privileges of corporate organization, he brought into being three corporations and did business through them. These corporations are not identical with the unincorporated associations to whose principal assets they have succeeded, and the losses of the associations suffered in an earlier year are not the losses of the corporations that came into existence afterwards.

The judgment is

Affirmed.

MICHIGAN *v.* MICHIGAN TRUST CO., RECEIVER.

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

No. 598. Argued April 19, 1932.—Decided May 16, 1932.

1. The annual tax laid by § 4 of Act No. 233, Pub. Acts of Mich., 1923, upon every local corporation "for the privilege of exercising its franchise and of transacting its business within this State," has been held by the state supreme court to be a tax on the privilege to do business, not merely on the doing of it, and to be applicable where the business is being conducted by a receiver, appointed for the purpose of continuing it. *Held:*

(1) The decision must be followed in a federal court receivership as a binding construction of the local law. P. 342.

(2) A decision upholding the tax as applied to a receiver is necessarily a construction of the statute, although the statute does not mention receivers and its application to them was guided by general principles as to the effect of a receivership. P. 343.

(3) The tax should be paid by the receiver as it accrues, as part of the expense of administration; and where this was deferred until the receivership developed from a merely protective into a winding up process, the accumulated taxes must be paid in preference to the claims of creditors. P. 344.

2. Receiverships for conservation should be watched with a jealous eye, to avoid inequitable results. P. 345.

3. *United States* v. *Whitridge,* 231 U. S. 144, distinguished. P. 346.

52 F. (2d) 842, reversed.

District Court, affirmed.

CERTIORARI, 284 U. S. 616, to review the reversal of an order requiring the receiver of a corporation to pay accrued corporate franchise taxes before the claims of creditors. The order was made on petition of the State.

Mr. Edward A. Bilitzke, Assistant Attorney General of Michigan, with whom *Mr. Paul W. Voorhies*, Attorney General, was on the brief, for petitioner.

The court below erred in holding that the receiver did not exercise any of the franchises of the corporation, and that the receiver may perform, under the direction of the court, any act which might be performed by any other citizen in total disregard of the corporate capacity and without any reliance upon its franchises. *Union Steam Pump Sales Co.* v. *State*, 216 Mich. 261; Thompson, Corps., 2d ed., Vol. 3, § 2864; *Mather's Sons Co. Case*, 52 N. J. Eq. 608; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 8 F. (2d) 304; *Central Trust Co.* v. *New York*, 110 N. Y. 250; *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512; *In re U. S. Car Co.*, 60 N. J. Eq. 514; *Armstrong* v. *Emmerson*, 300 Ill. 54; *Bright* v. *Arkansas*, 249 Fed. 950; *Liberty Trust Co.* v. *Gilliland*, 279 Fed. 432; *People* v. *Hopkins*, 18 F. (2d) 731; *In re Malko Milling & L. Co.*, 32 F. (2d) 825; *Collector* v. *Street Ry. Co.*, 234 Mass. 340.

The ruling of the Supreme Court of Michigan should be followed by federal courts.

Whether or not the tax is payable by a receiver depends upon the nature of the tax, which can only be determined by a construction of the particular statute.

Under § 65, Jud. Code, the federal receiver was required "to manage and operate" the property "according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

The court below was in error in holding that the limitation upon the power of a receiver to transact only corporate business arises solely by reason of the implied contract between the stockholders and the corporation, and not from any dependence by the court upon the grant of the powers enumerated in the charter. *Safford* v. *People,* 85 Ill. 559; *Louisville, N. A. & C. R. Co.* v. *Cauble,* 46 Ind. 281; *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 516.

The court below erred in making a distinction between a public utility corporation and a private corporation, indicating that in the case of a public utility corporation a receiver would be liable for the corporation privilege tax. *Mather's Sons Co. Case,* 52 N. J. Eq. 607; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* 8 F. (2d) 305; *In re Detroit Properties Corp.,* 254 Mich. 524; 4 Thompson, Corps., (3d ed.), 765; 1 Clark, Receivers, 959; *Liberty Trust Co.* v. *Gilliland,* 279 Fed. 432; *People* v. *Hopkins,* 18 F. (2d) 731; *In re Malko Milling & L. Co.,* 32 F. (2d) 825.

The taxes are payable even though the receiver did not exercise any of the corporate franchises. The tax is "imposed upon a corporation *organized*" under the laws of Michigan, regardless of whether the corporation does any business within the State. Cf. *State* v. *Bradley,* 207 Ala. 677.

Mr. Benjamin P. Merrick for respondent.

The decision below was not based upon an interpretation of the act. The language, which omits all reference to corporate receivers, is clear and unambiguous, leaving no room for interpretation. The receiver may be said to be "*casus omissus.*"

The undeniable conflict between the court below and the Michigan supreme court was solely upon the fundamental question of law: Does the receiver of a corporation, in operating the business thereof, exercise its franchises? In basing its decision upon an affirmative answer to this question, the state court manifestly took a position upon several questions of law not at all local in character. In determining what the correct applicable principles are, this Court, by its own decisions, is free (as was the court below) to exercise independent judgment. *Swift* v. *Tyson,* 16 Pet. 1; *Olcott* v. *Fond du Lac Co.,* 16 Wall. 678; *Burgess* v. *Seligman,* 107 U. S. 20; *Baltimore etc. R. Co.* v. *Baugh,* 149 U. S. 368; *Kuhn* v. *Fairmont Co.,* 215 U. S. 349; *Black & White Co.* v. *Brown & Yellow Co.,* 276 U. S. 518; *Salem Trust Co.* v. *Mfrs. Finance Co.,* 264 U. S. 182.

Had the State instituted suit upon its claim against respondent in a state court, the case would have been removable to the District Court under Jud. Code, § 33. *Barnette* v. *Wells Fargo Bank,* 270 U. S. 438.

The Michigan supreme court, despite the statute permitting suits against federal receivers without previous leave of court (Jud. Code, § 66), has declined to sustain an injunction restraining a federal court receiver of a telephone company from raising its rates. *Rogers* v. *Chippewa Circuit Judge,* 135 Mich. 79.

The same court has twice held that a federal court receiver of a railroad is not subject to action for recovery of penalties under statutes of the State. *Robinson* v. *Harmon,* 157 Mich. 272; *People* v. *Blair,* 183 Mich. 130.

The court below chose to rest its decision upon a principle of general applicability announced by this Court in *United States* v. *Whitridge,* 231 U. S. 144, 149; *Pease* v. *Peck,* 18 How. 595; *Carroll County* v. *Smith,* 111 U. S. 556.

Whether a receiver, by operating the business, uses the corporate franchises, was recognized not only by the court below but also by the state court, as the proper criterion of tax liability.

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The theory that the functional powers of a mercantile corporation are separable from the general franchise by which it exists, is unsound. Its powers of action, as a corporation, can no more be detached from the body and passed to another than can the physical powers or civil capacity of a natural person. And merely because the corporate functional powers, or the tangible business fruits thereof, may be subjected to specific taxation, it by no means follows that those powers are indispensable to one who, like the receiver of a mercantile corporation, succeeds to the operation of the business.

We submit that those powers which, together, constitute the functional capacity of a mercantile corporation are not, in any accurate sense, franchises at all. They are not intrinsically unique; they become peculiar only when conferred upon the corporation as accessory attributes without which it could not function as a living organism; and they are indispensable only to the corporation as such. *Slee* v. *Broom,* 19 Johns. (N. Y.) 456, 473–474; *Warner* v. *Beers,* 23 Wend. (N. Y.) 103, 145; *Thompson* v. *Waters,* 25 Mich. 214, 223–224; *Methodist Church* v. *Clark,* 41 Mich. 730, 736.

The appointment of the receiver did not divest the corporation of its franchises, nor did they *ipso facto* lapse. *Boston Glass Mfg. Co.* v. *Langdon,* 24 Pick. 49; *In re G. H. Hammond Co.,* 246 Mich. 179, 182.

In view of *Cady* v. *Knit Goods Mfg. Co.,* 48 Mich. 133 and *Jacobs* v. *E. Bement's Sons,* 161 Mich. 415, it is clear that a receiver of a Michigan corporation appointed in dissolution proceedings and vested by statute with power to conduct the business can not be said to derive any of these powers from the corporate franchises, for they are gone.

The legal capacity of the respondent to act at all is obviously derived from its own corporate organization as a trust company. Every power it possessed in its capacity as receiver it derived, not from the Worden Grocer Company or the corporate franchises thereof, but from the appointing court. It took over and managed the property not by sufferance of the corporate owner thereof, but by authority and as an officer of the court.

The court below was sound in holding *United States* v. *Whitridge,* 231 U. S. 144, to be controlling in principle. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

Other decisions in principle support the exemption of the respondent, as receiver, from a purely implied tax liability. *United States* v. *Wigglesworth,* 2 Story 369; *Eidman* v. *Martinez,* 184 U. S. 578; *Gould* v. *Gould,* 245 U. S. 151; *Crooks* v. *Harrelson,* 282 U. S. 55; *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602; *Reinecke* v. *Gardner,* 277 U. S. 239.

Mr. Justice Cardozo delivered the opinion of the Court.

A petition by the People of the State of Michigan that a receiver appointed by a federal court be directed to pay out of the moneys in his hands corporate franchise taxes due or claimed to be due to the People of the State was granted by the District Court, and denied by the Court of Appeals. 52 F. (2d) 842. The case is here on certiorari.

At the suit of a simple contract creditor, a receiver of the property of the Worden Grocer Company, a Michigan corporation, engaged in business at its domicile, was appointed by a Federal District Court in Michigan on February 9, 1926. The bill of complaint alleged that the defendant was solvent, and that if its business was handled by a receiver free from interference by its creditors, it would be able to pay its debts in full and would have a surplus available for preferred and common stockholders. On the same day the directors of the defendant adopted a resolution consenting to the receivership; and an answer admitting the allegations of the bill of complaint and consenting to the relief prayed for was filed forthwith. Thereupon, and still on the same day, the court made an order appointing the Michigan Trust Company receiver of the defendant and of all its assets with authority "to carry on the business now carried on by the Worden Grocer Company, and to operate and manage its property and business in such manner as will, in the judgment of said Receiver, produce the most satisfactory results." To that end authority was granted "to pay the current and unpaid payrolls of said defendant; to incur such obligations and indebtedness, . . . the same to be prior to the present unsecured obligation" of the defendant, . . . "as to the Receiver may seem necessary for continuance of the business," and in particular "to pay all taxes and assessments levied upon the property and assets of said company," as well as all rentals accrued or to accrue thereafter.

The receiver so appointed carried on the business thus committed to its charge. It continued to do this till December 30, 1929, when the court made an order confirming a sale of all the mercantile assets, as a result of which sale there was paid to the common creditors a dividend of 25%. Cash and unsold real estate are still in the receiver's custody.

In February, 1930, the People of the State filed in the District Court a petition that the receiver be directed to pay the corporate taxes or privilege fees for the years 1925 to 1929 inclusive, amounting in the aggregate to $10,988.36. The liability of the receiver in respect of such fees or taxes is the subject of this controversy. The District Court held that they were charges upon the assets prior to the claims of creditors in that they were expenses necessarily incurred by the receiver in fulfilling the duty to operate the business. The Court of Appeals held that they were liabilities due to the People of the State, but liabilities not to be discharged until the claims of all other creditors as well as the expense of the receivership had been satisfied in full.

By a statute of Michigan enacted in 1923 (Act No. 233, Public Acts 1923, § 4), "every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by Section 7 hereof, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state, an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars."

There were amendments of the statute in 1927 and 1929 (Act No. 140, Public Acts 1927; Act No. 175, Public Acts 1929), but their significance in relation to this controversy is not important enough to make it necessary to quote them.

The tax is laid upon the corporation "for the privilege of exercising its franchise and of transacting its business within this state." Whether a corporation does exercise its franchise or transact its business within the meaning of a statute so framed when it does business through a receiver is a subject on which much subtle argument has been expended by state and federal courts. Distinctions have been drawn between receivers appointed to carry on the business of a corporation with a view to the continuance of its corporate life, and receivers appointed in aid of the dissolution of the corporation or the liquidation of its business. See *e. g.*, *Collector of Taxes* v. *Railway*, 234 Mass. 336; 125 N. E. 614; *Ohio* v. *Harris*, 229 Fed. 892, 901. Other distinctions have been drawn between taxes on a franchise to exist as a corporation and a franchise for transacting business, or, as many of the cases put it, between a franchise to "be" and a franchise to "do."

See *e. g., Cobbs & Mitchell* v. *Tax Appeal Board,* 252 Mich. 478, 481; 233 N. W. 386. Even where the tax is on a franchise to "do," there is wide diversity of judgment. The wording of some statutes has been read by some courts as importing the doing of business in the usual course by agents and officers appointed in the usual way. *United States* v. *Whitridge,* 231 U. S. 144, 149. Wording only slightly different has been thought by other courts to include the operations of a business conducted by receivers. *Central Trust Co.* v. *N. Y. C. & N. R. Co.,* 110 N. Y. 250; 18 N. E. 92; *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512; 98 N. E. 11; *Re U. S. Car Co.,* 60 N. J. Eq. 514; 43 Atl. 673; *Armstrong* v. *Emmerson,* 300 Ill. 54; 132 N. E. 768; *People* v. *Hopkins,* 18 F. (2d) 731. Other wording not unlike has been held to import the imposition of a burden on the mere privilege to "do," though no business was in fact transacted by the directors or by any one (*In re G. H. Hammond Co.,* 246 Mich. 179; 224 N. W. 655; *New York* v. *Jersawit,* 263 U. S. 493, 495), a construction whereby the tax on the privilege to do becomes closely assimilated, in respect of domestic corporations, to one on the privilege to be. *In re G. H. Hammond Co., supra.*

We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that the courts of the State, if they have spoken, pronounce the final word. The decision of the Supreme Court of Michigan in *Re Detroit Properties Corporation,* 254 Mich. 523; 236 N. W. 850, is a controlling adjudication as to the meaning and application of the privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to "do"; that this privilege existed though nothing was ever done; that the order appointing a receiver to continue the business did not divest the privilege; that the only effect of such an order was to nominate the person who was to exercise the "powers belonging to the corporation by legislative grant;" and hence that within the meaning of the statute the corporation retained a "privilege of exercising its franchise and of transacting its business," for which a tax was due. Cf. *Central Trust Co.* v. *N. Y. C. & N. R. Co., supra; Ohio* v. *Harris, supra; People* v. *Hopkins, supra; In re G. H. Hammond Co., supra.* The significance of this decision is not avoided by the suggestion that the court in determining the application of the tax was guided by general principles as to the effect of a receivership, and not by any provision expressly covering receiverships in the body of the statute. This does not detract from the quality of the judgment as an expression of the local law. Problems of statutory construction do not arise unless the meaning of a statute is obscure or uncertain in its relation to a set of facts, and obscurities or uncertainties thus arising are not susceptible of settlement unless the words of the statute are read in a setting of common law implications, a background of common law doctrine, giving meaning and perspective to a vague and imperfect outline. *Ward* v. *Erie R. Co.,* 230 N. Y. 230, 234; 129 N. E. 886; *Murray* v. *Chicago & N. W. Ry. Co.,* 62 Fed. 24, 31; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 654; *Rice* v. *Railroad Co.,* 1 Black 358, 374, 375. The Supreme Court of Michigan in deciding the *Detroit Properties* case had to make answer to the question whether the legislature of the State in imposing a tax upon the privilege of exercising a franchise intended to reach a situation where the business of the corporation was conducted through the arm of a receiver. The tax, if there was any, could have no origin independent of the provisions of the statute, and any decision upholding or annulling it is one involving inescapably a construction of the statute. Cf. *New York* v.

Jersawit, 263 U. S. 493, 495; *Mason* v. *United States,* 260 U. S. 545, 555, 556; *Quong Ham Wah Co.* v. *Industrial Comm.,* 255 U. S. 445, 448; *Poe* v. *Seaborn,* 282 U. S. 101, 110.

We hold, therefore, in submission to the local law, that the corporation, the Worden Grocer Company, was still subject to the tax though it was in the hands of a receiver. The decision of the court below apparently concedes as much, but maintains that the tax must be paid by the corporation and not by the receiver, with the result that the State is subordinated to all the other creditors. We find no warrant for the discrimination either in the provisions of any statute or in any principle of equity governing the distribution of a fund in the hands of a receiver. On the contrary, statute and doctrine point the other way.

Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors. They are so treated in the order by which the receiver was appointed. By the order the receiver is directed in continuing the business to pay taxes and rentals and any other expenses necessary to enable the business to go on, and to give such payments priority over other debts and obligations. These privilege fees were charges of the nature there described. Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security. *Coy* v. *Title Guarantee & Trust Co.,* 220 Fed. 90, 92. The privilege fees, being taxes, were expenses of administration within the very terms of the order, but in addition they were taxes of such a kind that the corporation by failing to pay them became subject, if the State so elected, to a forfeiture of its franchise. Act No. 172, Public Acts

1923, § 7; cf. *Turner* v. *Western Hydro-Electric Co.,* 241 Mich. 6; 216 N. W. 476. The receiver was under a duty to pay them when they accrued, and having failed to fulfill that duty then, it should be compelled to pay them now. The decisions as to this are persuasive and uniform. *Coy* v. *Title Guarantee & Trust Co., supra; Bright* v. *Arkansas,* 249 Fed. 950; *McFarland* v. *Hurley,* 286 Fed. 365; *People* v. *Hopkins,* 18 F. (2d) 731, 733; cf. *In re Tyler,* 149 U. S. 164, 182.

If the receivership were to be viewed as equivalent to one for the liquidation of the business, the result would not be different, and this for the reason, without considering any other, that it was not such a receivership when the suit was instituted. It was then, as we have pointed out, a receivership for the conservation of the assets of a corporation believed to be completely solvent. If it ever lost its original quality and became a winding up receivership, the change was not earlier than the sale of the mercantile assets in the latter part of 1929. Claims of the State for taxes then accrued, instead of being postponed to those of other creditors, are entitled to a preference by the provisions of the local law. Sections 15315 and 15362, Compiled Laws of Michigan.

This court has had occasion to point out the abuses that can arise from friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay, *Harkin* v. *Brundage,* 276 U. S. 36, 52, 54; cf. *Kingsport Press* v. *Brief English Systems,* 54 F. (2d) 497, 499, 500. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes lest their function be perverted. For four years the business of this corporation was carried on in Michigan by a chancery receiver in the hope that winding up and dissolution would thereby be averted. There should be no shift of the theory of the suit in these, its expiring moments. To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the State and a reproach to equity.

A word in conclusion should be said as to *United States* v. *Whitridge, supra.* The court held in that case that a corporation operating through a receiver is not subject to a federal tax imposed as an excise on the actual doing of business and to be measured by its fruits. The tax in controversy is a State tax, and is laid not on the doing of business, but on the mere privilege to do it. The State decision as to its meaning would control in case of conflict, but conflict there is none.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the decree of the Circuit Court of Appeals should be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* SIMPSON, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 674. Argued April 25, 1932.—Decided May 16, 1932.

A locomotive engineer moved his train from a siding to the main line in neglect of an order to wait for the passing of another train. His conductor, in the caboose at the other end of his train, had his attention called to the possible danger, but deferred applying the air brakes while he consulted his own orders to make sure whether the order to wait had been countermanded. Almost immediately came a collision in which the engineer was killed. *Held:*

1. The casualty was attributable to the engineer's negligence. P. 350.