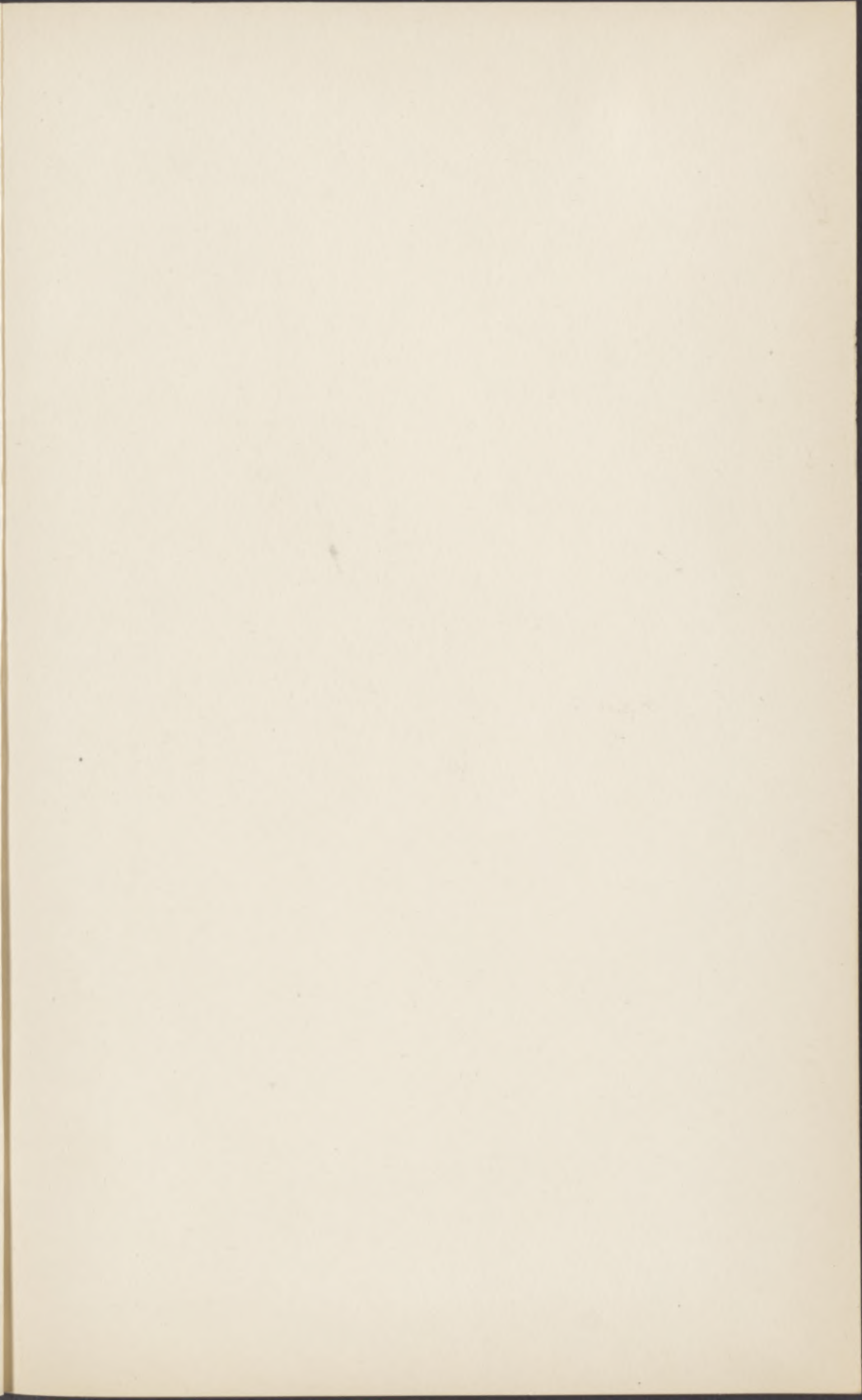
WAR RISK INSURANCE.

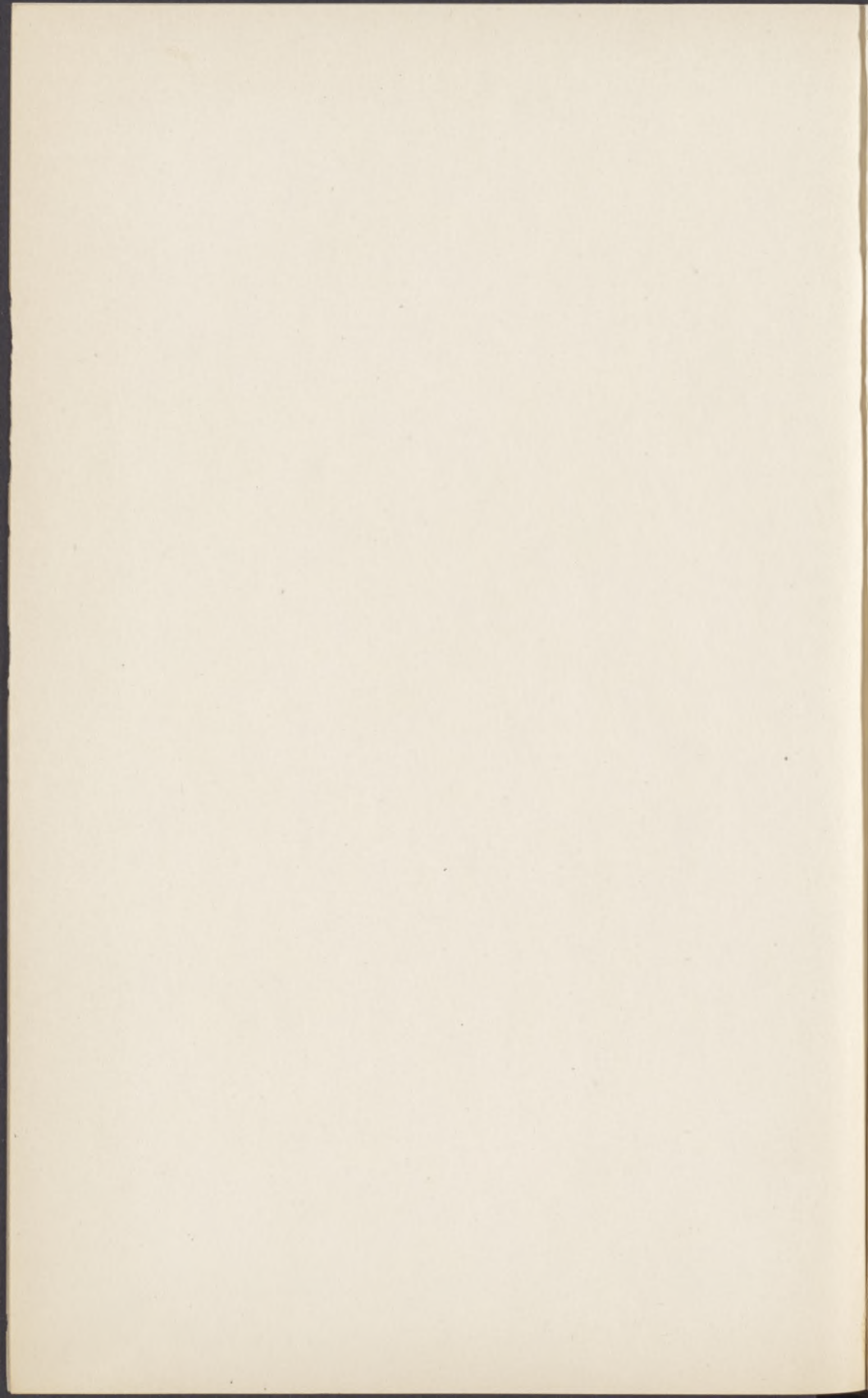
See *Pagel v. MacLean*, 266.

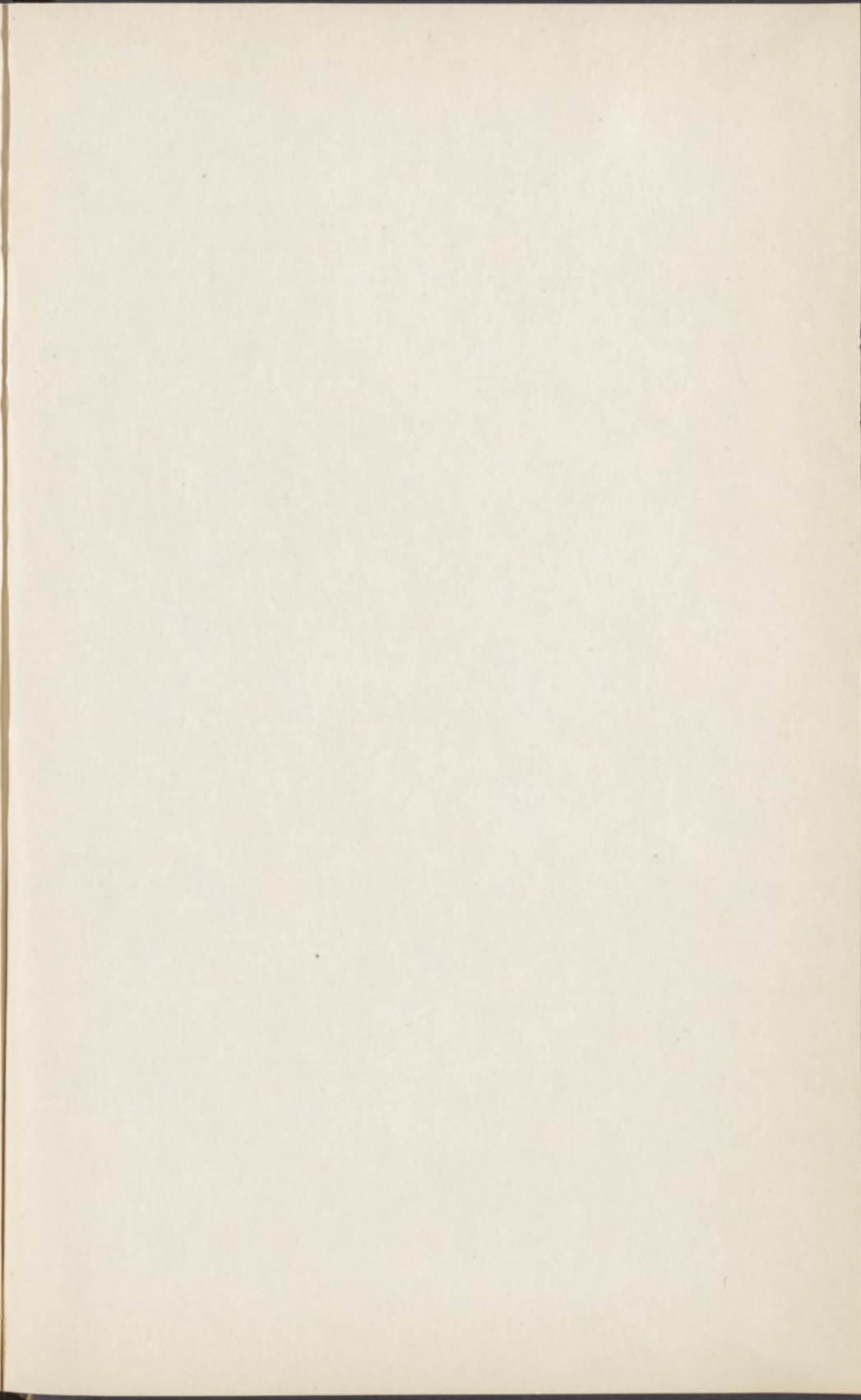
WITNESSES. See **Interstate Commerce Acts**, 11; **Jury**, 3.

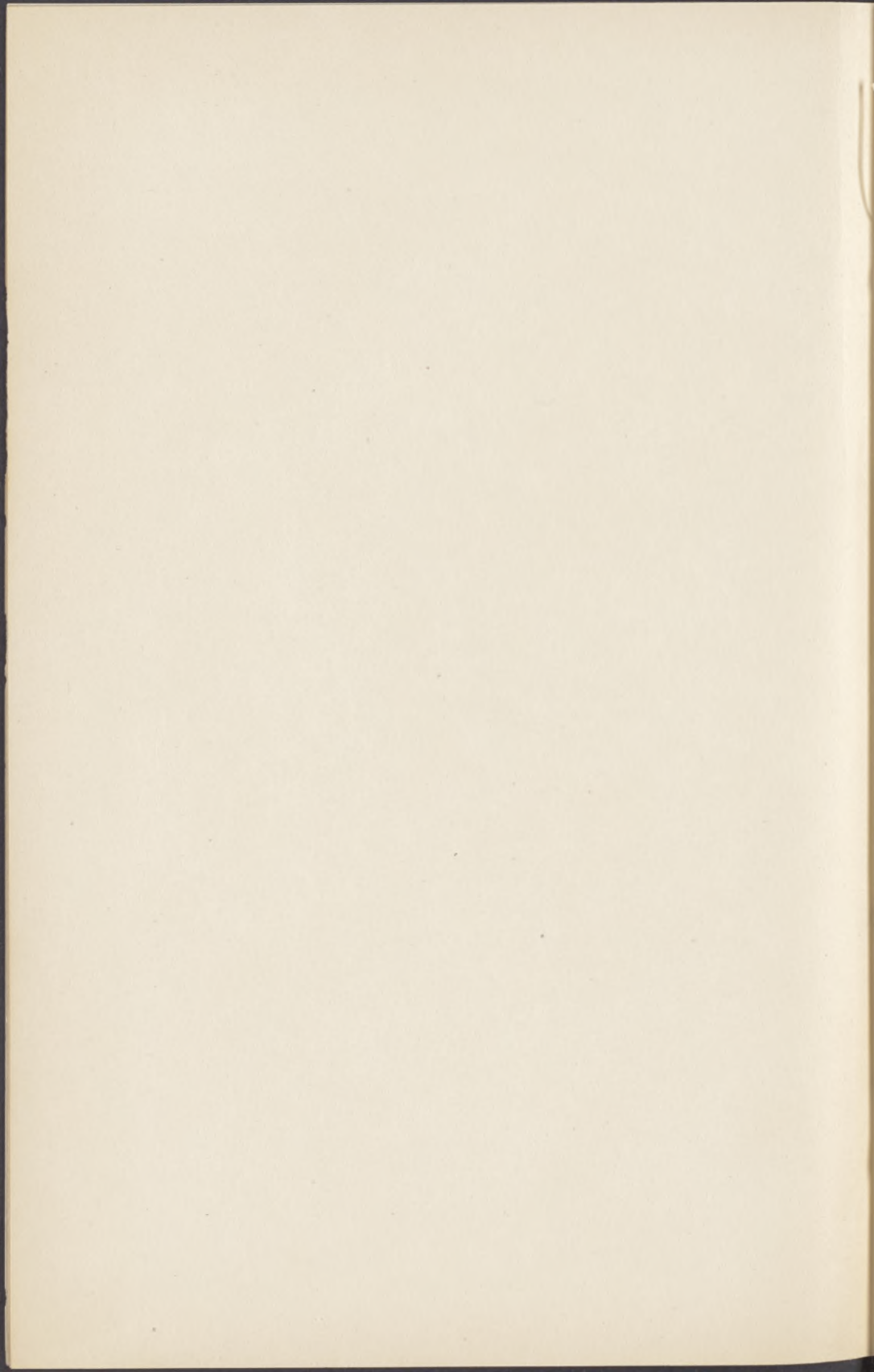


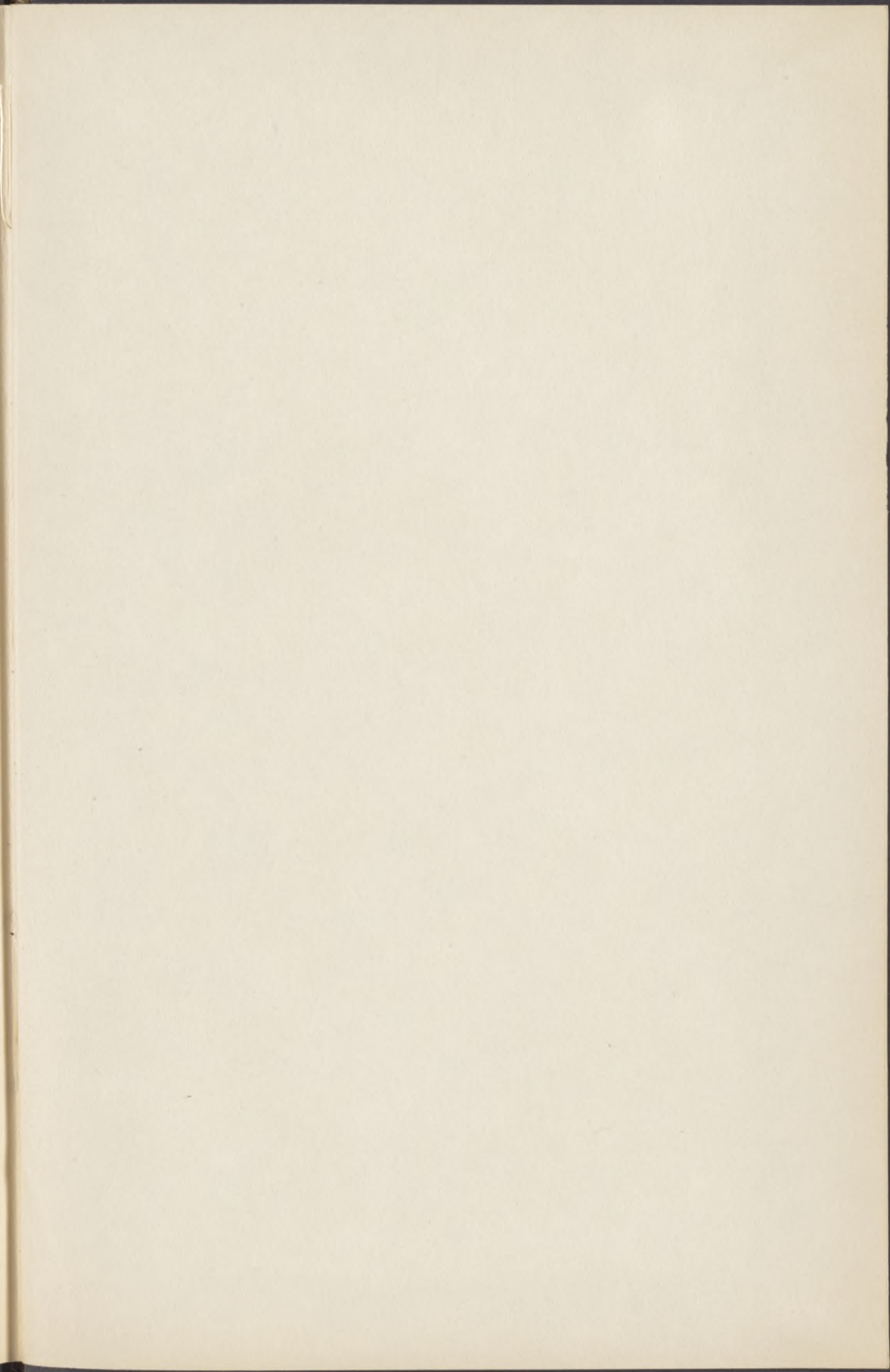


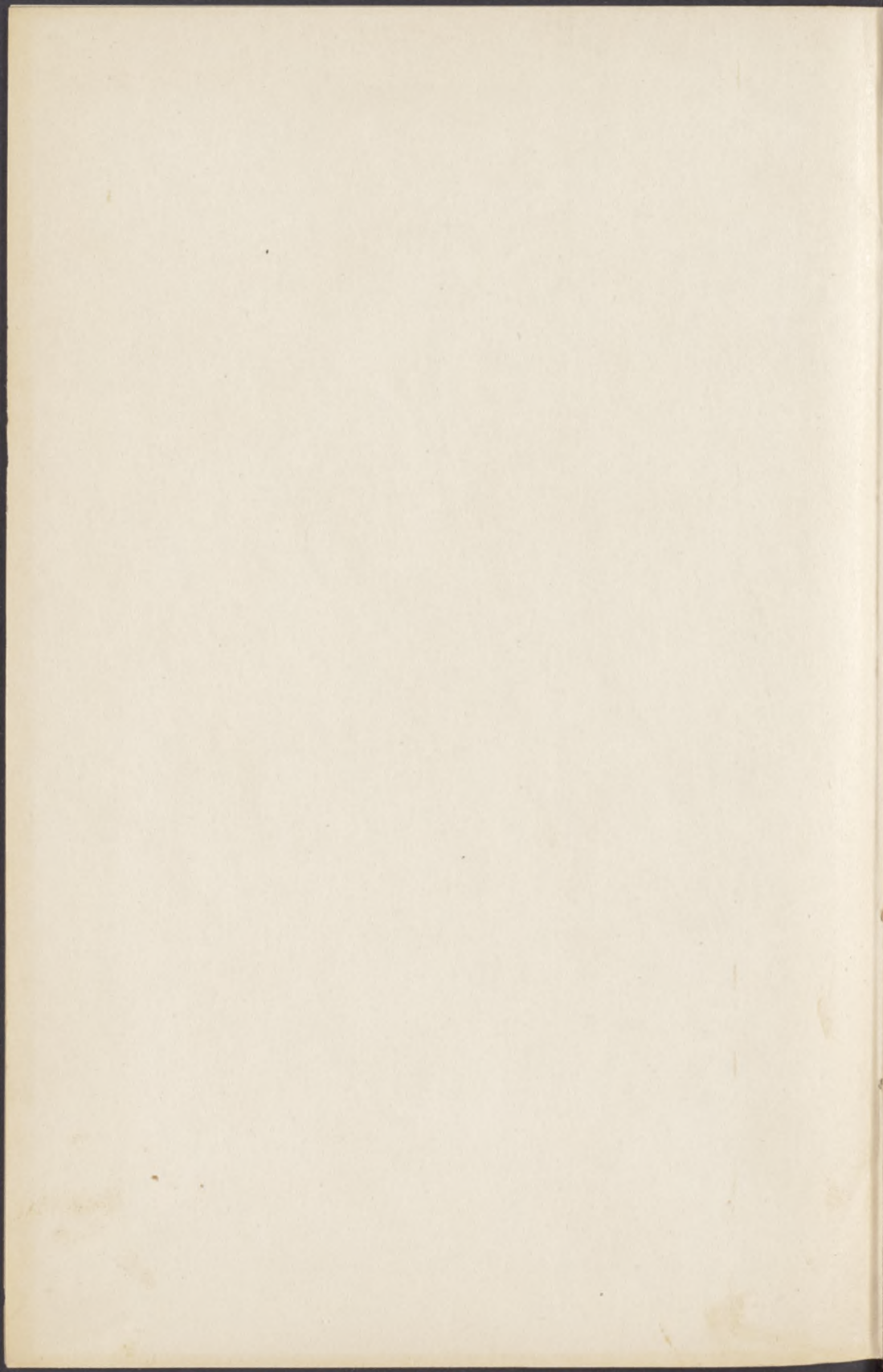


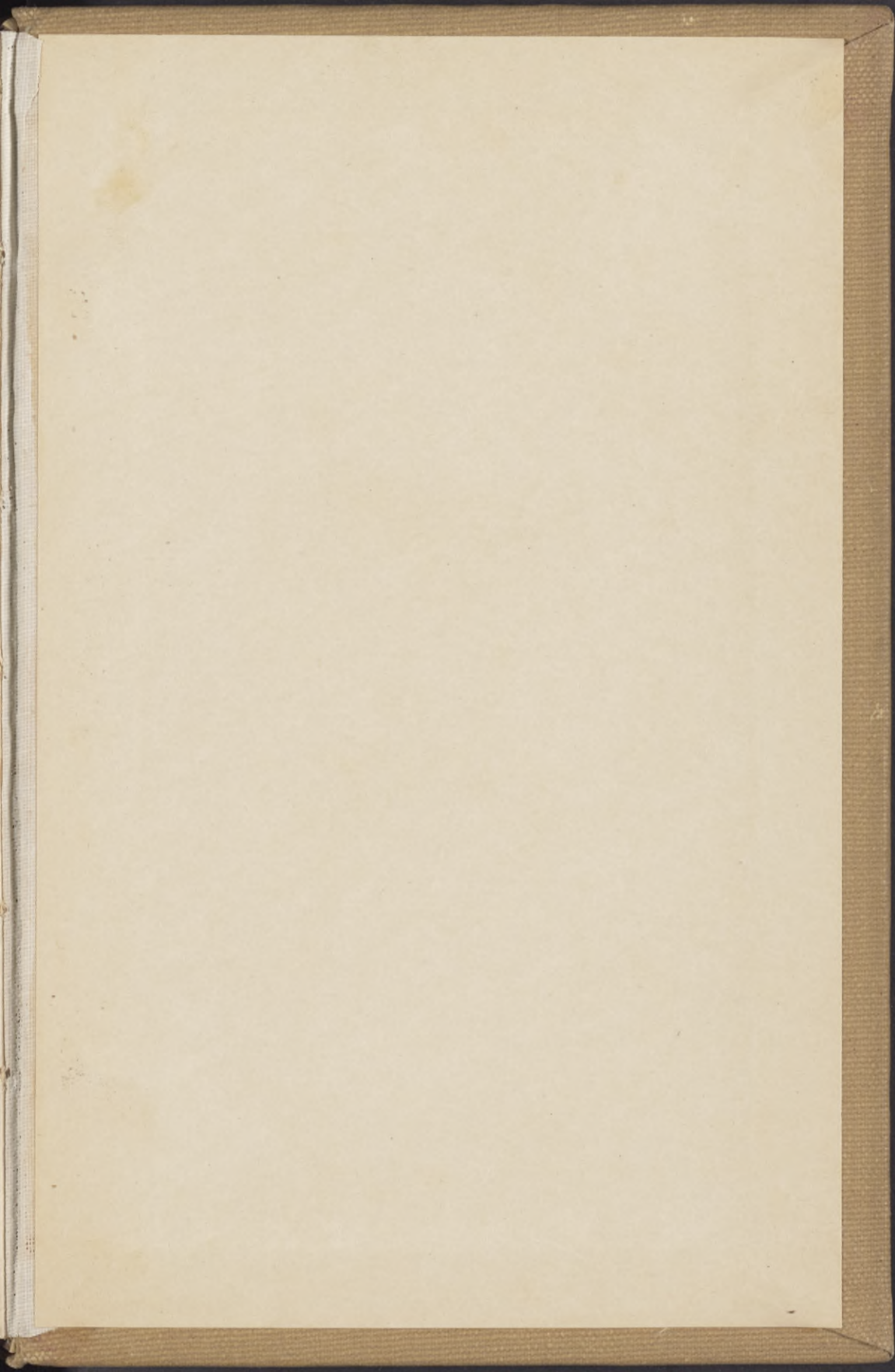














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