UNITED STATES REPORTS

VOLUME 286

CASES ADJUDGED

IN

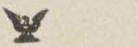
THE SUPREME COURT

AT

OCTOBER TERM, 1931

FROM APRIL 12, 1932, TO AND
INCLUDING MAY 31, 1932

ERNEST KNAEBEL
REPORTER



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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief 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.
BENJAMIN N. CARDOZO, Associate Justice.

WILLIAM D. MITCHELL, Attorney General.
THOMAS D. THACHER, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[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, Louis Dembitz Brandeis, 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, Benjamin N. Cardozo, 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.

March 28, 1932.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1931

TAYLOR *v.* UNITED STATES.

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

No. 693. Argued April 11, 12, 1932.—Decided May 2, 1932.

1. The time for settling a bill of exceptions after a conviction, was extended at the request of the Government and expired on a Sunday; counsel for both sides went together to the judge's chambers to secure his signature on the Saturday preceding, but failing to find him, agreed to ask for it on the next Monday. This was done and the bill was then signed pursuant to their agreement. *Held* that it should be accepted as part of the record, because of the exceptional circumstances. P. 4.
2. Suspicion that a person is engaged in violations of the prohibition law, confirmed by the odor of whisky and by peeping through a chink in a garage standing adjacent to his dwelling and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whisky for the purpose of obtaining evidence of guilt. P. 5.

55 F. (2d) 58, reversed.

CERTIORARI, 285 U. S. 534, to review the affirmance of a conviction under the Prohibition Act.

Mr. R. Palmer Ingram, with whom *Miss Helen Elizabeth Brown* was on the brief, for petitioner.

The Government's contention that the evidence in this case is not properly before the Court is untenable.

The fact that the last day of the period for settling the bill of exceptions fell on Sunday operated to extend the time to the next day on which the business of the court could legally be transacted.

Here there are both express consent and conduct equitably estopping the Government to deny consent.

An endorsement upon the Bill, "We agree upon the above, the foregoing Bill of Exceptions," signed by counsel after an extension by insufficient order, was held to be a waiver of any objections to the order in *Gulf, C. & S. F. Ry. Co.* v. *Jackson,* 64 Fed. 70. The facts bring the present case within the term "extraordinary circumstances." *In re Bill of Exceptions,* 37 F. (2d) 849, 851. See also *Waldron* v. *Waldron,* 156 U. S. 361.

The opinion below unduly narrows the term "private dwelling," in § 25, Title 2, National Prohibition Act, and limits the Fourth Amendment. The garage was part of the residence premises. *Henderson* v. *United States,* 12 F. (2d) 528, 529. In any event, the protection of the Fourth Amendment includes garages, barns and other structures. *Temperani* v. *United States,* 299 Fed. 365; *United States* v. *Slusser,* 270 Fed. 818.

The search of a dwelling for intoxicating liquor without a warrant is strictly prohibited; and the issuance of a search warrant for such premises is definitely limited. National Prohibition Act, § 25, Title 2; Espionage Act of June 15, 1917, §§ 611 *et seq.; Thompson* v. *United States,* 22 F. (2d) 134; *Staker* v. *United States,* 5 F. (2d) 312, 314; *Agnello* v. *United States,* 269 U. S. 20, 30.

The breaking into and search of any building at 2.30 o'clock at night is unreasonable and a wanton violation of the Fourth Amendment. The violation of the Constitution becomes even more grave when the building was part of a dwelling and the occupant was aroused from his sleep. *Alvau* v. *United States,* 33 F. (2d) 467, 470;

People v. *Marxhausen,* 204 Mich. 559; *Weeks* v. *United States,* 232 U. S. 383, 391, 392.

The search does not come within the exception mentioned in the *Agnello* case of a search "incident to a lawful arrest." No person was present and subject to arrest. The agents knew before they forced their way in that no one was there.

The common law powers of peace officers have been limited by constitutional provisions and largely replaced by statute. But prohibition agents are statutory creatures (*Dumbra* v. *United* States, 268 U. S. 435) without the general powers of peace officers.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* were on the brief, for the United States.

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment, United States District Court for Maryland, charged petitioner Taylor with the unlawful possession of intoxicating liquor—whiskey, one hundred twenty-two cases.

By timely petition to the court he asserted that in the night time prohibition agents acting without warrant had entered and searched the garage adjacent to his residence and had found and seized the liquor; that with this as evidence the indictment had been obtained; he anticipated that like use would be made of it at the trial. The prayer for its exclusion was denied.

By stipulation the cause went for trial by the court without a jury. The District Attorney called three of the agents who participated in the search. The defendant moved to exclude all their testimony on the ground

that the search and seizure, made without warrant and in violation of his constitutional rights, were unreasonable; also that his private dwelling had been entered contrary to the inhibition of the Willis-Campbell Act. The trial court overruled this motion, adjudged defendant guilty and imposed fine and imprisonment. The Circuit Court of Appeals affirmed the judgment. The cause comes up by certiorari.

There is a suggestion, first made here, that the bill of exceptions printed in the record was signed by the judge out of time and therefore cannot be considered.

The trial took place during February, 1931. By proper orders permission to file the bill of exceptions was extended to May 17th, 1931—Sunday. It was actually signed on May 18th. Immediately following the signature of the judge the following appears—" 5/18/31. This Bill of Exceptions is agreed upon. Simon E. Sobeloff, U. S. Attorney. James M. Hoffa, Assistant U. S. Attorney."

The facts surrounding the preparation and signing have been presented by affidavit and are not in dispute. Having prepared the bill, petitioner's counsel duly lodged it with the United States Attorney. For convenience of the latter's office there were extensions of time to May 17th. On May 16th, the Assistant District Attorney, having just completed examination of the bill, went with petitioner's counsel to the judge's chambers to secure his signature. Failing to find him, they agreed to ask his signature on Monday, May 18th. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill. The considerable delay in settling the bill followed the request of the Assistant District Attorney in charge and was permitted for his convenience.

In these exceptional circumstances—the facts being undisputed—we think the petitioner is entitled to the bene-

fit of the bill. And negativing any intent to relax the general rule, we accept it as adequate and properly incorporated in the record. See *Waldron* v. *Waldron,* 156 U. S. 361, 378.

Without undertaking to defend the challenged search and seizure, the Solicitor General submits the cause for our decision. As the conviction was affirmed by the Circuit Court of Appeals, he prefers not to enter a confession of error. He does, however, say that in his opinion, without regard to whether the garage constituted part of the private dwelling, upon the facts shown, the entry by the agents was wrongful and the search and seizure unreasonable. With this view we agree. The judgment below must be reversed.

During the night, November 19th, 1930, a squad (six or more) of prohibition agents, while returning to Baltimore City, discussed premises 5100 Curtis Avenue, of which there had been complaints " over a period of about a year." Having decided to investigate, they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building—is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises.

As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight, they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. Thereupon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him.

Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. See *Carroll* v. *United States,* 267 U. S. 132; *United States* v. *Lefkowitz,* 285 U. S. 452, and cases there cited.

Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest.

Reversed.

UNITED STATES *v.* GEORGE OTIS SMITH.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 694. Argued March 21, 22, 1932.—Decided May 2, 1932.

1. A question of construction of the Rules of the Senate becomes a judicial question when the right of an appointee to office, challenged in a *quo warranto* proceeding, depends upon it. P. 33.
2. In deciding such a question, great weight is to be attached to the present construction of the rules by the Senate itself; but that construction, so far, at least, as arrived at after the events in controversy, is not conclusive on the Court. *Id.*

3. Rules of the Senate provided that when a nomination to office was confirmed, any Senator voting in the majority might move for reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session; that if notification of the confirmation had been sent to the President before the expiration of the time within which the motion to reconsider might be made, the motion to reconsider should be accompanied by a motion to request the President to return said notification to the Senate; and that nominations confirmed should not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making the motion to reconsider the same, or while the motion to reconsider was pending, "unless otherwise ordered by the Senate." *Held* that when the Senate had confirmed a nomination and on the same day had by unanimous consent caused the President to be notified of the confirmation, and the President thereupon had commissioned the nominee and the latter had taken the oath and entered upon the duties of his office, the rules did not contemplate that the Senate thereafter, within two executive sessions following that of the confirmation, might entertain a motion to reconsider the confirmation, request return by the President of the notification, and upon his refusal to return it, might reconsider and reject the nomination. P. 32 *et seq.*

Supreme Ct. D. C., affirmed.

ON CERTIFICATION by the Court of Appeals of the District of Columbia of a question arising upon an appeal from a judgment dismissing a petition for a writ of *quo warranto*. This Court ordered up the whole record.*

Mr. John W. Davis, with whom *Mr. Alexander J. Groesbeck* was on the brief, for the United States Senate.

Rules XXXVIII and XXXIX empowered the Senate, at any time prior to the expiration of the next two days of actual executive session, to entertain a motion to re-

* The record in this case contains the results of an elaborate examination of the instances in which the Senate reconsidered its votes rejecting or confirming nominations, after the President had been notified of the action reconsidered; and also of the Presidential and Senatorial practice in such matters, as revealed by the Senate Executive Journal, and by records of the Executive Offices and of certain Departments.

consider its vote, even though it had previously ordered that a copy of its resolution of consent be forwarded forthwith to the President. Paragraphs 3 and 4 of Rule XXXVIII permit no other construction. A survey of the historical development of the rules relating to reconsideration substantiates this obvious interpretation. The existence of the power to reconsider after notification is further confirmed by the many instances appearing in the Executive Journals of the Senate in which the President, at the request of the Senate, returned resolutions both of confirmation and rejection.

The Senate's practice of reconsidering an action previously taken dates from the very inception of our Government. Ann. of Cong. (Gales, 1834,) 1st Cong. Vol. I, pp. 20, 945, 950. While in the Parliament of Great Britain the practice has never existed, we find it at a quite early date in some of the American colonies. While it is not mentioned in the rules and orders of the Congress of the Confederation, the record of its proceedings discloses that it was frequently resorted to. It was at once applied in the House of Representatives, although a rule on the subject was not adopted until January 7, 1802. The term "reconsideration" is found in the Constitution of the United States, Art. I, § 7.

In the debates of the Senate held on January 5, 6, 7, and 8, 1931, with reference to the reconsideration of the nomination of the appellee, there was considerable discussion as to whether the Secretary of the Senate had in fact been authorized by the Senate to forward immediately to the President a copy of the resolution consenting to the appointment. It was there argued by some Senators that assent by silence to the statement of the President *pro tempore* that, "The Senate advises and consents to the nomination and the President will be notified," did not constitute an order by the Senate that the resolution should be forthwith forwarded to the

President. It is not, however, the contention of the appellant in this case that the Secretary of the Senate exceeded his authority in forwarding the resolution to the President on December 22, 1930. The appellant admits that by the usual and established practice of the Senate assent by silence to such a statement by the presiding officer of the Senate constitutes an order. The Executive Journal of December 20 shows that it was ordered " that the foregoing resolution of confirmation [of appellee] be forwarded to the President of the United States," and that later it was ordered, " that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

But even so, paragraph 3 of Rule XXXVIII shows that the Senate expressly contemplated a situation in which it might reconsider a nomination although notification of its vote had by its direction already proceeded to the President. The plain and simple reading of its provisions,—

" But if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate,"—

permits of no other construction. The historical development of this provision substantiates the appellant's position.

The President was chargeable with knowledge that the Senate retained its right to reconsider. He knew that the vote advising and consenting to the appointment of appellee was taken on December 20. This appears on the face of the resolution delivered to him by the Secretary of the Senate. He also knew that the Senate had recessed on the same day until January 5, 1931. Moreover, he must have known, or at any rate is legally charged with knowl-

edge of, the rules of the Senate; and these rules on their face in unequivocal terms permitted the reconsideration of a vote by the Senate within the next two days of actual executive session.

The President must also have known that his predecessors in office had often been called upon to return resolutions transmitted to them by the Senate in order to permit the Senate to reconsider its vote, and that they did return such resolutions. In fact, the Executive Journal discloses that the Senate on two occasions prior to this case requested President Hoover himself to return resolutions advising and consenting to appointments, and that he did return them. These resolutions had been forwarded to him forthwith and prior to the expiration of the reconsideration period.

The power of reconsideration is not lost simply because the President has acted before the request for the return of the notification is received. To adopt the interpretation of the Attorney General would mean the bodily incorporation into paragraph 3 of Rule XXXVIII, after the words, " when a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate," of the words " unless the President has been notified and has made the appointment." This renders the rule meaningless and inconsistent. One portion should not be construed to annul or destroy what has been clearly provided by another. If the rule were to be so interpreted, it is obvious that the Senate, while a motion to reconsider a nomination was pending, would in no case order a notification to be sent to the President, knowing that if the President hurriedly made the appointment it could take no further action upon the pending motion. But paragraph 4 of Rule XXXVIII definitely provides that a notification may be ordered by the Senate to be transmitted to the President although at the time a mo-

tion to reconsider is pending. If the Senate desired in such a case to make its vote final—that is by destroying the possibility of reconsideration—the natural and ordinary method of doing so would be to make a motion to table the motion to reconsider. This is explicitly provided in paragraph 3 of Rule XXXVIII.

It is most unlikely that the Senate, which by its rules formulated the practice of reconsideration in order the better to reach a sound judgment in the confirmation of nominations submitted to it, should want to stake the loss of this valuable power upon the haste or procrastination of the President. And this is particularly so when we consider that the fundamental changes made in the rules of April 6, 1867, occurred at a time when relations between President Andrew Johnson and the Senate were exceedingly strained.

The conclusion reached by the Attorney General seems to suggest that the process resolves itself into a mere race of diligence upon the part of the President and Senate in case of a conflict, or possible conflict, of opinion between them. So long as the President is not in receipt of the Senate's request for a return of its notification, his hands are free, we are told, and any action he may take is final and irrevocable. If this is so, it can make no difference that a messenger is actually on his way with a request; or that the Senate has in fact voted to reconsider before the commission is signed; or even that on such reconsideration the nomination has been rejected. Indeed, by the same reasoning, the President, having once been notified, might wilfully hasten the appointment notwithstanding actual knowledge on his part from unofficial sources that the Senate had proceeded or was proceeding to reconsider and reverse its action. Could it be pretended that an appointment made under such circumstances was based on that advice and consent of the Senate which the Constitution contemplates?

The debates in the Senate and the very reconsideration of the nomination of the appellee disclose that the Senate believed that its power to reconsider was not destroyed by the immediate issue of a commission. In the construction of a parliamentary rule, the courts will respect the meaning which the legislative body by its action has placed upon it. *State* v. *Savings Bank,* 79 Conn. 141, 152; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310, 326; *State ex rel. Whitney* v. *Buskirk,* 40 N. J. L. 463, 467; *French* v. *Senate,* 146 Cal. 604, 608; *Davies* v. *Saginaw,* 87 Mich. 439, 444; *State ex rel. West* v. *Butler,* 70 Fla. 102, 120; *Smith* v. *Jennings,* 67 S. C. 324, 328; *People ex rel. Locke* v. *City Council,* 5 Lans. (N. Y.) 11, 14–15.

If the notification sent the President had contained an express statement that the Senate reserved the right at any time within the two succeeding days of executive session to reconsider its action, could the President foreclose the Senate from pursuing that course by the immediate issue of a commission? Yet just this qualification is attached by necessary implication to every such notification.

Analysis of the process of advising and consenting to a nomination shows the utter impossibility of applying to the case before this Court parliamentary rules formulated either by Jefferson or by the Senate to govern the process of legislation. The process of advising and consenting is not legislative. It may be termed quasi-executive; in fact, it is *sui generis.*

Presidential and senatorial practice do not support the contention that the power to reconsider is cut off either by an immediate appointment or by refusal to return the notification.

In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by Art. I, § 5, of the Constitution. The Rules are binding on both the

Senate and the Executive. *United States* v. *Ballin,* 144 U. S. 1.

Adjudications by state courts which deal specifically with the reconsideration of action taken by a legislative body, have consistently applied the tests announced in *United States* v. *Ballin, supra.* See, for instance, *Smith* v. *Jennings,* 67 S. C. 324; *State* v. *Savings Bank,* 79 Conn. 141, 152; *Crawford* v. *Gilchrist,* 64 Fla. 41; *People* v. *City Council,* 5 Lans. (N. Y.) 11, 14–15; *State ex rel. West* v. *Butler,* 70 Fla. 102, 120; *People ex rel. Birch* v. *Mills,* 32 Hun (N. Y.) 459, 460; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310.

The signing and delivery of a commission and the taking of an oath by the appellee can not fortify his position or shield him from ouster. The lack of a confirmation by the Senate as required by the Constitution could not be cured by any action on the part of the President. *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; *Dust* v. *Oakman,* 126 Mich. 717; 36 Op. Atty. Gen. 382; *State ex rel. West* v. *Butler,* 70 Fla. 102. See also *State* v. *Savings Bank,* 79 Conn. 141; *Conger* v. *Gilmer,* 32 Cal. 75; *Reed* v. *School Commission,* 176 Mass. 473; *Higgins* v. *Curtis,* 39 Kan. 283; *State ex rel. Gouldey* v. *City Council,* 63 N. J. L. 537; *Stiles* v *Lambertville,* 73 N. J. L. 90; *Ashton* v. *Rochester,* 133 N. Y. 187; *Commonwealth* v. *Allen,* 128 Mass. 308; *People* v. *Shawver,* 30 Wyo. 366; *State* v. *Foster,* 7 N. J. L. 123; *Red* v. *City Council,* 25 Ga. 386; Luther S. Cushing, Law & Practice of Legislative Assemblies, 9th ed., 1899, § 1265.

In a few decisions relating to the right of a legislative body to reconsider action previously taken, there are dicta indicating that the right may be trimmed down or lost if notice of the action so taken has gone forward. *Baker* v. *Cushman,* 127 Mass. 105; *Wood* v. *Cutter,* 138 Mass.

149; *State* v. *Phillips,* 79 Me. 506; *Allen* v. *Morton,* 94 Ark. 405; *State ex rel. Childs* v. *Wadhams,* 64 Minn. 318. See *State ex rel. Whitney* v. *Buskirk,* 40 N. J. L. 463. But in all of these cases, it should be noted, the legislative body had no rules definitely and explicitly conditioning the right to reconsider and indicating when its action became final.

Attorney General Mitchell, with whom *Solicitor General Thacher,* and *Mr. Erwin N. Griswold* were on the brief, as *amici curiae* by leave of Court.

This proceeding could only be maintained in the name of the United States and with the consent and on the relation of an official of the Department of Justice. As the officials of the Department of Justice were already committed by an opinion of the Attorney General (36 Ops. Atty. Gen. 382) to a conclusion adverse to the position taken by the Senate, consent to the institution of this proceeding was given on condition that the Senate would employ its own counsel. This explains why officials of the Department appear as *amici curiae.*

Three suggestions have been made as to the possible purpose and effect of the Senate's action in sending notification to the President that it consented to the respondent's appointment:

First. That the President was authorized to make an appointment forthwith but subject to its becoming ineffective through reconsideration of the nomination by the Senate;

Second. That the consent so given, of which notification went to the President, was a conditional and qualified consent not representing the final conclusion of the Senate, and therefore the appointment was premature and unauthorized;

Third. That the Senate's action shows unconditional and unqualified consent to an immediate appointment,

effective because the Senate did not recant and withdraw its consent, and notify the President of its withdrawal, before appointment was made.

The first position is wholly untenable. The consent required by the Constitution is an unconditional consent to an unconditional appointment.

Either this appointment was valid because made with the unqualified consent of the Senate or it was void. There is no middle ground. Any other view would allow the Senate to encroach upon executive functions by removing an officer after his appointment under the guise of reconsideration of his nomination and because of dissatisfaction with his official acts.

We mention this theory merely because it was suggested in the debates on this case in the Senate. The petitioner does not seem to rely on it, and it seems to be conceded now that the question is whether the consent was unqualified and the appointment valid, or whether final consent was never given and the appointment was premature and void. Approaching the case this way, there is no constitutional question presented, and we are left merely with the question whether the Senate intended unqualifiedly to consent and so advise the President; and that is to be resolved by considering what the Senate did, in the light of its rules and practices, reasonably construed.

One provision of the rules is that when a nomination is confirmed, a motion for reconsideration may be made within either of the next two days of actual executive session. This must be read in connection with Paragraph 4 which provides that a nomination confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider or while such motion is pending "unless otherwise ordered by the Senate." The rule in Paragraph 4 was intended to protect and preserve the

power of the Senate to reconsider. It is based on the assumption that if the notification goes to the President before the time allowed by the rule for reconsideration has elapsed and the President makes the appointment, the power to reconsider will be lost. The rules also expressly contemplate that before the time fixed by the rule for reconsideration has expired or even while a motion for reconsideration is pending, the Senate may order an immediate notification of its consent to the appointment to be transmitted to the President. In this case the Senate resolved that it consented to the appointment and it unanimously resolved that the President be immediately notified that it did consent. Its action in directing that the President be forthwith notified without waiting for the expiration of the time allowed by the rule for reconsideration must have had some purpose. Why order immediate notification to be sent to the President unless he was expected to act upon it? The only conceivable object in expediting the notice was to make it possible for the President to expedite the appointment, and to enable the President immediately to fill the vacancy and to serve the public interest by avoiding delay in the transaction of public business.

No second notice to the President is provided for by Senate rules or practices, and if the one sent be not effective so that the President may rely on it, he never would receive a notification of final consent. The petitioner's position is that before it has consented the Senate may send a notification that it has, and then after it has really consented, it sends no notice. Why do a futile thing—unanimously resolve to notify the President forthwith and rush a special messenger to the executive offices, if the action is not final and the President may not proceed? Why send a formal, expedited notification on which the President can not rely, and then refrain from giving him a notice of final decision of the Senate and

compel him to cause the records of the Senate to be searched to ascertain whether a motion for reconsideration has been made and lost, or two executive sessions have been held without a motion for reconsideration having been made? The fallacy of the petitioner's argument is in the conclusion that the rule allowing reconsideration was an inexorable thing which the Senate itself could not escape from. It involves also the mistaken assumption that the rule which provides for recalling notifications from the President contemplates that in all cases the recall will be in time and successful.

Any rule of the Senate may be suspended in a particular case by unanimous consent. Whether an order of the Senate for immediate notification is in accordance with the rules and requires only a majority vote or amounts to a suspension of the rules requiring unanimous consent is immaterial here. Acting in this case by unanimous consent immediately to notify the President, it did not expressly resolve to refrain from any further consideration and suspend the two executive session day rule, but its action is susceptible of no other interpretation. A decision to notify the President forthwith that it had consented to the appointment necessarily implies that it had decided then to reach a final conclusion.

The precedents indicate that no President has ever questioned the power of the Senate to reconsider and withdraw its consent to an appointment if notice of the withdrawal reaches him before the appointment is made.

The precedents tend to support the view that the question that has always been uppermost, and the subject of particular inquiry, has been whether notice of the withdrawal of the Senate's consent reached the President before the appointment was made. We have been unable to find a case in which the Senate actually proceeded to reconsider and reject a nomination once confirmed, where

it clearly appeared that an appointment had been made by the President before information reached him of the Senate's move to withdraw its consent.

In dealing with these cases, it is evident that those involved did not always have a clear and consistent idea as to what constituted an appointment or whether merely signing a commission effected it.

The cases are also complicated by the fact that the President has the power to remove executive officers, and although an appointment had been made before the Senate undertook to reconsider, he could, by withholding delivery of the commission and thus depriving the appointee of an opportunity to take the oath, followed by nomination and appointment of another, in effect remove the appointee. Such was the Plimley case.

In this connection we question the assumption by the petitioner that an entry in the White House records of the "date of commission" or "date commissioned" necessarily means that the commission was signed on the date entered. It may or may not have been. The date so entered is the date the commission bears, but not necessarily the date the President signs it.

The petitioner's argument is based on the premise that the Senate, though sending the notification, intended to reserve the power to reconsider, and our position is that it did not so intend. If our contention be accepted, questions as to whether the President is presumed to know the rules, or as to whether the President had a right to rely on a notification which was false and premature, or whether the Senate lost jurisdiction by parting with the papers, are eliminated from the case.

The proper conclusion is that by its action in this case the Senate intended to give its unqualified consent to an immediate appointment, and that its action directing notification to be sent forthwith and without waiting for the expiration of the time fixed by the rule for reconsid-

eration, taken by unanimous agreement, amounted to an abrogation in this case of the rules allowing further consideration and discloses the intention of the Senate then and there finally to consent to the appointment and to communicate that consent to the President for immediate action.

The situation is somewhat anomalous in that counsel for the Senate representing the petitioner are here contending for one interpretation of the Senate's rules and action, but the Senate itself since this case arose has repeatedly and without any uncertainty followed a practice consistent only with our position on the law. Referring to the Congressional Record, 71st Cong., 3d Sess., Vol. 74, Pt. 7, pp. 6489–6490; Vol. 74, Pt. 2, pp. 1748–1749; *Id.*, pp. 1937, 2066; Vol. 74, Pt. 3, p. 3393; 72d Cong., 1st Sess., pp. 1003, 1131, 3071, 3415, 3582, 3782, 3881, 4724. These extracts from the Congressional Record show beyond question that the Senate understands that under its present rules unanimous agreement to notify the President of its consent to an appointment, without waiting for the expiration of the time fixed by the rules for reconsideration, although without any express mention of the rule about reconsideration, amounts to a decision of the Senate to give unqualified consent to the appointment.

Mr. George Wharton Pepper for Smith.

It has never been doubted since *Marbury* v. *Madison*, 1 Cranch 137, and is conceded now, that where the President has nominated under the Constitution, the Senate has advised and consented to the appointment, and a commission has been signed by the President, the appointment is complete and the appointee is entitled to office unless and until properly removed.

The only point in the present case left open by that decision is whether such an appointment becomes void where the Senate, having first ordered immediate notifica-

tion to the President of its approval and consent, thereafter reconsiders and undertakes to reverse its action.

In that case, Chief Justice Marshall, speaking for the Court, said in effect, that the President could not have changed his mind after signing the commission, because, as he held, the President could not thereafter lawfully have forbidden the Secretary of State to deliver the commission (page 171 of opinion). Can the Senate be permitted as between itself and the President, to change its mind in a way not permitted to the President as between himself and his appointee?

In an attempt to meet the difficulty presented by this question the United States is driven to argue that the Senate in this case never really consented—that what it did was to give a mere interlocutory consent, which never became final because, within the period for reconsideration permitted by its own rules, the Senate reversed its consent. According to this view it is unimportant whether the President was or was not in fact ignorant of the Senate rules. Whether he knew it or not, the notice of confirmation immediately sent to him was merely for his comfort—to give him the satisfaction of knowing that so far the Senate was sympathetic.

As against any such theory it is submitted that the Senate had consented; that formal notification gave finality to the consent; and that when the President, having received such official notification and in reliance thereon, had made the appointment, the appointee was legally entitled to office until removed according to law.

The proposition last above stated is not only consistent with the provisions of the Senate rules but necessarily follows from a reasonable interpretation of them. In other words, the Senate has not by its rules attempted to embarrass the President or to impede the discharge of his executive duties. For the moment, however, let it be assumed that the Senate has actually attempted by its

rules to impose upon the Executive a period of inaction following receipt by him of notice of confirmation, the duration of the period of inaction being determined solely by the pleasure of the Senate as expressed in its rule. It is earnestly contended by the appellee that it is beyond the power of the Senate thus to control the conduct of the Executive. To concede such a power to a single House, or even to both Houses acting together, is to assign to their rules the force of a general law passed by both houses, signed by the President and binding on every citizen. Indeed a concession of such power might even involve the conclusion that a rule of the Senate or House is of greater efficacy than an Act of Congress, inasmuch as the latter will not be permitted by this Court to limit the Executive in the discharge of a constitutional function. Let it be assumed, for example, that the Senate rules were silent on the subject of reconsideration but that an Act of Congress provided that the President should not, for a six months' period, make an appointment after notice of Senate confirmation and that, within that period, Senate consent might be withdrawn: is it to be supposed that such an Act, passed, perhaps, over the President's veto, would be upheld by this Court? Would not that be a clear case of legislative encroachment upon the discharge of a constitutional function by the Executive? Each House under the Constitution may "determine the rules of its proceedings"—but not those of the President or of the Supreme Court. Neither House may "by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *United States* v. *Ballin,* 144 U. S. at p. 5. It was there decided that the rule of the House of Representatives permitting the Speaker and the clerk to determine by count the presence or absence of a quorum

was a valid exercise of the rule-making power. That decision goes no further than to sustain a reasonable exercise of the power to determine an intra-mural question of legislative procedure, the very case covered by the constitutional grant of power. But to invest Senate rules with a kind of extra-territorial quality is to put it within the power of one branch of Government to regulate the conduct of another by the device of seeming to regulate only its own. The "consent" contemplated by the Constitution is obviously an unconditional consent: no Senate rule can have the effect of annexing to it a clause of defeasance.

In order that the governmental machinery may operate smoothly there must be a specific formality in communicating to each branch the action taken by another, in every case where further official action is intended to follow. The President acts with utmost formality when he notifies the Senate of a nomination. The Senate acts with equal formality when notifying him that he may or may not proceed with the appointment. In neither case should there be mental or other reservations. In each instance it is essential that the notice sent should tell the whole story and that the recipient should be free to act upon it as authentic and decisive. In the instant case all necessary formality was observed.

The message which the Senate sent and the President received either has the quality and character attributed to it by appellee or it is a purposeless and even a misleading and mischievous communication.

When we turn to the Senate rules themselves, they do not furnish a basis for the argument that they were intended to provide for an interlocutory approval and confirmation of the President's nomination. Section 4 of Rule XXXVIII provides that the Secretary shall not notify the President of a confirmation or a rejection of his nomination until the expiration of the time limited for

making a motion to reconsider—that is to say, until the next two days of actual executive session after the day of the original consideration shall have expired—unless otherwise ordered by the Senate. The Senate intends to retain control of the subject-matter for that period of time unless it orders otherwise. Consistently with § 4, § 3 contemplates that if the Senate has "ordered" that the President shall be notified and if he has been notified of the action taken, then it is necessary that he should return the notification in order that the Senate shall have the right to reconsider—that is to say, shall have regained control of the subject-matter.

The rules recognize the settled parliamentary practice as to parting with control of the transaction; and, as held by the court below, notice of confirmation sent to the President was intended to be not merely a purposeless gesture, but information on which the Executive might rely.

It is, of course, not contended by the appellant that the Senate ever in fact called the President's attention to the rule in regard to reconsideration or that there is any such practice as to file with the President notice of changes made in the Senate rules.

The reasonable, as well as the only constitutional interpretation of these rules is that they contemplate that if the Senate parts with control by notification sent to the President, the Senate's power is exhausted unless and until such control is again restored.

Furthermore, while a practice could not change the fundamental law (as Mr. Justice Gordon in his opinion in the court below so clearly shows) the Senate by its own practice and acquiescence, has construed the portion of its rules in question in accordance with our contention. The Senate has never before contended that it had the legal right to reconsider its approval of a President's nomination after the President had in reliance on such ap-

proval appointed and had refused to accede to a Senate request for return of control.

There are some cases (there is no certainty that there are more than a very few) where the Executive after signing a commission restored control to the Senate at the request of the latter. But the appointee in these cases never asserted his legal rights, and all that such instances show is that the then Executive was concerned less with the legal rights of the appointee than with the desirability of conciliating the Senate. Probably in some cases the President never even considered the legal and constitutional phase of the matter. In some cases the Executive refused to restore control and thus protected the appointee, and the Senate acquiesced.

There never was a uniform presidential practice of granting the Senate's request by restoring to the Senate control after the appointment had been made. But even if there had been, such a practice could not affect the appointee's legal rights.

It is not necessary to discuss whether unanimous consent is necessary to the abrogation or suspension by the Senate of its own rules. It might be pointed out that there is in substance no difference between a unanimous suspension of the rules followed by a vote to notify the President at once, and simply a unanimous vote to notify the President at once. But the point is that there was no need of unanimous consent to suspension because no suspension of the rules was involved. The rules expressly provide that the Senate may order the immediate sending of notice, and this was done. It is true, and of course the Senate knew, that after sending the notice, the Senate could ask the President to restore the subject-matter to its control, and that, if he were in a position to acquiesce and did acquiesce, they could then reverse their previous action. But where the matter has passed out of the control of the President he has no power to restore such con-

trol to the Senate. The only way to get the appointee out of office is by removal. The Senate knew and intended this. The Senate, at the time of directing immediate notice to be sent to the President, was content with the possibility of regaining control if it wanted to change its mind. At the time it had no thought of so doing.

It is entirely unnecessary to consider a supposititious case of sharp practice—a case in which the President, having received official notice from the Senate of confirmation of one of his nominations, but having likewise received actual notice that such consent had in the meantime been reversed, immediately signs and causes to be sealed a commission to his appointee and delivers it in order to outwit the Senate. Possibly the result would be different there, but at any rate that is not this case.

In conclusion and to sum up, the only point left open by the decision in *Marbury* v. *Madison* is this: whether the Senate can annul an appointment after it has directed its officer to send notice of confirmation to the President and after he (in ignorance of a Senate rule reserving the right to reconsider within a certain period or, if knowing of the rule, yet supposing that the Senate, as the rule itself permitted, had voted to forego this period of reconsideration) has relied on the official notice and appointed his nominee to office. It is submitted that the Constitution permits the Senate no such reserved control; that the rules of the Senate have never contemplated, and the Senate by its own practice has never intimated that it claimed any such reserved control; that even if the rules clearly expressed any such intention, such rules are made only for the regulation of Senate procedure and have not the effect of a law which operates upon all alike whether they know of its terms or not; that no question of the abrogation of the rules of the Senate (by unanimous consent or otherwise) is involved in this case; that the Government could not function if the President were not en-

titled to rely upon official notice of confirmation of his nomination received from the Senate; and that the appellee was validly appointed to his office under the Constitution and laws of the United States and can be deprived thereof only by removal according to law.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition, in the name of the United States, for a writ of *quo warranto* was filed in the Supreme Court of the District of Columbia, on relation of the district attorney, in deference to the desire of the United States Senate to have presented for judicial decision the question whether George Otis Smith holds lawfully the office of member and chairman of the Federal Power Commission. The case was heard upon the petition and answer. On December 22, 1931, the trial court entered judgment denying the petition. An appeal was promptly taken to the Court of Appeals of the District. That court

* Attached to the brief are appendices giving

(A) A review of decisions of state courts dealing with reconsideration by legislative bodies, citing: *State* v. *Barbour,* 53 Conn. 76; *State* v. *Starr,* 78 Conn. 638; *State* v. *Phillips,* 79 Maine 506; *State* v. *Miller,* 62 Oh. St. 436; *State* v. *Tyrrell,* 158 Wis. 425; *The Justices* v. *Clark,* 1 T. B. Monroe (Ky.) 82; *United States* v. *LeBaron,* 19 How. 73; *Conger* v. *Gilmer,* 32 Cal. 75; *Lane* v. *Commonwealth,* 103 Pa. 481; *Harrington* v. *Pardee,* 1 Cal. App. 278; *Allen* v. *Morton,* 94 Ark. 405; Jefferson's Manual, § XLIII, 2d par.; *People ex rel. McMahon* v. *Davis,* 284 Ill. 439; *Witherspoon* v. *State,* 138 Miss. 310; *Attorney General* v. *Oakman,* 126 Mich. 717; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; *Matter of Fitzgerald,* 88 App. Div. (N. Y.) 434; *State ex rel. Whitney* v. *Van Buskirk,* 40 N. J. L. 463.

(B) A review of the history and interpretation of the standing rules of the Senate dealing with reconsideration of confirmation or rejection of nominations.

(C) A review of Senate, Departmental and Presidential practice in the light of the reconsideration rules of the United States Senate.

certified a question pursuant to § 239 of the Judicial Code. This Court granted joint motions of the parties to bring up the entire record and to advance the cause.

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. On December 20, 1930, the Senate, in open executive session, by a vote of 38 to 22, with 35 Senators not voting, advised and consented to the appointment of Smith to the office for which he had been nominated. On the same day, the Senate ordered that the resolution of confirmation be forwarded to the President.[1] This order was entered late in the evening of Saturday, December 20th; and still later on the same day the Senate adjourned to January 5, 1931. On Monday, December 22, 1930, the Secretary of the Senate notified the President of the United States of the resolution of confirmation, the communication being delivered by the official messenger of the Senate.[2] Subsequently,

[1] The terms of the resolution were: "*Resolved,* That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination." Upon the announcement of the vote, the President *pro tempore* stated: "The Senate advises and consents to the nomination and the President will be notified." No objection being made, or further proceedings having been had, in the Senate with reference to said consent or the notification thereof, the following order was entered by the Secretary of the Senate in usual course upon the Executive Journal of the Senate for December 20, 1930: "*Ordered,* that the foregoing resolution of confirmation be forwarded to the President of the United States."

Further action being had in Executive Session on the same day with reference to other nominations, there was entered on the Journal for December 20, 1930: "*Ordered,* that the foregoing resolution of confirmation this day agreed to be forwarded forthwith to the President of the United States."

[2] The terms of the communication were: "In executive session, Senate of the United States, Saturday, December 20, 1930. *Resolved,*

and on the same day, the President signed and, through the Department of State, delivered to Smith a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. Smith then, on the same day, took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider the nomination of Smith was duly made by a Senator who had voted to confirm it, and also a motion to request the President to return the resolution of confirmation which had passed into his possession. Both motions were adopted and the President was notified in due course. On January 10, 1931, the President informed the Senate by a message in writing that he had theretofore appointed Smith to the office in question, after receiving formal notice of confirmation, and that, for this reason, he refused to accede to the Senate's request.[3]

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that the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations:

Federal Power Commission

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest: (Signed) EDWIN P. THAYER,
Secretary."

[3] The message of the President read as follows:

To the Senate of the United States:

I am in receipt of the resolution of the Senate dated January 5, 1931—

"That the President of the United States be respectfully requested to return to the Senate the resolution advising and consenting to the

Thereafter, a motion was made and adopted in the Senate directing the Executive Clerk to place on the Executive Calendar the "name and nomination of the said George Otis Smith." Subsequently, on February 4, 1931, the President *pro tempore* of the Senate put to the Senate the question of advice and consent to the appointment of Smith, and a majority of the Senators voted in the negative. Notification of this action was sent to the President. On the following day, February 5, 1931, the Senate by resolution requested the district attorney of the District of Columbia to institute in its Supreme Court proceedings in *quo warranto* to test Smith's right to hold office; and,

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appointment of George Otis Smith to be a member of the Federal Power Commission, which was agreed to on Saturday, December 20, 1930."

I have similar resolutions in respect to the appointment of Messrs. Claude L. Draper and Col. Marcel Garsaud.

On December 20, 1930, I received the usual attested resolution of the Senate, signed by the Secretary of the Senate, as follows:

"*Resolved*, That the Senate advise and consent to the appointment of the following-named person to the office named agreeably to his nomination:

Federal Power Commission

George Otis Smith, to be a member of the Federal Power Commission."

I have similar resolutions in respect to Colonel Garsaud and Mr. Draper.

I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.

HERBERT HOOVER.

The White House, January 10, 1931.

pursuant to that request, this proceeding was filed on May 4, 1931. As the officials of the Department of Justice were committed by an opinion of the Attorney General (36 Op. Atty. Gen. 382) to a conclusion adverse to the position taken by the Senate, consent to the institution of the proceeding was conditioned upon the Senate's employing its own counsel and upon the understanding that officials of the Department of Justice would not support the petitioner.

No fact is in dispute. The sole question presented is one of law. Did the Senate have the power, on the next day of executive session, to reconsider its vote advising and consenting to the appointment of George Otis Smith, although meanwhile, pursuant to its order, the resolution of consent had been communicated to the President, and thereupon, the commission had issued, Smith had taken the oath of office and had entered upon the discharge of his duties? The answer to this question depends primarily upon the applicable Senate rules. These rules are numbers XXXVIII and XXXIX.[4] The pivotal provisions are paragraphs 3 and 4 of Rule XXXVIII, which read:

"3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of

[4] Rule XXXIX provides: "The President of the United States shall, from time to time, be furnished with an authenticated transcript of the executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose." The transcript of executive records relating to action by the Senate on nominations, furnished to the President under this rule, appears to consist only of copies of resolutions of confirmation or rejection.

the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion."

"4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate."

The contention on behalf of the Senate is that it did not advise and consent to the appointment of George Otis Smith to the office of member of the Federal Power Commission, because, by action duly and regularly taken upon reconsideration in accordance with its Standing Rules, it refused such consent, and gave to the President formal notice of its refusal.

The argument is that the action of the Senate in assenting to the nomination of Smith on December 20, 1930, and ordering that the President be notified, was taken subject to its rules and had only the effect provided for by them; that the rules empowered the Senate, in plain and unambiguous terms, to entertain, at any time prior to the expiration of the next two days of actual executive session, a motion to reconsider its vote advising and consenting to the appointment, although it had previously ordered a copy of the resolution of consent to be forwarded forthwith to the President; that the Senate's action can not be held to be final so long as it retained the right to reconsider; that the Senate did not by its order of notification waive its right to reconsider or intend that the President should forthwith commission Smith; that the

rules did not make the right of reconsideration dependent upon compliance by the President with its request that the resolution of consent be returned; that the rules were binding upon the President and all other persons dealing with the Senate in this matter; that as the President was charged with knowledge of the rules, his signing of the commission prior to the expiration of the period within which the Senate might entertain a motion to reconsider had no conclusive legal effect; and that the nominee who had not been legally confirmed could not by his own acts in accepting the commission, taking an oath of office and beginning the discharge of his duties vest himself with any legal rights.

Counsel for the Senate assert that a survey of the historical development of the rules of the Senate relating to reconsideration confirms its present interpretation of the rules; and that the interpretation is further confirmed by the multitudinous instances appearing in the Executive Journal of the Senate in which the President, at the Senate's request, returned resolutions, both of confirmation and of rejection.[5] We are of opinion that the Senate's contention is unsound.

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[5]At the argument in the Supreme Court of the District, the parties joined in submitting a pamphlet containing a list of precedents for the reconsideration by the Senate of a vote confirming or rejecting a nomination after notification of the President of its action thereon; and this pamphlet was filed with the opinion of that court. Before entry of the order denying the petition, the parties, by stipulation, submitted additional information in regard to facts concerning nomination, confirmation and the issuance of commissions in special cases, as shown by the Senate Executive Journal, by records of the Executive Offices of the White House, and in certain instances by departmental records. The stipulation was made part of the record in the case in the Supreme Court. In accordance with agreement of counsel, both the pamphlet and the stipulation were printed as one document by the Clerk of the Court of Appeals.

Unless otherwise indicated, the references in the succeeding footnotes are drawn from this material.

First. The question primarily at issue relates to the construction of the applicable rules, not to their constitutionality. Article I, § 5, cl. 2, of the Constitution provides that "each house may determine the rules of its proceedings." In *United States* v. *Ballin,* 144 U. S. 1, 5, the Court said: "Neither do the advantages or disadvantages, the wisdom or folly, of . . . a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." Whether, if the rules of the Senate had in terms reserved power to reconsider a vote of advice and consent under the circumstances here presented, such reservation would be effective as against the President's action, need not be considered here.

As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one. Smith asserts that he was duly appointed to office, in the manner prescribed by the Constitution. See *Marbury* v. *Madison,* 1 Cranch 137, 155, 156. The Senate disputes the claim. In deciding the issue, the Court must give great weight to the Senate's present construction of its own rules; but so far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it.

Second. Obviously, paragraph 3 of Senate Rule XXXVIII contemplates circumstances under which the Senate may still reconsider a vote confirming or rejecting

a nomination, although notification of its original action has already been sent to the President. Otherwise, the provision for a motion to request the return of a resolution would be meaningless. But paragraph 4 of the same rule contemplates that normally such notification shall be withheld, until the expiration of the time limited for making a motion to reconsider, and if a motion be made, until the disposition thereof; for it declares that notification shall be so withheld " unless otherwise ordered by the Senate." In this case the Senate did so order otherwise; and the question is as to the meaning and effect of this special procedure.

Smith urges that upon receipt of a resolution of advice and consent, final upon its face, the President is authorized to complete the appointment; and that a request to return the resolution can have no effect unless it is received prior to the signing of the commission; that if this were not true the notification would not authorize the President to do anything until the expiration of the reconsideration period, and hence would be futile; or it would purport to authorize him to make an appointment defeasible upon reconsideration and reversal of the Senate's action, and hence would violate a constitutional requirement of unconditional assent. We do not understand counsel for the appellant to urge that an appointment so defeasible may be made, and we have, therefore, no occasion to consider the constitutional objection, advanced on Smith's behalf, to a construction permitting such action. Nor need we consider whether the President might decline to accede to a request to return the Senate's resolution if he received it before making the appointment. The question at issue is whether, under the Senate's rules, an order of notification empowers the President to make a final and indefeasible appointment, if he acts before notice of reconsideration; or whether,

despite the notification, he is powerless to complete the appointment until two days of executive session shall have passed without the entry of a motion to reconsider.

Third. The natural meaning of an order of notification to the President is that the Senate consents that the appointment be forthwith completed and that the appointee take office. This is the meaning which, under the rules, a resolution bears when it is sent in normal course after the expiration of the period for reconsideration. Notification before that time is an exceptional procedure, which may be adopted only by unanimous consent of the Senate.[6] We think it a strained and unnatural construction to say that such extraordinary, expedited notification signifies less than final action, or bears a different meaning than notification sent in normal course pursuant to the rules.

It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the Government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.[7] The construction urged by the Senate would prevent the President from proceeding in any case upon notification of advice and consent, without first determining through unofficial

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[6] The practice of the Senate seems to be to treat the ordering of immediate notification to the President as, in effect, a suspension of the rules requiring unanimous consent. See, *e. g.*, 74 Cong. Rec., pt. 2, pp. 1748–1749, 1937, 2066; *id.* pt. 3, p. 3393; Cong. Rec. 72d Cong., 1st Sess., pp. 3782, 3881.

[7] Paragraph (2) of Senate Rule XIII, dealing with reconsideration of measures which have been sent to the House of Representatives, contains a provision for a motion to request the return of a measure similar to that of Rule XXXVIII in respect to nominations. No precedent has been called to the Court's attention indicating that this provision would be construed as permitting the Senate to proceed to a reconsideration, even though the House declined to honor its request.

channels whether the resolution had been forwarded in compliance with an order of immediate notification or by the Secretary in the ordinary course of business; for the resolution itself bears only the date of its adoption. If the President determined that the resolution had been sent within the time limited for making a motion to reconsider, he would have then to inform himself when that period expired. If the motion were made, he would be put upon notice of it by receipt of a request to return the resolution. But under the view urged by the Senate, that reconsideration may proceed even though the resolution be not returned, he would receive no formal advice as to the disposition of the motion, save in the case of a final vote or rejection or confirmation.[8] The uncertainty and confusion which would be engendered by such a construction repel its adoption.

The Senate has offered no adequate explanation of the meaning of an order of immediate notification, if it has not the meaning which Smith contends should be attached to it. Its counsel argues that the practice of ordering such notification developed at a time when the Senate passed upon nominations in closed session; and that the order may have been simply a means of furnishing the President with information, not available through public channels, concerning the probable attitude of the chamber prior to final action. It is suggested that the President might thereby be enabled to muster support for a nominee at first rejected, or to withdraw the nomination before final rejection. But the explanation has no application to a notification of a favorable vote. Nor is it

[8] Thus, the motion to reconsider might be withdrawn, or tabled, or, when put to a vote, might fail, in any of which events the nomination would stand as confirmed, without further notice to the President. If the motion prevailed, the nomination would stand as originally made by the President, but no notice of that fact would reach him unless it were again finally acted upon.

credible that the Senate by unanimous vote would adopt a procedure designed merely to permit the exertion of influence upon a majority to change a decision already made. The construction urged is a labored one. It should not be adopted unless plainly required by the history of the rules and by the meaning which the Senate and the Executive Department in practice have given them.

Fourth. We find nothing in the history of the rules which lends support to the contention of the Senate; and much in their history to the contrary. The present rules relating to the reconsideration of votes confirming or rejecting nominations are substantially those of March 25, 1868. The earlier history is this: Prior to April 6, 1867, no rule had dealt specifically with reconsideration of votes concerning nominations. A resolution adopted February 25, 1790, provided generally that "when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." In 1806, two limitations were attached to this provision: first, that, "no motion for the reconsideration of any vote shall be in order, after a bill, resolution, message, report, amendment, or motion, upon which the vote was taken, shall have gone out of the possession of the Senate, nor after the usual message shall have been sent from the Senate, announcing their decision;" and, second, that no such motion shall be in order "unless made on the same day in which the vote was taken, or within the three next days of actual session of the Senate thereafter." [9] In 1818, a resolution was adopted, "that in future, all nominations approved, or definitely acted on by the Senate, be by the Secretary returned to the President of the United States, from day

[9] This rule was altered in 1820 by limiting the time for making a motion to reconsider to two days, and by striking out the words "nor after the usual message shall have been sent from the Senate."

to day, as such proceedings may occur, any rule or usage to the contrary notwithstanding."

These rules remained in force until 1867.[10] Under them, the Senate decided by unanimous vote in 1830, in the earliest of the precedents cited by the parties, that it was without power to reconsider its rejection of the nomination of Isaac Hill as Second Comptroller of the Treasury, "because the President had been notified." No request appears to have been made in that case for the return of the resolution of rejection. Subsequently, however, it became the practice for the President upon request, to return resolutions of rejection or confirmation, as a matter of comity; and the Senate thereupon reconsidered its action, despite the question under its rules whether reconsideration was in order. Between 1830, the time of Hill's case, and April 5, 1867, about 160 such

[10] In 1792, on January 27, the Senate in executive session ordered, "that the President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time;" and "that no executive business, in future, be published by the Secretary of the Senate." The latter provision remained in force until June 18, 1929, when it was resolved that all such business should be transacted in open session. The former provision is still in force, although modified by subsequent rules. See note 4, *supra*. The first such modification was the resolution of March 27, 1818, mentioned in the text, making special provision for immediate notification of the President concerning action upon nominations. On January 5, 1829, it was "*Resolved*, That no paper, sent to the Senate by the President of the United States, or any executive officer, be returned, or delivered from the office of the Secretary, without an order of the Senate for that purpose."

On February 18, 1843, the Senate adopted the following resolution: "That nominations made by the President to the Senate, and which are neither approved nor rejected during the session at which they are made, shall not be acted upon at any succeeding session without being again made by the President, and that such shall hereafter be the rule of the Senate." This resolution is in substance incorporated in present Rule XXXVIII, paragraph (6).

cases occurred. But several occurring at the close of the period show clearly the limits of the practice. In two cases, the President declined to return the resolution on the ground that the commission had already issued; and the Senate acceded to the refusal.[11] In another, the resolution was returned, but with the statement that a commission had issued; and the Senate appears to have taken no further action.[12] And on April 3, 1867, in the case of A. C. Fisk, the Senate upheld a decision of the chair that a motion to reconsider a vote of confirmation was out

[11] These were the nominations of John H. Goddard, in 1864, for Justice of the Peace for Washington County, District of Columbia, and of Westley Frost, in 1867, as Assessor of Internal Revenue for the Twenty-first District of Pennsylvania. In the Goddard case, President Lincoln advised the Senate simply that the resolution was sent to the Department of State prior to receipt of the request for its return, and that "a commission in accordance therewith [was] issued to Mr. Goddard on the same day, the appointment being thus perfected, and the resolution becoming a part of the permanent records of the Department of State." No further proceedings are recorded in the Senate Executive Journal. In the Frost case, after a similar reply, Senator Sherman offered a resolution that "the Secretary of the Treasury be requested to recall the commission . . . and that the President be requested to return to the Senate the action of the Senate in the appointment. . . ." This resolution was rejected by a vote of 14 to 23.

[12] In the case of Joseph K. Barnes, nominated as Medical Inspector General in 1864, President Lincoln returned the resolution of confirmation, but "respectfully called" the attention of the Senate to certain circumstances, including the execution and delivery of a commission before the making of the motion to reconsider. The author of the motion to reconsider asked, and had leave, to withdraw it.

In the case of H. H. Smith, nominated as Secretary of the Territory of New Mexico, in 1867, President Johnson returned the resolution of confirmation, together with a report of the Secretary of State that "the commission was made out and sent to the Execuive Mansion for signature, and has not been returned." It is not clear that a commission did, in fact, issue. No further proceedings are recorded in the Journal.

of order after the President had been notified, and before the resolution had been returned.

Three days thereafter decisive changes were made in the rules relating both to reconsideration and to notification of the President.[13] On April 6, 1867, the rule concerning reconsideration was modified so as to except specifically motions to reconsider votes upon a nomination from the general prohibition of any such motion where the paper announcing the Senate's decision had gone out of its possession; and the present provision was added, that "a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate." At the same time, it was provided that "all nominations approved or definitely acted on by the Senate shall be returned by the Secretary on the next day after such action is had, unless otherwise ordered by the Senate."

These changes in the rules not only met the situation which had arisen in Fisk's case, but gave explicit sanction to the long-standing practice of requesting the President to return resolutions upon nominations and thereafter reconsidering them. Counsel for the Senate argue that, in addition, they completely reversed the practice theretofore established in respect to reconsideration after notification of the President; that by divorcing the period for reconsideration from the normal time for notifying the President, they showed an intention that the power to reconsider should be unaffected by the transmittal of no-

[13] These changes were apparently prompted by certain of the incidents just referred to. The resolution presented by Senator Sherman in the Frost case, *supra*, note 11, was rejected on April 1, 1867. The amended rules were adopted, April 6, 1867, on motion of Senator Fessenden, who had appealed to the Senate from the decision of the chair in the Fisk case.

tification or by the President's action thereon. In a case occurring shortly after the new rules were adopted, however, the Senate Committee on the Judiciary clearly showed its understanding that no such change had taken place. Noah L. Jeffries was nominated for Register of the Treasury and confirmed and the President was notified. To a subsequent request for the return of the resolution the President replied that a commission had already issued. The Committee on the Judiciary, to which the matter was referred, expressed the opinion that the Senate had power to reconsider its vote, but gave as its reason that the request to return the resolution had in fact been received before the commission was signed.[14]

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[14] The President returned the resolution, with an accompanying report of the Secretary of the Treasury. The report stated "that in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant. General Jeffries had legally qualified and entered upon the discharge of the duties of his office prior to the receipt of the Senate resolution of the 14th instant, which, under these circumstances, is herewith returned." The Committee on the Judiciary reported in part as follows: "It . . . appears that before Mr. Jeffries had been qualified or commissioned as required by law precedent to his entering upon the discharge of his functions under his permanent appointment the President of the United States, in whom the sole right of appointment, subject to the approval of the Senate, is vested by the Constitution, had received notice from the Senate that it had not finally acted upon the question of advising and consenting to the nomination, and withdrawing its resolution of assent to that appointment which had been transmitted to the President on the same day; and the committee are, therefore, of the opinion that the Senate may now lawfully reconsider its vote advising and consenting to the appointment if it shall see proper cause therefor. In this view of the case a majority of the committee were of opinion that it was inexpedient to enter upon an inquiry as to the matter of fact whether the issuing of the commission in this case and the qualification of the officer in question was hastened for any cause out of the usual course of business." The only evidence concerning the subsequent history of the case is that during the same session,

The basis for the argument drawn from the rules of 1867, however, was clearly destroyed a year later, when the rule for notification was further altered, and given virtually its present form. The new rule, adopted March 25, 1868, provided that "nominations approved or definitely acted on by the Senate shall not be returned by the Secretary of the Senate to the President until the expiration of the time limited for making a motion to reconsider, or while a motion to reconsider is pending, unless otherwise ordered by the Senate." No material changes have since been made, either in this rule or in that respecting reconsideration.[15]

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some five months later, Mr. Jeffries was nominated for another office, and rejected.

In the case of Samuel M. Pollock, confirmed as brigadier general by brevet, on April 8, 1867, the President, on April 11, complied with a request to return the resolution sent him on April 10, and the Senate later rejected the nomination. The records of the War Department show April 11, 1867, as the date of a commission to Samuel M. Pollock. The entry is marked in red ink, "Cancelled (rejected by the Senate)." Counsel for Smith, and the Attorney General and Solicitor General in their brief *amici curiae* question whether a commission was in fact issued in this case. See note 19 *infra*.

[15] The phrase "approved or defintely acted on" was changed in 1877 to "confirmed or rejected," and as so changed the rule still stands as paragraph 4 of Rule XXXVIII. The rule on reconsideration was also given its present wording in 1877, when the material affecting nominations was taken out of the general provision relating to reconsideration in Rule 20 and placed in a separate rule. The only changes of substance were the extension of the period for reconsideration to two days of "actual executive session," and the addition of the sentence: "Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion." At the same time there was added, as a separate rule, the following, now paragraph 5 of Rule XXXVIII: "When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which

Read in the light of the preceding rules and the practice under them, the meaning of the rules thus established is, in our opinion, free from doubt. Prior to 1867, it had been continuously recognized that the President was authorized to commission a nominee upon receiving notification of the advice and consent of the Senate, and that the signing of a commission cut short the power of reconsideration. The Senate so concedes. No explicit change in this respect was made either in the rules of 1867 or of 1868. The inference that no change was intended is strengthened by the fact that under the latter rules, for the first time, the sending of notification ordinarily coincided with the lapse of power in the Senate to reconsider its action, under any circumstances. The proviso, "unless otherwise ordered by the Senate," made possible the sending of notification before the expiration of the period provided for reconsideration. But there is no indication that the Senate intended thereby to introduce a complete departure from past practice. The natural inference is to the contrary. The proviso for immediate notification must be read in connection with the clause permitting motions to request the return of a resolution, which would be in order only in cases in which the Senate had acted under the proviso. A motion to request the return of a resolution was a familiar device, employed by the Senate on repeated occasions. There is no reason to suppose that such a motion was now intended to have a different effect than that which, by common understanding, it had had in the past. The common understanding had been that a motion to request the return of a resolution was without effect if the President before receiving it had completed the appointment.

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shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be."

Fifth. This construction of the rules is confirmed by the precedents in the Senate arising since 1868. In all cases in which no commission had yet issued, the Executive has honored the request of the Senate for a return of its resolution, in accordance with the invariable practice from the beginning.[16] In the only instances, prior to the case at bar, in which the Senate had occasion to consider the effect, under the present rules, of the signing of the commission before receipt of its request, it indicated an understanding that the power to reconsider was gone.[17]

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[16] The list of precedents incorporated in the record includes some 170 cases of nominations, arising since March 25, 1868, in which motions to reconsider and request the return of the resolution were entered. In almost all the cases the Senate Executive Journal records affirmatively that the President complied with the request. In a few instances the fact of such return is not recorded, although the Senate proceeded with the reconsideration. In no case, except the two referred to in the text, does it affirmatively appear that the President declined to return the resolution. In no case since the earliest precedent listed, in 1830, is there a record of refusal to honor the request on any other ground than that a commission had been signed and the appointment perfected.

[17] In the case of J. C. S. Colby, nominated as Consul at Chin Kiang, the Senate on December 17, 1874, voted to confirm and ordered that the President be notified forthwith. On December 21 a motion to reconsider was entered and the return of the resolution was requested. President Grant replied, "Mr. Colby's commission was signed on the 17th day of December, and upon inquiry at the Department of State it was found that it had been forwarded to him by mail before the receipt of the resolution of recall." There is no evidence of further action on the part of the Senate.

Morris Marks was confirmed as Collector of Internal Revenue for the District of Louisiana on June 6, 1878. On June 11 a motion to reconsider was entered and the return of the resolution requested. President Hayes wrote: "In reply I would respectfully inform the Senate that upon the receipt of the notice of confirmation the commission of Mr. Marks was signed and delivered to him, on the 8th instant." The Senate Executive Journal records the fact that this message was read, but contains no reference to any subsequent proceedings in the case.

In those two cases the President wrote informing the Senate of the issuance of a commission, and no further action was taken by it.

Attention is called, however, to other cases in which it is contended that the President returned the resolution in spite of the intervening signing of a commission, and that the Senate reconsidered its action. Sixteen cases arising after 1868 are cited.[18] The value of most of these

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[18] The cases of Lewis A. Scott, originally confirmed on June 7, 1870, as Postmaster at Lowville, New York; John W. Bean, confirmed as first lieutenant on January 11, 1872; James F. Legate, confirmed as Governor of Washington Territory on January 26, 1872; George Nourse, confirmed as Register of the Linkville Land Office, Oregon, June 5, 1872; Alva A. Knight, confirmed as United States Attorney for the Northern District of New York, January 21, 1873; Belle C. Shumard, confirmed as Deputy Postmaster at Fort Smith, Arkansas, February 6, 1873; Peter C. Shannon, confirmed as Chief Justice of the Supreme Court of Dakota Territory, March 17, 1873; E. Raymond Bliss, confirmed as Deputy Postmaster at Columbus, Mississippi, March 18, 1873; John W. Clark, confirmed as Deputy Postmaster at Montpelier, Vermont, March 20, 1873; William H. Tubbs, confirmed as Postmaster at New London, Conn., December 20, 1878; Joseph H. Durkee, confirmed as Marshal of the Northern District of Florida, June 30, 1879; Laban J. Miles, confirmed as Indian Agent at Osage Agency, Indian Territory, February 15, 1883; George W. Pritchard, confirmed as United States Attorney for the Territory of New Mexico, February 19, 1883; Thomas H. Reeves, confirmed as Indian Agent, Quapau Agency, Indian Territory, April 9, 1884; Edwin I. Kursheedt, confirmed as Marshal for the Eastern District of Louisiana, March 27, 1889; and William Plimley, confirmed as Assistant Treasurer, March 10, 1903.

In the Bean, Legate, Nourse, and Kursheedt cases, the Senate Executive Journal does not record whether or not the President returned the resolution, as requested. The President withdrew the nomination of Mr. Legate, on his own request, before the Senate had proceeded further than to debate the motion to reconsider. The Reeves and Plimley nominations were also withdrawn. In the Scott, Knight and Miles cases the motion to reconsider was withdrawn after return of the resolution; in the Durkee case it was tabled; and in the Bliss and Pritchard cases, when put to a vote, it failed. In the Clark case

cases as precedents is questioned by Smith, and also by the Attorney General and the Solicitor General in the brief filed by them *amici curiae.* In none of the cases is there any indication that the Senate was informed of the fact of the signing of the commission, if in fact the commission was signed. Therefore, none of those cases furnish an authoritative construction by the Senate of its own rules made prior to the events culminating in the present litigation. They amount, at most, only to evidence of the construction placed upon the rules by the Executive Department. The weight of many of the cases, as such evidence, is further lessened by the circumstance that the records do not disclose beyond dispute that a commission had actually been signed by the President before receipt of the Senate's request for return of its resolution.[19] All the cases but one arose between 1870

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no further proceeding is recorded after the return of the resolution. In the Shannon and Tubbs cases the nominee was again confirmed; in the Shumard, Bean, Nourse, and Kursheedt cases, the Senate adopted the motion to reconsider, and either recommitted the nomination or placed it upon the calendar. Only in the last six cases did the Senate in fact exercise the power to reconsider.

It is conceded by Smith that in the cases of Legate, Shumard, and Plimley, a commission had in fact been signed by the President at the time he received and acceded to the request for return of the resolution. In the remaining cases the evidence of signing of the commission rests mainly upon entries of dates in the records of the executive offices of the White House. In the Knight and Miles cases there are also copies of the commission in the records of the respective departments. The entry of the date of commission in the Tubbs case appears to have been erased, although it is still legible. Those in the Reeves and Kursheedt cases are scratched or crossed out. See note 19 *infra.*

[19] The contention of Smith, in which the Attorney General and Solicitor General concur, is that the dates relied on in the White House records are the dates which the commissions bore, but not necessarily those on which they were signed. The practice in the executive offices in this respect appears not to have been uniform. Thus, in certain instances pointed out in the brief *amici curiae,* taken

and 1889, nine of them in the administrations of President Grant and President Hayes. Each of these Presidents on occasion refused to accede to similar requests on the ground that a commission had already been issued.[20]

Perhaps the most satisfactory explanation of the instances cited on behalf of the Senate is that the Executive Department has not always treated an appointment as complete upon the mere signing of a commission.[21] Compare *Marbury* v. *Madison,* 1 Cranch 137; *United States* v. *Le Baron,* 19 How. 73, 78. Even in the view most favorable to the Senate's contention they fall far short of

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from a later period, it appears affirmatively, under the heading "Remarks," that the commission was actually signed at a date subsequent to that entered under the heading "Commissioned." On the other hand in the Plimley case, *supra,* note 18, and in the Colby and Marks cases, *supra,* note 17, other evidence indicates that the signature was in fact made on the date entered in the White House records. It appears to be the practice for the appropriate department to prepare the commission in all respects, including the date, upon receipt of notification of confirmation, and thereafter to present it to the Executive to be signed. This practice creates the possibility of disparity between the date of signing and the date appearing on the commission.

[20] In the Colby and Marks cases, respectively, *supra,* note 17. The most recent case, which is urged as strongly supporting the Senate's contention, is that of William Plimley. President Roosevelt nominated Plimley in 1903 for Assistant Treasurer of the United States. His commission was made out and signed, and a letter notifying him of his appointment and enclosing an official bond was placed in the mails. Notice of a motion to reconsider the vote of confirmation having been received at the White House, the chief of the division of appointments ordered the letter extracted from the mails, and the President returned the resolution and subsequently withdrew the nomination.

[21] Thus, it will be noted in both the Colby and Marks cases, *supra,* note 17, that the commission had been either placed in the mails or delivered, and that the message of the President placed emphasis on these facts.

clear recognition of the power, never heretofore asserted by the Senate itself, to reconsider a vote of confirmation, after an appointee has actually assumed office and entered upon the discharge of his duties. We are unable to regard any of the cases as of sufficient weight to overcome the natural meaning of the clauses.[22]

Sixth. To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better. A rule designed to ensure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the Court the most sympathetic consideration. But the reasons, above stated, against the Senate's construction seem to us compelling. We are confirmed in the view we have taken by the fact that, since the attempted reconsideration of Smith's confirmation, the Senate itself seems uniformly to have treated the ordering of immediate notification to the Pres-

[22] In addition to the Senate precedents above discussed, counsel for the Senate cite various decisions from state courts relating to reconsideration by state and municipal deliberative bodies. *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439; 120 N. E. 326; *Witherspoon* v. *State ex rel. West,* 138 Miss. 310; 103 So. 134; *Wood* v. *Cutter,* 138 Mass. 149; *Crawford* v. *Gilchrist,* 64 Fla. 41; 59 So. 963; *Dust* v. *Oatman,* 126 Mich. 717; 86 N. W. 151. None of these cases, however, presented the question here at issue of the effect upon the power to reconsider of an intervening notification of confirmation sent to an appointing officer, and of the signing by that officer of a commission. It is therefore unnecessary to examine the reasoning upon which they were decided.

ident as tantamount to authorizing him to proceed to perfect the appointment.[23]

The judgment of the Supreme Court of the District is

Affirmed.

GENERAL MOTORS ACCEPTANCE CORP. *v.* UNITED STATES.*

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

No. 574. Argued April 14, 15, 1932.—Decided May 2, 1932.

1. The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. P. 56.

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[23] Thus in the confirmation of Judge Louie W. Strum, Senator Fletcher, in seeking unanimous consent "to waive the rule about two subsequent executive sessions," and notify the President of the Senate's action, gave as his reason that "this judge is very much needed, and has been for some months." 74 Cong. Rec. pt. 7, pp. 6489–6490. Notification was ordered on December 21, 1931, of votes confirming nominations to the Interstate Commerce Commission and the Board of Mediation, upon the statement of Senator Couzens that otherwise "those gentlemen . . . can not hold office until after two executive sessions shall have been held." Cong. Rec. 72d Cong., 1st Sess., December 21, 1931, p. 1003. Again, on December 22, 1931, on the confirmation of Robert B. Adams as engineer in chief of the Coast Guard, Senator Copeland stated that "this man's appointment expired on the 18th of December, and it is very important that he be immediately put on duty." Notification was ordered. *Id.* 1131. On February 1, 1932, notification was ordered of the confirmation of certain appointees to the Reconstruction Finance Corporation board, upon the statement of Senator Robinson that "it is believed that there is necessity for the board to function immediately." *Id.* 3071. See also, *id.* 3415, 3582, 3881.

* Together with two other cases of the same title and *Howard Automobile Co.* v. *United States.*

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2. When the smuggling is by automobile, the driver is subject to prosecution under the tariff act (U. S. C., Title 19, §§ 497, 1593) for the importation and under the National Prohibition Act (Title II, § 29; U. S. C., Title 27, § 46) for the transportation in the United States. P. 56 *et seq.*
3. The provisions of Rev. Stats., §§ 3061 and 3062 (U. S. C., Title 19, §§ 482, 483) for forfeiture of vehicles bearing smuggled goods remain in force as part of the existing tariff system, and apply where the merchandise in the vehicle is intoxicating liquor as well as in other cases. P. 56.
4. Where intoxicating liquors are smuggled over the boundary into the United States in an automobile, the Government has its election either (a) to seize and forfeit it under the customs laws (R. S., §§ 3061, 3062) for the unlawful importation, in which case the forfeiture may be enforced even against an innocent owner, though the Secretary of the Treasury may remit it, upon such terms as he deems reasonable, if satisfied that there was neither wilful negligence nor intent to violate the law, (R. S., § 3078; Tariff Acts of 1922 and 1930, §§ 613, 618); or (b) to seize the vehicle under the Prohibition Act for wrongful transportation (ignoring the importation), in which case the prosecution must proceed on the same basis and the owner of the vehicle may have whatever protection comes from § 26 of that Act, and may, as of right, reclaim what has been taken if he has acted in good faith. Pp. 57, 59.
5. The proposition that § 26 of the Prohibition Act, though aimed only at transportation within the United States, lays down the exclusive rule for forfeiture of vehicles in which intoxicating liquors are unlawfully imported, and therein supersedes the forfeiture provisions of the customs laws, is untenable. *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, distinguished. Pp. 58, 60.
6. Repeals by implication are not favored; and least of all to the derangement of a statutory system deep rooted in tradition. P. 61.

RESPONSE to questions certified by the court below upon appeals from decrees forfeiting automobiles under the customs laws. The appellants had intervened in the District Court, claiming that the vehicles should be released to them as innocent owners.

Mr. John Thomas Smith, with whom *Mr. C. A. Lindeman* was on the brief, for General Motors Acceptance Corporation et al.

The importation of forbidden liquor by transportation across the border is a clear violation of the Prohibition Act, subjecting the vehicle to forfeiture under § 26.

The national prohibition laws constitute a single, complete system for the suppression of the liquor traffic, including importation. The sweeping language of § 26 (*Richbourg Motor Co.* v. *United States,* 281 U. S. 528), is an example. It pre-empts the field of transportation.

The incongruity of an obligation to pay a tax on an article, the possession or importation of which had become unlawful, led this Court to hold that the revenue laws pertaining to liquor fell before the Prohibition Act. *United States* v. *Yuginovich,* 256 U. S. 450. Shortly following that decision, Congress passed the so-called Willis-Campbell Act, c. 134, 42 Stat. 222, 223. Not by any force of their own, but rather by virtue of that Act, the penalty provisions of the customs laws and the internal revenue laws, in force when the Prohibition Act was enacted, were continued, but only if and to the extent that they are not in conflict with the penalty or forfeiture provisions thereof. The purpose was to make the other laws subsidiaries of the National Prohibition system, in so far as they related to the specific practices or acts condemned by the latter.

The failure to repeal §§ 3061–2 under the tariff laws does not signify that Congress intended those sections to have co-ordinate authority with § 26. It is more consistent with the language of that section and of the Willis-Campbell Act to say that all libels in liquor transportation cases must be under § 26, leaving §§ 3061–2 for application to other violations of the customs law.

The construction here urged has been accepted in *United States* v. *Ford Coupe,* 43 F. (2d) 212; *United States* v. *One Studebaker,* 45 F. (2d) 430; *The Sebastopol,* 47 F. (2d) 336; *Colon* v. *Hanlon,* 50 F. (2d) 353.

In other cases the Government was permitted to proceed under §§ 3061–2, where there was no evidence of

transportation. *United States* v. *Cahill,* 13 F. (2d) 83; *United States* v. *One Reo Coupe,* 46 F. (2d) 815.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Arthur W. Henderson* and *Paul D. Miller* were on the brief, for the United States.

The enforcement provisions of the customs laws provide a flexible and comprehensive system well adapted to govern the importation of merchandise of all kinds. The Tariff Acts of 1922 and 1930, passed subsequently to the enactment of the National Prohibition Act, define the word "merchandise" as including commodities the importation of which is prohibited. Both Acts provide for duties on intoxicating liquors, and the penalty and forfeiture provisions of both unquestionably apply to intoxicating liquor, as well as to any other merchandise the importation of which is forbidden.

On the other hand, in the National Prohibition Act Congress did not provide completely or comprehensively for the control of unlawful importations of liquor. Thus, that Act contains no specific provision for the forfeiture of vehicles used in the unlawful importation of intoxicating liquors.

Implied repeal is a matter of intent. By making adequate and inclusive provisions in the customs laws for the enforcement of the law against unlawful importation of intoxicating liquors, by failing to provide complete control of liquor importations in the National Prohibition Act, and by expanding the facilities of the customs and coast guard services in order to handle liquor importation cases, Congress has indicated an intent that the forfeiture provisions of the customs laws are to be available in cases involving unlawful liquor importations.

Richbourg Motor Co. v. *United States,* 281 U. S. 528, does not govern this case. There the Court was dealing

with the forfeiture provisions of an internal revenue law originally enacted with reference to a lawful business which subsequently became unlawful, and the Court held that the mandatory provisions of § 26 of the National Prohibition Act impliedly repealed the forfeiture provisions of the internal revenue law. The present case involves the forfeiture provisions of the customs laws which expressly applied to the importation of merchandise the importation of which was forbidden. The forfeiture provisions of these laws are as mandatory as those in § 26. If they are in conflict, the former must be regarded as controlling, in view of legislative enactments since the National Prohibition Act.

The substance of the offense involved in the *Richbourg* case was the unlawful transportation of intoxicating liquors. The substance of the offense involved in the present case is the unlawful importation of the intoxicating liquors, the transportation being only incidental to the importation.

Mr. Joseph G. Myerson, by leave of Court, filed a brief as *amicus curiae.*

Mr. Justice Cardozo delivered the opinion of the Court.

The facts stated in the certificate are these:

"The record presents four consolidated automobile forfeiture cases in which the same disputed legal questions are involved.

"On four different dates during July and August, 1930, the four automobiles whose forfeiture is in issue were seized at ports of entry on the Mexican border, each vehicle having liquor concealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling

some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by Customs officers.

"All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.

"A libel of information in rem was filed by the United States attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes [19 U. S. C. A. 482 and 483]. In three of the cases the General Motors Acceptance Corporation intervened as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the government's sole remedy was under Section 26, Title II, of the National Prohibition Act [27 U. S. C. A. 40].

" In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

" The government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were admitted in evidence, to which the respective interveners duly excepted.

" Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

" The District Court entered decrees of forfeiture in all four cases, finding that each automobile ' was engaged in smuggling dutiable merchandise into the United States in violation of the customs laws thereof.' "

The four interveners having appealed to the Circuit Court of Appeals for the ninth circuit, that court certified for answer by this court the following questions (Judicial Code, § 239; 28 U. S. C., § 346):

" 1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

" 2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

"3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

"4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?"

The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. This was the law under the tariff act of 1922, enacted after the adoption of the Eighteenth Amendment. Tariff Act of 1922, c. 356, § 593 b, 42 Stat. 982; U. S. C., Title 19, § 497. It is still the law under the present tariff act of 1930; U. S. C., Title 19, § 1593. True, the drivers of the cars who brought these liquors from Mexico into California were subject to prosecution under the National Prohibition Act, 27 U. S. Code, § 46. They were subject to prosecution under the tariff act also (*Callahan* v. *United States*, 285 U. S. 515), and under that act they were indicted and convicted.

The appellants would have us hold that prosecution of the offender may be based at the election of the Government either on the one act or on the other, but that forfeiture of the implements used in his offending may be based on only one of them. The consequence of such a holding would be to withdraw from the tariff acts remedies and sanctions existing for the better part of a century. Forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling. The provisions of the Revised Statutes, §§ 3061 and 3062, which carried forward the provisions of earlier acts (Act of July 18, 1866, c. 201, 14 Stat. 178, § 3), have in turn been

carried forward into the United States Code. U. S. Code, Title 19, §§ 482, 483. By implication, if not in express terms, they were recognized as law in the Tariff Act of 1922, which declares it to be the duty of any customs agent who has made seizure of a vehicle for violation of the customs law to turn the vessel over to the collector of the district (Tariff Act of 1922, c. 356, § 602, 42 Stat. 984; U. S. Code, Title 19, § 509). They are recognized by like provisions in the Tariff Act of 1930. Act of 1930, c. 497, § 602, 46 Stat 754; U. S. Code, Title 19, § 1602. Indeed the same implication persists in the prohibition law itself, or in acts connected with it. By section 1 of the act of March 3, 1925, c. 438, 43 Stat. 1116; U. S. Code, Title 27, § 41, "any vessel or vehicle summarily forfeited to the United States for violation of the customs laws, may, in the discretion of the Secretary of the Treasury, under such regulations as he may prescribe, be taken and used for the enforcement of the provisions of this title [i. e., the title, Intoxicating Liquors] in lieu of the sale thereof as provided by law" (cf. 27 U. S. Code, § 42). Certain it is therefore that vehicles carrying smuggled merchandise other than intoxicating liquors may still be seized and forfeited under the provisions of the tariff acts and those of the Revised Statutes ancillary thereto. The forfeiture may be enforced even against innocent owners, though the Secretary of the Treasury may remit it, upon such terms as he deems reasonable, if satisfied that there was neither wilful negligence nor intent to violate the law. R. S. § 3078; Tariff Acts of 1922 and 1930, §§ 613, 618. The penalty is at times a hard one, but it is imposed by the statute in terms too clear to be misread. Beyond all room for question, the owner of a vehicle bearing smuggled merchandise runs the risk of forfeiture, subject to remission by the grace of an administrative officer, where the merchandise is medicine or wheat or drygoods or machinery, subjects of legitimate trade upon payment of the lawful duties. The argu-

ment for the interveners is that the intention of Congress was to make the risk a lighter one where the trade is wholly illegitimate, i. e., where the merchandise smuggled consists of intoxicating liquors. They tell us that perhaps a forfeiture under the tariff acts will be permitted when what is laden in the vehicle is partly intoxicating liquor and partly something else. Cf. *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977, 978, 979. They insist, however, that the remedy under those acts must be held to be excluded when liquor and liquor only is the subject matter of the carriage.

Section 26 of the National Prohibition Act (41 Stat. 305, 315; U. S. C., Title 27, § 40), which is quoted in the margin,* is said to lead to that bizarre result. We think its purpose is misread when such a meaning is ascribed to it.

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* "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being

Section 26 of the National Prohibition Act is not directed against smuggling, though the conduct that it does cover may be an incident of smuggling. The Eighteenth Amendment distinguishes the importation of intoxicating liquors into the United States from their transportation within, or their exportation from, the United States, just as it distinguishes each of these activities from manufacture and from sale. The National Prohibition Act maintains the same distinction. Sections 3061 and 3062 of the Revised Statutes are aimed at importation from without the United States, and not at transportation within. Section 26 of the National Prohibition Act is aimed at transportation within, and not at importation from without. We do not mean that the Government may not separate the transaction into its criminal components, and prosecute or forfeit, according to its choice, for the one constituent or for the other. Cf. *Callahan* v. *United States, supra.* It may elect to seize under the prohibition act for wrongful transportation (ignoring the preliminary or later acts of importation or exportation), and in that event the prosecution must proceed on the same basis. Cf. *Port Gardner Co.* v. *United States,* 272 U. S. 564; *Commercial Credit Co.* v. *United States,* 276 U. S. 226, 231; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. If the seizure is for transportation only, the owner of the vehicle will have whatever protection comes from § 26, and may reclaim what has been taken if he has acted in good faith. Restitution in such circumstances will be granted as of right, and not by an act of grace as it is where the seizure has been for evasion of the customs.

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bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. . . ."

Neither owner nor offender, however, has the privilege of choice between forfeiture upon the footing of illegal transportation and forfeiture upon the footing of a smuggled importation. The choice is for the Government.

We are told that this conclusion is inconsistent with *Richbourg Motor Co.* v. *United States, supra,* where seizure under another section of the Revised Statutes (§ 3450) was held to be excluded. The section there considered had no relation to the customs. It had been adopted as an internal revenue law many years before the National Prohibition Act, at a time when the sale of intoxicating liquors for beverage purposes was still a lawful business. By its terms there might be a forfeiture of a vessel or other means of conveyance which had been used to remove goods or commodities with intent to defraud the United States of a tax imposed thereon. This provision was held to have been superseded in the circumstances there disclosed by the forfeiture provisions in the act prohibiting the transportation of intoxicating liquors. National Prohibition Act, § 26. We are unwilling to extend the ruling to a situation like the one at hand. Two grounds of distinction mark the limits of extension. The first is that in the *Richbourg Motor Company* case, the operator of the automobile was arrested at the time of the seizure and arraigned before a United States Commissioner on a charge of illegal transportation of intoxicating liquors. There was a clear election to go forward under the provisions of the prohibition act, and not under any other. Section 26 is explicit in its requirement that the officer seizing the vehicle under the authority of that section shall at once proceed against the person arrested "under the provisions of this title." By parity of reasoning the court held that when there has been arrest and seizure under § 26 because of wrongful transportation, the forfeiture of what has been seized must go forward on the same footing. Cf. *Commercial Credit Co.* v. *United*

States, 276 U. S. 226, 231; *United States* v. *One Ford Coupe,* 272 U. S. 321, 325. There is, however, a second ground of distinction that is independent of the conduct of the officer discovering the offense. It has relation to the difference between § 3450 of the Revised Statutes on the one hand and §§ 3061 and 3062 on the other in respect of the wrong to be redressed. The act of removal from one place within the United States to another with intent to evade the tax upon spirituous liquors is one more nearly identical with that of transportation within the United States in violation of the prohibition law than is a wrongful importation in evasion of the customs. The bond of integration is closer and more intimate. Cf. *United States* v. *American Motor Boat K–1231,* 54 F. (2d) 502, 505. Removal from one place within the United States to another in order to evade a tax is differentiated from unlawful transportation by the quality of the intent, and not by anything else. Importation is differentiated also by the nature of the act.

To refuse to give heed to these distinctions will lead us into a morass of practical difficulties as well as doctrinal refinements. If forfeiture of a vehicle seized in the course of importation must always be under § 26, and not under other statutes, then the smuggler arrested at the same time must always be prosecuted under the prohibition act, and never for the smuggling, since seizure under § 26 must be followed, as we have seen, by prosecution of the arrested person under that title and no other. We cannot bring ourselves to believe that Congress had in view the creation of so great a breach in historic remedies and sanctions. Cf. *United States* v. *American Motor Boat K-1231, supra.* Derangement of a system thus rooted in tradition is not to be inferred from a section aimed upon its face at transportation within the United States and not at importation from without. Cf. *Maul* v. *United States,* 274 U. S. 501, 508. Repeals by implication are

not favored (*Henderson's Tobacco,* 11 Wall. 652; *United States* v. *Tynen,* 11 Wall. 88, 92), and least of all where inveterate usage forbids the implication. Indeed, the breach, if we once allow it, will hardly be confined within the ramparts of the acts that regulate the duties upon imports. If a forfeiture under the customs laws is forbidden where there has been an unlawful importation of intoxicating liquors, we shall have difficulty in upholding a forfeiture where there has been a violation of the navigation laws or other cognate statutes. Already the net of these complexities has entangled the decisions. Cf. *The Ruth Mildred, post.* p. 67, and *General Import & Export Co.* v. *United States, post,* p. 70. Courts accepting the conclusion that the customs forfeitures are ended in respect of intoxicating liquors have been unable to extricate themselves from the conclusion that forfeitures under the navigation acts have fallen at the same time. A halt must be called before the tangle is so intricate that it can no longer be unraveled.

We hold, then, that *Richbourg Motor Co.* v. *United States, supra,* does not rule the case at hand. The question is one as to which the decisions of the other Federal courts are almost equally divided. On the one side are *United States* v. *One Ford Coupe,* 43 F. (2d) 212; *United States* v. *One Studebaker,* 45 F. (2d) 430; *The Ruth Mildred,* 47 F. (2d) 336; *Colon* v. *Hanlon,* 50 F. (2d) 353; *United States* v. *One Buick Coupe,* 54 F. (2d) 800. On the other are *The Pilot,* 43 F. (2d) 491; *United States* v. *One Reo Coupe,* 46 F. (2d) 815; *The Daisy T,* 48 F. (2d) 370; *United States* v. *James Hayes,* 52 F. (2d) 977; *Maniscalco* v. *United States,* 53 F. (2d) 737; *United States* v. *American Motor Boat K-1231,* 54 F. (2d) 502. The list is not exhaustive. The courts of each group have invoked the Willis-Campbell Act (Act of Nov. 23, 1921, c. 134, 42 Stat. 222, 223, § 5), but have drawn opposing inferences from it. By that act, all laws relating to the

manufacture, taxation and traffic in intoxicating liquors and all penalties for their violation in force when the National Prohibition Act was adopted, were continued in force except such provisions as are "directly in conflict with the provisions of the National Prohibition Act." See *United States* v. *Stafoff*, 260 U. S. 477. The advocates of an implied repeal insist that there is a direct conflict between a statute whereby immunity for innocent lienors or owners is given as of right and a statute whereby immunity is on the footing of an act of grace. To this the retort is made by the opponents of repeal that the spheres of the two immunities are diverse and that the apparent conflict is unreal. Transportation within the United States is the sphere of the one, and importation from without the sphere of the other.

Of the four questions certified, those numbered two and three are adequately answered when we answer question number one.

The answer to question four may depend upon circumstances imperfectly disclosed in the certificate, and is not shown to be necessary. *White* v. *Johnson*, 282 U. S. 367.

The second, third and fourth questions are not answered, and the first question is answered "No."

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

UNITED STATES *v.* COMMERCIAL CREDIT CO., INC.

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

No. 734. Argued April 15, 1932.—Decided May 2, 1932.

1. Vehicles employed in the unlawful importation of intoxicating liquors may be seized and forfeited under the Tariff Act and the provisions of the Revised Statutes ancillary thereto. *General Motors Acceptance Corp.* v. *United States, ante*, p. 49. P. 66.

2. This extends to vehicles that take up the contraband after it has crossed the border and act as implements or links in a continuous process of carriage from the foreign country into this one. P. 67.
3. When the two federal courts below are in agreement as to the inferences fairly to be gathered from the facts, their findings are not to be disturbed unless clearly erroneous. *Id.*

53 F. (2d) 977, reversed.
46 F. (2d) 171, affirmed.

CERTIORARI, 285 U. S. 534, to review the reversal of a judgment of the District Court forfeiting automobiles which had been seized and libeled by the United States for breach of the customs laws. The above-named respondent, claiming as *bona fide* lienor, filed an intervening petition, which was dismissed.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Arthur W. Henderson, Paul D. Miller,* and *Carroll P. Lynch* were on the brief, for the United States.

Mr. Duane R. Dills, with whom *Mr. Berthold Muecke, Jr.,* was on the brief, for respondent.

The respondent asks that this Court give effect to the express intention of Congress that the rights of innocent parties be protected where transportation of intoxicating liquor is involved. It is true that executive clemency may remit the forfeiture, but mitigation by grace is not the equivalent of statutory immunity. *United States* v. *The Sebastopol,* 56 F. (2d) 590, s. c., *post,* p. 70. This is so particularly since the decision of the executive is not subject to review. *U. S. ex rel. Walter E. Heller & Co.* v. *Mellon,* 40 F. (2d) 808, 810, cert. den., 281 U. S. 766.

The reason for holding that the mandatory features of § 26 of the Prohibition Act supplant R. S., § 3450, in taxation cases, apply equally to R. S. §§ 3061 and 3062, in these customs cases. *United States* v. *One Mack Truck,* 4 F. (2d) 923; *United States* v. *Almeida,* 9 F. (2d) 15, 16; *United States* v. *One Ford Coupe,* 43 F. (2d) 212, 214.

The Willis-Campbell Act did not re-enact R. S. §§ 3061 and 3062, because they are in direct conflict with the provisions of the National Prohibition Act relative to transportation in customs cases in that they provide for absolute forfeiture of the rights of the innocent, while the National Prohibition Act protects the innocent. *United States* v. *One Packard Truck*, 284 Fed. 394; *United States* v. *One Studebaker*, 45 F. (2d) 430; *United States* v. *One Ford Coupe*, 43 F. (2d) 212. Transportation is necessarily involved in importation, just as much as concealment was involved in the transportation in the *Richbourg* case. Cf. *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564; *Commercial Credit Co.* v. *United States*, 276 U. S. 226; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528; *United States* v. *One Ford Coupe*, 272 U. S. 321.

None of the vehicles in the cases at bar was used in the "importation" of liquor. They were all used in the transportation of liquor within the boundaries of the United States after the importation had been completed. To this extent, the vehicles in this case are distinguished from the vehicles involved in *General Motors Accept. Corp.* v. *United States, ante*, p. 49. See also *National Bond & Inv. Co.* v. *United States*, 8 F. (2d) 942.

If the substantive offense is importation and the customs laws are available to the Government, then forfeiture might be had under those laws; if the substantive offense is concealment with intent to defraud the Government of a tax, then forfeiture might be had under § 3450. *United States* v. *One Ford Coupe, supra.* But if the dominating enterprise is transportation, then forfeiture must be under § 26 of the National Prohibition Act. *Commercial Credit Co.* v. *United States, supra; Richbourg Motor Co.* v. *United States, supra; United States* v. *One Reo Coupe*, 46 F. (2d) 815; *United States* v. *One Buick Coupe*, 54 F. (2d) 800, 802.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Three motor cars were seized by a customs officer of the United States in Texas near the Mexican border on a charge that they were employed in the unlawful importation of intoxicating liquors.

Following the seizure, the Government filed a libel of information against the automobiles so employed under §§ 3061 and 3062 of the Revised Statutes (19 U. S. Code, §§ 482 and 483) and prayed for a decree of forfeiture.

Thereupon, the Commercial Credit Company, Inc., the holder of a chattel mortgage, filed an intervening petition alleging that its lien had been created in good faith; that it was innocent of any participation in the wrongful use of the cars; and that by force of § 26 of the National Prohibition Act it should have an award of the possession. The District Court dismissed the intervening claim and adjudged a forfeiture, holding that §§ 3061 and 3062 of the Revised Statutes were unrepealed by § 26 of the National Prohibition Act and permitted the forfeiture of articles illegally employed in the importation of intoxicating liquors, 46 F. (2d) 171. The Circuit Court of Appeals reversed the decree and dismissed the libels, holding that § 26 of the National Prohibition Act had superseded other remedies, 53 F. (2d) 977. A writ of certiorari has brought the case here.

Our judgment handed down herewith in *General Motors Acceptance Corp.* v. *United States, ante,* p. 49, sustains the position of the Government that vehicles employed in the unlawful importation of intoxicating liquors may be seized under the Tariff Act and the provisions of the Revised Statutes ancillary thereto. All that remains is to determine whether these vehicles were so employed. The cars subjected to forfeiture in No. 574 were the same that had brought the contraband merchandise from beyond

the Mexican border. The cars libeled in this proceeding were laden with the liquors, for all that the evidence shows, on this side of the border line.

The difference is not one that exacts differing relief. The circumstantial evidence justifies a finding that the cars, wherever laden, were implements or links in a continuous process of carriage from Mexico into Texas. This was unlawful importation as well as unlawful transportation. The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their findings are not to be disturbed unless clearly erroneous. *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 558.

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

Reversed.

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

UNITED STATES *v.* THE RUTH MILDRED.

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

No. 795. Argued April 15, 1932.—Decided May 2, 1932.

1. Revised Statutes, § 4377, which provides that any licensed vessel employed in any other trade than that for which she is licensed shall be forfeited, applies to a vessel licensed only for the fishing trade which carries a cargo of intoxicating liquors. P. 68.
2. Forfeiture under Rev. Stats., § 4377, is strictly *in rem* and (unlike forfeiture under § 26 of the National Prohibition Act) is not dependent upon a preliminary adjudication of personal guilt. P. 69.

56 F. (2d) 590, reversed.

CERTIORARI, 285 U. S. 534, to review the affirmance of a judgment of the District Court dismissing a libel brought

by the United States to forfeit a vessel for breach of the navigation laws. Cf. the last two preceding cases.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Arthur W. Henderson* and *Paul D. Miller* were on the brief, for the United States.

Mr. Milton R. Kroopf, with whom *Mr. Louis Halle* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The schooner " Ruth Mildred " was licensed to engage in the cod and mackerel fisheries. On March 1, 1928, she was observed by the Coast Guard in Long Island Sound headed for New York. She was trailed by a patrol boat till she docked in the East River. The master admitted to the customs officers that his vessel was carrying intoxicating liquors, and upon the search that followed a stock of liquors was discovered. A libel of information was thereafter filed against the vessel praying a decree of forfeiture for breach of the navigation laws (R. S. § 4377; U. S. Code, Title 46, § 325) in carrying on a business not permitted by the license. The master intervened in the suit, and pleaded that the remedy under § 26 of the National Prohibition Act was exclusive of any other. The District Court, upholding that defense, dismissed the libel, 47 F. (2d) 336, and the Circuit Court of Appeals affirmed, 56 F. (2d) 590. The case is here on a writ of certiorari granted on the petition of the Government.

Our decision in *General Motors Acceptance Corp.* v. *United States, ante,* p. 49, would require a reversal of this judgment if the vessel had been seized for unlawful importation in violation of the tariff act. Even more

plainly that result must follow where the basis of the seizure is a breach of the navigation acts growing out of a departure by the vessel from the conditions of her license. Contrast with the decision below the decision of the same court in *United States* v. *American Motor Boat K-1231,* 54 F. (2d) 502. By § 4377 of the Revised Statutes (U. S. Code, Title 46, § 325): "Whenever any licensed vessel . . . is employed in any other trade than that for which she is licensed, . . . such vessel with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited." The "Ruth Mildred" was licensed for the fishing trade and not for any other. She would have been subject to forfeiture if her cargo had been wheat or silk or sugar. In a suit under this statute, her guilt was not affected, was neither enlarged nor diminished, by the fact that the cargo happened to be one of intoxicating liquors. The Government made out a case of forfeiture when there was proof that the cargo was something other than fish. Forfeiture under § 26 of the National Prohibition Act is one of the consequences of a successful criminal prosecution of a personal offender, and is ancillary thereto. Forfeiture under the Revised Statutes, § 4377, for breach of the navigation laws, is strictly *in rem,* and is not dependent upon a preliminary adjudication of personal guilt. *United States* v. *Stowell,* 133 U. S. 1, 16, 17. In brief, the basis of the charge of guilt directed against this vessel is not a breach of the National Prohibition Act nor any movement of transportation, lawful or unlawful. It is the act of engaging in a business other than the fishing trade in contravention of a license.

The decree should be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

GENERAL IMPORT & EXPORT CO., INC. *v.* UNITED STATES.

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

No. 811. Argued April 15, 1932.—Decided May 2, 1932.

A vessel seized in territorial waters while carrying an unmanifested cargo of intoxicating liquors may be libeled under the Tariff Act of 1922, §§ 584 and 594, (19 U. S. C., §§ 486, 498) to enforce the money penalties thereby imposed upon the master and charged upon the vessel for his misconduct in not producing a manifest and in carrying cargo not described in a manifest. Section 26 of the National Prohibition Act does not prevent. *General Motors Acceptance Corp.* v. *United States, ante,* p. 49; *United States* v. *The Ruth Mildred, ante,* p. 67. P. 73.

56 F. (2d) 590, affirmed.

CERTIORARI, 285 U. S. 534, to review the reversal of a decree, 47 F. (2d) 336, dismissing a libel to enforce liens on a vessel.

Mr. Milton R. Kroopf, with whom *Mr. Louis Halle* was on the brief, for petitioner.

Section 26, Title II, of the National Prohibition Act is the exclusive statute under which the United States may proceed against the vessel. *Richbourg Motor Co.* v. *United States,* 281 U. S. 528.

Paragraph 813 of Schedule 8 does not refer to intoxicating liquors for beverage purposes, or if it does, it can only refer to such as may be imported consistently with the Prohibition Act. It can not afford a basis for invoking §§ 584 and 594 of the Tariff Act of 1922.

In the presence of the specific legislation in the Tariff Act as to what merchandise is prohibited, it is significant that intoxicating liquor for beverage purposes is nowhere included. Nor does it include those articles and liquors

which are enumerated in Schedule 8, for obviously that schedule refers to merchandise capable of importation.

Paragraph 813 of Schedule 8, being part of the Tariff Act, could not recognize the importation of intoxicating liquors for beverage purposes contrary to the Eighteenth Amendment. *United States* v. *Katz,* 271 U. S. 354.

The master of a vessel actually within the territorial limits of the United States, and on which intoxicating liquors are being imported, is amenable to prosecution under the National Prohibition Act; the vessel subject to seizure under § 26 of the National Prohibition Act; and the cargo forfeitable by virtue of Paragraph 813 of Schedule 8.

Strictly speaking, § 26 of the Prohibition Act is not a forfeiture statute. It does not declare forfeit the *res* although all the proceedings under it are directed to that end. The vehicle is ordered sold, but the rights of innocent lienors and owners are saved. Only to the extent of guilty interests is the *res* penalized. Nor is the guilt of the person in charge transferable to the *res.* In such respect, § 26 is a penalty statute in the same sense as the Tariff Act, § 594, with the obvious and vital difference that innocence provides a defense.

The court below in *United States* v. *One Mack Truck,* 4 F. (2d) 923, reached a conclusion irreconcilable with the one in this case.

The weight of authority is with the District Court. *United States* v. *One Ford Coupe,* 43 F. (2d) 212; *United States* v. *One Studebaker,* 45 F. (2d) 430; *Colon* v. *Hanlon,* 50 F. (2d) 353; *Corriveau* v. *United States,* 53 F. (2d) 735. See also *United States* v. *Ryan,* 284 U. S. 167.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Arthur W. Henderson* and *Paul D. Miller* were on the brief, for the United States.

There is no direct conflict between a forfeiture statute and a penalty statute. The two are different in theory and distinguishable in effect. It would be carrying the doctrine of implied repeal beyond reasonable bounds to hold that two statutes so essentially different could be in direct conflict. It is only by accident in this case that the penalty was so great as to exhaust the entire value of the vessel and result in her forfeiture.

In forfeiture proceedings the law operates upon the title to the property. In a penalty suit the property is merely security to insure the payment of a money penalty.

Evidence necessary to support the one proceeding is essentially different from that required in the other. Because of these differences a conflict can not exist. *Carter* v. *McClaughry,* 183 U. S. 365; *Burton* v. *United States,* 202 U. S. 344; *Gavieres* v. *United States,* 220 U. S. 338; *Morgan* v. *Devine,* 237 U. S. 632.

Mr. Justice Cardozo delivered the opinion of the Court.

The steamship "Sebastopol" was seized by Coast Guard Officers in the harbor of New York while carrying an unmanifested cargo of intoxicating liquors. The master of the vessel did not produce a manifest for the cargo when a manifest was demanded by the boarding officer. Thereafter a libel of information was filed by the Government under §§ 584 and 594 of the Tariff Act of 1922 (Act of Sept. 21, 1922, c. 356, 42 Stat. 858, 980, 982; 19 U. S. C., §§ 486, 498) for the enforcement of two liens, one of $500 for failing to produce a manifest and another for an amount equal to the value of the cargo for having on board merchandise not described in the manifest.

The District Court dismissed the libel on the ground that § 26 of the National Prohibition Act had established a system of forfeiture exclusive of any other. 47 F. (2d) 336. The Circuit Court of Appeals advanced the view

that the suit was not strictly one for the forfeiture of the vessel, but one for the enforcement of money penalties charged upon the vessel by reason of the misconduct of the master. On this ground it distinguished its own decision in the case of the *Ruth Mildred,* announced at the same time, and gave judgment for the Government.

For that reason as well as for the broader reasons stated in *General Motors Acceptance Corp.* v. *United States, ante,* p. 49, and *United States* v. *The Ruth Mildred, ante,* p. 67, the decree will be affirmed.

Affirmed.

NIXON *v.* CONDON ET AL.

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

No. 265. Argued January 7, 1932. Reargued March 15, 1932.—Decided May 2, 1932.

A statute of Texas provided: "every political party in the State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party . . ." Acting under this statute, and not under any authorization from the convention of their party, the Executive Committee of the Democratic Party in Texas adopted a resolution that only white Democrats should participate in the primary elections, thereby excluding negroes. *Held:*

1. Whatever inherent power a state political party has to determine the qualifications of its members resides in the party convention and not in any committee. P. 84.

2. The power exercised by the Executive Committee in this instance was not the power of the party as a voluntary organization but came from the statute. P. 85.

3. The committee's action was therefore state action within the meaning of the Fourteenth Amendment. P. 88.

4. The resulting discrimination violates that Amendment. P 89.

5. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth

Amendment is a question which this Court must determine for itself. P. 88.
49 F. (2d) 1012, reversed.

CERTIORARI, 284 U. S. 601, to review the affirmance of a judgment dismissing the complaint, 34 F. (2d) 464, in an action for damages against judges of a primary election who refused to allow the plaintiff to vote.

Messrs. James Marshall and *Nathan R. Margold,* with whom *Messrs. Arthur B. Spingarn,* and *Fred C. Knollenberg* were on the brief, for petitioner.

The power of respondents to deny petitioner's right to vote at the primary election was derived from the resolution of the State Democratic Executive Committee adopted pursuant to authority granted by c. 67 of the Laws of 1927. Both the statute and the resolution adopted thereunder violated the Fourteenth Amendment because they authorized and worked a classification based on color.

If the Democratic Legislature of Texas could not constitutionally forbid negroes to vote at primaries in view of the decision of this Court in *Nixon* v. *Herndon,* 273 U. S. 536, it could nevertheless with a feeling of assurance entrust to the Democratic State Committee power to enact such prohibition and achieve the same end.

That it was the legislative intention to accomplish this purpose and to evade and nullify that decision appears from the face of the enactment. The statute expressly indicates that the new Art. 3107 was being substituted for the one held unconstitutional, in order to take care of the "emergency" created by the decision in *Nixon* v. *Herndon.* What could this emergency be if not that negroes would be able to vote at the next primary election unless some new method were devised to exclude them? By providing that the Executive Committee "shall in its own way determine who shall be qualified to

vote," the Act plainly delegated authority to the committee to determine among other things that only white Democrats should be entitled to vote. *Qui facit per alium facit per se.*

Inherent power in the political party to prescribe the qualifications of its own members and those entitled to vote at party primary elections was necessarily superseded by this statute.

The new statute did not purport to withdraw legislative sovereignty but merely to substitute a new provision in place of the one declared unconstitutional.

Decisions of the Texas courts demonstrate that the party in Texas and its executive committee had ceased to have any inherent power to prescribe qualifications of voters at Democratic primary elections long before the resolution here in question was adopted. *Briscoe* v. *Boyle,* 286 S. W. 275; *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515.

Whether this be regarded as the creation of a new power or the recognition and restoration of an old one, the existence of the power itself would be necessarily and wholly dependent upon the force of the statute and hence would be a statutory power, not an inherent one.

Moreover, there is no reason why a legislative "recognition," even of an existing inherent power, should not turn the inherent power into a statutory one. *Clancy* v. *Clough,* 30 S. W. (2d) 569; *Love* v. *Taylor,* 8 S. W. (2d) 795; *Friberg* v. *Scurry,* 33 S. W. (2d) 762.

The Texas cases, with one exception, all confirm our contention that the party executive committees are agencies of the State, subject to legislative control and endowed with powers by the Legislature. The exception is *White* v. *Lubbock,* 30 S. W. (2d) 72, where the court held that the party had inherent power to exclude negroes from voting. It was recognized by this Court in the *Home Telephone & Telegraph* case, 227 U. S. 278,

that the local conception of what amounts to state action may differ from the national conception of it. So here the holding of the state court that political parties have inherent power to exclude negroes from primary elections, and in so acting were not exercising state powers, is not binding upon this Court.

Even if the Executive Committee exceeded the powers delegated to it by the Legislature, its action, though *ultra vires,* constituted state action in violation of the Fourteenth Amendment, because it authorized and worked a classification based on color. *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278; *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356.

Although the primary machinery was originally the private affair of the party, it has become absorbed by the State, which has exercised its sovereignty over primary elections with the "rules and regulations laid down in minute and cumbersome detail." *Briscoe* v. *Boyle,* 286 S. W. 275; Primary Elections, Merriam & Overacker, 1928 ed., p. 140; 23 Mich. L. Rev. 279; *Bliley* v. *West,* 42 F. (2d) 101; s. c., 33 F. (2d) 177; *Commonwealth* v. *Willcox,* 111 Va. 849, 859; *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515; *Clancy* v. *Clough,* 30 S. W. (2d) 569.

Those cases hold that the party committees are so much controlled by state authority that they are without power to vary on their own initiative the qualifications prescribed for voters, candidates or committee members.

The State can not perform by an agency an act which it could not accomplish in its own name. *Williams* v. *Bruffy,* 96 U. S. 176; *Ford* v. *Surget,* 97 U. S. 594; *King Mfg. Co.* v. *Augusta,* 277 U. S. 100; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278; *Standard Scale Co.* v. *Farrell,* 249 U. S. 571.

Respondents by reason of their office as judges of election derived their power to deny the petitioner the right

to vote at the primary election from the statutes of the State. In applying that power to a state purpose in such a way as to work a color classification they violated the Fourteenth Amendment, irrespective of c. 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee.

The time, place and manner of holding primary elections, as well as of determining and contesting the results thereof, are comprehensively and minutely prescribed by statutory provisions. Among these provisions are the ones which provide for the appointment of judges of election and prescribe their functions, powers and duties.

A vote at a primary is a vote within the intendment of the Fifteenth Amendment. Section 31, Title 8, U. S. C., evidences a contemporaneous interpretation of the Fifteenth Amendment applying the right to vote to "any election." The word "vote" is used throughout the Texas election laws in its usual sense, with no distinction between primary and general elections.

The whole tenor of the primary laws of Texas is to protect the expression of the will of the people in nominating candidates. *Love* v. *Wilcox, supra.* The primary involves the initial and, in Texas, the determinative choice of the officers of the government.

If it were true that the right to vote guaranteed by the Fifteenth Amendment did not extend to primary elections, then the same would be true of the Nineteenth Amendment, which in identical words guarantees the right to vote without regard to sex. The Fifteenth Amendment has frequently been held to be self-executing. *Neal* v. *Delaware,* 103 U. S. 370, 389; *Ex parte Yarbrough,* 110 U. S. 651, 665. And even were it not self-executing, § 31, Title 8, of the United States Code expresses in statutory form what the Amendment contemplated.

Distinguishing: *Newberry* v. *United States,* 256 U. S. 232; *Koy* v. *Schneider,* 110 Tex. 369. Cf. *Ashford* v.

Goodwin, 103 Tex. 491, and *Anderson* v. *Ash,* 62 Tex. Civ. App. 262.

Even if the refusal to permit the petitioner to vote at the primary election was not a denial of his right to vote, because he could still express his will at the general election, nevertheless his right to vote would have been abridged.

In States such as Texas, where the primary election is in a real sense the only true election, the vote at the final election is merely a formal flourish. The courts of Texas have taken judicial notice of the fact that for all practical purposes, and certainly in so far as state elections are concerned, there is only one political party, and that the real political battles of the State are not those held at the final election, but those waged for nomination at the Democratic primaries. *Moore* v. *Meharg,* 287 S. W. 670; 23 Mich. L. Rev. 279. Cf. *Newberry* v. *United States,* 256 U. S. 232, 266–7; Merriam, Primary Elections, 1908 ed., pp. 83–85; *Koy* v. *Schneider,* 110 Tex. 369.

Under the statutes as they existed prior to the adoption of c. 67 of the Laws of 1927, there was no inherent power in the party to exclude the petitioner from the primaries. The power to do so was solely derived from c. 67 of the Laws of 1927.

Even prior to the Act of 1923 the State had defined party powers and who might vote in party primaries. In consequence, the limitation contained in c. 67 of the Laws of 1927 was not a limitation upon inherent powers already existing in parties, but was a limitation necessitated by the grant to the Executive Committee of the power to determine party membership.

The election laws define and limit in meticulous detail the principal functions of political parties. This exercise of sovereignty has deprived the parties of their inde-

pendence of action. Parties have, in their relation to primary and other elections, only such powers, duties and privileges, as the statutes give them.

Mr. Ben R. Howell, with whom *Mr. Thornton Hardie* was on the brief, for respondents.

The Fourteenth and Fifteenth Amendments are a limitation only upon the power of a State, and do not affect private individuals or private associations of individuals. Citing the *Slaughterhouse Cases,* 16 Wall. 36, and a multitude of others.

The action of the Executive Committee in excluding petitioner from voting at a primary was not an action of the State.

A political party has the inherent right to determine the qualifications of its own members.

No one can question the right of men to organize a party of men and exclude women from its ranks; no one can question the right of women to organize a party of women and exclude men from its ranks; no one can question the right of a group of individuals to organize a political party with its membership based on stature, color of the hair or color of the skin. It seems to be conceded in petitioner's brief that the Democratic party, prior to 1923 when Art. 3093–A (the statute involved in *Nixon* v. *Herndon,* 273 U. S. 536) was passed by the Texas Legislature, had the right to exclude the negro from membership in that party.

The Texas Supreme Court has drawn a clear distinction between the State and a political party, and has defined a political party. *Waples* v. *Marrast,* 108 Tex. 5; 184 S. W. 180; *Koy* v. *Schneider,* 110 Tex. 369; 218 S. W. 480; 221 S. W. 880; *Cunningham* v. *McDermott,* 277 S. W. 218; *Winnett* v. *Adams,* 71 Neb. 917; 99 N. W. 681; *State* v. *Kanawha County,* 78 W. Va. 168; 88 S. E. 662;

Stephenson v. *Board of Electors,* 118 Mich. 396; 76 N. W. 914; *Phillips* v. *Gallagher,* 73 Minn. 528; 76 N. W. 285; *Kearns* v. *Hawley,* 188 Pa. 116; 41 Atl. 273; *Grigsby* v. *Harris,* 27 F. (2d) 942.

The statute enacted in 1923, declared unconstitutional in *Nixon* v. *Herndon, supra,* was void and did not operate to diminish the power already possessed by the party to determine the qualifications of its own members.

By enacting c. 67 of the Laws of 1927 the legislature merely withdrew the State from an attempted unlawful interference with the right of the party to determine the qualifications of its members. The legislature thus recognized a power which had long existed in the party to determine its membership and did not delegate such power to the party.

Every court which has passed upon the statute in question has construed it to be a withdrawal by the State and a recognition of the party's rights by the State. *Nixon* v. *Condon,* 34 F. (2d) 464; s.c., 49 F. (2d) 1012; *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515; *White* v. *Lubbock,* 30 S. W. (2d) 72; *Grigsby* v. *Harris,* 27 F. (2d) 972.

The Fifteenth Amendment, like the Fourteenth, is limited to action by a State. Respondents, as judges in the primary, were not officers of the State, and their action in denying petitioner a vote was not state action.

The record shows that the judges are selected and paid by the party. It is true that their duties are regulated in many details by the statutes. But regulation to insure fair primaries does not mean that the party officers become state officers.

The primary involved was not an election of the people within the meaning of § 31, Title 8, U. S. C. A party nomination is not "an election of the people," but is merely the choosing of a candidate by that party, and consequently petitioner fails to show jurisdiction under this

section or to state any cause of action against respondents under the statute.

Messrs. J. Alston Atkins, Carter W. Wesley, and *J. M. Nabrit, Jr.,* by leave of Court, filed a brief as *amici curiae.*

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner, a Negro, has brought this action against judges of election in Texas to recover damages for their refusal by reason of his race or color to permit him to cast his vote at a primary election.

This is not the first time that he has found it necessary to invoke the jurisdiction of the federal courts in vindication of privileges secured to him by the Federal Constitution.

In *Nixon* v. *Herndon,* 273 U. S. 536, decided at the October Term, 1926, this court had before it a statute of the State of Texas (Article 3093a, Revised Civil Statutes, afterwards numbered 3107) whereby the legislature had said that " in no event shall a negro be eligible to participate in a democratic party primary election [held in that State]," and that " should a negro vote in a democratic primary election, the ballot shall be void," and election officials were directed to throw it out. While the mandate was in force, the Negro was shut out from a share in primary elections, not in obedience to the will of the party speaking through the party organs, but by the command of the State itself, speaking by the voice of its chosen representatives. At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States.

Promptly after the announcement of that decision, the legislature of Texas enacted a new statute (L. 1927, c. 67)

repealing the article condemned by this court; declaring that the effect of the decision was to create an emergency with a need for immediate action; and substituting for the article so repealed another bearing the same number. By the article thus substituted, " every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

Acting under the new statute, the State Executive Committee of the Democratic party adopted a resolution " that all white democrats who are qualified under the constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928," and the chairman and secretary were directed to forward copies of the resolution to the committees in the several counties.

On July 28, 1928, the petitioner, a citizen of the United States, and qualified to vote unless disqualified by the foregoing resolution, presented himself at the polls and requested that he be furnished with a ballot. The respondents, the judges of election, declined to furnish the ballot or to permit the vote on the ground that the petitioner was a Negro and that by force of the resolution of the Executive Committee only white Democrats were allowed to be voters at the Democratic primary. The refusal was followed by this action for damages. In the District Court there was a judgment of dismissal, 34 F.

(2d) 464, which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 49 F. (2d) 1012. A writ of certiorari brings the cause here.

Barred from voting at a primary the petitioner has been, and this for the sole reason that his color is not white. The result for him is no different from what it was when his cause was here before. The argument for the respondents is, however, that identity of result has been attained through essential diversity of method. We are reminded that the Fourteenth Amendment is a restraint upon the States and not upon private persons unconnected with a State. *United States* v. *Cruikshank,* 92 U. S. 542; *Strauder* v. *West Virginia,* 100 U. S. 303; *Ex parte Virginia,* 100 U. S. 339, 346; *James* v. *Bowman,* 190 U. S. 127, 136. This line of demarcation drawn, we are told that a political party is merely a voluntary association; that it has inherent power like voluntary associations generally to determine its own membership; that the new article of the statute, adopted in place of the mandatory article of exclusion condemned by this court, has no other effect than to restore to the members of the party the power that would have been theirs if the lawmakers had been silent; and that qualifications thus established are as far aloof from the impact of constitutional restraint as those for membership in a golf club or for admission to a Masonic lodge.

Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny. The argument for the petitioner is that quite apart from the article in controversy, there are other provisions of the Election Law whereby the privilege of unfettered choice has been withdrawn or abridged (citing, *e. g.,* Articles 2955, 2975, 3100, 3104, 3105, 3110, 3121, Revised Civil Laws); that nomination

at a primary is in many circumstances required by the statute if nomination is to be made at all (Article 3101); that parties and their representatives have become the custodians of official power (Article 3105); and that if heed is to be given to the realities of political life, they are now agencies of the State, the instruments by which government becomes a living thing. In that view, so runs the argument, a party is still free to define for itself the political tenets of its members, but to those who profess its tenets there may be no denial of its privileges.

A narrower base will serve for our judgment in the cause at hand. Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the petitioner so far. As to that, decision must be postponed until decision becomes necessary. Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.

We recall at this point the wording of the statute invoked by the respondents. "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." Whatever inherent power a State political party has to determine the content of its membership resides in the State convention. Bryce, Modern Democracies, vol.

2, p. 40. There platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally, is true more particularly in Texas, where the statute is explicit in committing to the State convention the formulation of the party faith (Article 3139). The State Executive Committee, if it is the sovereign organ of the party, is not such by virtue of any powers inherent in its being. It is, as its name imports, a committee and nothing more, a committee to be chosen by the convention and to consist of a chairman and thirty-one members, one from each senatorial district of the State (Article 3139). To this committee the statute here in controversy has attempted to confide authority to determine of its own motion the requisites of party membership and in so doing to speak for the party as a whole. Never has the State convention made declaration of a will to bar Negroes of the State from admission to the party ranks. Counsel for the respondents so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.

Our conclusion in that regard is not affected by what was ruled by the Supreme Court of Texas in *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515, or by the Court of Civil Appeals in *White* v. *Lubbock,* 30 S. W. (2d) 722.

The ruling in the first case was directed to the validity of the provision whereby neither the party nor the committee is to be permitted to make former political affiliations the test of party regularity. There were general observations in the opinion as to the functions of parties and committees. They do not constitute the decision. The decision was merely this, that "the committee whether viewed as an agency of the State or as a mere agency of the party is not authorized to take any action which is forbidden by an express and valid statute." The ruling in the second case, which does not come from the highest court of the State, upholds the constitutionality of § 3107 as amended in 1927, and speaks of the exercise of the inherent powers of the party by the act of its proper officers. There is nothing to show, however, that the mind of the court was directed to the point that the members of a committee would not have been the proper officers to exercise the inherent powers of the party if the statute had not attempted to clothe them with that quality. The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence. In any event, the Supreme Court of Texas has not yet spoken on the subject with clearness or finality, and nothing in its pronouncements brings us to the belief that in the absence of a statute or other express grant it would recognize a mere committee as invested with all the powers of the party assembled in convention. Indeed, its latest decision dealing with any aspect of the statute here in controversy, a decision handed down on April 21, 1932 (*Love* v. *Buckner,* 49 S. W. (2d) 425), describes the statute as constituting "a grant of power" to the State Executive Com-

mittee to determine who shall participate in the primary elections.* What was questioned in that case was the validity of a pledge exacted from the voters that it was their *bona fide* purpose to support the party nominees. The court in upholding the exaction found a basis for its ruling in another article of the Civil Statutes (Art. 3167), in an article of the Penal Code (Art. 340), and in the inherent power of the committee to adopt regulations reasonably designed to give effect to the obligation assumed by an elector in the very act of voting. To clinch the argument the court then added that if all these sources of authority were inadequate, the legislature had made in Article 3107 an express " grant of power " to determine qualifications generally. There is no suggestion in the opinion that the inherent power of the committee was broad enough (apart from legislation) to permit it to prescribe the extent of party membership, to say to a group of voters, ready as was the petitioner to take the statutory pledge, that one class should be eligible and another not. On the contrary, the whole opinion is instinct with the concession that pretensions so extraordinary must find their warrant in a statute. The most that can be said for the respondents is that the inherent powers of the Committee are still unsettled in the local courts. Nothing in the state of the decisions requires us to hold that they have been settled in a manner that would be subversive of the fundamental postulates of party organization. The suggestion is offered that in default of in-

* " We are bound to give effect to a grant of power to the State Executive Committee of a party to determine who shall participate in the acts of the party otherwise than by voting in a primary, when the Legislature grants the power in language too plain to admit of controversy, and when the determination of the Committee conflicts with no other statutory requirement or prohibition, especially when the Committee's determination makes effectual the public policy of the State as revealed in its statutes." *Love* v. *Buckner, supra.*

herent power or of statutory grant the committee may have been armed with the requisite authority by vote of the convention. Neither at our bar nor on the trial was the case presented on that theory. At every stage of the case the assumption has been made that authority, if there was any, was either the product of the statute or was inherent in the committee under the law of its creation.

We discover no significance, and surely no significance favorable to the respondents, in earlier acts of legislation whereby the power to prescribe additional qualifications was conferred on local committees in the several counties of the State. L. 1903, c. 101, § 94. The very fact that such legislation was thought necessary is a token that the committees were without inherent power. We do not impugn the competence of the legislature to designate the agencies whereby the party faith shall be declared and the party discipline enforced. The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine

for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon* v. *Herndon, supra.* Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Ex parte Virginia, supra; Buchanan* v. *Warley,* 245 U. S. 60, 77. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

The judgment below is reversed and the cause remanded for further proceedings in conformity with this opinion. *Reversed.*

MR. JUSTICE McREYNOLDS, dissenting.

March 15, 1929, petitioner here brought suit for damages in the United States District Court, Western Division of Texas, against Condon and Kolle, theretofore judges in a Democratic primary election. He claims they wrongfully deprived him of rights guaranteed by the Fourteenth and Fifteenth Amendments, Federal Constitution, by denying him the privilege of voting therein. Upon motion the trial court dismissed the petition, holding that it failed to state a cause of action; the Circuit Court of Appeals sustained this ruling. The matter is here by certiorari.

The original petition, or declaration, alleges—

L. A. Nixon, a negro citizen of the United States and of Texas duly registered and qualified to vote in Precinct

No. 9, El Paso County at the general election and a member of the Democratic party, was entitled to participate in the primary election held by that party July 28, 1928, for nominating candidates for State and other offices. He duly presented himself and sought to cast his ballot. Defendants, the judges, refused his request by reason of the following resolution theretofore adopted by the State Democratic Executive Committee—

"Resolved: That all white Democrats who are qualified and [*sic*] under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

That, the quoted resolution "was adopted by the State Democratic Executive Committee of Texas under authority of the Act of the Legislature"—Ch. 67, approved June 7, 1927. Chapter 67 undertook to repeal former Article 3107,[1] Ch. 13, Rev. Civil Stat. 1925, which had been adopted in 1923, Ch. 32, § 1 (Article 3093a) and in lieu thereof to enact the following:

"Article 3107 (Ch. 67 Acts 1927). Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State

[1] Original Art. 3107—Rev. Civ. Stats. 1925: "In no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same."

because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That, in 1923, prior to enactment of Chapter 67, the Legislature adopted Article 3093a,[2] Revised Civil Statutes, declaring that no negro should be eligible to participate in a Democratic party primary election. This was held invalid state action by *Nixon* v. *Herndon,* 273 U. S. 536.

That, when chapter 67 was adopted only the Democratic party held primary elections in Texas and the legislative purpose was thereby to prevent Nixon and other negroes from participating in such primaries.

That chapter 67 and the above quoted resolution of the Executive Committee are inoperative, null and void in so far as they exclude negroes from primaries. They conflict with the Fourteenth and Fifteenth Amendments to the Federal Constitution and laws of the United States.

That there are many thousand negro Democratic voters in Texas. The State is normally overwhelmingly Democratic and nomination by the primaries of that party is equivalent to an election. Practically there is no contest for State offices except amongst candidates for such nominations.

That the defendants' action in denying petitioner the right to vote was unlawful, deprived him of valuable political rights, and damaged him five thousand dollars. And for this sum he asks judgment.

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[2] [Acts 2d C. S. 1923, p. 74] Article 3093a from Acts 1923. "All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

The trial court declared [p. 468]—

"The court here holds that the State Democratic Executive Committee of the State of Texas, at time of the passage of the resolution here complained of, was not a body corporate to which the Legislature of the State of Texas could delegate authority to legislate, and that the members of said Committee were not officials of the State of Texas, holding position as officers of the State of Texas, under oath, or drawing compensation from the State, and not acting as a state governmental agency, within the meaning of the law, but only as private individuals holding such position as members of said State Executive Committee by virtue of action taken upon the part of members of their respective political party; and this is also true as to defendants, they acting only as representatives of such political party, viz: the Democratic party, in connection with the holding of a Democratic primary election for the nomination of candidates on the ticket of the Democratic party to be voted on at the general election, and in refusing to permit plaintiff to vote at such Democratic primary election defendants were not acting for the State of Texas, or as a governmental agency of said State."

Also [p. 469] "that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating membership of such organization, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed."

The Circuit Court of Appeals said [p. 1013]—

"The distinction between appellant's cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied permission to vote in the former by

state statute, and in the latter by resolution of the State Democratic Executive Committee. It is argued on behalf of appellant that this is a distinction without a difference, and that the State through its legislature attempted by the 1927 act to do indirectly what the Supreme Court had held it was powerless to accomplish directly by the 1923 act.

"We are of opinion, however, that there is a vast difference between the two statutes. The Fourteenth Amendment is expressly directed against prohibitions and restraints imposed by the States, and the Fifteenth protects the right to vote against denial or abridgment by any State or by the United States; neither operates against private individuals or voluntary associations. *United States* v. *Cruikshank,* 92 U. S. 542; *Virginia* v. *Rives,* 100 U. S. 313; *James* v. *Bowman,* 190 U. S. 127.

"A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed. *Waples* v. *Marrast,* 108 Tex. 5; 184 S. W. 180; *White* v. *Lubbock,* (Tex. Civ. App.) 30 S. W. (2d) 722; *Grigsby* v. *Harris,* 27 F. (2d) 942. It did not attempt as did the 1923 act to exclude any voter from membership in any political party. Precinct judges of election are appointed by party executive committees and are paid for their services out of funds that are raised by assessments upon candidates. Revised Civil Statutes of Texas, §§ 3104, 3108."

I think the judgment below is right and should be affirmed.

The argument for reversal is this—

The statute—Chapter 67, present Article 3107—declares that every political party through its State Executive Committee "shall have the power to prescribe the qualifications of its own members and shall in its own

way determine who shall be qualified to vote or otherwise participate in such political party." The result, it is said, is to constitute the Executive Committee an instrumentality of the State with power to take action, legislative in nature, concerning membership in the party. Accordingly, the attempt of the Democratic Committee to restrict voting in primaries to white people amounted to State action to that effect within the intendment of the Federal Constitution and was void under *Nixon* v. *Herndon, supra.*

This reasoning rests upon an erroneous view of the meaning and effect of the statute.

In *Nixon* v. *Herndon* the Legislature in terms forbade all negroes from participating in Democratic primaries. The exclusion was the direct result of the statute and this was declared invalid because in conflict with the Fourteenth Amendment.

The act now challenged withholds nothing from any negro; it makes no discrimination. It recognizes power in every political party, acting through its Executive Committee, to prescribe qualifications for membership, provided only that none shall be excluded on account of former political views or affiliations, or membership or non-membership in any non-political organization. The difference between the two pronouncements is not difficult to discover.

Nixon's present complaint rests upon the asserted invalidity of the resolution of the Executive Committee and, in order to prevail, he must demonstrate that it amounted to direct action by the State.

The plaintiff's petition does not attempt to show what powers the Democratic party had entrusted to its State Executive Committee. It says nothing of the duties of the Committee as a party organ; no allegation denies that under approved rules and resolutions, it may determine

and announce qualifications for party membership. We cannot lightly suppose that it undertook to act without authority from the party. Ordinarily, between conventions party executive committees have general authority to speak and act in respect of party matters. There is no allegation that the questioned resolution failed to express the party will. For present purposes the Committee's resolution must be accepted as the voice of the party.

Petitioner insists that the Committee's resolution was authorized by the State; the statute only recognizes party action and he may not now deny that the party had spoken. The exclusion resulted from party action and on that footing the cause must be dealt with. Petitioner has planted himself there. Whether the cause would be more substantial if differently stated, we need not inquire.

As early as 1895—Ch. 35, Acts 1895—the Texas Legislature undertook through penal statutes to prevent illegal voting in political primaries, also false returns, bribery, etc. And later, many, if not all, of the general safeguards designed to secure orderly conduct of regular elections were extended to party primaries.

By Acts of 1903 and 1905, and subsequent amendments, the Legislature directed that only official ballots should be used in all general elections. These are prepared, printed and distributed by public officials at public expense.

With adoption of the official ballot it became necessary to prescribe the methods for designating the candidates whose names might appear on such ballot. Three, or more, have been authorized. A party whose last candidate for governor received 100,000 votes must select its candidate through a primary election. Where a party candidate has received less than 100,000, and more than 10,000, votes it may designate candidates through convention or primary, as its Executive Committee may deter-

mine. A written petition by a specified number of voters may be used in behalf of an independent or nonpartisan candidate.

Some of the States have undertaken to convert the direct primary into a legally regulated election. In others, Texas included, the primary is conducted largely under party rules. Expenses are borne by the party; they are met chiefly from funds obtained by assessments upon candidates. A number of States (eleven perhaps) leave the determination of one's right to participate in a primary to the party, with or without certain minimum requirements stated by statute. In "Texas the party is free to impose and enforce the qualifications it sees fit," subject to some definite restrictions. See Primary Elections, Merriam and Overacker, pp. 66, 72, 73.

A "primary election" within the meaning of the chapter of the Texas Rev. Civil Stat. relating to nominations "means an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, or to nominate the county executive officers of a party." Article 3100; General Laws 1905, (1st C. S.) Ch. 11, § 102. The statutes of the State do not and never have undertaken to define *membership*—who shall be regarded as a *member*—in a political party. They have said that *membership* shall not be denied to certain specified persons; otherwise, the matter has been left with the party organization.

Since 1903 (Acts 1903, Ch. CI., § 94,[3] p. 150, 28th Leg.; Acts 1905, Ch. 11, § 103, p. 543, 29th Leg.) the statutes of Texas have recognized the power of party executive committees to define the qualifications for membership. The Act of 1923, Ch. 32, § 1, (Art. 3093a) and the Act

[3]Acts 1903, Ch. CI. "Sec. 94. . . . provided, that the county executive committee of the party holding any primary election may prescribe additional qualifications necessary to participate therein."

of 1927, Ch. 67, §1, (Art. 3107) recognize the authority of the party through the Executive Committee, or otherwise, to specify such qualifications throughout the State. See *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515, 523.

These Acts, and amendments, also recognize the right of State and County Executive Committees generally to speak and act for the party concerning primaries. These committees appoint the necessary officials, provide supplies, canvass the votes, collect assessments, certify the successful candidates, pay expenses and do whatever is required for the orderly conduct of the primaries. Their members are not State officials; they are chosen by those who compose the party; they receive nothing from the State.

By the amendment of 1923 the Legislature undertook to declare that "all qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." *Love* v. *Wilcox, supra,* 274; 523. This enactment, held inoperative by *Nixon* v. *Herndon, supra,* (1927) was promptly repealed.

The courts of Texas have spoken concerning the nature of political primary elections and their relationship to the State. And as our present concern is with parties and legislation of that State, we turn to them for enlightenment rather than to general observations by popular writers on public affairs.

In *Waples* v. *Marrast,* 108 Texas 5, 11, 12; 184 S. W. 180, decided in 1916, the Supreme Court declared—

"A political party is nothing more or less than a body of men associated for the purpose of furnishing and main-

taining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are [*sic*] comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the State may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the Legislature to do by a proper act of the character of the one here under review. But the payment of the expenses of purely party elections is a different matter. On principle, such expenses can not be differentiated from any other character of expense incurred in carrying out a party object, since the attainment of a party purpose—the election of its nominees at the general elections through the unified vote of the party membership—is necessarily the prime object of a party primary. . . .

"To provide nominees of political parties for the people to vote upon in the general elections, is not the

business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues can not be employed in that connection. To furnish their nominees as claimants for the popular favor in the general elections is a matter which concerns alone those parties that desire to make such nominations. It is alone their concern because they alone are interested in the success of their nominees. The State, as a government, can not afford to concern itself in the success of the nominees of any political party, or in the elective offices of the people being filled only by those who are the nominees of some political party. Political parties are political instrumentalities. They are in no sense governmental instrumentalities. The responsible duties of the State to all the people are to be performed and its high objects effected without reference to parties, and they have no part or place in the exercise by the State of its great province in governing the people."

Koy v. *Schneider,* 110 Texas, 369, 376, 218 S. W. 479; 221 S. W. 880 (April 21, 1920)—" The Act of the Legislature deals only with suffrage within the party primary or convention, which is but an instrumentality of a group of individuals for the accomplishment of party ends." And see *id.* pp. 394 *et seq.*

Cunningham v. *McDermett,* 277 S. W. 218, (Court of Civil Appeals, Oct. 22, 1925)—"Appellant contends that the Legislature by prescribing how party primaries must be conducted, turned the party into a governmental agency, and that a candidate of a primary, being the candidate of the governmental agency, should be protected from the machinations of evilly disposed persons.

" With this proposition we cannot agree, but consider them as they were held to be by our Supreme Court in

the case of *Waples* v. *Marrast,* 108 Tex. 5, 184 S. W. 180, L. R. A. 1917A, 253, in which Chief Justice Phillips said: ' Political parties are political instrumentalities. They are in no sense governmental instrumentalities.' "

Briscoe v. *Boyle,* 286 S. W. 275, 276 (Court Civil Appeals, July 2, 1926)—This case was decided by an inferior court while the Act of 1923, Ch. 32, § 1, amending Art. 3093, was thought to be in force—before *Nixon* v. *Herndon, supra,* ruled otherwise. It must be read with that fact in mind. Among other things, the court said—" In fine, the Legislature has in minute detail laid out the process by which political parties shall operate the statute-made machinery for making party nominations, and has so hedged this machinery with statutory regulations and restrictions as to deprive the parties and their managers of all discretion in the manipulation of that machinery."

Love v. *Wilcox, supra,* 272, (Sup. Ct., May 17, 1930)—" We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall participate as voters or candidates in its conventions or primaries. We have no such state of facts before us. The respondents claim that the State Committee has this power by virtue of its general authority to manage the affairs of the party. The statute, article 3107, Complete Tex. St. 1928 (Vernon's Ann. Civ. St. art. 3107), recognizes this general authority of the State Committee, but places a limitation on the discretionary power which may be conferred on that committee by the party by declaring that, though the party through its State Executive Committee, shall have the power to prescribe the qualifications of its own members, and to determine who shall be qualified to vote and otherwise participate, yet the committee shall not exclude anyone from participation in the party primaries because of former political views or affiliations, or because of member-

ship or non-membership in organizations other than the political party. The committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants. The effect of the statutes is to decline to give recognition to the lodgment of power in a State Executive Committee, to be exercised at its discretion. The statutes have recognized the right of the party to create an Executive Committee as an agency of the party, and have recognized the right of the party to confer upon that committee certain discretionary powers, but have declined to recognize the right to confer upon the committee the discretionary power to exclude from participation in the party's affairs any one because of former political views or affiliations, or because of refusal to take any other than the statutory pledge. It is obvious, we think, that the party itself never intended to confer upon its Executive Committee any such discretionary power. The party when it selected its State Committee did so with full knowledge of the statutory limitations on that committee's authority, and must be held to have selected the committee with the intent that it would act within the powers conferred, and within the limitations declared by the statute. Hence, the committee, whether viewed as an agency of the state or as a mere agency of the party, is not authorized to take any action which is forbidden by an express and valid statute."

Love v. *Buckner,* 49 S. W. (2d) 425, (Sup. Ct., Texas, April 21, 1932).

The Court of Civil Appeals certified to the Supreme Court for determination the question—"Whether the Democratic State Executive Committee had lawful authority to require otherwise lawfully qualified and eligible Democratic voters to take the pledge specified in the resolution adopted by the Committee at its meeting in March," 1932.

The resolution directed that no person should be permitted to participate in any precinct or county Democratic convention held for the purpose of selecting delegates to the State convention at which delegates to the National Democratic Convention are selected unless such person shall take a written pledge to support the nominees for President and Vice-President.

"The Court answers that the Executive Committee was authorized to require the voters to take the specified pledge."

It said—

"The Committee's power to require a pledge is contested on the ground that the Committee possesses no authority over the conventions of its party not granted by statute, and that the statutes of Texas do not grant, but negative, the Committee's power to exact such a pledge.

"We do not think it consistent with the history and usages of parties in this State nor with the course of our legislation to regard the respective parties or the state executive committees as denied all power over the party membership, conventions, and primaries save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party organizations including the state committees, as the repositories of party power, which the Legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends, such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership.

"Without either statutory sanction or prohibition, the party must have the right to adopt reasonable regulations for the enforcement of such obligations to the party from its members as necessarily arise from the nature and purpose of party government. . . .

"We are forced to conclude that it would not be beyond the power of the party through a customary agency such as its state executive committee to adopt regulations designed merely to enforce an obligation arising from the very act of a voter in participating in party control and party action, though the statutes were silent on the subject. . . .

"The decision in *Love* v. *Wilcox,* 119 Tex. 256, gave effect to the legislative intent by vacating action of the State Committee violative of express and valid statutes. Our answer to the certified question likewise gives effect to the legislative intent in upholding action of the State Committee in entire accord with the governing statutes as well as with party custom."

The reasoning advanced by the court to support its conclusion indicates some inadvertence or possibly confusion. The difference between statutes which recognize and those which confer power is not always remarked, *e. g.,* "With regard to the state committee's power to exact this pledge the statutes are by no means silent. The statutes do not deny the power but plainly recognize and confer same." But the decision itself is a clear affirmation of the general powers of the State Executive Committee under party custom to speak for the party and especially to prescribe the prerequisites for membership and for "voters of said political party" in the absence of statutory inhibition. The point actually ruled is inconsistent with the notion that the Executive Committee does not speak for the organization; also inconsistent with the view that the Committee's powers derive from State statutes.

If statutory recognition of the authority of a political party through its Executive Committee to determine who shall participate therein gives to the resolves of such party or committee the character and effect of action by the State, of course the same rule must apply when party

conventions are so treated; and it would be difficult logically to deny like effect to the rules and by-laws of social or business clubs, corporations, and religious associations, etc., organized under charters or general enactments. The State acts through duly qualified officers and not through the representatives of mere voluntary associations.

Such authority as the State of Texas has to legislate concerning party primaries is derived in part from her duty to secure order, prevent fraud, etc., and in part from obligation to prescribe appropriate methods for selecting candidates whose names shall appear upon the official ballots used at regular elections.

Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government.

If any political party as such desires to avail itself of the privilege of designating candidates whose names shall be placed on official ballots by the State it must yield to reasonable conditions precedent laid down by the statutes. But its general powers are not derived from the State and proper restrictions or recognition of powers cannot become grants.

It must be inferred from the provisions in her statutes and from the opinions of her courts that the State of Texas has intended to leave political parties free to determine who shall be admitted to membership and privileges, provided that none shall be excluded for reasons which are definitely stated and that the prescribed rules in respect of primaries shall be observed in order to secure official recognition of nominees therein for entry upon the ballots intended for use at general elections.

By the enactment now questioned the Legislature refrained from interference with the essential liberty of party associations and recognized their general power to define membership therein.

The words of the statute disclose such purpose and the circumstances attending its passage add emphasis. The Act of 1923 had *forbidden* negroes to participate in Democratic primaries. *Nixon* v. *Herndon* (March, 1927) *supra,* held the inhibition invalid. Shortly thereafter (June, 1927) the Legislature repealed it and adopted the Article now numbered 3107 (Rev. Stats. 1928) and here under consideration. The fair conclusion is, that accepting our ruling as conclusive the lawmakers intended expressly to rescind action adjudged beyond their powers and then clearly to announce recognition of the general right of political parties to prescribe qualifications for membership. The contrary view disregards the words, that "every political *party* . . . shall in its own way determine who shall be qualified to vote or otherwise participate in such political party"; and really imputes to the Legislature an attempt indirectly to circumvent the judgment of this Court. We should repel this gratuitous imputation; it is vindicated by no significant fact.

The notion that the statute converts the Executive Committee into an agency of the State also lacks support. The language employed clearly imports that the political party, not the State, may act through the Committee. As shown above, since the Act of 1903 the Texas laws have recognized the authority of Executive Committees to announce the party will touching membership.

And if to the considerations already stated there be added the rule announced over and over again that, when possible, statutes must be so construed as to avoid unconstitutionality, there can remain no substantial reason for upsetting the Legislature's laudable effort to retreat from

an untenable position by repealing the earlier act, and then declare the existence of party control over membership therein to the end that there might be orderly conduct of party affairs, including primary elections.

The resolution of the Executive Committee was the voice of the party and took from appellant no right guaranteed by the Federal Constitution or laws. It was incumbent upon the judges of the primary to obey valid orders from the Executive Committee. They inflicted no wrong upon Nixon.

A judgment of affirmance should be entered.

I am authorized to say that MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur in this opinion.

UNITED STATES *v.* SWIFT & CO. ET AL.*

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 568. Argued March 17, 18, 1932.—Decided May 2, 1932.

1. A court of equity has power to modify a continuing decree of injunction which is directed, not to the protection of rights fully accrued upon facts substantially permanent, but to the supervision of future conduct in relation to changing conditions. P. 114.
2. This power, if not reserved expressly in the decree, is still inherent; and it is the same whether the decree was entered by consent or after litigation. *Id.*
3. The decree in this case is to be treated as a judicial act, not as a contract; the consent to it was directed to events as they then were and was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be. P. 115.

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* Together with No. 569, *American Wholesale Grocers Assn. et al.* v. *Swift & Co. et al.;* and No. 570, *National Wholesale Grocers Assn.* v. *Same.*

4. Mere size is not an offense against the Sherman Act unless it amounts to a monopoly; but size carries with it opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. P. 116.
5. By a decree entered on consent in a suit brought by the United States under the Sherman Act, a monopolistic combination of meat packers was dissolved and the units that composed it were individually enjoined from selling meat at retail and also from continuing to trade, whether at wholesale or at retail, in "groceries," i. e., in certain food-stuffs and other commodities not within the meat industry. The reasons for this last provision were (1) that, because of its great size and its ownership of refrigerator cars, branch houses and other special facilities incident to its meat business, each of the defendants was in a position to distribute groceries with substantially no increase of overhead, and, by lowering prices temporarily, could eliminate competition of rivals less fortunately situated; and (2) that by their conduct they had proved their disposition to do this. Upon an application, years later, to modify the injunction so as to permit wholesaling of groceries, *Held:*

   (1) The question is not of reviewing the decree to determine whether it was right or wrong originally, but is whether, having been made to include the collateral lines of trade with the consent of each defendant, it should now be relaxed because of changed conditions. P. 119.

   (2) The changes that would justify removing this restraint would be such as did away with the reasons upon which it was founded. *Id.*

   (3) In the absence of proof that the reasons for the restraint have vanished, or that the hardships of the decree amount to oppression, the injunction should not be modified. P. 117 *et. seq.*

Reversed. (For opinion below see U. S. Daily, Jan. 6, 1931.)

APPEALS from a decree modifying an injunction in a suit under the Sherman Law. For other phases of the same litigation, see *Swift & Co.* v. *United States,* 276 U. S. 311, and *United States* v. *California Canneries,* 279 U. S. 553. One of the present appeals was by the United States; the other two were by associations of wholesale grocers, which intervened to oppose the application.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher,* and *Messrs. Charles H. Weston*

and *Hammond E. Chaffetz* were on the brief, for the United States.

Mr. Edgar Watkins, with whom *Messrs. Mac Asbill* and *Edgar Watkins, Jr.,* were on the brief, for the American Wholesale Grocers Assn. et al., appellants.

Mr. Wm. C. Breed, with whom *Messrs. Dana T. Ackerly, Sumner Ford,* and *Edward A. Craighill, Jr.,* were on the brief, for the National Wholesale Grocers Assn., appellants.

Mr. Frank J. Hogan, with whom *Messrs. Paul M. Godehn, Henry Veeder, Charles J. Faulkner, Jr.,* and *Nelson T. Hartson* were on the brief, for Swift & Co. et al., appellees.

The Government consented to a modification of the consent decree if there were a proper showing of changed conditions.

Injunctive decrees are always subject to modification because of changed conditions, regardless of the expiration of the time for taking an appeal. *Lowe* v. *Cemetery Assn.,* 75 Neb. 85; *Larson* v. *Minnesota N. W. Elec. Ry. Co.,* 136 Minn. 423; *Emergency Hospital* v. *Stevens,* 146 *Md.* 159; *Ladner* v. *Siegel,* 298 Pa. 487, s. c., 68 A. L. R. 1172, 1180. See also *American Press Assn.* v. *United States,* 245 Fed. 91.

Consent decrees entered in antitrust proceedings may be modified upon a proper showing of changed conditions even if the Government expressly refuses to consent to modification. *United States* v. *New York, N. H. & H. R. Co.,* D. C. S. D., N. Y., Equity Cause No. 11,301 (not reported); *United States* v. *Discher,* 255 Fed. 719; *United States* v. *Dupont Co.,* 273 Fed. 869. See also *Marietta Chair Co.* v. *Henderson,* 121 Ga. 399.

The Court also has power to modify the decree because of the reservation of this jurisdiction in the decree itself. *Swift & Co.* v. *United States,* 276 U. S. 311.

The intervener-appellants were permitted to intervene for a limited purpose long after the decree was entered and are not in a position to urge that the decree can not be modified without an unconditional consent by the Government.

Changed conditions have removed any danger of monopolistic control by the defendants.

The exclusion of the appellees as competitors in the general food industry is unjust and inequitable to them and injurious to the public.

Under present conditions the use of appellees' refrigerator cars to transport commodities other than meats will not give them any unfair advantage over their competitors.

There is no foundation in fact for the claims of alleged contumacious conduct and violation of the antitrust laws by the appellees.

By leave of Court, briefs of *amici curiae* were filed: by *Mr. Dayton Moses* on behalf of the Texas & Southwestern Cattle Raisers' Assn. et al., and by *Messrs. George A. Clough* and *R. C. Fulbright* on behalf of the American National Live Stock Assn. et al.

Mr. Justice Cardozo delivered the opinion of the Court.

A decree of the Supreme Court of the District of Columbia has modified an earlier decree of the same court which enjoined the continuance of a combination in restraint of trade and commerce.

Separate appeals, one by the United States of America, and the others by associations of wholesale grocers intervening by leave of court, have brought the case here, Judicial Code, § 238; U. S. Code, Title 28, § 345.

In February, 1920, a bill was filed by the Government under § 4 of the Act of July 2, 1890 (c. 647, 26 Stat. 209;

U. S. Code, Title 15), known as the Sherman Antitrust Act, against the five leading meat-packers in the United States to dissolve a monopoly. The packers joined as defendants were Swift & Company, Armour & Company, Wilson & Company, the Morris Packing Company, and the Cudahy Packing Company, together with their subsidiaries and also their chief officers. The charge was that by concert of action the defendants had succeeded in suppressing competition both in the purchase of live stock and in the sale of dressed meats, and were even spreading their monopoly into other fields of trade. They had attained this evil eminence through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled; through the acquisition and control of stockyards and stockyard terminal railroads; through the purchase of trade papers and journals whereby cattle raisers were deprived of accurate and unbiased reports of the demand for live stock; and through other devices directed to unified control. "Having eliminated competition in the meat products, the defendants next took cognizance of the competition which might be expected" from what was characterized as "substitute foods." To that end, so it was charged, they had set about controlling the supply of "fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese and other substitute foods ordinarily handled by wholesale grocers or produce dealers." Through their ownership of refrigerator cars and branch houses as well as other facilities, they were in a position to distribute "substitute foods and other unrelated commodities" with substantially no increase of overhead. Whenever these advantages were inadequate, they had recourse to the expedient of fixing prices so low over temporary periods of time as to eliminate competition by rivals less favorably situated. Through these and

other devices there came about in the view of the Government an unlawful monopoly of a large part of the food supply of the nation. The prayer was for an injunction appropriate to the case exhibited by the bill.

The defendants consented to dismemberment, though answering the bill and traversing its charges. With their answer there was filed a stipulation which provided for the entry of a decree upon the terms therein set forth and provided also that the decree "shall not constitute or be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." The decree entered on February 27, 1920, enjoined the defendants from maintaining a monopoly and from entering into or continuing any combination in restraint of trade and commerce. In addition they were enjoined both severally and jointly from (1) holding any interest in public stockyard companies, stockyard terminal railroads or market newspapers, (2) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of 114 enumerated food products, (principally fish, vegetables, fruit and groceries), and thirty other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities for the handling of any of these enumerated articles, (4) selling meat at retail, (5) holding any interest in any public cold storage plant, and (6) selling fresh milk or cream. No injunction was granted in respect of the sale or distribution of poultry, butter, cheese and eggs, though these had been included in the bill among the substitute foods which the defendants were seeking to engross. The decree closed with a provision whereby jurisdiction of the cause was retained for the purpose of taking such other action or adding at the foot such other relief "as may become necessary or appropriate for the carrying out and enforcement" thereof, "and for the purpose of entertaining at

any time hereafter any application which the parties may make" with reference thereto.

The expectation would have been reasonable that a decree entered upon consent would be accepted by the defendants and by those allied with them as a definitive adjudication setting controversy at rest. The events that were to follow recount a different tale. In April, 1922, the California Co-operative Canneries Corporation filed an intervening petition alleging that the effect of the injunction was to interfere with the performance by Armour & Company of a contract by which Armour had agreed to buy large quantities of California canned fruit, and praying that the decree be vacated for lack of jurisdiction. Leave to intervene was granted by the Court of Appeals of the District, which ordered " that such further proceedings thereupon be had as are necessary to determine the issue raised." In November, 1924, motions for like relief were made by Swift and by Armour, their subsidiaries and officers. The motions were denied by the Supreme Court of the District, and thereafter were considered by this court, which upheld the consent decree in the face of a vigorous assault. *Swift & Co.* v. *United States,* 276 U. S. 311. In the meantime, however, an order had been made on May 1, 1925, by the Supreme Court of the District at the instance of the California Canneries whereby the operation of the decree as a whole was suspended " until further order of the court to be made, if at all, after a full hearing on the merits according to the usual course of chancery proceedings" (see *United States* v. *California Canneries,* 279 U. S. 553, 555). This order of suspension remained in force till May, 1929, when a decision of this court swept the obstacle aside. *United States* v. *California Canneries, supra.*

The defendants and their allies had thus been thwarted in the attempt to invalidate the decree as of the date of its entry, and again the expectation would have been reasonable that there would be acquiescence in its restraints.

Once more the expectation was belied by the event. The defendants, or some of them, discovered as they thought that during the years that had intervened between the entry of the decree and its final confirmation, conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive. The discovery or supposed discovery had its fruit in the proceeding now before us. On April 12, 1930, the defendants Swift & Company and Armour & Company and their subsidiaries, being no longer under the shelter of an order suspending the injunction, filed a petition to modify the consent decree and to adapt its restraints to the needs of a new day. The prayer was that the petitioners be permitted (1) to own and operate retail meat markets; (2) to own stock in stockyard companies and terminal railroads; (3) to manufacture, sell and deal in the 144 articles specified in paragraph fourth of the decree, which for convenience will be spoken of as "groceries;" (4) to use or permit others to use their distributive facilities in handling such commodities; and one of the defendants, Swift & Company, asked in addition that the defendants be permitted to hold interests in public cold-storage warehouses and to sell fresh milk and cream. Of the five defendants named in the original suit, one, Morris & Company, sold out to Armour & Company in 1923, and discontinued business. The two other defendants, Wilson and Cudahy, did not join in the petition to modify the decree, but stated in open court that they would consent to such modification as the court might order provided it be made applicable to the defendants equally. All the requests for modification were denied except numbers 3 and 4, of which 4 is merely ancillary to 3 and calls for no separate consideration. The modification in respect of number 3 gave permission to deal at wholesale

in groceries and other enumerated commodities, but maintained the injunction against dealing in them at retail. In every other respect, the decree of February 27, 1920, was continued in force as originally entered. The modifying decree, which was entered January 31, 1931, is the subject of this appeal.

We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. The power is conceded by the Government, and is challenged by the interveners only. We do not go into the question whether the intervention was so limited in scope and purpose as to withdraw this ground of challenge, if otherwise available. Standing to make the objection may be assumed, and the result will not be changed. Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. *Ladner* v. *Siegel,* 298 Pa. St. 487, 494, 495; 148 Atl. 699; *Emergency Hospital* v. *Stevens,* 146 Md. 159; 126 Atl. 101; *Larson* v. *Minn. N. Electric Ry. Co.,* 136 Minn. 423; 162 N. W. 523; *Lowe* v. *Prospect Hill Cemetery Assn.,* 75 Neb. 85; 106 N. W. 429; 108 N. W. 978. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. *Ladner* v. *Siegel, supra.* The result is all one whether the decree has been entered after litigation or by consent. *American Press Assn.* v. *United States,* 245 Fed. 91. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been

doing has been turned through changing circumstances into an instrument of wrong. We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.

The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then had, is theirs with undiminished force today.

The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now. Their capacity to make such distribution cheaply by reason of their existing facilities is one of the chief reasons why the sale of groceries has been permitted by the modified decree, and this in the face of the fact that it is also one of the chief reasons why the decree as originally entered took the privilege away.

The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.

Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly (*United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether. It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up. It said that the privilege should be renounced forever, and this whether the units within the combination were acting collectively or singly. The combination was to be disintegrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the de-

fendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court. Groceries and other enumerated articles they were not to sell at all, either by wholesale or by retail. Even the things that they were free to sell, meats and meat products, they were not to sell by retail. The court below annulled the restraint upon sales of groceries by wholesale, but retained the prohibition in respect of sale by retail both for groceries and for meats. The one prohibition equally with the other was directed against abuse of power by the individual units after the monopoly was over; and the death of the monopoly, the breaking up of the combination, if an adequate reason for terminating one of them, is an adequate reason for terminating both.

We have said that the defendants are still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today. The meat monopoly has been broken, for the members now compete with one another. The size of the component units is substantially unchanged. In 1929, the latest year for which any figures are furnished by the record, the sales made by Swift and Armour, each, amounted to over a billion dollars; those made by all the defendants together to over $2,500,000,000; and those made by their thirteen chief competitors to only $407,000,000. Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods. The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice

to the interests of the classes whom this particular restraint was intended to protect. Much is made in the defendants' argument of the rise of the chain stores to affluence and power, and especially of chains for the sale of groceries and other foods. Nothing in that development eradicates the ancient peril. Few of the chain stores produce the foods they have for sale, and then chiefly in special lines. Much, indeed most, of what they offer, they are constrained to buy from others. They look to the defendants for their meats, and if the ban of this decree is lifted, they will look to the defendants for other things as well. Meats and groceries today are retailed at the same shops, departments of a single business. The defendants, the largest packers in the country, will thus hold a post of vantage, as compared with other wholesale grocers, in their dealings with the chains. They will hold a post of vantage in their dealings with others outside the chains. When they add groceries to meats, they will do so, they assure us, with substantially no increase of the existing overhead. Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start. The opportunity will be theirs to renew the war of extermination that they waged in years gone by.

Sporadic instances of unfair practices even in the meat business are stated in the findings to have occurred since the monopoly was broken, practices as to which the defendants' officers disclaim responsibility or knowledge. It is easy to make such excuses with plausibility when a business is so huge. They become less plausible when the size of the business is moderate. Responsibility is then centered in a few. If the grocery business is added to the meat business, there may be many instances of unfair pressure upon retailers and others with the design of forcing them to buy from the defendants and not from rival grocers. Such at any rate was the rationale of the decree of 1920. Its restraints, whether just or excessive,

were born of that fear. The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.

There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints. There was the fear that even when so acting they would still be ready and able to crush their feebler rivals in the sale of groceries and kindred products by forms of competition too ruthless and oppressive to be accepted as fair and just. Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.

What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

The decree should be reversed and the petitions dismissed. *Reversed.*

The CHIEF JUSTICE, MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

The facts on which the District Supreme Court allowed modification of parts of the 1920 consent injunction are set forth in its findings prepared in accordance with Equity Rule No. 70½. They are discussed and amplified in a painstaking opinion contained in the record. I think they are sustained by the evidence and are sufficient to support the decree.

Conditions affecting competition in the lines of business carried on by defendants have changed since 1920. Indeed, the Government, after the introduction of evidence by appellees, formally stipulated that they "are in active competition with each other" etc.[1] The facts nega-

[1] Census figures in respect of slaughtering and meat packing establishments in 1921 and 1927 are as follows:

Value of production per year:	1921	1927
$5,000 to $20,000	142	64
$20,000 to $100,000	304	267
$100,000 to $500,000	360	429
$500,000 to $1,000,000	112	163
$1,000,000 and over	266	327
Total	1,184	1,250

The relations between each of the defendant packers' production of meat and lard and total production of these articles in the United States during the years 1920 and 1929 are as follows:

tive any suggestion that danger of monopolistic control now exists. Each of the principal packers has suffered discouraging operating losses. One of them, retiring from business, sold its plants to another. The purchaser, in order to avoid failure, was compelled to refinance and has not earned reasonable profits in any year. Another, being embarrassed, passed into the hands of a receiver, was subsequently adjudged bankrupt and later reorganized. Only two have continued able to sustain themselves. It is shown without dispute that defendants' earnings, whether considered in relation to sales or to the worth of property invested, are low and substantially less than those of others carrying on the same lines of business.[2]

Since 1920 the manufacture and distribution of food have grown greatly and to a large extent have come to

	1920	1929
Swift	13.2%	15.2%
Armour (including Morris)	15.8%	14.1%
Wilson	5.2%	4.3%
Cudahy	4.0%	4.7%

[2] The following table groups the defendants' earnings and compares them with the combined earnings of 15 competitors from 1920 to 1929:

Year	Percentage of defendants' earnings on sales	Percentage of competitors' earnings on sales	Percentage of defendants' earnings on net worth	Percentage of competitors' earnings on net worth
1920	0.18	0.76	0.88	2.48
1921	[a] 3.05	[a] .17	[a] 10.27	[a] 5.80
1922	.10	2.72	.35	10.87
1923	1.58	3.40	5.65	12.00
1924	1.77	3.39	6.46	13.28
1925	1.44	2.03	5.82	9.11
1926	1.35	2.65	5.03	12.24
1927	.63	2.07	2.49	9.83
1928	1.24	3.17	5.13	14.10
1929	1.06	2.68	4.55	14.02

[a] Loss.

be carried on by integrated concerns in strong hands, which have taken over and are handling many products from the sources of production to consumers. More and more, meat—formerly distributed through shops selling little if anything else—is sold in stores carrying groceries and other articles of food. The diversification of the business of defendants permitted by the modification of the injunction is in harmony with present legitimate tendencies in the business of producing and selling meat, groceries and other articles of food. In all branches of such activities there is strong and active competition. The use by defendants of their employees and facilities for the sale and distribution of groceries as well as meat would not give them any undue advantage over their competitors. Under present conditions the relief granted below would not enable them to inflict the evils of monopoly upon any part of the food industry. The denial of that relief makes against competition intended to be preserved by the Sherman Act. Defendants should be permitted more efficiently to use their help and equipment to lessen their operating expenses. That makes for lower prices and so is in the public interest.

The wholesale grocers, represented here by objecting interveners, are not entitled to the court's protection against the competition of non-members or of defendants carrying on separately and competing actively. They may not avoid the burden of sustaining themselves in a free and open market by protestation of fear that, if allowed to engage in the grocery business at all, defendants will unfairly compete in violation of the federal antitrust laws. If and whenever shown necessary for the protection of the commerce safeguarded by the original decree, the Government may have the modified provisions restored or new ones added.

There is nothing in the original complaint that makes for reversal here. The Government's allegations were denied by answer. The decree was entered without evi-

dence or findings pursuant to a written stipulation between the Government and the defendants expressly providing that "this stipulation shall not constitute or be considered as an admission, and the rendition or entry of the decree, or the decree itself, shall not constitute or be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." And that provision was in exact words incorporated in and made a part of the decree. Thus the Government consented to, and the court adopted, this provision quite as much as the defendants consented to the other parts of the decree.

The fact that defendants thereafter applied to have the decree vacated upon grounds directed only to the power of the court to enter it ought not to be regarded as militating against them or their good faith—particularly when it is recalled that this court, when reviewing that proceeding, deemed the questions presented of sufficient importance to call for their argument a second time. 276 U. S. 311.

I am of opinion that the facts found, taken with those conceded or established by uncontradicted evidence, justly entitle appellees to the measure of relief given below, and that the modifying decree should be affirmed.

I am authorized to say that MR. JUSTICE VAN DEVANTER concurs in this opinion.

FOX FILM CORP. *v.* DOYAL ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 118. Argued January 12, 1932. Reargued March 15, 16, 1932.—Decided May 16, 1932.

1. A privilege tax on a business of licensing copyrighted motion pictures, measured by the gross receipts of royalties, is in effect a direct charge upon the royalties. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, distinguished. P. 126.

2. Copyrights, as granted under the Copyright Act, are the property of the author, in which the United States has no interest aside from the general benefits derived by the public from the labors of authors. P. 127.
3. Copyrights are not federal instrumentalities and income derived from them is not immune from state taxation. *Long* v. *Rockwood,* 277 U. S. 142, (holding otherwise as to patents) is overruled. Pp. 128, 131.
4. The principle of immunity of federal instrumentalities from state taxation and of state instrumentalities from federal taxation is confined to the protection of operations of government. P. 128.
5. The mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor does the fact that the grant is made in furtherance of a governmental policy of the United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity. P. 128.
6. A nondiscriminatory tax on the royalties from copyrights does not hamper the execution of the policy of the copyright statute. P. 131.

173 Ga. 403, affirmed.

APPEAL from a judgment, by a divided court, sustaining the dismissal of a suit to enjoin collection of state taxes.

Messrs. Wm. A. Sutherland and *Joseph B. Brennan,* with whom *Mr. Benjamin P. DeWitt* was on the brief, for appellant.

Copyrights granted by the United States are federal instrumentalities and the royalties derived therefrom are not taxable by the States. *Long* v. *Rockwood,* 277 U. S. 142; followed in *Quicksafe Mfg. Corp.* v. *Graham,* 161 Tenn. 46; *Maxwell* v. *Chemical Const. Co.,* 200 N. C. 500.

There is no basis for drawing any distinction between patents and copyrights in the present connection. Copyright and patent powers are conferred upon Congress by the Constitution in exactly the same language.

In *Educational Films Corp.* v. *Ward,* 282 U. S. 379, it was not suggested that copyrights are to be treated differently from patents with regard to state taxation. See *Long* v. *Rockwood,* 41 F. (2d) 395, 396.

A State may not tax income from federal instrumentalities under an occupation or privilege tax measured by gross receipts. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136, 140; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338.

A distinction should be drawn here between an excise tax which is measured by gross receipts and one which is measured by net receipts from a federal instrumentality. This Court has held that royalties from United States copyrights may be included in the net income which is the measure of the New York Corporate Franchise Tax. *Educational Films Corp.* v. *Ward, supra.* In that case it was following *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162 *et seq.,* which upheld a federal tax levied upon a corporate franchise, and measured by the entire corporate net income, including income from tax-exempt municipal bonds. Cf. *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 635.

It should be noticed that both the *Educational Films Corp.* case and *Flint* v. *Stone Tracy Co.,* involved corporate franchise taxes, rather than general occupation taxes such as the Georgia Gross Receipts tax. In upholding the tax in the *Educational Films Corp.* case, the three judge district court distinguished the case of *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, on the ground that the privilege tax held void in that case was not a corporate franchise tax. *Educational Films Corp.* v. *Ward,* 41 F. (2d) 395, 397. Cf. *National Life Ins. Co.* v. *United States,* 277 U. S. 508.

At least royalties from copyrights are no less immune from state taxation than receipts from interstate commerce, and it is clear that receipts from interstate commerce can not validly be taxed under the Georgia Gross Receipts Tax Act. *Gillespie* v. *Oklahoma,* 275 U. S. 501; *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Sou. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Meyer* v. *Wells,*

Fargo & Co., 223 U. S. 298; *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328–29; *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, 346.

Mr. Orville A. Park, with whom *Messrs. George M. Napier,* Attorney General of Georgia, and *J. A. Smith* were on the brief, for appellees.

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

Appellant, a New York corporation which is engaged within the State of Georgia in the business of licensing copyrighted motion pictures, brought this suit to restrain the collection of the state tax upon the gross receipts of royalties under such licenses. The tax was challenged upon the ground that copyrights are instrumentalities of the United States. On demurrer, the suit was dismissed, and the Supreme Court of the State, the Justices being equally divided in opinion, affirmed the judgment. 172 Ga. 403; 157 S. E. 664. The case comes here on appeal.

The Gross Receipts Tax Act (Georgia Laws, 1929, p. 103), describes the tax as laid "upon the privilege of engaging in certain occupations" and "upon certain business and commercial transactions and enterprises." As the tax is measured by gross receipts, the case is not ruled by *Educational Films Corp.* v. *Ward,* 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its application to gross receipts, is to impose a direct charge upon the royalties. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136, 141. See, also, *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 297; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328, 329; *New Jersey Bell Telephone Co.* v. *State Board,* 280 U. S. 338, 346. The question is thus presented whether copyrights are to be

deemed instrumentalities of the Federal Government and hence immune from state taxation.

The Constitution empowers the Congress " To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, par. 8. The production to which the protection of copyright may be accorded is the property of the author and not of the United States. But the copyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one. *Wheaton* v. *Peters,* 8 Pet. 591, 661; *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 291; *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, 362; *Caliga* v. *Inter Ocean Newspaper Co.,* 215 U. S. 182, 188. The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter. U. S. C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, should be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 422, 424. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is " at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to

further efforts for the same important objects." *Kendall* v. *Winsor,* 21 How. 322, 327, 328; *Grant* v. *Raymond,* 6 Pet. 218, 241, 242.

The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland,* 4 Wheat. 316, 436), and the immunity does not extend " to anything lying outside or beyond governmental functions and their exertions." *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an " entire absence of power " (*Johnson* v. *Maryland,* 254 U. S. 51, 55, 56), but it does not exist " where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government." *Willcuts* v. *Bunn,* 282 U. S. 216, 225.

In this instance, the mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor does the fact that the grant is made in furtherance of a governmental policy of the United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity. The disposition by the Government of public lands, in order to advance the general interest by promoting settlement, illustrates the principle and its limitation. The property of the United States is not subject to state taxation (*Van Brocklin* v. *Tennessee,* 117 U. S. 151), but the property of individual owners, although derived from the United States under its public land laws, may be taxed. The power to tax exists as soon as the ownership is changed. *Witherspoon* v. *Duncan,* 4 Wall. 210, 219.

Though the legal title remains in the Government, if the proceedings have reached the point where nothing more remains to be done by the entryman and the Government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land as subject to taxation. *Bothwell* v. *Bingham County*, 237 U. S. 642, 647.[1] Again, the possessory right of a qualified locator after discovery of minerals is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such interest from early times has been held to be vendible, inheritable, and taxable. *Forbes* v. *Gracey*, 94 U. S. 762, 766, 767; *Elder* v. *Wood*, 208 U. S. 226, 232; *Union Oil Co.* v. *Smith*, 249 U. S. 337, 349; *Irwin* v. *Wright*, 258 U. S. 219, 231.[2] It is thus apparent that the mere fact that a property right is created by statute to fulfil a governmental purpose does not make it nontaxable when it is held in private ownership and exercised for private advantage. See *Susquehanna Power Co.* v. *State Tax Commission (No. 1)*, 283 U. S. 291, 297.

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[1] See, also, *Carroll* v. *Safford*, 3 How. 441, 461; *Tucker* v. *Ferguson*, 22 Wall. 527, 572; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 505; *Irwin* v. *Wright*, 258 U. S. 219, 228, 229; *New Brunswick* v. *United States*, 276 U. S. 547, 556; *Exchange Trust Co.* v. *Drainage District*, 278 U. S. 421, 425; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282.

[2] Even the reservation to the United States, in its grant of property, of a right of user for particular governmental purposes does not necessarily withdraw the property granted from the taxing power of the State. *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375. Property in private ownership is not rendered non-taxable by the mere fact that it is the property of an agent of the Government and is used in the conduct of the agent's operations and is necessary for the agency, when Congress has not provided for its exemption. *Railroad Co.* v. *Peniston*, 18 Wall. 5, 33; *Central Pacific R. Co.* v. *California*, 162 U. S. 91, 125; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371; *Choctaw, Oklahoma & Gulf R. Co.* v. *Mackey*, 256 U. S. 531, 537; *Shaw* v. *Oil Corporation*, 276 U. S. 575, 581.

We are of the opinion that no controlling distinction can be based, in the case of copyrights, upon the character of the right granted. The argument that it is in the nature of a franchise or privilege bestowed by the Government, is met by the fact that it is not a franchise or privilege to be exercised on behalf of the Government or in performing a function of the Government. The 'mining claim' above mentioned, or the possessory right to explore and work a mine under the applicable Federal laws and regulations, may also be regarded as a franchise or privilege, but the Court found the right to be none the less taxable, observing in *Forbes* v. *Gracey, supra,* that "those claims are the subject of bargain and sale and constitute very largely the wealth of the Pacific coast States." Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the Government has in the use of the property which is the subject of the grants. After the copyright has been granted the Government has no interest in any action under it save the general one that its laws shall be obeyed. Operations of the owner in multiplying copies, in sales, in performances or exhibitions, or in licensing others for such purposes, are manifestly not the operations of the Government. A tax upon the gains derived from such operations is not a tax upon the exertion of any governmental function.

In *Gillespie* v. *Oklahoma,* 257 U. S. 501, the question concerned income derived from leases of restricted Indian lands. The leases were deemed to be instrumentalities of the United States in carrying out its duties to the Indians, and the Court, speaking through Mr. Justice Holmes, concluded that the tax imposed by Oklahoma was "a direct

hamper upon the effort of the United States to make the best terms that it can for its wards." *Id.*, p. 506. A similar result was reached in the recent ruling in relation to what was deemed to be the correlative case of leases by Oklahoma of lands held by the State for the support of its schools. *Burnet* v. *Coronado Oil & Gas Company,* 285 U. S. 393. These decisions are not controlling here. The nature and purpose of copyrights place them in a distinct category and we are unable to find any basis for the supposition that a nondiscriminatory tax on royalties hampers in the slightest degree the execution of the policy of the copyright statute.

We agree, however, with the contention that in this aspect royalties from copyrights stand in the same position as royalties from the use of patent rights, and what we have said as to the purposes of the Government in relation to copyrights applies as well, *mutatis mutandis,* to patents which are granted under the same constitutional authority to promote the progress of science and useful arts. The affirmance of the judgment in the instant case cannot be reconciled with the decision in *Long* v. *Rockwood,* 277 U. S. 142, upon which appellant relies, and in view of the conclusions now reached upon a re-examination of the question, that case is definitely overruled.

Judgment affirmed.

McCORMICK & CO., INC. ET AL. *v.* BROWN, STATE COMMISSIONER OF PROHIBITION OF WEST VIRGINIA, ET AL.

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

No. 599. Argued April 22, 1932.—Decided May 16, 1932.

Alcoholic preparations, made and sold for medicinal, mechanical, toilet, and culinary purposes, *held* subject to provisions of the West Virginia prohibition statute, and regulations thereunder, by which

nonresident manufacturers and wholesalers, though holding federal permits issued under the National Prohibition Act, are required to obtain state permits and pay state license fees before shipping such products into the State, even to purchasers holding state licenses as retail dealers.

1. The power of a State to prohibit sale of alcoholic liquor as a beverage, carries with it the power to supervise the sale of other alcoholic preparations which normally will be, but possibly may not be, used legitimately. P. 139.

2. The Act of March 1, 1913, called the Webb-Kenyon Act, by which interstate shipments and sales of intoxicating liquor were stripped of their immunity from the prohibitory laws of the State into which it is taken, was not repealed by the Eighteenth Amendment or by the National Prohibition Act, but is still in force. P. 140.

3. State prohibition laws derive their force from the power originally belonging to the States and preserved to them by the Tenth Amendment, and are not superseded by the Eighteenth Amendment where they do not sanction what it forbids. P. 141.

4. The power of a State by administrative control to prevent traffic in products of intoxicating alcoholic content unless so treated as to render them unfit for beverages, was made applicable by the Webb-Kenyon Act to interstate transactions. P. 141.

5. The Webb-Kenyon Act was not limited in that respect by the provisions of the National Prohibition Act authorizing traffic in certain articles containing alcohol, put up for non-beverage uses, when manufactured and prepared for market under federal permits. P. 142.

6. The Webb-Kenyon Act prohibits the shipment or transportation of intoxicating liquor into a State when it "is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." *Held* that sales by wholesalers who have not the permits required by West Virginia, to retailers having local permits to receive, store and sell the kind of alcoholic products shipped, are directly within the terms of the Act, since the state law does not make the permits issued to the local dealers a substitute for those required of the wholesalers. P. 143.

7. State legislation, though it can not give validity to acts prohibited by the Eighteenth Amendment, may provide additional instruments to make prohibition effective. *Id.*

Affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill for an injunction to restrain officers of West Virginia from requiring the appellants to obtain state licenses and to pay license fees before shipping into the State certain products containing alcohol.

Messrs. Philip C. Friese and *H. D. Rummel* for appellants.

Messrs. W. G. Brown and *R. Dennis Steed,* Assistant Attorney General of West Virginia, with whom *Mr. H. B. Lee,* Attorney General, was on the brief, for appellees.

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

This suit was brought by nonresident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the State Commissioner of Prohibition, and to pay an annual license fee of $50, before shipping certain products into the State to purchasers there for resale.

The bill alleged that, while these products contained ethyl alcohol, they were used and usable solely for medicinal, mechanical, toilet, and culinary purposes, and were not intoxicating liquors or fit for beverage purposes within the meaning of the laws of the United States; that the products were covered by permits issued to the complainants respectively under the National Prohibition Act; and that the shipment and sales in question were to dealers in West Virginia holding state permits. The bill charged that the requirements of the state officers, purporting to act under state legislation, constituted an interference with interstate commerce in violation of the commerce clause of the Federal Constitution, and that the complainants were without remedy at law. In their answer, defendants (appellees) denied that the products in question were used and usable solely for the purposes

alleged and that none of the products were "intoxicating liquors" and that they were non-intoxicating in fact; and, while admitting that the complainants held permits under the National Prohibition Act, defendants asserted the validity of the state laws and regulations by which state permits and the payment of the license fee were required.

The District Court, composed of three judges (Jud. Code, § 266, U. S. C., § 380) heard and denied, upon the pleadings and affidavits, an application for an interlocutory injunction. Upon final hearing no further evidence was introduced and from the final decree, dismissing the bill, this appeal has been taken.

The Constitution of West Virginia (Art. VI, § 46) prohibits "the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature," except "such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes" and "denatured alcohol for industrial purposes," dealings in which are permitted under legislative regulations. The legislature was directed to enact such laws as might be necessary to carry these provisions into effect.

The legislative act now in force is Chapter 60 of the West Virginia Official Code (1931). The definition of "liquors" in section one of Article one embraces "all liquids, mixtures or preparations, whether patented or not, which will produce intoxication."[1] By section four, sell-

[1] "§ 1. The word 'liquors,' as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this chapter; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing one-half of one per cent or more of alcohol, by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors,' as used in this chapter."

ing or soliciting or receiving orders for "any liquors" is penalized, "except as hereinafter provided"; and "in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier," the sale is deemed to be made in the county of delivery.[2] Exceptions, found in section five,[3] include sales of wine for sacra-

[2] "§ 4. Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for, any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, . . . and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

[3] "§ 5. The provisions of this chapter shall not be construed to prevent . . . the manufacture and sale of pure grain alcohol, at wholesale, to druggists, hospitals, sanitariums, laboratories and manufacturers for medicinal, pharmaceutical, scientific and mechanical purposes, or of wine for sacramental purposes by religious bodies, or to prevent the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law; or to prevent the sale by druggists, through pharmacists, of pure grain alcohol for medicinal, scientific, pharmaceutical and mechanical purposes; or to prevent the use of such alcohol by physicians, dentists and veterinarians in the practice of their profession; or to prevent the medication and sale of pure grain alcohol according to formulae and under regulations of the national prohibition act; . . . *Provided,* That no one shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prohibition so to do. Forms of application and permits shall be prepared by the commissioner and a fee for each permit issued shall be collected by him as follows:

"(a) All manufacturers of liquors and wholesale dealers therein shall pay a fee of fifty dollars for each permit; (b) all purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medi-

mental purposes or of "any United States pharmacopeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law," and this section contains a proviso that no one "shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prohibition so to do." Permits are to be issued for the calendar year, and fees for each permit are prescribed, being fifty dollars in the case of manufacturers and wholesale dealers, ten dollars in the case of purchasers in wholesale quantities of ethyl alcohol, whether pure, medicated or denatured, for use as provided, and two dollars in the case of purchasers, except licensed druggists, in wholesale quantities of liquors, as defined in section one, for sale at retail. By section nine, common carriers are forbidden to carry into the State, or within the State, intoxicating liquors except "pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five."[4] Section eleven makes it unlawful

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cated, or denatured, for use as herein provided, shall pay a fee of ten dollars for each permit; (c) all purchasers in wholesale quantities of liquors as defined in section one of this article for sale at retail, except duly licensed druggists, shall pay a fee of two dollars for each permit; . . .

"Permits shall be issued for the calendar year and shall expire on the thirty-first day of December next following the issuance thereof. . . . *Provided further,* That such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the federal prohibition commissioner and in accordance with regulations issued in pursuance of the national prohibition act."

[4] The provision in Section 9 is as follows: "*Provided further,* That no common carrier, for hire, nor other person, for hire, or without hire, shall bring or carry into this State, or carry from one place to another within this State, intoxicating liquors for another, even when

for nonresident dealers to sell to persons within the State intoxicating liquors or any of the preparations described, when they " are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State "; and in case of shipment or delivery by a carrier, the county in which the delivery is made is to be taken as the place of sale.[5]

Section three of Article two of Chapter 60 provides that the manufacture and sale of " liquors " by wholesale druggists and other dealers shall be under the supervision of the commissioner of prohibition and governed by the regulations he may from time to time prescribe. The commissioner's regulations place nonresident manufacturers in the category of " wholesale dealers " and define the business of such dealers as " that of selling at wholesale ethyl alcohol in any form . . . and wine as permitted and supervised by the Federal Government; or selling . . . any liquid, mixture, or preparation . . . which will produce intoxication, or coming within the definition of

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intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article."

[5] " § 11. . . .

" It shall be unlawful for any nonresident vendor, dealer or other person to sell or furnish any malt, brewed, vinous, or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State, when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State; and in case of such sale or furnishing in which a shipment or delivery of such liquors is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

'liquors' in section one" of the statute. These dealers, it is provided, upon obtaining a permit from the state commissioner, may sell such liquors at wholesale for medicinal, pharmaceutical, scientific and mechanical purposes to persons holding permits to purchase. The regulations also classify alcoholic preparations, as those regarded as beverages, the sale of which is forbidden, and those which comprise articles having a recognized legitimate use and which can be sold under permits, the latter including a large variety of preparations with a described alcoholic content, such as proprietary medicines, tonics, cordials, elixirs, lotions, extracts and flavors, and various compounds bearing trade names.

Complainants' products fall within these regulations. They contain ethyl alcohol ranging, according to the allegation of the bill as to the foodstuffs and toilet articles of one of the complainants, "from four per cent. to ninety per cent. ethyl alcohol by volume." There is no charge that applications by complainants for permits have been denied. On the contrary, the bill of complaint alleged that complainants have either procured the required permits from the state commissioner, on the payment of the prescribed fee, or "have refused to procure such permits and refrained from shipping said products into said State." The question is simply one of the authority of the state officers to demand that state permits be obtained.

The District Court found that the products in question are "liquors" within the meaning of the state statute, and we see no ground for a contrary conclusion. *State* v. *Muncey,* 28 W. Va. 494; *State* v. *Good,* 56 W. Va. 215; 49 S. E. 121; *State* v. *Durr,* 69 W. Va. 251; 71 S. E. 767; *State* v. *Henry,* 74 W. Va. 72; 81 S. E. 569. Nor do we think that the regulations of the commissioner go beyond the authority which the statute confers. No state decision to that effect has been cited, and examination of the statutory provisions we have quoted gives no support to

the contention that the commissioner has misconceived his duty. On the application for injunction the complainants presented affidavits to show that their products, as required by Federal law and regulations, were unfit for beverage purposes and that consumption of them as a beverage "would involve serious gastric irritations or disorders, or nausea, and, in some cases, if persisted in, serious illness," and that the products were sold strictly "for medicinal, toilet, and culinary purposes." Defendants denied the unfitness for beverage use, and, in support, submitted an affidavit of the chemist who had been employed by the state department to examine preparations covered by the commissioner's regulations, including products of this sort submitted by one of the complainants on its application for a state permit. This witness testified that these various preparations, falling within the above-mentioned classes of the regulations, are such as "will produce intoxication and drunkenness" and he based this statement on the "alcoholic content, the potability and the physiological effect of the final product, and upon his actual experience and observation that said preparations are intoxicating in fact."

We may lay the controversy of fact on one side, so far as it relates to the particular products of complainants, as the question is not merely that of the normal uses and purposes of these preparations which have alcoholic content and come within the state law, but whether, in view of that content and of possible abuses, the State has the power to put the sale of such products under the prescribed administrative supervision. There is no basis for objection because of any arbitrariness in the State's requirements, as they are appropriately directed to the enforcement of its prohibitory legislation. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204; *Eberle* v. *Michigan,* 232 U. S. 700, 706; *Vigliotti* v. *Pennsylvania,* 258 U. S. 403, 407. The question before us is thus the narrower one

whether the State's authority extends to the complainants' transactions in the light of their interstate character and of the Federal legislation asserted to be applicable.

Prior to the adoption of the Eighteenth Amendment, the Congress, exerting its constitutional power of regulation, had prohibited the movement in interstate commerce into any State of intoxicating liquors for purposes prohibited by the state law. The Webb-Kenyon Act [6] (Mar. 1, 1913, c. 90, 37 Stat. 699; U. S. C., Tit. 27, § 122). See, also, the Wilson Act (Aug. 8, 1890, c. 728, 26 Stat. 313; U. S. C., Tit. 27, § 121) and the Reed Amendment (Mar. 3, 1917, c. 162, § 5, 39 Stat. 1069; U. S. C., Tit. 27, § 123). With direct application to the prohibition law of West Virginia (the predecessor of the present statute and having a similar definition of "liquors," West Virginia Laws, 1913, c. 13), this Court held that the purpose of the Webb-Kenyon Act "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at

[6] The Webb-Kenyon Act is entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and provides: "That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

naught." The Act was said to operate " so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling." *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 324. See, also, *Seaboard Air Line Ry.* v. *North Carolina,* 245 U. S. 298, 303, 304; *United States* v. *Hill,* 248 U. S. 420, 424, 425; *Williams* v. *United States,* 255 U. S. 336; *Rainier Brewing Co.* v. *Great Northern Co.,* 259 U. S. 150, 152. The appellants do not urge, and there would be no ground for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of repealing the Webb-Kenyon Act. The Congress has not expressly repealed that Act, and there is no basis for an implication of repeal. The Eighteenth Amendment and the National Prohibition Act have not superseded state prohibitory laws which do not authorize or sanction what the constitutional amendment prohibits. *Vigliotti* v. *Pennsylvania, supra.* Such laws derive their force not from that amendment but from power originally belonging to the States and preserved to them by the Tenth Amendment. *United States* v. *Lanza,* 260 U. S. 377, 381; *Hebert* v. *Louisiana,* 272 U. S. 312, 315; *Van Oster* v. *Kansas,* 272 U. S. 465, 469. As the prohibitory legislation of the States may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions.

The appellants contend, however, that the products in question are not " intoxicating liquors " within the meaning of the Webb-Kenyon Act. They insist that this term as used in that Act must be defined in the light of the terms of the subsequent National Prohibition Act. They refer to the exemptions in the later Act with respect to such articles as medicinal and toilet preparations, pro-

prietary medicines and flavoring extracts, when manufactured and prepared for the market under required permits. U. S. C., Tit. 27, § 13. But these provisions were not in contemplation at the time of the passage of the Webb-Kenyon Act and cannot operate to restrict the natural significance of the terms of that Act as they were adopted by the Congress and have been left unrepealed. That Act did not attempt to establish a definition of intoxicating liquors. It expressly referred to the prohibitory laws of the States, the enforcement of which it was intended to aid. The Congress undoubtedly recognized, as this Court had decided, that the State could prohibit the sale of liquor absolutely or conditionally. It could prohibit sale as a beverage and permit sale for medicinal and like purposes. It could prohibit sale by merchants and permit it by licensed druggists. *Eberle* v. *Michigan, supra; Kidd* v. *Pearson,* 128 U. S. 1, 19; *Rippey* v. *Texas,* 193 U. S. 504, 509; *Crane* v. *Campbell,* 245 U. S. 304, 307; *Vigliotti* v. *Pennsylvania, supra.* If preparations by reason of their alcoholic content would be intoxicating, and could be used for beverage purposes, unless so treated as to render them unfit for such purposes, the States were clearly at liberty to insist, within the range of their authority, upon being satisfied that such preparations had been so treated and to establish administrative control to that end. *Seaboard Air Line Ry.* v. *North Carolina, supra.* When the definition of intoxicating liquors, as set forth in state legislation and as applied to such preparations, is not an arbitrary one—and it cannot be regarded as arbitrary in the instant case—the Webb-Kenyon Act must be taken as referring to the liquors which the state legislation describes, or the plain purpose of the Act would be frustrated. The same reasons which lead to the conclusion that the Webb-Kenyon Act was not repealed by the National Prohibition Act, compel the view that the

scope of the application of the former was in no way limited by the latter.

The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made. The Act prohibits the shipment or transportation of intoxicating liquor into a State when it "is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, that is, to those who are authorized by the state commissioner of prohibition "to receive, store, and sell the same." The short answer is that the state law does not make the permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the State for the purpose of there consummating their sales without the described permits would fall directly within the terms of that Act.

In determining the ultimate question of the validity, not simply of the State's prohibitory legislation in its general features, but, in particular, of its requirement of permits as to products for which federal permits have been issued, we need only refer to the criterion established by the decisions of this Court. While state legislation cannot give validity to acts prohibited by the Eighteenth

Amendment, that legislation may provide additional instruments to make prohibition effective. That the State may adopt appropriate means to that end was expressly provided in section two of the Amendment in declaring that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." *National Prohibition Cases,* 253 U. S. 350, 387; *Vigliotti* v. *Pennsylvania, supra.* The Court said in *United States* v. *Lanza, supra:* "In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. . . . We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." See, also, *Hebert* v. *Louisiana, supra.* The mere fact that a state statute has broader scope than a provision of the National Prohibition Act upon the same subject does not affect its validity. *Van Oster* v. *Kansas, supra.* Different and higher penalties may be provided by the state law. *Edwards* v. *Georgia,* 150 Ga. 754; 105 S. E. 363, affirmed 258 U. S. 613; *Chandler* v. *Texas,* 89 Tex. Cr. 306; 232 S. W. 317, affirmed 260 U. S. 708. State legislation imposing punishment for the sale of liquor without a state license may be enforced. *Molinari* v. *Maryland,* 141 Md.

565; 119 Atl. 291, affirmed 263 U. S. 685, 686; *Weisengoff* v. *Maryland,* 143 Md. 638; 123 Atl. 107, affirmed 263 U. S. 685, 686; *Colora* v. *New Jersey,* 97 N. J. Law 316; 117 Atl. 702, affirmed 267 U. S. 576. In *Idaho* v. *Moore,* 36 Idaho 565; 212 Pac. 349, affirmed 264 U. S. 569, Moore was convicted of having intoxicating liquor in his private dwelling in violation of the state law, notwithstanding the stipulation that his possession was "permitted by and lawful under the provisions of section 33 of the National Prohibition Act." U. S. C., Tit. 27, § 50. See, also, *North Carolina* v. *Campbell,* 182 N. C. 911; 110 S. E. 86, affirmed 262 U. S. 728; *Barnes* v. *New York,* 266 U. S. 581; *Colonial Drug & Sales Co.* v. *Western Products Co.,* 54 F. (2d) 216.

Applying the principle thus repeatedly declared, we are of the opinion that the provisions of the National Prohibition Act relating to the issue of permits did not supersede the authority of West Virginia to require state permits, as in the instant case, in the appropriate enforcement of its valid legislation. *Decree affirmed.*

BRADFORD ELECTRIC LIGHT CO., INC. *v.* CLAPPER, ADMINISTRATRIX.

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

No. 423. Argued February 15, 16, 1932.—Decided May 16, 1932.

1. A state statute is a "public act" within the meaning of the full faith and credit clause of the Federal Constitution. P. 154.
2. A federal court is bound equally with courts of the State in which it sits to observe the command of the full faith and credit clause. P. 155.
3. As regards the question whether a State is bound to recognize in its courts an Act of another State which is obnoxious to its public policy, different considerations may apply where the right claimed

under the Act is the cause of action sued on, and where it is set up merely as a defense to an asserted liability. P. 160.

4. Through a contract made in Vermont, an employer domiciled and having its principal place of business there, and its employee, also a resident of that State, tacitly accepted the Vermont Workmen's Compensation Act, which provides that injury or death of an employee suffered in Vermont or elsewhere in the course of his employment, shall be compensated for only as by the Act provided, without recourse to actions based on tort, which it expressly excludes. The employee died of an injury he received while casually in New Hampshire about the employment, and left no New Hampshire dependents. *Held*:

   (1) That the Vermont statutory agreement is a defense to the employer against an action for death by wrongful act, brought in New Hampshire, in the federal court, by the personal representative of the deceased employee. P. 153.

   (2) Refusal to recognize such defense is a failure to give full faith and credit to the Vermont statute, in violation of Art. IV, §1, of the Federal Constitution. P. 154.

   (3) To recognize as a defense in another State the statutory relationship and obligations to which the parties to the employment subjected themselves under the Vermont Act, is not to give that Act an extraterritorial application. P. 155.

   (4) The fact that the New Hampshire Compensation Act permits employees to elect, after the injury, whether to sue for negligence or to avail themselves of its compensation provisions, does not establish that it would be obnoxious to New Hampshire public policy to give effect, *ut supra*, to the Vermont statute in cases involving only the rights of residents of that State. P. 161.

5. Acceptance of the New Hampshire Workmen's Compensation Act by a Vermont employer in order to save certain common law defenses if sued by employees resident in the former State *held* not an abandonment of the employer's defense under the Vermont Act in respect of an employee who resided in Vermont and was injured while casually working in New Hampshire. P. 162.

51 F. (2d) 992, 999, reversed.

CERTIORARI to review the affirmance of a recovery in an action for death by wrongful act. See 284 U. S. 221.

Messrs. Stanley M. Burns and *George T. Hughes*, with whom *Mr. Wm. E. Leahy* was on the brief, for petitioner.

Mr. Robert W. Upton, with whom *Mr. John E. Benton* was on the brief, for respondent.

The plaintiff's intestate having received the injuries which caused his death in New Hampshire, the rights of the parties depend primarily upon the laws of that State. *Martin* v. *West,* 222 U. S. 191; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52; *Gould's Case,* 215 Mass. 480; *Saloshin* v. *Houle,* 155 Atl. 47.

The New Hampshire statute providing for the survival of actions for wrongful death is not based upon Lord Campbell's Act. The measure of damages is not the loss to dependents. *Imbriani* v. *Anderson,* 76 N. H. 491. As originally enacted, the statute was quasi penal, and gave rights only as against railroads. The essential characteristics of this statute have been preserved. *Holland* v. *Morley Button Co.,* 83 N. H. 482. See also *Dillon* v. *Railway,* 73 N. H. 367; *Davis* v. *Herbert,* 78 N. H. 179. They are opposed to the law in most jurisdictions. Decisions from other jurisdictions might aid but would scarcely control in its interpretation. Likewise, in the development of workmen's compensation New Hampshire has not followed the general trend.

New Hampshire recognizes that compensation does not compensate the injured employee for his loss. The right of the employee to recover his entire loss when his injury is due solely to the negligence of his employer has been maintained. Under the New Hampshire system the benefits of compensation are assured to the employee and the inflexibility and injustice of an exclusive system of compensation largely eliminated. The Legislature of New Hampshire has repeatedly refused to abolish the right of election after injury. The differences in policy between New Hampshire and the other States are such that the rights of the parties to this action may not properly be determined by decisions from other jurisdictions.

Having set up its acceptance of the New Hampshire Act and obtained the benefit of it in this action, the peti-

tioner ought not to be heard to assert that the acceptance did not extend to the respondent's intestate. The legal consequences naturally attaching to the petitioner's acceptance are not enlarged if the petitioner is held to the law of the trial. The acceptance was unlimited.

A contract intended to exempt the employer from liability for negligence is against the public policy of New Hampshire and invalid. *Saloshin* v. *Houle,* 155 Atl. 47.

It is asserted " that compensation acts are not contrary to the public policy." But in so far as this may be true, the result has been attained by legislative action. At common law contracts intended to relieve the employer from liability from future negligence are invalid. *Piper* v. *Railroad,* 75 N. H. 228; *Johnston* v. *Fargo,* 184 N. Y. 379. The reasonableness of the consideration does not enter into the determination of the validity of such agreements. Consequently, agreements embodying compensation principles have been held valid only if they preserve to the employee " the right to elect whether he will sue his employer or accept benefits from the association." *Chicago, B. & Q. R. Co.* v. *Miller,* 76 Fed. 439; *Twaits* v. *Pennsylvania R. Co.,* 77 N. J. Eq. 103. See also *Day* v. *Atlantic Coast Line R. Co.,* 179 Fed. 26; *Johnson* v. *Philadelphia & Reading R. Co.,* 163 Pa. 127; *Otis* v. *Pennsylvania Co.,* 71 Fed. 136; Labatt, Master & Servant, 2d ed., § 1921.

In determining whether such a contract as that said to have been made in Vermont ought to be enforced in New Hampshire, a fair test is to inquire whether such a contract if made in New Hampshire would be valid. It is plain that it would not be enforcible. *Piper* v. *Railroad,* 75 N. H. 228; *Conn* v. *Company,* 79 N. H. 450; *Wessman* v. *Railroad,* 84 N. H. 475.

The New Hampshire Compensation Act applies to all employees and employers engaged in specified employments. No distinction based upon the place of hire is

recognized. The purpose of this legislation is preventive as well as remedial. The enlarged liability has a tendency to reduce industrial accidents. If the employee were permitted by contract to exempt the employer from his liability for negligence, this purpose might be defeated. The situation is similar to that arising under the federal laws relating to the safety of employees of railroads. Contracts intended to relieve the railroad from the obligations imposed by these laws have been regarded as against public policy. *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603. For similar reasons the attempts to extend state compensation laws to accidents subject to maritime law have failed. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205.

The respondent's action sounds in tort and is therefore controlled by the law of the place of injury. *Gould's Case,* 215 Mass. 480.

In Vermont, the provisions of the Compensation Act were made a part of the contract of hiring, unless the employer or employee gave written notice that its provisions were not to apply. But the laws of Vermont can have no extra-territorial effect. In New Hampshire the parties were free to modify this contract. The petitioner maintained a large portion of its distribution system in New Hampshire and might properly bring its men when at work there under local law. The petitioner, by written declaration, accepted the compensation provisions of the Act of New Hampshire.

The petitioner's acceptance, at the least, was an offer to its employees injured in New Hampshire to pay compensation or to respond in damages according to the provisions of the Compensation Act. This offer was accepted by the respondent. The election of both parties to have their rights determined by the laws of New Hampshire, constituted an agreement superseding the alleged contract, based upon the Compensation Act of Ver-

mont. The parties omitted no act necessary to have their rights determined by the laws of New Hampshire.

The theory that the compensation law of the place of hire determines the rights of parties must not be extended so far as to deny the employer and employee the right to modify the contract when the parties enter another jurisdiction. Moreover, it is not the contract of hire, but the relation arising therefrom upon which the law should operate. The obligation to pay compensation arises out of the relation of master and servant rather than out of the contract by which that relation is created. The relation is brought into existence from day to day as the service is performed. Consequently, when the employer and employee both enter another State, there is no sound reason why the law there should not determine the obligations arising out of the relation of master and servant. *American Radiator Co.* v. *Rogge,* 87 N. J. L. 436; *Doutwright* v. *Champlin,* 91 Conn. 524; *American Mut. Liability Ins. Co.* v. *McCaffrey,* 37 F. (2d) 870, cert. den., 281 U. S. 751; *Carl Hagenback & G. W. Show Co.* v. *Randall,* 75 Ind. App. 417; *Johns-Manville, Inc.* v. *Thrane,* 80 Ind. App. 432; *Smith* v. *Heine Safety Boiler Co.,* 119 Me. 552; *Ocean Accident & G. Corp.* v. *Industrial Commission,* 32 Ariz. 265; *Johnson* v. *Nelson,* 128 Minn. 158; *Mitchell* v. *St. Louis Smelting & Rfg. Co.,* 202 Mo. App. 251; *Ginsburg* v. *Byers,* 171 Minn. 366.

Mr. Justice Brandeis delivered the opinion of the Court.

This action for damages was brought in a court of New Hampshire under the employers' liability provisions of the Employers' Liability and Workmen's Compensation Act of that State, N. H. Public Laws, 1926, c. 302, to recover for the death of Leon J. Clapper, which the plaintiff claimed was due to his employer's negligence. The case

was removed to the federal court on the ground of diversity of citizenship; the defendant, Bradford Electric Light Co., Inc., being a citizen and resident of Vermont and the plaintiff, Jennie M. Clapper, administratrix, being a citizen and resident of New Hampshire. It appeared that the Company had its principal place of business in Vermont and lines extending into New Hampshire; that Leon Clapper, a resident of Vermont, was employed by it there as a lineman for emergency service in either State; and that in the course of his duties, he was sent to restore some burned-out fuses at a substation in New Hampshire and while doing so was killed. The Company, invoking the full faith and credit clause of the Federal Constitution, set up as a special defense that the action was barred by provisions of the Vermont Compensation Act; that the contract of employment had been entered into in Vermont, where both parties to it then, and at all times thereafter resided; and that the Vermont Act had been accepted by both employer and employee as a term of the contract.

The District Court ruled that the action was properly brought under the laws of the State of New Hampshire; that the action was based on a tort occurring in that State; and that the Vermont Workmen's Compensation Act had no extra-territorial effect. Accordingly, that court rejected the special defense and denied a motion to dismiss. The case was tried three times before a jury, the third trial resulting in a verdict for the plaintiff in the sum of $4,000. The judgment entered thereon was first reversed by the Circuit Court of Appeals. But upon a rehearing, the judgment of the trial court was affirmed, one judge dissenting. 51 F. (2d) 992, 999. The Company filed in this Court both an appeal and a petition for writ of certiorari. The appeal was denied, and certiorari granted. 284 U. S. 221.

The Vermont Workmen's Compensation Act provides that a workman hired within the State shall be entitled to compensation even though the injury was received outside the State, Vermont General Laws, c. 241, § 5770; that "employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement," § 5774; that every contract of employment made within the State shall be presumed to have been made subject to its provisions, unless prior to the accident an express statement to the contrary shall have been made, in writing, by one of the parties, § 5765; and that acceptance of the Act is "a surrender by the parties . . . of their rights to any other method, form or amount of compensation or determination thereof," § 5763. Neither the Company nor Leon Clapper filed a statement declining to accept any provision of the Vermont Act.

The New Hampshire Employers' Liability and Workmen's Compensation Act provides that the employer shall become subject to the workmen's compensation provisions of the Act only by filing a declaration to that effect, N. H. Public Laws, c. 178, § 4; and that even if the declaration is filed, the employee may, subsequent to the injury, still elect either to claim compensation, § 11, or to sue for damages at common law as modified by the employers' liability provisions of the Act. Failure to file such a declaration exposes the employer to a common law action of negligence in which the defenses of assumption of risk and injury by a fellow servant may not be interposed. §§ 2, 3. The Company filed in New Hampshire the declaration provided for by its statute.

Thus each State has a workmen's compensation law of the elective type; but their provisions differ sharply. The New Hampshire statute, unlike that of Vermont, permits the employee or his representative to elect, after the injury, to sue for damages as at common law; and it was as a result of such an election made by the administratrix that the case at bar arose. The main question for decision is whether the existence of a right of action for Leon Clapper's death should be determined by the laws of Vermont, where both parties to the contract of employment resided and where the contract was made, or by the laws of New Hampshire, where the employee was killed.

First. It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment. The provisions of the Act leave no room for construction.[1] The statute declares in terms that when a workman is hired within the State, he shall be entitled to compensation thereunder for injuries received outside, as well as inside, the State, unless one of the parties elects to reject the provisions of the Act. And it declares further that for injuries wherever received the remedy under the statute shall exclude all other rights and remedies of the employee or his personal representative. If the acci-

[1] "*Right to Compensation Exclusive:* The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement." Vt. Gen. Laws, [1917] c. 241, § 5774.

dent had happened in Vermont, the statute plainly would have precluded the bringing of an action for damages in New Hampshire under its employers' liability act.[2] For such action is predicated on a tort; and in Vermont an injury resulting from the employer's negligence is not a tort, if the provisions of the Compensation Act have been accepted. The question is whether the fact that the injury occurred in New Hampshire leaves its courts free to subject the employer to liability as for a tort. That is, may the New Hampshire courts disregard the relative rights of the parties as determined by the laws of Vermont where they resided and made the contract of employment; or must they give effect to the Vermont Act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided by the statute?

Second. If the conflict presented were between the laws of a foreign country and those of New Hampshire, its courts would be free, so far as the restrictions of federal law are concerned, to attach legal consequences to acts done within the State, without reference to the undertaking of the parties, entered into at their common residence abroad, that such consequences should not be enforced between them. But the conflict here is between the laws of two States; and the Company in setting up as a defense a right arising under the Vermont statute, invokes Art. IV, § 1, of the Federal Constitution, which declares that "full faith and credit shall be given in each State to the public acts . . . of every other State." That a statute

[2] Compare *Home Ins. Co.* v. *Dick,* 281 U. S. 397. No question is here raised of the character of that considered in *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55; and *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, of the validity of an attempt to create a statutory cause of action and confine it to the courts of the enacting State.

is a " public act " within the meaning of that clause is settled. *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 550, 551; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 393. See *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, 360; *Chicago & Alton R. Co.* v. *Wiggins Ferry Co.,* 119 U. S. 615, 622.[3] A federal court sitting in New Hampshire is bound equally with courts of the State to observe the command of the full faith and credit clause, where applicable.[4] The precise question for decision is whether that clause is applicable to the situation here presented.

Third. The administratrix contends that the full faith and credit clause is not applicable. The argument is that to recognize the Vermont Act as a defense to the New Hampshire action would be to give to that statute an

[3] See also *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274, 279; *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & M. Co.,* 243 U. S. 93, 96; *Western Life Indemnity Co.* v. *Rupp,* 235 U. S. 261, 274, 275; *Texas & New Orleans R. Co.* v. *Miller,* 221 U. S. 408, 416; *Louisville & Nashville R. Co.* v. *Melton,* 218 U. S. 36, 50–52; *El Paso & Northeastern Ry. Co.* v. *Gutierrez,* 215 U. S. 87, 92, 93; *Smithsonian Institute* v. *St. John,* 214 U. S. 19, 28; *Allen* v. *Alleghany Co.,* 196 U. S. 458, 464, 465; *Finney* v. *Guy,* 189 U. S. 335, 340; *Johnson* v. *New York Life Ins. Co.,* 187 U. S. 491, 496; *Eastern Bldg. & Loan Assn.* v. *Ebaugh,* 185 U. S. 114, 121; *Banholzer* v. *New York Life Ins. Co.,* 178 U. S. 402, 405, 406; *Lloyd* v. *Matthews,* 155 U. S. 222, 227, 228; *Glenn* v. *Garth,* 147 U. S. 360, 367, 369. Compare *Royal Arcanum* v. *Green,* 237 U. S. 531, 544, 545; *Converse* v. *Hamilton,* 224 U. S. 243, 260, 261; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *Crapo* v. *Kelley,* 16 Wall. 610; *Green* v. *Van Buskirk,* 5 Wall. 307. See 2 Farrand, " Records of the Federal Convention," pp. 188, 447, 577. Congress, acting under the authority of Article IV, § 1, has provided for the authentication of " acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States." Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905, U. S. Code, Tit. 28, § 687.

[4] Compare *Mills* v. *Duryee,* 7 Cranch 481; Rev. Stat. §§ 905, 906. See also *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 72; *Cooper* v. *Newell,* 173 U. S. 555, 567.

extra-territorial effect, whereas a State's power to legislate is limited to its own territory. It is true that full faith and credit is enjoined by the Constitution only in respect to those public acts which are within the legislative jurisdiction of the enacting State. See *National Mutual Bldg. & Loan Assn.* v. *Brahan,* 193 U. S. 635, 647; *Olmsted* v. *Olmsted,* 216 U. S. 386, 395.[5] But, obviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, compare *Quong Ham Wah Co.* v. *Industrial Accident Comm.,* 255 U. S. 445, dismissing writ of error, 184 Cal. 26; 192 Pac. 1021, and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries.[6]

[5] See also *New York Life Ins. Co.* v. *Head,* 234 U. S. 149, 161; *Bonaparte* v. *Tax Court,* 104 U. S. 592, 594. Compare *Atchison, T. & S. F. Ry.* v. *Sowers,* 213 U. S. 55, 70; *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, 360.

[6] For decisions construing state workmen's compensation acts as applicable, under appropriate circumstances, to injuries received outside the State, and upholding the validity of the acts as so construed, see *Quong Ham Wah Co.* v. *Industrial Accident Comm.,* 184 Cal. 26, 36; 192 Pac. 1021; *Industrial Commission* v. *Aetna Life Ins. Co.,* 64 Colo. 480, 490; 174 Pac. 589; *Kennerson* v. *Thames Towboat Co.,* 89 Conn. 367, 375; 94 Atl. 372; *Metropolitan Casualty Ins. Co.* v. *Huhn,* 165 Ga. 667, 670; 142 S. E. 121; *Beall Bros. Supply Co.* v. *Industrial Comm.,* 341 Ill. 193, 199; 173 N. E. 64; *Pierce* v. *Bekins Van & Storage Co.,* 185 Iowa 1346, 1356; 172 N. W. 191; *Saunder's Case,* 126 Me. 144, 146; 136 Atl. 722; *Pederzoli's Case,* 269 Mass. 550, 553; 169 N. E. 427; *Crane* v. *Leonard, Crossette & Riley,* 214 Mich. 218, 231; 183 N. W. 204; *State ex rel. Chambers* v. *District Court,* 139 Minn. 205, 208, 209; 166 N. W. 185; *State ex rel. Loney* v. *Industrial Accident Board,* 87 Mont. 191, 195, 196; 286 Pac. 408; *McGuire* v. *Phelan-Shirley Co.,* 111 Neb. 609, 611, 612; 196 N. W. 615; *Rounsaville* v. *Central R. Co.,* 87 N. J. Law 371, 374; 94 Atl. 392; *Post* v. *Burger & Gohlke,* 216 N. Y. 544, 549; 111 N. E. 351; (compare *Smith* v. *Heine Safety Boiler Co.,* 224 N. Y. 9, 11, 12; 119

The existence of this power is not denied. It is contended only that the rights thus created need not be recognized in an action brought in another State; that a provision which Vermont may validly enforce in its own courts need not be given effect when the same facts are presented for adjudication in New Hampshire.

The answer is that such recognition in New Hampshire of the rights created by the Vermont Act, can not, in any proper sense, be termed an extra-territorial application of that Act.[7] Workmen's compensation acts are

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N. E. 878; *Cameron* v. *Ellis Construction Co.*, 252 N. Y. 394, 397; 169 N. E. 622); *Grinnell* v. *Wilkinson*, 39 R. I. 447, 462, 463; 98 Atl. 103; *Smith* v. *Van Noy Interstate Co.*, 150 Tenn. 25, 36; 26 S. W. 104; *Texas Employers' Ins. Assn.* v. *Volek*, 44 S. W. (2d) 795, 798 (Tex. Civ. App.); *Pickering* v. *Industrial Comm.*, 59 Utah 35, 38; 201 Pac. 1029; *Gooding* v. *Ott*, 77 W. Va. 487, 492, 493; 87 S. E. 862; *Anderson* v. *Miller Scrap Iron Co.*, 169 Wis. 106, 114, 115; 170 N. W. 275; 171 N. W. 935. A contrary construction was reached in *Altman* v. *North Dakota Workmen's Compensation Bureau*, 50 N. D. 215; 195 N. W. 287; *Sheehan Pipe Line Const. Co.* v. *State Industrial Comm.*, 151 Okla. 272, 273; 3 P. (2d) 199. Early decisions to like effect, in California, Illinois, and Massachusetts, have been superseded by statute. See *North Alaska Salmon Co.* v. *Pillsbury*, 174 Cal. 1; 162 Pac. 93; *Union Bridge & Construction Co.* v. *Industrial Comm.*, 287 Ill. 396, 398; 122 N. E. 609; *Gould's Case*, 215 Mass. 480; 102 N. E. 693. The provisions of the state statutes in respect to injuries occurring outside the state are summarized in Schneider, "The Law of Workmen's Compensation" (2d ed. 1932), vol. I, pp. 428–433.

[7] The statute does not undertake to prohibit acts beyond the borders of the State. Compare *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Nutting* v. *Massachusetts*, 183 U. S. 553, 557. It does not attempt to forbid or regulate subsequent modification of the Vermont contract, or the formation of subsidiary contracts, or new agreements, by the parties in other States. Compare *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357. It affects only the rights and liabilities of parties who by their conduct within the State have subjected themselves to its operation. As to those parties, its effect is not to create a liability for acts without the State, compare *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, but to give rise to a defense in consequence of acts within.

treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law tort. See *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 423; *Mulhall* v. *Nashua Mfg. Co.,* 80 N. H. 194, 197; 115 Atl. 449; *Matter of Cameron* v. *Ellis Construction Co.,* 252 N. Y. 394, 396; 169 N. E. 622; *Chandler* v. *Industrial Commission,* 55 Utah 213, 217; 184 Pac. 1020; *Anderson* v. *Miller Scrap Iron Co.,* 169 Wis. 106, 113, 117, 118; 170 N. W. 275; 171 N. W. 935. The relation between Leon Clapper and the Company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there. For both Clapper and the Company were at all times residents of Vermont; the Company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into New Hampshire only for temporary and specific purposes, in response to orders given him at the Vermont office. The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation.[8] Com-

[8] See *Barnhart* v. *American Concrete Steel Co.,* 227 N. Y. 531, 535; 125 N. E. 675, denying recovery in a common law action for damages in the state of injury, on the ground that the employee's remedy was for compensation under the law of the state of employment. Compare *In re Spencer Kellogg & Sons,* 52 F. (2d) 129, 134, reversed on other grounds, 285 U. S. 502. Compensation was similarly denied in *Hall* v. *Industrial Comm.,* 77 Colo. 338, 339; 235 Pac. 1073; *Hopkins* v. *Matchless Metal Polish Co.,* 99 Conn. 457, 464; 121 Atl. 828; *Proper* v. *Polley,* 233 N. Y. App. Div. 621; 253 N. Y. S. 530. Compare *Scott* v. *White Eagle Oil & Rfg. Co.,* 47 F. (2d) 615, 616. See also *Darsch* v. *Thearle Diffield Fire Works Display Co.,* 77 Ind. App. 357; 133 N. E. 525. Compare *Wiley* v. *Grand Trunk Ry. of Canada,* 227 Fed. 127, 130; *Mexican Nat. R. Co.* v. *Jackson,* 118 Fed. 549, 552.

pare *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, 536, 537.

By requiring that, under the circumstances here presented, full faith and credit be given to the public act of Vermont, the Federal Constitution prevents the employee or his representative from asserting in New Hampshire rights which would be denied him in the State of his residence and employment. A Vermont court could have enjoined Leon Clapper from suing the Company in New Hampshire, to recover damages for an injury suffered there, just as it would have denied him the right to recover such damages in Vermont. Compare *Cole* v. *Cunningham,* 133 U. S. 107; *Reynolds* v. *Adden,* 136 U. S. 348, 353. The rights created by the Vermont Act are entitled to like protection when set up in New Hampshire by way of defense to the action brought there. If this were not so, and the employee or his representative were free to disregard the law of Vermont and his contract, the effectiveness of the Vermont Act would be gravely impaired. For the purpose of that Act, as of the workmen's compensation laws of most other States, is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate. Compare *New York Central R. Co.* v. *White,* 243 U. S. 188; *Hawkins* v. *Bleakly,* 243 U. S. 210; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

Fourth. It is urged that the provision of the Vermont statute which forbids resort to common law remedies for injuries incurred in the course of employment is contrary to the public policy of New Hampshire; that the full faith and credit clause does not require New Hampshire to enforce an act of another State which is obnoxious to its public policy; and that a federal court sitting in that State may, therefore, decline to do so. Compare *Union*

Trust Co. v. *Grosman,* 245 U. S. 412. It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy; see *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U. S. 142, 148, 149; compare *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377; or because it fails to provide procedure appropriate to its determination, see *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354, 359; compare *Slater* v. *Mexican National R. Co.,* 194 U. S. 120, 128, 129; or because the enforcement of the right conferred would be obnoxious to the public policy of the forum, compare *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274, 277–279; *Union Trust Co.* v. *Grosman,* 245 U. S. 412; *Bond* v. *Hume,* 243 U. S. 15, 25; *Converse* v. *Hamilton,* 224 U. S. 243, 260, 261; or because the liability imposed is deemed a penal one, see *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, 490, compare *Stewart* v. *Baltimore & Ohio R. Co.,* 168 U. S. 445, 448. But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done. Compare *Modern Woodmen*

of America v. *Mixer,* 267 U. S. 544, 550, 551; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *Royal Arcanum* v. *Green,* 237 U. S. 531. See also *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542; *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55, 69.

Moreover, there is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens.[9] In support of the contention that the provision of the Vermont Act is contrary to the New Hampshire policy, it is urged that New Hampshire's compensation law is unique among workmen's compensation acts in that it permits the injured employee to elect, subsequent to injury, whether to bring a suit based upon negligence or to avail himself of the remedy provided by the Act; and that the legislature of New Hampshire has steadily refused to withdraw this privilege.[10] But the mere fact that the Vermont legislation does not conform to that of New

[9] Compare *Saloshin* v. *Houle,* 155 Atl. 47, an action of negligence by the widow of a New York resident killed in New Hampshire while working for a New York firm, brought against a third person residing in New Hampshire. The Supreme Court of New Hampshire held that the widow's right of action was barred by her acceptance of compensation under the New York Act, and that the acceptance, in accordance with the provisions of that Act, operated as an assignment to the compensation insurer of her rights against the defendant.

[10] Attention is called to the following rejected compensation bills abolishing the right of election after accident: 1915 Session, House Bills No. 206, 302, Journal, pp. 720, 1021; 1917 Session, House Bills No. 319, 485, Journal, pp. 567, 568; 1919 Session, House Bill No. 134, Journal, p. 437; 1927 Session, House Bill No. 212, Journal, p. 752; 1929 Session, House Bill No. 292, Journal, p. 752. In 1923 the statute was amended to increase the compensation, N. H. Laws, 1923, c. 91; and in 1925, as amended, it was reënacted without change, N. H. Public Laws, c. 178.

Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute in cases involving only the rights of residents of that State incident to the relation of employer and employee created there. *Northern Pacific R. Co.* v. *Babcock,* 154 U. S. 190, 198. Nor does sufficient reason appear why it should be so regarded. The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the State's interest would be subserved, under such circumstances, by burdening its courts with this litigation.

Sixth. The administratrix urges that the Company had in fact accepted the provision of the New Hampshire Compensation Act, which reserves to the employee the right to elect to sue for damages as at common law. It was upon this ground, primarily, that the Circuit Court of Appeals based, upon the rehearing, the affirmance of the judgment of the District Court. The circumstances under which the acceptance of the New Hampshire Act was filed show that the Company did not intend thereby to abandon its rights under the Vermont law in respect to Leon Clapper or other employees similarly situated. It had had occasion to hire in New Hampshire residents of that State for employment there in connection with the operation of its lines in that State. In case of injury of such employees, failure to accept the New Hampshire Act would have made the petitioner liable to an action for negligence in which it would have been denied the defenses of assumption of risk and injury by a fellow servant. *Jutras* v. *Amoskeag Mfg. Co.,* 84 N. H. 171, 173; 147 Atl. 753; *Levesque* v. *American Box & Lumber Co.,* 84 N. H. 543; 153 Atl. 10. Its acceptance is to be construed as referable only to such New Hampshire em-

ployees, and not as bringing under the New Hampshire Act employees not otherwise subject to it.

We are of opinion that the rights as between the Company and Leon Clapper or his representative are to be determined according to the Vermont Act. The judgment of the Circuit Court of Appeals must accordingly be reversed. We have no occasion to consider whether if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law.

Reversed.

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

MR. JUSTICE STONE, concurring.

I agree that in the circumstances of the present case, the courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire. In the absence of any controlling decision of the New Hampshire courts, I assume, as does the opinion of the Court, that they would do so and that what they would do we should do. Hence, it seems unnecessary to decide whether that result could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause.

If decision of that question could not be avoided, I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability of the employer for a tortious act committed within the state, are compelled to apply Vermont law instead of their own. The full faith and credit clause

has not hitherto been thought to do more than compel recognition, outside the state, of the operation and effect of its laws upon persons and events within it. *Bonaparte* v. *Tax Court,* 104 U. S. 592; *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354; *Hood* v. *McGehee,* 237 U. S. 611; see *Union Trust Co.* v. *Grosman,* 245 U. S. 412, 415, 416; *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542, 547.

It is true that in this case the status of employer and employe, terminable at will, was created by Vermont laws operating upon them while they were within that state. I assume that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employe and given a *locus* in New Hampshire by their presence within the state, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employe there, which grow out of or affect the status in New Hampshire, must, by mandate of the Constitution, be either defined or controlled, in the New Hampshire courts, by the laws of Vermont rather than of New Hampshire.

The interest, which New Hampshire has, in exercising that control, derived from the presence of employer and employe within its borders, and the commission of the tortious act there, is at least as valid as that of Vermont, derived from the fact that the status is that of its citizens, and originated when they were in Vermont, before going to New Hampshire. I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other. On the contrary, I think it should be interpreted as leaving the courts of New Hampshire free, in

the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law.

UTAH POWER & LIGHT CO. *v.* PFOST, COMMISSIONER OF LAW ENFORCEMENT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 722. Argued April 13, 1932.—Decided May 16, 1932.

1. The generation of electricity from water-power and the transmission of the electricity over wires from the generator to consumers in another State, are, from the practical standpoint of taxation, distinct processes, the one local, the other interstate, like the making and shipping of goods to order, although the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch. P. 177.
2. Therefore a state license tax on the electricity produced at a plant within the State is valid under the commerce clause as applied to that which is transmitted therefrom and sold to consumers in another State. P. 181.
3. In deciding whether a part of a statute is separable, the fact that the bill was passed after a bill like it but lacking the part in question had been withdrawn by unanimous consent does not justify the inference that the legislature would not have passed the statute if that part had been omitted. P. 183.
4. A clause in a statute declaring that an adjudication that any of its provisions is unconstitutional shall not affect the validity of the Act as a whole, or any other of its provisions or sections, has the effect of reversing the common law presumption that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility. P. 184.
5. This presumption of divisiblity must prevail unless the inseparability of the provisions be evident or there be a clear probability that the legislature would not have been satisfied with the statute without the invalid part. *Id.*
6. The primary object of the Idaho statute here involved (Laws 1931, Ex. Sess., c. 3) is to raise revenue by taxing production of electricity. Section 5, which provides an exemption as to electricity

used for pumping water for irrigating land in Idaho, is secondary in purpose and its validity may be considered apart. P. 185.

7. In the Idaho law taxing electricity produced for sale, the exemption of that used for irrigating lands, inserted for the benefit of those so using it, is consistent with the equal protection clause of the Fourteenth Amendment, because in the arid region the irrigation of even private lands is a matter of public concern. P. 185.
8. The question whether a state taxing statute will operate unconstitutionally to take the money of one person to give to another, will not be decided here when the construction of the statute is involved and has not been determined by the state supreme court, and when it does not appear that the party complaining is presently in danger of such an application of it. P. 186.
9. This Court can not assume in advance that a state court will so construe or apply a state statute as to render it obnoxious to the Federal Constitution. *Id.*
10. To warrant holding a statute invalid under a constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title," the violation must be substantial and plain. P. 187.
11. The Idaho statute, *supra*, complies in this respect with § 16, Art. III, of the Idaho constitution. *Id.*
12. The statute is to be construed as laying the tax only on the electricity produced for barter, sale or exchange, to be determined by deducting from the production of the generator the amounts disposed of otherwise, including the part used by the producer, or consumed in effecting transmission. P. 188.
13. Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. P. 190.
14. In the administration of a revenue act involving complicated measurements and computations, fair and reasonable approximations must suffice where absolute precision is impracticable. *Id.*

54 F. (2d) 803, affirmed.

Appeal from the final decree in a suit to enjoin the enforcement of a law taxing production of electrical power. The decree dissolved an interlocutory injunction and required the petitioner corporation to pay the tax, with interest, but without penalties accrued during the pendency of the suit.

Mr. John F. MacLane, with whom *Mr. Robert H. O'Brien* was on the brief, for appellant.

The tax involved in this case—on the kilowatt hour of electric energy—is not a tax on the manufacture of goods or on the production or extraction of a product of nature but on the transfer or conveyance of energy in nature from its source to its place of use. When this transfer is across state lines it is interstate commerce.

The "generation" of electric energy is a part of the process of transferring energy from a source in nature such as falling water to some point where it may be usefully applied. Energy can not be "generated, manufactured or produced" except as it is transmitted and used. The process through the generator is continuous and simultaneous with the consumer's demand for energy. That part of the process described as generation is the part which is responsible for and causes the movement. The generator is thus an instrumentality of commerce. The entire combined process of generation, transmission and use is integral, continuous and essentially simultaneous.

Energy transferred to the consumer is drawn directly from its source at the water fall and is not stored in the system either at the consumer's place of use or some intermediate point. It is not analogous to a water or gas system with storage facilities either separately furnished or present in the water main or gas pipes.

Transformers interposed in the system for economy in transmission, while they result in interrupting the flow of electric current and in the induction of a different voltage and current on the other side of the transformer, do not interrupt the flow of electric power. This passes directly from its source through the transformers along the transmission line to the place of use. It is this energy, and not current or voltage, measured in terms of kilowatt hours, which is taxed by the Act involved in this case.

So-called losses in the electric system on account of which more energy leaves the generator than is delivered to the consumer do not alter the fundamental nature of the process. The system itself is a consuming device to the extent that it requires the transfer of certain energy from the source to enable the system to function and to keep it electrically alive. These so-called losses are used in the system and impress a demand upon the generator of exactly the same nature as the demand exerted by the devices of the consumers.

The kilowatt hour is a mathematical product of the power relation in the electric circuit between the generator and the receiving device measured in kilowatts and hours. It is a measure of the relationship expressed in terms of power demand (kilowatts) and the duration in time that that demand is exerted (hours). It is therefore a measure of the use of the vehicle of commerce which we call the electric system. Energy conceived of as leaving a generator in one State in response to the demand of a consumer in another State, and measured in terms of kilowatt hours, is in transit, and in fact actually crossing the state line and used by the consumer in the second State simultaneously with its measurement.

That part of appellant's system which consists of generating stations in Idaho, and transmission lines across the Utah-Idaho line to the terminal substation in Utah where it is connected with transmission lines for local distribution systems to consumers' devices, operates in interstate commerce. Whether such commerce extends beyond the terminal substation is not involved in this case. *Public Utilities Comm.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83; *Idaho Power Co.* v. *Thompson*, 19 F. (2d) 547.

The tax imposed by the Act under review is a license tax exacted of appellant as a condition of continuing its business. As applied to interstate business, it is similar to a tax on a ton of freight, considered in the *State Freight*

Tax Cases, 15 Wall. 233, or upon passengers carried, as in the *Passenger Cases,* 7 How. 283, or on the tonnage of vessels, as in the *Tonnage Cases,* 12 Wall. 204, or upon telegraph messages as in the *Telegraph Cases,* 105 U. S. 460. Being levied at a unit rate on energy in interstate commerce, it can not be sustained as a license tax for the privilege of conducting an intrastate business.

While the Act describes the tax as levied upon the kilowatt hour generated, manufactured or produced, yet the process of generation is simultaneous and interdependent with the transmission and use. The Act burdens transmission and use equally with generation. The generator is an instrumentality of commerce. It is this inseparability of process which makes the whole interstate commerce. *Foster Packing Co.* v. *Haydel,* 278 U. S. 1; *Station WBT* v. *Poulnot,* 46 F. (2d) 671; and other cases cited. In this respect, it is also within the rule of *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338; *Sprout* v. *South Bend,* 277 U. S. 163.

Since the tax falls and has its incidence on energy already in commerce, and is measured by the amount of the commerce in energy, it is likewise void under the rule announced in *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *Coe* v. *Errol,* 116 U. S. 517; *Champlain Realty Co.,* v. *Brattleboro,* 260 U. S. 366; and other cases cited.

The Act in burdening interstate commerce is void in its entirety because it appears that the intent is to tax the whole business and no provision is made for the separate determination of interstate and intrastate business. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

Decisions in *Hope Natural Gas Co.* v. *Hall,* 102 W. Va. 272; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, reviewed and distinguished.

Section 5 of the Tax Act uses the power of taxation for the purpose of granting a subsidy to users of electric energy for irrigation pumping by requiring a credit upon their bills of an amount equal to the tax otherwise payable on such energy.

This is a use of the power of taxation for private, as distinguished from public purpose, and is void under the Fourteenth Amendment, and other constitutional provisions cited. *Jones* v. *Portland,* 245 U. S. 217; *Loan Assn.* v. *Topeka,* 20 Wall. 655.

If this section is unconstitutional for the reasons above stated, the Act must fall in its entirety. The history of its passage shows that this so-called exemption, or subsidy, was inserted to secure its passage, and it would not have been passed without it. Exemption features of statutes inserted to favor certain individuals, or industries, in order to secure their passage can not be excluded by judicial interpretation; and their invalidity carries with it the entire Act of which they are a part. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463.

This view is not affected by that section of the Act which provides that if any part be adjudged unconstitutional, such adjudication shall not affect the validity of the Act as a whole or other parts. *Dorchy* v. *Kansas,* 264 U. S. 286; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

The levy of a license tax on electric energy generated in a State; and a subsidy in favor of irrigation pumping users is void under the Idaho Constitution. Art. III, § 16. *State* v. *Banks,* 37 Idaho 27; *Hailey* v. *Huston,* 25 Idaho 165.

The subject of the Act is not expressed in the title. The Act is void for that reason. *Utah Mortgage Loan Corp.* v. *Gillis,* 49 Idaho 676; *Jackson* v. *Gallet,* 39 Idaho 382.

The Act is void for uncertainty and ambiguity because it can not be determined whether a tax is levied on all kilowatt hours generated, or only on those produced for

barter, sale or exchange. If the latter is the true construction, and the court below so construed the Act in order to sustain it against the objection that the title did not express the subject, then the Act affords no guide or means for the determination of what electric energy is generated for barter, sale or exchange, and does not confer upon the Commissioner of Law Enforcement any power to prescribe a formula for such determination, but attempts, on its face, to fix a place and method of measurement, which, of necessity, excludes any possibility of determining the energy generated for barter, sale or exchange.

A similar ambiguity and uncertainty is involved in § 5. This section provides for the so-called exemption and credit on irrigation power bills of the full tax which would have been due on such energy. Since the only measurement of the tax is at the point of generation, and the only means of determining the irrigation pumping use is at the users' pumps, there is no possible means of determining the amount of energy generated for irrigation pumping.

The Act, being highly penal in its nature, must be capable of definite construction and enforcement according to its terms, and, failing in this, violates the due process clause of the Constitution. *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Capital Traction Co.,* 34 App. D. C. 592; *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *United States* v. *Shreveport G. & E. Co.,* 46 F. (2d) 354; *Western Union* v. *Texas,* 62 Tex. 630.

Mr. Sidman I. Barber, Assistant Attorney General of Idaho, with whom Messrs. *Fred J. Babcock,* Attorney General, and *Maurice H. Greene,* Assistant Attorney General, were on the brief, for appellees.

The generator does not function to produce electrical energy for barter, sale or exchange, except as its output

is called for by appellant's consumers. The response is accomplished through the use of auxiliary controlling or regulating devices adapted to that purpose. The demand of a consumer's appliance is not related to the production of any specific generator or generating station, but is impressed upon the system as a whole, and appellant supplies the aggregate demand by generation at such station or stations and in such varying quantities between stations as it may determine.

The components of electrical energy are voltage and current. With the voltage and current at which the energy flows from the generator, it may not be transmitted to distant points. The transformer is therefore interposed to change the current and voltage. This change is similar to the packing of goods for shipment. The output of the generator can not be said to have entered upon its final journey until it leaves the transformer.

The losses or so-called uses in the system effectually distinguish generation from use, in that the percentage of electrical energy generated by stations which is delivered to consumers is dependent upon the character of construction of the transmission line and distribution system and their efficiency of maintenance, and not by any character of machinery or manner of operation at the generating plant.

The kilowatt hour is a unit of measurement of an amount of electrical energy that will accomplish a definite amount of mechanical work. It is not a measurement of any period of service. It may be generated or sold, delivered and used in the fraction of a second or over the period of hours. It is an article of commerce and bought and sold as such.

No tax is attempted to be imposed upon the kilowatt hour itself. The tax is measured by the amount of electrical energy generated without respect to its subsequent

transmission, at the first practical point of measurement, and prior to its packing for shipment by the transformer.

The operation of appellant's system as a whole does not destroy the distinction between the several and separate steps of generation, transmission and distribution, in industrial and legal contemplation. These separate steps may be undertaken by separate entities. Transmission is subsequent to generation, and similar to the transportation of goods after manufacture. The control of the routing of the electrical energy is in the transmission network and not in the hands of the man in control of the generator. Only the transmission phase is in interstate commerce.

The tax is an excise with respect to an activity for which a license is required, and imposed solely because of the act of generating for barter, sale and exchange, without regard to transmission. Where generation is accomplished by others from whom appellant purchases electrical energy, appellant pays no tax with respect to its transmission of such energy.

The telephone and radio cases discussed by appellant are to be distinguished in that they deal only with transportation. The transmission of thoughts, intelligence, and entertainment is not an act of production or manufacture.

The mode of measurement is upheld by the rule of *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459.

The tax being imposed solely because of the intrastate activity of generation and without respect to whether the output of the generator is thereafter transmitted in interstate commerce, it is not invalidated by any intent to transport across state lines. The amount of electrical energy generated for intrastate sales is capable of determination in the practical operation of appellant's system and with reasonable certainty.

With respect to the Constitution of Idaho the language of § 5 is held to create an exemption and not a subsidy. It does not lend the aid or credit of the State. *Williams* v. *Baldridge,* 48 Idaho 618.

As a public utility, appellant is entitled to only a just and reasonable return. Its rate structure is not involved in this suit, and the effect of § 5 with respect thereto is beyond the purview of this inquiry and without the evidence. Unless it imposes a rate that is non-compensatory the Tax Act is not wanting in due process because of § 5.

The exemption made by § 5 is a permissible classification. It affects alike all who are similarly situate, and therefore does not deny equal protection. Appellant is not the proper party to claim a discrimination against irrigation uses in Utah.

If the section were unconstitutional it is severable from the remainder of the Act.

The Act embraces but one subject and matters properly connected therewith, which subject is expressed in the title.

The tax is not so uncertain as to require arbitrary administrative action. The Act provides that the tax shall be measured only by kilowatt hours generated or produced for barter, sale or exchange in the operation of appellant's system. The amount of electrical energy generated for this purpose is ascertainable, and the basic measurement must be made at the place of production.

An act is sufficiently definite where for reasons found to result either from the text of the statutes involved or the subjects with which they deal, a reasonable standard is afforded. *Mahler* v. *Eby,* 264 U. S. 32; *United States* v. *Brewer,* 139 U. S. 278; *Miller* v. *Strahl,* 239 U. S. 426; *Nash* v. *United States,* 229 U. S. 373; *Omaechevarria* v. *Idaho,* 246 U. S. 343.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Utah Power & Light Company is a Maine corporation doing business in the states of Idaho, Utah and Wyoming, under the laws of those states. The corporation is a public utility engaged in generating, transmitting and distributing electric power and energy for barter, sale and exchange to consumers in each of these three states and in interstate commerce among them. The present suit was brought to enjoin the enforcement of an act of the Idaho legislature, levying a license tax on the manufacture, generation or production, within the state, for barter, sale or exchange, of electricity and electrical energy. Laws of Idaho, 1931 (Extraordinary Session), c. 3.

Section 1 of the act provides that any individual, corporation, etc., engaged in the generation, manufacture or production of electricity and electrical energy, by any means, for barter, sale or exchange, shall, at a specified time, render a statement to the Commissioner of Law Enforcement of all electricity and electrical energy generated, manufactured or produced by him or it in the state during the preceding month, and pay thereon a license tax of one-half mill per kilowatt hour, " measured at the place of production." Sections 2, 3 and 4 provide for the time and method of payment of the tax and the furnishing of appropriate information. Section 4 further requires the producer to maintain, at the point or points of production, suitable instruments for measuring the electricity or electrical energy produced. Section 5, which is the subject of a distinct attack, provides:

"All electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this Act, except in cases where the water so pumped is sold or rented

to such irrigated lands. Provided, the exemption here given shall accrue to the benefit of the consumer of such electricity or electrical energy. Provided further that the full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power, and such producer shall include a statement of the amount of electricity and electrical energy exempted by this section, furnished by it for the purpose of pumping water for irrigation purposes on lands in the State of Idaho, to the Commissioner of Law Enforcement of the State of Idaho as a part of the statement required by Section 1 of this Act, together with a statement of the credits made on the power bills to the consumers of such electricity and electrical energy for the pumping of water for irrigation to be used on lands in the State of Idaho."

Section 8 imposes a penalty for any violation of the act, or failure to pay the license tax provided for therein when due, in the sum of three times the amount of the unpaid or delinquent tax, to be recovered by civil action. Section 11 provides that if any section or provision of the act be adjudged unconstitutional or invalid, such adjudication shall not affect the validity of the act as a whole or of any section or provision thereof not specifically so adjudged unconstitutional or invalid.

After the filing of the complaint an interlocutory injunction was granted, 52 F. (2d) 226; and, thereafter, appellees answered. Upon the evidence reported by a master, to whom the case had been referred, the court below (composed of three judges as required by law) made findings of fact and conclusions of law and entered a final decree dissolving the interlocutory injunction and

requiring appellant to pay the tax in question with interest, but without any penalties which might have accrued during the pendency of the suit. 54 F. (2d) 803. This appeal followed.

The validity of the act under the federal and state constitutions is assailed upon four grounds: (1) that it imposes a direct burden on interstate commerce in violation of clause 3, § 8, Art. I of the Federal Constitution; (2) that it denies appellant the equal protection of the laws and deprives it of property without due process of law in violation of the Fourteenth Amendment and of a corresponding provision of the state Constitution, in that § 5 of the act compels the appropriation and payment of money by appellant for the benefit of private individuals, and that, § 5 being unconstitutional, the act as a whole must fall; (3) that the act violates § 16, Art. 3 of the state Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; (4) that the act is so uncertain and ambiguous in specified particulars that its enforcement is left to arbitrary administrative action without a legislative standard, and thus violates the due process of law clause of the Fourteenth Amendment.

First. Appellant contends that the tax is not one on manufacture or production or on the extraction of a product of nature, but on the transfer or conveyance of energy in nature from its source to its place of use; that in part appellant's system consists of generating stations in Idaho and transmission lines across the boundary into Utah, and thence to various consumers, the combined action of which constitutes an operation in interstate commerce; that the energy is brought to the consumers in Utah directly from its source in the water fall; that thus the generator is an instrumentality of interstate commerce; that the process of generation is simultaneous and interdependent with

that of transmission and use, and because of their inseparability the whole is interstate commerce; that since the intent of the act is to tax the whole business, and no provision is made for the separate determination of interstate and intrastate business, the act, in burdening interstate commerce, is void in its entirety.

On the other hand, appellees say that the tax is laid upon the generation of electrical energy as a distinct act of production, and without regard to its subsequent transmission; that the process of generation is one of converting mechanical energy into electrical form; that the resulting change is substantial and is a change in the physical characteristics of the energy in respect of voltage, current, and character as alternating or direct current, according to the design of the mechanical generating devices; that the process of conversion is completed before the pulses of energy leave the generator in their flow to the transformer; that the tax is measured by the amount of electrical energy generated, without regard to its subsequent transmission; that such transmission is subsequent to, and separable from, generation, and, in effect, corresponds to the transportation of goods after their manufacture; that the generation of the electrical energy is local, and only its transmission is in interstate commerce; that since the tax is imposed in respect of generation, it is not invalidated by reason of any intent on the part of the producer to transport across state lines.

In the light of what follows, we find it unnecessary to state or consider the claims of the parties as to the effect of the interposition of the transformer between the generator and the places of consumption.

From the foregoing greatly abbreviated but, for present purposes, we think sufficient statement of the views of the respective parties, it is apparent that in the last analysis the question we are called upon to solve is this: Upon the facts of the present case is the generation of electrical energy, like manufacture or production gener-

ally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce? From the strictly scientific point of view the subject is highly technical, but in considering the case, we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical considerations.

Electrical energy has characteristics clearly differentiating it from the various other forms of energy, such as chemical energy, heat energy, and the energy of falling water. Appellant here, by means of what are called generators, converts the mechanical energy of falling water into electrical energy. Thus, by the application of human skill, a distinct product is brought into being and transmitted to the places of use. The result is not merely transmission; nor is it transmission of the mechanical energy of falling water to the places of consumption; but it is, first, conversion of that form of energy into something else, and, second, the transmission of that something else to the consumers. While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts.

The point is stressed that in appellant's system electricity is not stored in advance but produced as called for. The consumer in Utah, it is said, by merely turning a switch, draws directly from the water fall in Idaho, through the generating devices, electrical energy which appears instantaneously at the place of consumption. But this is not precisely what happens. The effect of turning the switch in Utah is not to draw electrical energy directly

from the water fall, where it does not exist except as a potentiality, but to set in operation the generating appliances in Idaho, which thereupon receive power from the falling water and transform it into electrical energy. In response to what in effect is an order, there is production as well as transmission of a definite supply of an article of trade. The manufacture to order of goods and their immediate shipment to the purchaser furnishes a helpful analogy, notwithstanding the fact that there the successive steps from order to delivery are open to physical observation, while here the succession of events is chiefly a matter of inference—although inference which seems unavoidable. The process by which the mechanical energy of falling water is converted into electrical energy, despite its hidden character, is no less real than the conversion of wheat into flour at the mill.

The apparent difficulty in perceiving the analogy arises principally from the fact that electrical energy is not a substance—at least in common meaning. It cannot be bought and sold as so many ounces or pounds, or so many quarts or gallons. It has neither length, breadth nor thickness. But that it has actual content of some kind is clear, since it is susceptible of mechanical measurement with the necessary certainty to permit quantitative units to be fixed for purposes of barter, sale and exchange. However lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary tokens of materiality. It is subject to known laws; manifests definite and predictable characteristics; may be transmitted from the place of production to the point of use and there made to serve many of the practical needs of life.

We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so

far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. Appellant's chief engineer, although testifying that generation is a part of the process of transferring energy, said on cross-examination that in the process of generation there is a "conversion of the mechanical energy in the turbine shaft into a different form of energy, that is electrical energy. It must be converted into electrical energy before it can be transmitted . . . . This process of transformation is complete at the generator, and you have a greater amount of energy there, capable of doing a greater amount of mechanical work, at the generator than you do after transmitting it into Utah." The evidence amply sustains the conclusion that this transformation must take place as a prerequisite to the use of the electrical product, and that the process of transferring, as distinguished from that of producing, the electrical energy, begins not at the water fall, but definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy.

The various specific objections to the findings made below, and the failure to adopt others suggested by appellant, become immaterial in view of our conclusions. We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. *Cornell* v. *Coyne,* 192 U. S. 418, 428–429. "Commerce succeeds to manufacture, and is not a part of it." *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 12.

Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution. The situation does not differ in principle from that considered by this court in *Oliver Iron Co.*, v. *Lord,* 262 U. S. 172. There the State of Minnesota had imposed an occupation tax on the business of mining ores. The tax was assailed as being in conflict with the commerce clause. It appeared that substantially all the ores there in question were mined for delivery to consumers outside the state; and that the ores passed practically at once after extraction into the channels of interstate commerce. The greater part of the ores came from open pit mines, to which empty cars were run and there loaded, the ores being severed from their natural bed by means of steam shovels and lifted directly into the cars. When loaded these cars were promptly returned to the railroad yards from which they came and were there put into trains and continued their interstate journey. The several steps followed in such succession that there was practical continuity of movement from the severance of the ores to the end of their journey in another state. Upon these facts the court held that the commerce clause was not infringed.

" The ore does not enter interstate commerce," it was said, p. 179, " until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce,

just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Hope Gas Co.* v. *Hall,* 274 U. S. 284, this court considered an act of the State of West Virginia imposing a tax upon the production, among other things, of natural gas. The chief business of the Hope Gas Company was the production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of it through pipe lines into adjoining states, where it was sold, delivered and consumed. Most of it passed into interstate commerce by continuous movement from the wells where it originated. Interpreting and following the decision of the state court, it was held that the tax was to be computed upon the value of the gas at the well, and that if, thereafter, executive officers should fix values upon an improper basis appropriate relief would be afforded by the courts. The tax was sustained as not involving an infringement of the commerce clause of the Constitution.

In the light of what we have said in respect of the character of the product here involved, the manner of its production, and the relation of such production to its interstate transmission, these cases in principle clearly control the present case and render further discussion or citation of authorities unnecessary.

Second. The attack upon § 5 of the act, which is copied on a preceding page, is based upon the contention that it does not grant an exemption but has the effect of laying a tax for the benefit of favored consumers, that is to say, of selected private persons; and that the enforcement of the section in respect of allowances of credits by the producer to the favored consumers will result in taking the money of the former and giving it to the latter. A further contention is that § 5 is an inseparable part of the act, and being unconstitutional, the entire act must fall

with it. In support of the latter point, the grounds stated are that the legislative history discloses as a matter of fact that the act would not have been passed had § 5 not been included; and that it is apparent on the face of the act itself that the provisions of the section are essential and inseparable parts of the act as an entirety. It will shorten our consideration of the first point if we begin by disposing of the second point as to the question of separability.

The claim that the legislative history discloses that the act would not have passed without § 5 seems to rest entirely upon the fact that a bill for a similar act, but which did not contain the challenged section, failed of passage; but that, upon § 5 being included, the act thereafter was passed. The bill first introduced did not come to a vote, but was withdrawn from consideration by unanimous consent. That it would have been rejected if put to a vote rests upon mere supposition. There is no real ground for an opinion one way or the other. Courts are not justified in resting judgment upon a basis so lacking in substance.

Nor do we think the inseparability of the section from the rest of the act appears from the face of the legislation. The act itself (§ 11) provides that an adjudication that any provision of the act is unconstitutional shall not affect the validity of the act as a whole, or of any other provision or section thereof. While this declaration is but an aid to interpretation and not an inexorable command (*Dorchy* v. *Kansas,* 264 U. S. 286, 290), it has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied with the statute unless it

had included the invalid part. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241–242.

It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including § 5. The primary object of the statute, under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field* v. *Clark,* 143 U. S. 649, 696–697; *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 N. Y. 48, 60–63; 129 N. E. 202.

In the light of these conclusions, § 5, in respect of the constitutional question, stands apart from the remainder of the act and is to be considered accordingly. The court below followed the decision of the state supreme court (*Williams* v. *Baldridge,* 48 Idaho 618; 284 Pac. 203), in holding that § 5 granted an exemption ultimately for the benefit of the consumers of electrical power for irrigation purposes on lands within the state. It seems to us plain that the purpose of the act was to relieve the producer from liability for the tax *pro tanto,* and to pass on to the irrigation consumers the benefit thereof to the extent—and only to the extent—of the savings effected through the exemption. There is nothing to suggest that the legislature intended to cast any additional burden upon the producer or require him to yield to the irrigation consumers anything beyond the equivalent of the exemption. The irrigation of even private lands in the arid region is a matter of public concern (*Clark* v. *Nash,* 198 U. S. 361),

and we are of opinion that an exemption of the character here involved is not precluded by the equal protection clause of the Fourteenth Amendment. Compare *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 40.

The provisions in respect of the allowance of credits to the consumers by the producer present a question of more difficulty. If these provisions embody nothing more than a method of accounting to make sure that the irrigation consumers shall not bear, in whole or in part, the burden of the tax from which the producer is exempt, they would seem to be without fault. If by construction or in application they result in taking from the producer more than the sum of the exemption, a different question would arise. The supreme court of Idaho thus far has not construed § 5 in respect of the provisions now under consideration. The point was presented but reserved in *Williams* v. *Baldridge, supra,* p. 631. It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that "a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Oliver Iron Co.* v. *Lord, supra,* pp. 180–181; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Gorieb* v. *Fox,* 274 U. S. 603, 606. Primarily, the construction of these provisions of the statute is for the state supreme court, and we cannot assume in advance that such a construction will be adopted, or such an application made of the provisions, as to render them obnoxious to the federal Constitution. In *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544–545, 546, Mr. Justice Pitney pointed out that

". . . in cases other than such as arise under the contract clause of the Constitution, it is the appropriate

function of the court of last resort of a State to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by § 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution." This was said in a case brought for review from the supreme court of a state, but the same doctrine was recognized in *Arizona Employers' Liability Cases,* 250 U. S. 400, 430, which came here on error to a federal district court.

Third. Section 16, Art. III, of the Idaho Constitution provides—" Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Appellant contends that the act now under review contains two subjects, (a) the levy of a license tax on electrical energy generated in the state; and (b) a subsidy (§ 5) in favor of irrigation pumping users. The purpose of the constitutional provision, as this court said in *Posados* v. *Warner, B. & Co.,* 279 U. S. 340, 344, " is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. . . . the courts disregard mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain." We cannot agree with the claim that the violation here is substantial and plain. The statute levies a license tax and creates an exemption therefrom in specified cases. This exemption, although it inures to the benefit of third persons, and whether it be constitutional or not, is obviously a matter properly connected with the subject matter of the act. It is nothing more than a limitation upon the generality of the tax. The supreme court of

Idaho has laid down the proper rule in *Pioneer Irrigation Dist.* v. *Bradley,* 8 Idaho 310; 68 Pac. 295, to the effect that the purpose of the constitutional provision is to prevent the inclusion in title and act of two or more subjects diverse in their nature and having no necessary connection; but that if the provisions relate directly or indirectly to the same subject, have a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united. Following this rule, we are of opinion that the objection is untenable.

It is further said that the subject of the act is not expressed in the title, since the title purports to levy a license tax on electricity and electrical energy generated, etc., for barter, sale or exchange, while the act requires payment of a tax upon such electricity and electrical energy generated, etc., in the state of Idaho for any purpose and measured at the place of production. The point made is that a tax on energy generated specifically for barter, sale or exchange, and a tax on all energy generated or produced in the state are entirely different things. The force of the contention depends upon the construction of the act. We are of opinion, as will appear more fully under the next heading, that the act, in harmony with the title, imposes a tax only upon the energy which is generated for barter, sale or exchange.

Fourth. Appellant contends that the act is so uncertain and ambiguous as to require arbitrary administrative action without a legislative standard, and thus take appellant's property without due process of law. The uncertainties said to exist are (1) that it can not be determined whether the tax is levied on all electrical energy generated or produced, or only on such as is generated or produced for barter, sale or exchange; and (2) that if the latter be the true construction, the act affords no guide for the determination of what electrical energy in fact is generated for barter, sale or exchange; but by fixing the

place and method of measurement it excludes the possibility of a determination of that matter. The same uncertainties are said to exist in respect of § 5.

We think the act is reasonably open to the construction that the tax is to be measured by the kilowatt hours generated or produced for barter, sale or exchange. The purpose, as manifested by the title, is to levy a tax "on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange." The act itself in terms applies to those engaged in the production of electricity and electrical energy in the State of Idaho "for barter, sale or exchange." The producer is required to render a statement and pay a license "on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production." Considering these provisions and, in connection therewith, the title and the general scope and purpose of the act, the intent to impose the tax only in respect of energy generated for barter, sale or exchange is sufficiently clear.

The limitation of the tax to electrical energy generated only for barter, sale or exchange obviously requires that in determining the amount so generated there be excluded from the computation all electrical energy generated for other purposes. In other words, the intent of the act being to levy a tax only in respect of electrical energy generated for the purposes named, it becomes necessary, in order to effectuate the intention, to deduct from the amount produced and measured at the generator such amounts as are generated for appellant's own use, or otherwise than for the specified purposes. We think this view is not precluded by the provision in § 1 of the act that the tax is levied in respect of the electrical energy generated, "measured at the place of production"; nor by the further provision in § 4 that the producer shall maintain at the point of production suitable appliances

for measuring the electrical energy produced. Since the tax applies not to all electrical energy generated, and, therefore, not to all measured at the point of production, but only to such as is produced for barter, sale or exchange, it necessarily follows that other factors than the basic measurement at the generator must be taken into consideration. That is, to put the matter concretely, the amount of the initial production must first be ascertained by measurement at the place of production, and from that there must be taken amounts used by the producer or consumed in effecting transmission (including so-called line or system losses), or disposed of otherwise than by barter, sale or exchange—the remainder only being subject to the tax. The record shows that the ascertainment of these necessary factors is practicable, testimony being to the effect that the flow of energy passing any point in the transmission system, as well as the amount delivered at any point on the system, can be measured with fair accuracy if proper instruments be attached. Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. See *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, 463; *Hope Gas Co.* v. *Hall, supra.*

It is said that the commissioner, who administers the act, has not provided for these deductions or the means for determining them. But the commissioner must administer the act as it is construed, and it is not to be supposed that he will not now properly do so. Undoubtedly, the administration of an act like this one is attended with some difficulty. Measurements and calculations are more or less complicated. Absolute precision in either probably cannot be attained; but that is so to a greater or less degree in respect of most taxing laws. If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence,

depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations. Compare *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 150; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563–566; *Commonwealth* v. *People's Five Cents Savings Bank*, 87 Mass. 428, 436.

Decree affirmed.

REED ET AL. *v.* ALLEN.

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

No. 600. Argued April 18, 1932.—Decided May 16, 1932.

1. The title to real estate and the right to rents collected from it depended alike upon one and the same construction of a will. In an interpleader over the rents, A got the decree. B appealed, without supersedeas, and secured a reversal; but before his appeal was decided, A had sued him in ejectment, invoking the decree, and recovered a judgment for the real estate. B did not appeal from this judgment, but after the reversal of the decree he sued A in ejectment for the land, relying upon the reversal. *Held:*

   (1) That the judgment in the first action of ejectment was a bar to the second. P. 197.

   (2) B's remedy was to appeal the first ejectment as well as the interpleader and advise the appellate court of their relation. *Butler* v. *Eaton*, 141 U. S. 240. P. 198.

2. A suit by interpleader to determine the right to funds collected as rents from a piece of land, and an action in ejectment to determine title to the land itself, are on distinct causes of action concerning different subject-matters, even though both depend upon the same facts and law, and a decree of reversal in the interpleader suit can not be made to operate as a reversal of a judgment for the other party, in the ejectment case; the rule of restitution upon reversal is irrelevant. P. 197.

3. Jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. P. 198.

4. Where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata,* although the first judgment be subsequently reversed. P. 199.
5. A judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided whether the decision be right or wrong. P. 201.

57 App. D. C. 78; 54 F. (2d) 713, reversed.

CERTIORARI, 284 U. S. 615, to review the reversal of a judgment of ejectment. See also, 17 F. (2d) 666.

Messrs. J. Wilmer Latimer, Walter C. Clephane, and *Gilbert L. Hall* submitted for petitioners.

The common law doctrine which permitted successive ejectment actions between the same parties involving the same issue has been abrogated by § 1002 of the District of Columbia Code. Cf. *Barrows* v. *Kindred,* 4 Wall. 399.

Whenever this Court has had occasion to speak of the estoppel by judgment, it has spoken in no uncertain terms. *Johnson Co.* v. *Wharton,* 152 U. S. 252; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1; *Fayerweather* v. *Ritch,* 195 U. S. 276; *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U. S. 294; *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522.

The appellate court's interpretation of the will, in the interpleader suit, was not handed down for many months after the first ejectment judgment had been entered and petitioners put in possession. The present decision of the Court of Appeals is that, notwithstanding the acquiescence of respondent in the judgment in the first ejectment suit, he is nevertheless not bound by it, but may maintain this second ejectment suit because of that intervening ruling in the interpleader suit. In other words, when (through the appellate court's subsequent ruling in a wholly collateral suit) it appears that a final judgment in ejectment, unappealed from and acquiesced in, was

erroneous, the losing party may again litigate the same issue with the same parties in a second ejectment action.

Error does not at all affect the finality and conclusiveness of a judgment not reviewed. *Oklahoma* v. *Texas,* 256 U. S. 70.

Failure to assert rights in a suit in which a judgment is obtained, either through ignorance of law or of facts, or through negligence or misconduct of counsel, does not affect the estoppel; and so long as the judgment remains unappealed from and in full force, the fact that it may have been erroneous does not detract from its effect as a bar to further suits upon the same cause of action. *Wilson's Executor* v. *Deen,* 121 U. S. 525; *Cromwell* v. *County of Sac,* 94 U. S. 351; *United States* v. *Moser,* 266 U. S. 236; *Elliott* v. *Peirsol,* 1 Pet. 328, 340; *Chicago, R. I. & P. R. Co.,* v. *Schendel,* 270 U. S. 611, 617.

So important is the maintenance of the doctrine of *res judicata* that this Court has declared that it must be enforced even when no review of the judgment by appeal was available because of the small amount involved. *Johnson Co.* v. *Wharton,* 152 U. S. 252.

That the interpleader decree did not create or vest title to the real estate is obvious. The only possible authority of the court in that suit was to determine who was entitled to the money in Walker's hands. The trial court's construction of the will gave the money to petitioners as devisees under the will. The appellate court's construction gave it to respondent Allen as heir-at-law. In either view the title to the land must have vested at the testator's death (which occurred about 30 years before) or as soon after his death as the claimants came into being. Therefore the equity court could not have vested title to the land by its decree in the interpleader suit; and the fact is that neither the first decree nor the decree upon mandate attempted to do so.

Petitioners' ejectment action was based, as of course it must have been, upon the title which they had long asserted as devisees under the will. Manifestly the judgment therein could not have been based, nor in any way dependent, upon a decree which vested no title to the real estate in them. But even if petitioners in that action had erroneously relied upon the trial court's decree in the collateral suit, as their source of title, respondent could not by a second action in ejectment attack the erroneous judgment from which he omitted to appeal.

One judgment or decree is not dependent on another merely because the same question was involved in both cases. *Buck* v. *Colbath,* 3 Wall. 334; *Watson* v. *Jones,* 13 Wall. 679, 716.

Mr. George C. Gertman, with whom *Mr. Alvin L. Newmyer* was on the brief, for respondent.

The equity suit was in no sense collateral to the ejectment suits; it was their foundation. It alone established the title. In both cases it was relied on as creating the only evidence of title.

On reversal, the law raises an obligation in the party who has received the benefit of an erroneous judgment to make restitution to the other party for what he has lost. The reversal gives a new right or cause of action and creates a legal obligation to restore what was lost by reason of the enforcement of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right. *United States* v. *Bank of Washington,* 6 Pet. 8, 19.

What § 1002 of the Code of the District of Columbia accomplished was merely to codify and declare the doctrine of *res judicata* applicable to ejectment actions.

In its last analysis the essence of the subject of the equity suit was that of title; the rent was secondary.

Golde Clothes Shop v. *Loew's Buffalo Theatres,* 236 N. Y. 465, 470.

The equity branch of the court having first obtained jurisdiction of the subject, no co-ordinate branch of the court could usurp jurisdiction. The branch of the court that first obtained jurisdiction retained it until its final decree was made. *Mackenzie* v. *Engelhard Co.,* 266 U. S. 131.

The decree of July 24, 1925, adjudged the petitioners to be the owners of the property; but the defeasible quality of their title by reason of the appeal was ingrafted upon it by operation of law and propagated itself through all subsequent stages. *Chicago, etc. R. Co.* v. *Fosdick,* 106 U. S. 47, 71; *Marks* v. *Cowles,* 61 Ala. 299.

The controversy could not be treated as *res judicata* until it had been finally decided in the court of last resort. *Eastern Bldg. & Loan Assn.* v. *Welling,* 103 Fed. 352, 355.

No title could be established by the ejectment suit, as that was the question adjudged by and involved in the defeasible decree of July 24, 1925, upon which the ejectment suit was based. Likewise no title is to be adjudicated in the present ejectment suit.

To have decided that the first judgment in ejectment was a barrier to respondent's suit would have been unconscionable.

The true test of the identity of causes of action is the identity of the facts essential to their maintenance. *Pierce* v. *National Bank,* 268 Fed. 487; *Union Central Life Ins. Co.* v. *Drake,* 214 Fed. 536. See *Barrows* v. *Kindred,* 4 Wall. 399; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *Cromwell* v. *County of Sac,* 94 U. S. 351.

The judgment in the first ejectment suit was not rendered on the same matters that are involved in the present one. *Bird* v. *Cross,* 123 Tenn. 419.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

In 1922 Thomas Walker filed a bill of interpleader in the Supreme Court of the District of Columbia, naming as defendants these petitioners (or their predecessors) and this respondent, for the purpose of having determined, as between them, the ownership of money then in the hands of Walker, which he had collected as rentals from certain real property. The rights of the rival claimants to the funds depended upon the construction of the will of Silas Holmes. The court construed the will in favor of petitioners and against respondent, and thereupon entered a decree awarding the money to the former.

Thereafter, and pending an appeal from that decree to the District Court of Appeals taken without a supersedeas, petitioners brought an action in ejectment against respondent to recover the real estate from which the rents had been derived. The title which they asserted in that action rested upon the same provisions of the Holmes will as were involved in the interpleader suit; and petitioners pleaded and relied upon the decree in that suit as having conclusively established the construction of these provisions in their favor. See *Lessee of Parrish* v. *Ferris,* 2 Black 606, 608. Judgment was rendered for petitioners, and possession of the real property delivered to them under a writ issued to carry the judgment into effect. From this judgment respondent did not appeal. Thereafter, the District Court of Appeals reversed the decree of the District Supreme Court in the interpleader suit and remanded the cause for further proceedings not inconsistent with its opinion. 57 App. D. C. 78; 17 F. (2d) 666. Following the mandate issued thereon, the trial court vacated its decree and directed payment of the rental money to the respondent.

Some months later a second ejectment action was brought, this time by respondent against petitioners for the repossession of the same real property. By way of estoppel petitioners pleaded the final judgment in the first ejectment action, upon which the trial court gave judgment in their favor. Upon appeal to the District Court of Appeals the latter judgment was reversed. 54 F. (2d) 713.

The appellate court thought that the first ejectment action was merely in aid of the decree in the equity suit, and that when that decree was reversed the judgment in the first ejectment action fell with it. With that view we cannot agree. The interpleader suit and the decree made therein involved only the disposition of the funds collected and held by Walker. The decree adjudged, and could adjudge, nothing in respect of the real estate. It is perfectly plain, therefore, that petitioners could not have been put into possession of the real property by force of that decree; and it is equally plain that respondent could not have been put into such possession in virtue of the reversal. So far as that property is concerned, the rule in respect of restitution upon reversal of a judgment is irrelevant. The first action in ejectment was not brought to effectuate anything adjudicated by the decree, or, in any sense, in aid thereof. It was brought to obtain an adjudication of a claim in respect of a different subject matter. The facts and the law upon which the right to the money and the title to the realty depended may have been the same; but they were asserted in different causes of action. The decree in the interpleader suit no more vested title to, or compelled delivery of possession of, the realty than the judgment in the ejectment action required payment to one party or the other of the money surrendered by the stakeholder. Compare *United States* v. *Moser*, 266 U. S. 236, 241.

The judgment in the ejectment action was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. The appellate court was limited to a review of the interpleader decree; and it is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. If respondent, in addition to appealing from the decree, had appealed from the judgment, the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton,* 141 U. S. 240. But this course respondent neglected to follow. What the appellate court would or could have done if an appeal from the judgment had been taken and had been heard in advance of the appeal from the decree is idle speculation, since the probability that such a contingency would have arisen is so remote as to put it beyond the range of reasonable supposition. In the first place, the appeal from the decree had been taken and was pending when the judgment in the law action was rendered. It well may be assumed that the natural and usual course of hearing cases in the order of their filing would have been followed. But, in addition to that, both appeals necessarily would have been pending before the appeal from the judgment possibly could have been heard, and it rationally may not be doubted that upon application and a showing of their relationship the court would have heard them together, or at least not have disposed of the appeal from the judgment without considering its connection with the other appeal from the decree.

The predicament in which respondent finds himself is of his own making, the result of an utter failure to follow the course which the decision of this court in *Butler* v. *Eaton, supra,* had plainly pointed out. Having so failed, we can not be expected, for his sole relief, to upset the general and well established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the

state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton,* 98 U. S. 61, 65, 68–69.

The rule has been settled for this court that where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata,* although the first judgment be subsequently reversed. *Deposit Bank* v. *Frankfort,* 191 U. S. 499. There a federal court had upheld a contract of exemption from taxation, basing its decision upon the judgment of a state court of first instance. Subsequently that judgment was reversed. On error to the state court of appeals, it was held that under the doctrine of *res judicata* the judgment of the federal court estopped each party from again litigating the question. Speaking for the court, Mr. Justice Day said (pp. 510–511):

"It is urged that the state judgment upon which the Federal decree of 1898 is based was afterward reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms em-

bodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. . . . We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

"It is to be remembered," the court added (p. 512), "that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based."

Parkhurst v. *Berdell,* 110 N. Y. 386, 392; 18 N. E. 123, is cited with approval. In that case the Court of Appeals of New York rejected the contention that the reversal of a judgment which had been given effect as an estoppel in a second action, would avoid the force of the second judgment.

"If the judgment-roll was competent evidence when received," the state court said, "its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently

reversed has thus been received in evidence can have is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

See also *Gould* v. *Sternberg,* 128 Ill. 510, 515–516; 21 N. E. 628.

These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett* v. *Williams,* 20 Wall. 226, 249–250; *Wilson's Executor* v. *Deen,* 121 U. S. 525, 534; *Chicago, R. I. & P. Ry.* v. *Schendel,* 270 U. S. 611, 617. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.

Judgment reversed.

MR. JUSTICE CARDOZO, dissenting.

The real estate belonging to Silas Holmes was devised by his will, in the event of the death of his daughter "without issue," to his nephew and to his brothers and sisters then living, in equal shares.

Upon the death of the daughter a controversy arose between her grandson, Lorenzo Allen, who was the sole surviving descendant of the testator, and the nephew and brothers and sisters.

An interpleader suit followed to determine the distribution of rents deposited as a fund in the Registry of the Court.

In that suit the Supreme Court of the District adjudged on July 24, 1925, that the true interpretation of the will of Silas Holmes was that upon the death of his daughter

"without leaving child her surviving," the real estate described in the bill of complaint was devised to the nephew and the brothers and sisters, and that the rents accruing since her death should be divided in the same way.

On appeal to the Court of Appeals that decree was reversed (January 3, 1927) with the result that on May 27, 1927, a final decree was entered vacating the decree of July 24, 1925, adjudging that the true interpretation of the will of Silas Holmes was that upon the death of said decedent's daughter, Virginia Allen, leaving issue, *i. e.*, a grandson, but no child her surviving, "the said will became inoperative as to the real estate therein described and the said testator therefore died intestate as to the said real estate," and further adjudging that the balance of the fund on deposit in the registry be paid to Lorenzo Allen, the sole heir at law.

In the meantime, the nephew and the brothers and sisters, who for convenience will be spoken of as the collateral relatives, brought an action of ejectment against the heir to recover the possession of the real estate adjudged to be theirs by the decree of July, 1925. In that action they relied solely upon the will and the decree establishing their ownership thereunder. The defendant, admitting the decree, set up the plea that an appeal had been taken from it and was still undetermined. A demurrer to the plea was sustained, and the plaintiffs recovered a judgment (August 21, 1926), under which possession was delivered to them. From that judgment the defendant did not prosecute an appeal.

In December, 1927, upon the entry of the final decree in the equity court the respondent, Lorenzo Allen (the defendant in the first action of ejectment) brought this action of ejectment against the collateral relatives to recover the possession of the real estate from which they

had ousted him. The defendants pleaded in bar the judgment previously rendered in their favor in the first action of ejectment. The plaintiff (the respondent here) filed a replication showing the relation between that judgment and the equity decree and the reversal of the decree after possession had been delivered. The Supreme Court of the District sustained a demurrer to the replication and ordered judgment for the defendants. The Court of Appeals reversed and gave the possession to the plaintiff. The case is here upon certiorari.

The respondent, in order to prevail, must uphold three propositions. He must show: (1) that he is entitled to restitution of any property interests lost to him by force of the erroneous decree; (2) that in losing possession under the judgment of ejectment he suffered a loss that was caused by the decree; (3) that the present action of ejectment is, irrespective of its name, an action for restitution, and an appropriate remedy to put him back where he was at the time of the ouster.

1. As to proposition number 1, there is hardly room for controversy. The rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216; *United States Bank* v. *Bank of Washington*, 6 Pet. 8, 17; *Haebler* v. *Myers*, 132 N. Y. 363; 30 N. E. 963. Two remedies exist, the one by summary motion addressed to the appellate court, the other by a plenary suit. The books show that it has long been the practice to embody in the mandate of reversal a direction that the plaintiff in error "be restored to all things which he hath lost by occasion of the said judgment." *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*,

supra; Haebler v. *Myers, supra.* What this was might be ascertained through an order to show cause known as a *scire facias quare restitutionem habere non debet. Haebler* v. *Myers, supra.* Inquiry was then made whether anything had been taken "by colour of the judgment," (*Sympson* v. *Juxon,* Cro. Jac., 698), with an appropriate mandate for the return of anything discovered. On the other hand, the litigant who has prevailed on the appeal is not confined to a motion for summary relief. He may elect to maintain an action, or the court in its discretion may remit him to that remedy. *United States Bank* v. *Bank of Washington, supra; Haebler* v. *Myers, supra; Clark* v. *Pinney,* 6 Cowen 297. One form of remedy or the other, however, is granted as of right. The remedy in its essence like the one for money had and received is for the recovery of benefits that in good conscience may no longer be retained. "It is one of the equitable powers inherent in every court of justice, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co., supra.* Indeed, the correction may extend to cases where the postulants for restitution are not even parties to the record. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co., supra,* p. 146; *Stevens* v. *Fitch,* 11 Metc. 248. The whole subject has heretofore been dealt with in a spirit of the largest liberality. The judicial process has been moulded with an anxious effort to put an end as speedily as may be to wrongs originating in judicial errors.

2. Our second inquiry must now be answered: Was the loss of possession under the judgment of ejectment a loss that was inflicted upon the respondent by force of the decree in equity adjudging, and adjudging erroneously, that the petitioners were the owners?

A question very similar was considered by the courts of New York in the early case of *Clark* v. *Pinney,* 6

Cowen 297 (cited by this court in *United States Bank* v. *Bank of Washington, supra*). The plaintiffs had given a note in satisfaction of an execution issued on a judgment, and thereafter a second judgment was recovered on the note. The first judgment having been reversed, they sued to recover the money paid upon the second. The decision was that the defendant had money in his hands that *ex aequo et bono* was owing to the plaintiffs, and that he should be compelled to pay it back. The court was not deterred from this conclusion by the intervention of a second judgment, unappealed from, between the first judgment and the payment. It looked to the events in their combined significance, and viewed the action for restitution as an instrument of justice. The entry of a second judgment, instead of being a circumstance fastening the rivets of injustice, was merely an additional reason why the rivets should be broken.

The problem now before us should be approached in a like spirit.

If the decree had contained a provision that the petitioners were entitled to a deed to be executed by a trustee, there can be no doubt that upon the reversal of the decree they could have been required to execute a deed back. If the trustee had refrained from executing a conveyance and had been compelled by a separate decree to fulfill what appeared to be his duty, only a narrow view of the remedial powers of equity would discover in the separate decree a decisive element of difference. The restitution that would have been decreed if the auxiliary proceeding had been one in equity, is equally available here where the auxiliary remedy was one at law, an action of ejectment for the recovery of possession. In every substantial sense, the judgment in ejectment was the consequence and supplement of the erroneous adjudication that the petitioners were the owners and entitled to the rents. The respondent made no claim to any right of possession except such right as was his by virtue of ownership under the will.

The petitioners made no claim on their side apart from the will and the decree adjudicating ownership in them. Looking into the record of the trial, as we are privileged to do, in order to ascertain the grounds upon which possession was awarded (*Oklahoma* v. *Texas,* 256 U. S. 70, 88; *National Foundry Co.* v. *Oconto Water Supply Co.,* 183 U. S. 216, 234; *Russell* v. *Place,* 94 U. S. 606, 608), we find that there was no opportunity for a consideration upon the merits of the respondent's claim of title, and that within the principle of *res judicata* there was nothing to be tried. Indeed, the respondent made no contention to the contrary, but merely urged in his plea that judgment be deferred till the appeal from the decree could be determined by the appellate court. The plea being overruled, judgment of ouster followed as an inevitable consequence. It was as inevitable, and as plainly the fruit of the earlier decree in equity, as it would have been if that decree had said upon its face that the respondent was under a duty to surrender possession to the petitioners if possession was demanded.

The argument for the petitioners is that the respondent in this predicament had one remedy, and one only, an appeal from the judgment giving effect to the decree, and that failing to prosecute that remedy, he became helpless altogether. I concede that an appeal was a remedy available to the respondent, but not that it was his only one, or that the failure to pursue it brought down upon his head a penalty so dire. *Clark* v. *Pinney, supra.* Consider the situation in which he would have stood if the appeal had been taken. The judgment of ejectment was not erroneous when rendered. No other judgment could properly have been rendered if there was to be adherence to the principle of *res judicata.* The Court of Appeals would have been constrained to affirm it, whether they believed the earlier decision to be correct or erroneous,

if the accidents of the calendar had brought up the review of the judgment before there had been opportunity to pass upon the decree. *Parkhurst* v. *Berdell,* 110 N. Y. 386; 18 N. E. 123; *Deposit Bank* v. *Frankfort,* 191 U. S. 499, 512. Even if the appeal from the decree had been heard and decided first, the reversal of the second judgment would have followed, not for any error of the trial court, but in furtherance of substantial justice by the application of principles analogous to those that govern the allowance or denial of a writ of restitution. The subject was considered in *Butler* v. *Eaton,* 141 U. S. 240. The ruling there was that the court in such a situation, if it learns from its own records that the foundation judgment has been reversed, will set aside the second though the trial be free from error. By a short cut to justice it will relieve the litigant of the necessity of resorting to bills of review and motions for a new trial and all the technical apparatus familiar to students of procedure. Cf. *Ballard* v. *Searls,* 130 U. S. 50, 55; *Walz* v. *Agricultural Ins. Co.,* 282 Fed. 646. On the other hand, there are barriers to remedies so summary where the decree of reversal has been rendered in the courts of another jurisdiction. *Deposit Bank* v. *Frankfort, supra.* In such circumstances the reversal is no longer cognizable without proof, is no longer within the range of judicial notice. There are, besides, other complications resulting from the duty of a State to give effect and credit to the judgments of the federal courts and those of other States. *Deposit Bank* v. *Frankfort, supra.* The very fact, however, that the second judgment will be reversed where the reversal of the first judgment is known to the appellate court by force of judicial notice is in itself a potent token that the second judgment is understood to be the product of the first, and hence within the equity and reason of the writ of restitution. What was written in *Butler* v. *Eaton,*

supra, pp. 243, 244, can be applied with little variation here. "The judgment complained of," it was there written, "is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from the inspection of the record that the whole foundation of the part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?" The respondent is in a worse plight than was the plaintiff in error in *Butler* v. *Eaton.* He has no remedy in the court of first instance, unless it be by an action of this nature, for the time to move for a new trial on the ground of newly discovered evidence expired with the term. *United States* v. *Mayer,* 235 U. S. 55; *Realty Acceptance Corp.* v. *Montgomery,* 284 U. S. 547. If he had appealed from the judgment in ejectment and the appeal had been heard and decided before the reversal of the decree, his position would be no better. Upon the reversal of the decree afterwards he would still, in the view of the petitioners, have been left without a remedy; there would even then have been no power in the court to undo the wrong that had been perpetrated under color of its mandate. I think we should hesitate long before committing our procedure to so sterile a conclusion.

For the purpose of the case before us, no significance is to be given to the provisions of the Code (Code of District of Columbia, § 1002) whereby "a final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since the commencement of the action." The object of that statute

was to abrogate anomalies as to the effect of a judgment in ejectment that had grown up at common law when the remedy was held to be one affecting possession only, and not directed to the title. *Cincinnati* v. *White,* 6 Pet. 431, 443. The codifiers did not mean that a party who has recovered in ejectment shall be more immune from restitution than one in any other form of action. A different question would be here if the persons resisting restitution were not the immediate parties to the suit, but strangers acquiring an interest in the property in reliance on the judgment. As to strangers so situated the remedy of restitution has been excluded since ancient days. *Matthew Manning's Case,* 4 Coke 94; *United States Bank* v. *Bank of Washington, supra.*

3. The third branch of the inquiry need not detain us long. If I have been right in what has gone before, there can be little room for controversy as to the fitness of the remedy. An action for restitution has for its aim to give back to a suitor what a judgment has taken from him. What was taken from the respondent under the shelter of this reversed decree and because of its coercive power was the possession of a tract of land. The effect of a judgment in this action of ejectment will be to re-establish his possession and put him where he was before. The quality of the remedy is to be determined by the end to be achieved, and not by any label, whether restitution or ejectment.

A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him

free. I think the paths to justice are not so few and narrow. A little of the liberality of method that has shaped the law of restitution in the past (*Clark* v. *Pinney, supra; Arkadelphia* v. *St. Louis S. W. Ry. Co., supra*) is still competent to find a way.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

CHAMPLIN REFINING CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 122. Argued March 23, 1932.—Decided May 16, 1932.

1. In Oklahoma, as generally elsewhere, the owners of the land containing an oil and gas pool do not have absolute title to those minerals as they permeate below the surface; but each has the right through wells on his own land to take all the oil and gas that he may be able to reduce to possession, including that coming from the land of the others. P. 233.
2. This right, however, is constitutionally subject to reasonable regulation by the State, to the end that the natural gas pressure available for lifting the oil to the surface, may not be unreasonably and wastefully used, and that the common supply of gas and oil may not be unreasonably and wastefully depleted to the injury of the others who are entitled to take from the same pool. *Id.*
3. Even though an operator have facilities for making useful disposition of all the oil and gas that may naturally flow from his wells, he has not a constitutional right to operate them at full production where such operation, by improvident use of natural gas pressure, would itself cause a serious diminution of the quantity of oil ultimately to be recovered from the pool, and, by compelling other

* Together with No. 485, *Champlin Refining Co.* v. *Corporation Commission of Oklahoma et al.;* and No. 486, *Corporation Commission of Oklahoma et al.* v. *Champlin Refining Co.*

owners to speed production in self-defense, would cause them to add to that waste and cause them to waste oil on the surface by producing it in excess of their means of transport and proper storage and their market demand. P. 233.

4. A statute of Oklahoma prohibits waste of petroleum. Section 3 defines waste to include, in addition to its ordinary meaning, economic, underground and surface waste, and waste incident to production in excess of transportation or marketing facilities or reasonable market demands; and it empowers a commission to make regulations for the prevention of such waste. Section 4 provides that whenever full production from any common source of supply "can only be had under conditions constituting waste as herein defined" then any person having a right to produce from such common source "may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of such person . . . bears to the total production of such common source of supply." *Held,* That in this case it is not shown that the rule of proration prescribed in § 4, or any other provision involved, amounts to or authorizes arbitrary interference with private business or property rights or that such statutory rule is not reasonably calculated to prevent the wastes specified in § 3. P. 234.
5. Section 2 of the statute, objected to as authorizing the regulation of prices of crude oil, is separable from the parts under which the order of proration, to prevent waste, was made in this case; and its constitutionality need not be considered. *Id.*
6. A declaration in a statute that invalidity of any part shall not affect the validity of the other parts, creates a presumption that, eliminating invalid parts, the legislature would have enacted the remainder. *Id.*
7. Proration orders applying to the production of oil but not to sales or transportation, *held* consistent with the commerce clause of the national Constitution. P. 235.
8. An order of the Oklahoma Corporation Commission prorating the production of oil from a common source to prevent waste, will not be set aside at the suit of one of the producers when not shown to be arbitrary or discriminatory in fact, merely because information as to production etc., upon which the Commission acted, was procured by other producers in the same field, serving the Commission without pay, and by an umpire, whose salary and expenses in default of legislative appropriations, were paid by such producers. P. 236.

9. Since a proration order, though valid under the Oklahoma statute at one time, may through change of conditions cease to be so and may become unjust and arbitrary at a later time, denial of an injunction will not preclude the plaintiff from applying again on a different state of facts. P. 236.
10. To warrant an injunction to restrain criminal proceedings under a state statute as unconstitutionally affecting property rights, there must be a present danger that such proceedings will be taken. P. 237.
11. In a suit attacking the constitutionality of administrative orders made under a state statute, *held* that the federal court had authority to stay their enforcement pending an appeal from its order denying a temporary injunction. P. 239.
12. Section 9 of the Oklahoma statute, *supra*, provides that any person violating the Act shall be subject to have his producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General, but that such receivership shall only extend to the operating of producing wells and the marketing of the production thereof under the provisions of the Act. *Held:*

    (1) That a proceeding under the section, taken in a state court against the plaintiff in a pending suit in the federal court, was properly restrained by the latter pending its final decision on the validity of provisions of the statute and orders made under it. P. 239.

    (2) The fact that the Attorney General dismissed the proceeding brought, though not required to do so, did not establish that prosecution under the section was no longer imminent. P. 240.

    (3) The section considered with other parts of the Act, is plainly a penal provision. *Id.*

    (4) As such it is void under the due process clause of the Fourteenth Amendment, because it purports to punish violations of regulatory provisions of the Act, §§ 1, 3, 4, (not orders of the Commission) which are too vague and indefinite to afford a standard of conduct. P. 243.

51 F. (2d) 823, affirmed with modifications.

APPEALS in a suit brought by the Refining Company for the purpose of enjoining the enforcement of certain provisions of the Oklahoma "Curtailment Act," as to oil and gas, and of certain orders made under it by the Corporation Commission. No. 122 was an appeal from an order denying a temporary injunction. It is dismissed.

The other two branches were cross-appeals from different parts of the final decree.

Messrs. Harry O. Glasser and *James M. Beck,* with whom *Messrs. George S. Ramsey, Horace G. McKeever,* and *Edgar A. DeMeules* were on the brief, for the Champlin Refining Co.

The business of producing and marketing crude oil is not a public service business, nor does the producer devote his property to a public use. He has the right to drill on his land and take all the oil and gas he can get so long as he does not waste it. If he devotes it to a useful purpose his right to take extends to any oil he can find under his land wherever it comes from. All offset wells draw oil from adjoining lands as well as the land upon which they are located. This has long been the established rule of property in Oklahoma. *Kolachny* v. *Galbreath,* 26 Okla. 772. See also, *Rich* v. *Doneghey,* 71 Okla. 204; *Frank Oil Co.* v. *Belleview Gas & Oil Co.,* 29 Okla. 719; *Priddy* v. *Thompson,* 204 Fed. 955; *Alexander* v. *King,* 46 F. (2d) 235; *Ohio Oil Co.* v. *Indiana,* 177 U. S. 209; *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229; *Barnard* v. *Monongahela Natural Gas Co.,* 216 Pa. 362; *People's Gas Co.* v. *Tyner,* 131 Ind. 277; *Kelley* v. *Ohio Oil Co.,* 57 Oh. St. 317; *Letts* v. *Kessler,* 54 Oh. St. 73; *Higgins Oil Co.* v. *Guaranty Oil Co.,* 145 La. 233; Summers, Oil & Gas, 1927, pp. 72, 74.

The right of the producer to take and appropriate the natural flow through his own wells can not be arrested for the purpose of enabling an adjacent land owner either to find capital with which to develop his property or a market in which to dispose of his oil. This is very different from the statutes involved in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, *Natural Carbonic Gas* case, 220 U. S. 61, and *Midland Carbon Co.* case, 254 U. S. 300.

Admittedly plaintiff's control of pipe line facilities for its own production, and the ownership of a refinery and

markets through its filling stations in Oklahoma and several States, gives it an advantage over the producers in the same oil pool who are without such facilities, for any period during which the pool as a whole is capable of producing more oil than can be sold and transported out of it at prices satisfactory to the majority of the producers. But this advantage lies in the acquisition of its markets, which involved the expenditure of capital vastly in excess of the non-integrated producer's investment and thus entailing a correspondingly greater hazard. Does this advantage acquired by the hazard of large capital investment fall within the protection of the Fourteenth Amendment, or is it subject to confiscation without compensation under the police power of the State? If an oil lessee is without capital to develop his lease, can the legislature prevent the adjacent lessee, with capital, from drilling for oil until the other can find the money to operate? The bankrupt lessee has the same argument to put forward as here, in substance, by the defendants, to-wit, that it would be unfair and inequitable to let one with finances penetrate the oil-bearing sand and remove the oil—without waste—while he, the bankrupt, had not the means to explore his property. See the dissenting opinion below.

The case falls within the principle of *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393. See *Buchanan* v. *Warley,* 245 U. S. 74–75; *Lawton* v. *Steele,* 152 U. S. 133–144.

Assuming that the legislature, in the exercise of the police power, may limit the production of oil for useful purposes without actual physical waste and authorize the commission to make rules and regulations for enforcement, nevertheless, § 2 of the Act is a price-fixing law and void under the Fourteenth Amendment.

Section 2 is an inseparable part of the statute, being the very keystone of the whole legislative arch, and therefore

either renders the entire Act void under the Fourteenth Amendment or furnishes such key to the meaning and effect thereof as to render the entire Act void. *Dies* v. *Bank,* 100 Okla. 205; *Parwal Inv. Co.* v. *State,* 71 Okla. 122; *Williams* v. *Standard Oil Co.,* 278 U. S. 239; *Hill* v. *Wallace,* 259 U. S. 44.

Without § 2, § 3 is void for uncertainty in that "economic waste . . . and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands" clearly refers to § 2 prohibiting the "taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum," as determined by the commission under its authority conferred by the Act. The prevention of actual physical waste is one thing the ordinary man may understand, but "economic waste . . . and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands" means something else. That which constitutes economic waste is a political question or business question about which many may differ.

There is no method known to science for determining underground waste, and in operating a given well or drilling into a given sand, one expert might prescribe the way to do so to get the greatest recovery and suffer the least waste underground, while another set of experts would say to operate in an entirely different manner.

What constitutes "reasonable market demands" is inseparably connected with price, as one might regard the demand reasonable at a price of 50 cents per barrel while another operator might regard anything less than $1.00 a barrel unreasonable. Therefore, unless §§ 3, 4, and 5 are construed together, § 3 must fall for want of

certainty. Construing them as a unit, the legislature declared the production of oil in Oklahoma to be " economic waste " unless there was a " market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum " as determined by the commission.

Even if § 2 is wholly disregarded, then the remaining portions are too uncertain and indefinite to confer upon the commission the authority it seeks to exercise through its regulations, in that the Act does not define economic waste or waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands, and does not confer authority upon the commission to define such waste; and if it does confer such authority then it is void because in violation of the state constitution, § 1 of Art. 4, dividing the powers of government into three separate departments, and § 1 of Art. 5, vesting the legislative power in the legislature.

Assuming that § 2 is severable, the Act is nevertheless unconstitutional for the reason that § 3 is plainly for the purpose and has the necessary effect of authorizing an agency of the State to control prices for the benefit of a particular class,—the oil producers.

The theory of proration to meet an insufficient market outlet necessarily presumes a proportionate right to such market. Such a conception is foreign to our jurisprudence, and that of the English speaking race. There is no such thing as a right to a market. The only right which anyone has to a market is that which is due to his skill, industry, foresight and capital, and that must be protected by the working of natural forces.

But if proration is to be recognized in this case, there must be an equitable system invoked for the measurement of the relative equities which competing producers would have in a market which is insufficient for all. Obviously the ability to bring oil to the surface is no reasonable

measure of any assumed right to a proportionate share of the market; for such proportionate share must necessarily depend, if it be recognized at all, upon the facilities which each competitor has to find a market for his products.

The plaintiff in this case has an abundant use for all the crude oil that it can produce—without waste—and with its facilities has no difficulty in getting a market for all its production. The result is that, having had the industry to create a market, the plaintiff is now obliged to divide that market, or at least a portion of it, with those who either are without a market, or at least without an adequate market for their products. Moreover, the facts in this case show, as further illustrating the injustice of the situation, that plaintiff with an abundant capacity for production of crude oil in its wells, ample for the needs of its refinery, and with an ample market demand for its products, is actually obliged, in the practical working of these proration orders, to buy both crude oil and gasoline from the very competitors who, in the manner hereinbefore described, have imposed this unjust system upon it.

The production of oil is but an incident. Its chief use is in the manufacturing process of refining and selling it in the form of a gasoline. As between different competitors there is a manifest difference in the ability of each to get a market, if the law left the matter to the natural forces of competition.

All the right of superior industry and capital to the markets that have been thus earned are nullified by a purely artificial and arbitrarily unreasonable basis of proration.

If the scheme of proration is to be recognized as a valid exercise of legislative power, in measuring relative rights to a market, such scheme must be based upon the consideration of capital investment in meeting the demands of the market. If, therefore, the commission had valued

the relative investments of different competitors in Oklahoma, and had said that each was entitled to a market in proportion to his capital investment in the facilities for meeting the market, something could be said for the fairness of thus apportioning markets, although its objectionable price-fixing character would remain.

The commission's rules vesting Collins and Bradford with jurisdiction over gauges and the amount of oil to be run by any operator are void because they involve unlawful delegation of the exercise of judgment and discretion.

The legislature had no power to delegate authority to the commission to create the office of umpire and prescribe the qualifications and duties thereof and arrange for his salary; and if § 5 of the Curtailment Act is construed to vest that authority in the commission, it is void under § 1 of Art. 4 and § 1 of Art. 5 of the Oklahoma constitution.

The payment of salaries by the Operators' Committee to Collins and Bradford is against public policy, and vitiated all their alleged official acts. "The ox knoweth his owner, and the ass his master's crib."

Without § 5, requiring the commission to gauge each well, § 4, purporting to authorize proportionate taking, would be void under the Fourteenth Amendment, in that it would delegate to the commission an uncontrollable discretion and arbitrary power over all oil operators in the State—a power unlimited by any provisions of the statute and unascertainable by any oil operator.

A gauge made in accordance with the rules of the commission permitting the operator to gauge his own wells in the presence of a representative of an adjoining operator, although agreed to by a majority of the Operators' Committee or the umpire, is void in that private parties are permitted to determine the basis (potential production) for the proration of production and consequently markets in which all operators are interested.

Gauges made under the supervision of Collins and Bradford are illegal and void because their appointment as umpires was against public policy. They never subscribed to any oath of office. The proration orders and regulations are all permeated with this inseparable, fatal vice. No one should be coerced under threatened penalties to recognize such gauges.

The storage above ground of oil produced in conformity with proration orders, without regard to quantity, has never been forbidden or found objectionable by the commission as physically wasteful.

The complained of waste of gas energy is not in the least prevented by the orders, but retarded only in time of complete dissipation in the intermittent wide-open flush-flow permitted by the orders.

The regulations are void in that they interfere with and constitute a burden upon interstate commerce.

The commission had no power to interpose itself as a shield between the operators and purchasers on the one side and the Antitrust Laws on the other—the commission had no power to legitimate any such agreement or conspiracy by adopting it and making it what appeared to be its own. See letter, Atty. Gen., U. S., to Secy. Int., of March 29, 1929.

The penalties provided in §§ 8 and 9 are for violation of the prohibitions of the Act, as distinguished from the rules of the commission.

The Act is so indefinite that any penalty prescribed for the violation thereof constitutes a denial of due process of law.

Messrs. W. P. Z. German and *John H. Miley,* with whom *Messrs. J. Berry King,* Attorney General of Oklahoma, *Jess L. Ballard,* Assistant Attorney General, and *E. S. Ratliff* were on the brief, for the Corporation Commission of Oklahoma et al.

The purpose of the law was to secure a just distribution to all persons having the right to produce from a common source.

A police regulation which bears a reasonable relation to an object within the governmental authority is valid. *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561, 592; *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Bacon* v. *Walker,* 204 U. S. 311; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61.

The requirement for proportional production, a percentage of the potential capacity of each well in a pool, is reasonable. *Ohio Oil Co.* v. *Indiana, supra; Lindsley* v. *Natural Carbonic Gas Co., supra; West* v. *Kansas Natural Gas Co.,* 221 U. S. 229; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Bacon* v. *Walker,* 204 U. S. 311. It places all producers upon the same basis.

The history of the times shows that the limitation was necessary. Prior to the enactment the correlative rights of some of the surface owners in certain oil pools in Oklahoma were being seriously injured, and in some cases practically destroyed, by excessive withdrawals by certain producers specially equipped to handle their own production. Their conduct was the direct cause of untold surface waste of oil, as well as underground waste. The chief offenders were the integrated producers. These made excessive drafts on the common sources of supply of oil, transporting their production through their own pipe lines to their own steel storage tanks for use in their own refineries.

It would be most unreasonable to expect individual non-integrated producers to store any of their own production, in excess of amounts they can market, in above-ground tanks in order to save their properties from drainage by the integrated companies like the plaintiff. They might as well permit their estates to be destroyed by drainage by others as to destroy them themselves by costly

storage of deteriorating and unsalable oil. Furthermore, many of them can not possibly finance such storage. The best and cheapest storage is in the natural reservoirs.

If correlative rights are to be protected, some limitation on production must be imposed and ratable taking must be required. And the only practicable method is to limit production to the amount which the market will absorb.

Ratable taking based on market demand injures no producer. No owner is thereby deprived of any part of his fair share of the common supply of oil. In the absence of ratable taking, no one producer in the field will sit supinely by and see his own right to draw upon the store of oil destroyed or even seriously injured. It is a question as to whether the State will allow property rights to be destroyed, an irreplaceable natural resource to be wasted, and fresh-water streams and farm lands to be ruined, or whether it will extend its protecting hand to maintain such rights.

It may be true that plaintiff individually commits no waste nor threatens to do so, but the State nevertheless has the power to regulate pools or common sources of supply as units in order better to insure against waste by any one, and to require conformance to such reasonable regulation. This is the policy of the statute.

Plaintiff's capital investment theory, if adopted, would substitute for proration measured by the potential production of the wells of the various land owners, a criterion consisting wholly of investments extraneous to the pool itself. If that theory were a reasonable one, then the question of adopting it would be for the discretion of the legislature.

Proration, instead of dealing with those who are engaged in the business of refining and marketing the refined oil, regulates and protects the rights of the owners of land in the pool. It is but a regulation of real property and operates to preserve and protect such rights.

Ohio Oil Co. v. *Indiana,* 177 U. S. 190. It operates upon land owners as producers, and not as refiners and marketers of the oil they may produce.

Plaintiff's contention challenges the power of the State to protect the public welfare against waste of an irreplaceable natural resource—clearly within the police power; the suggestion is repugnant to the maxim *sic utere tuo.*

Section 2 of the Act is separable. The Corporation Commission has never under it attempted to fix the value of crude oil, or to regulate production with reference thereto. No attempt has been made to enforce it. Moreover, the validity of the section is not involved in this suit. Nor need it be resorted to as an aid to the construction of the other provisions.

Until an attempt is made to enforce the penalty clauses of a statute, if severable from the remainder, there is no occasion to pass upon their validity. *Ohio River & W. R. Co.* v. *Dittey,* 232 U. S. 576, 594; *Grand Trunk R. Co.* v. *Michigan Railroad Comm.,* 231 U. S. 457, 473; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338, 350; *Phoenix R. Co.* v. *Geary,* 239 U. S. 277; *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433, 443; *Western Union* v. *Richmond,* 224 U. S. 160, 172.

Under a proper construction of the Act as a whole, the production of oil in excess of the statutory proportion prescribed by the Act, when the number of barrels constituting the respective statutory factors has been determined by the Commission, constitutes a violation of the Act, and affords a sufficiently definite and certain standard of conduct for a penal statute.

Section 9 does not impose a penalty as punishment but provides a civil remedy to secure compliance with the law. *Columbia Athletic Club* v. *State,* 143 Ind. 98; 40 N. E. 914; *Anton Caha* v. *United States,* 152 U. S. 211, 218.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Cicero I. Murray, Warwick M. Downing,* and *Kenner McConnell,* on behalf of the Oil States Advisory Committee; and by *Mr. Philip Kates.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

The refining company by this suit seeks to enjoin the commission, attorney general and other state officers from enforcing certain provisions of c. 25 of the laws of Oklahoma enacted February 11, 1915,* and certain orders of

* C. O. S. 1921, §§ 7954–7963.

§ 1. That the production of crude oil or petroleum in the State of Oklahoma, in such a manner and under such conditions as to constitute waste, is hereby prohibited. [§ 7954.]

§ 2. That the taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum is hereby prohibited, and the actual value of such crude oil or petroleum at any time shall be the average value as near as may be ascertained in the United States at retail of the by-products of such crude oil or petroleum when refined less the cost and a reasonable profit in the business of transporting, refining and marketing the same, and the Corporation Commission of this State is hereby invested with the authority and power to investigate and determine from time to time the actual value of such crude oil or petroleum by the standard herein provided, and when so determined said Commission shall promulgate its findings by its orders duly made and recorded, and publish the same in some newspaper of general circulation in the State. [§ 7955.]

§ 3. That the term " waste " as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil. [§ 7956.]

§ 4. That whenever the full production from any common source of supply of crude oil or petroleum in this State can only be obtained under conditions constituting waste as herein defined, then any per-

the commission on the ground that they are repugnant to the due process and equal protection clauses of the Fourteenth Amendment and the commerce clause. The district court consisting of three judges, 28 U. S. C., § 380, denied plaintiff's application for a temporary injunction, and No. 122 is plaintiff's appeal from such refusal. As final judgment has been entered, this appeal will be dismissed. The final decree sustains certain regu-

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son, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply. The Corporation Commission is authorized to so regulate the taking of crude oil or petroleum from any or all such common sources of supply, within the State of Oklahoma, as to prevent the inequitable or unfair taking, from a common source of supply, of such crude oil or petroleum, by any person, firm, or corporation, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. [§ 7957.]

§ 5. That for the purpose of determining such production, a gauge of each well shall be taken under rules and regulations to be prescribed by the Corporation Commission, and said Commission is authorized and directed to make and promulgate, by proper order, such other rules and regulations, and to employ or appoint such agents with the consent of the Governor, as may be necessary to enforce this act. [§ 7958.]

§ 6. That any person, firm, or corporation, or the Attorney General on behalf of the State, may institute proceedings before the Corporation Commission, or apply for a hearing before said Commission, upon any question relating to the enforcement of this act, and jurisdiction is hereby conferred upon said Commission to hear and determine the same. Said Commission shall set a time and place, when and where such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein, by publication in some newspaper or newspapers, having general circulation in the State, and in addition thereto, shall cause reasonable notice in writing to be served personally on any person, firm or corporation complained against. In the exercise and enforcement of such jurisdiction, said Commission is authorized to determine any question or fact, arising hereunder, and to summon witnesses, make ancillary orders, and use mesne and final

latory provisions of the Act but declares invalid some of its penal clauses. 51 F. (2d) 823. No. 485 is plaintiff's appeal from the first mentioned portion of the decree and No. 486 is defendants' appeal from the other part.

No. 485.

The Act prohibits the production of petroleum in such a manner or under such conditions as constitute waste.

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process, including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations, as now provided by law. [§ 7959.]

§ 7. That appellate jurisdiction is hereby conferred upon the Supreme Court in this State to review the action of said Commission in making any order, or orders, under this act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from shall not be superseded by the mere fact of such appeal being taken, but shall be and remain in full force and effect until legally suspended or set aside by the Supreme Court. [§ 7960.]

§ 8. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm, or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00), or by imprisonment in the county jail not to exceed thirty (30) days, or by both fine and imprisonment. [§ 7961.]

§ 9. That in addition to any penalty imposed under the preceding section, any person, firm or corporation, violating the provisions of this act, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General, or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this act. [§ 7962.]

§ 10. That the invalidity of any section, sub-division, clause or sentence of this act shall not in any manner effect [sic] the validity of the remaining portion thereof. [§ 7963.]

§ 1. Section 3 defines waste to include—in addition to its ordinary meaning—economic, underground and surface waste, and waste incident to production in excess of transportation or marketing facilities or reasonable market demands, and empowers the commission to make rules and regulations for the prevention of such wastes. Whenever full production from any common source can only be obtained under conditions constituting waste, one having the right to produce oil from such source may take only such proportion of all that may be produced therefrom without waste as the production of his wells bears to the total. The commission is authorized to regulate the taking of oil from common sources so as to prevent unreasonable discrimination in favor of one source as against others. § 4. Gauges are to be taken for the purpose of determining production of wells. And the Commission is directed to promulgate rules and regulations and to appoint such agents as may be necessary to enforce the Act. § 5. Since the passage of the Act the commission has from time to time made "proration orders."

The court made its findings, which, so far as need be given here, are indicated below:

Plaintiff is engaged in Oklahoma in the business of producing and refining crude oil and transporting and marketing it and its products in intrastate and interstate commerce. It has oil and gas leases in both the Greater Seminole and the Oklahoma City fields. In each field it has nine wells. It owns a refinery having a daily capacity of 15,000 barrels of crude and there produces gasoline and other products. It has approximately 735 tank cars, operates about 470 miles of pipeline including adequate facilities for the transportation of crude oil from the fields to its refinery, and has about 256 wholesale and 263 retail gasoline stations in Oklahoma and other States which are supplied from its refinery. At the refinery it has gas-

tight steel storage tanks with a total capacity of about 645,000 barrels. It does not use earthen storage or permit its crude to run at large or waste any oil produced at its wells. All that it can produce will be utilized for commercial purposes. It also purchases much oil.

The Greater Seminole area covers a territory fifteen to twenty by eight to ten miles and has eight or more distinct pools in formations which do not overlie each other. The first pool was discovered in 1925 and by June 15, 1931, there were 2141 producing wells having potential production of 564,908 barrels per day. The wells are separately owned and operated by 80 lessees. About three-fourths of them, owning wells with 40 per cent. of the total potential capacity of the field, have no pipelines or refineries and are entirely dependent for an outlet for their crude upon others who purchase and transport oil. Five companies, owning wells with about 13 per cent. of the potential production, have pipelines or refinery connections affording a partial outlet for their production. Nineteen other companies own or control pipelines extending into this area having a daily capacity of 468,200 barrels, and most of them from time to time purchase oil from other producers in the field.

The Oklahoma City field, about 65 miles west of the Seminole, is about six by three miles and part of it has been divided into small lots. All of plaintiff's leases are in that portion of the field. Oil was discovered there in December, 1928, and is being produced from four different formations more than 6,000 feet below the surface. In some parts of the area two or more overlie each other, and at many points the wells penetrate all overlying formations and are capable of producing from all of them. The field is not yet fully developed. June 15, 1931, there were 746 producing wells, having an estimated potential of 2,987,993 barrels per day. These wells are owned by 53 different lessees. Thirty-six of them are wholly, and

eight are partially, nonintegrated; they operate wells having about 90 per cent. of total potential production. The ten producing companies control pipelines extending into this area with a carrying capacity of only 316,000 barrels per day. Most of them from time to time purchase oil from other producers there.

Crude oil and natural gas occur together or in close proximity to each other, and the gas in a pool moves the contents toward the point of least resistance. When wells are drilled into a pool the oil and gas move from place to place. If some of the wells are permitted to produce a greater proportion of their capacity than others, drainage occurs from the less active to the more active. There is a heavy gas pressure in the Oklahoma City field. Where proportional taking from the wells in flush pools is not enforced, operators who do not have physical or market outlets are forced to produce to capacity in order to prevent drainage to others having adequate outlets. In Oklahoma prior to the passage of the Act, large quantities of oil produced in excess of transportation facilities or demand therefor were stored in surface tanks, and by reason of seepage, rain, fire and evaporation enormous waste occurred. Uncontrolled flow of flush or semi-flush wells for any considerable period exhausts an excessive amount of pressure, wastefully uses the gas and greatly lessens ultimate recovery. Appropriate utilization of gas energy is especially important in the Oklahoma City field where, because of the great depth of the wells, the cost of artificially recovering the oil would be very high.

The first of the present series of proration orders took effect August 1, 1927, and applied to the then flush and semi-flush pools in the Seminole. Similar orders have been in effect almost continuously since that time. Soon after the discovery of oil in the Oklahoma City field, production exceeded market demand there. The first proration order applicable in that field took effect October 15,

1929. Such orders usually covered short terms because of rapidly changing potential production and market demand from each of the pools.

All the proration orders attacked by plaintiff were made pursuant to §§ 1, 3, 4, 5 and 6 of the Act. Each, and the findings that it contained, were made after notice to all interested persons and were based upon evidence adduced at the hearings. The allegations of the complaint that the orders were made by the commission without having heard the testimony of witnesses under oath or any legal evidence were not sustained before the court.

The commission construes the Act as intended to empower it to limit production to the amount of the reasonable daily market demand and to require ratable production by all taking from the common source. In current orders it has found that waste of oil will result in the prorated areas unless production is limited to such demand. In order No. 5189, June 30, 1930, it found that the potential production in the United States was approximately 4,730,000 barrels per day and that imports amounted to about 300,000 barrels, creating a supply of over 5,000,000 barrels as against an estimated domestic and export demand of 2,800,000 barrels. And it found that the existing stocks of crude in storage exceeded the needs of the industry and that purchasers were unwilling to buy in Oklahoma for storage in any amount sufficient to take the surplus of potential production in that State. Similar findings are contained in the commission's subsequent orders.

Based on findings of the daily potential of the Oklahoma City field and the amount of the market outlet for oil there—that is, the amount that could be produced without waste as defined by the Act—plaintiff at the time of the trial was limited by the proration orders to about six per cent. of the total production of its wells in that field. And the orders also operated to restrict plaintiff

to much less than the potential production of its nine wells in the Seminole pools.

The court found that at all times covered by orders involved there was a serious potential overproduction throughout the United States and particularly in the flush and semi-flush pools in the Seminole and Oklahoma City fields; that, if no curtailment were applied, crude oil for lack of market demand and adequate storage tanks would inevitably go into earthen storage and be wasted; that the full potential production exceeded all transportation and marketing facilities and market demands; that accordingly it was necessary, in order to prevent waste, that production of flush and semi-flush pools should be restricted as directed by the proration orders, and that to enforce such curtailment, with equity and justice to the several producers in each pool, it was necessary to enforce proportional taking from each well and lease therein and that, upon the testimony of operators and others, a comprehensive plan of curtailment and proration conforming to the rules prescribed in the Act was adopted by the commission and was set forth in its orders.

The commission, acting under § 5 of the Act and with the consent of the governor of the State, appointed one Collins as its umpire and agent and constituted certain producers in each pool an operating committee to assist him in administering the prescribed rules and regulations. Later, one Bradford was appointed assistant umpire and agent. He spent all his time in the Oklahoma City field leaving Collins to serve in the other prorated areas. They supervised the taking of gauges, ascertained daily production of prorated wells, checked the same against quantities transported and kept complete records to the end that wells in each pool should be operated in accordance with the commission's rules and that violations be detected and reported. No appropriation had been made for the payment of umpires or agents. The commission did not have

sufficient regular help for the administration of the proration orders. Members of operators committees served without pay. Collins's salary and expenses have been paid by voluntary contributions of certain producers in the Seminole field and Bradford's by voluntary contribution of producers in the Oklahoma City field. In each field a great majority of the producers joined to raise such funds, and contributions were prorated on the basis of production. This method of paying for such help has been followed since 1927 and at all times has been known to the commission, the governor and the public. In that period there have been two sessions of the legislature, and it has not forbidden the practice or provided funds to pay for the work. Neither the umpire nor the members of the committee are public officers; they are mere agents or employees of the commission. The evidence does not establish that they have been guilty of favoritism or dishonesty or that the commission has acted arbitrarily or discriminated in favor of the groups paying such agents or that the plaintiff has suffered any injury by reason thereof.

The commission has not discriminated against the Oklahoma City field or any other prorated area nor in favor of the Seminole. The relation between potential production of each pool and the amount of crude oil that without waste could be produced therefrom was not the same in all prorated pools and therefore the applicable percentages of curtailment varied. The same pipelines and purchasers did not serve or take oil from all the pools, and in some the reasonable market demand was greater in proportion to potential production than in others. Some were prorated longer and had purchasers whose facilities do not extend to others. When oil was discovered in the Oklahoma City field the pools in the Seminole area were quite fully developed and some had passed flush production. The latter is a more favored location

in respect of trunk pipelines and has a larger market demand, although the daily production of the former is greater. The constant bringing in of new wells in the Oklahoma City field has resulted in a continuous and rapid increase in the potential production of that field, whereas market demand for oil there has increased very slowly.

None of the commission's orders has been made for the purpose of fixing the price of crude oil or has had that effect. When the first order was made the price was more than two dollars per barrel, but it declined until at the time of the trial it was only thirty-five cents. In each case the commission has allowed to be produced the full amount of the market demand for each pool. It has never entered any order under § 2 of the Act.

It was not shown that the commission intended to limit the amount of oil entering interstate commerce for the purpose of controlling the price of crude oil or its products or of eliminating plaintiff or any producer or refiner from competition, or that there was any combination among plaintiff's competitors for the purpose of restricting interstate commerce in crude oil or its products, or that any operators' committee made up of plaintiff's competitors formulated the proration orders.

The evidence before the trial court undoubtedly sustains the findings above referred to, and they are adopted here.

1. Plaintiff here insists that the Act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

We need not consider its suggestion that the business of production and sale of crude oil is not a public service and that it does not devote its property to the public use. The proration orders do not purport to have been made, and in fact were not made, in respect of services or charges

of any calling so affected with a public interest as to be subject to regulation as to rates or prices.

Plaintiff insists that it has a vested right to drill wells upon the lands covered by its leases and to take all the natural flow of oil and gas therefrom so long as it does so without physical waste and devotes the production to commercial uses. But if plaintiff should take all the flow of its wells, there would inevitably result great physical waste, even if its entire production should be devoted to useful purposes. The improvident use of natural gas pressure inevitably attending such operations would cause great diminution in the quantity of crude oil ultimately to be recovered from the pool. Other lessees and owners of land above the pool would be compelled, for self-protection against plaintiff's taking, also to draw from the common source and so to add to the wasteful use of lifting pressure. And because of the lack, especially on the part of the non-integrated operators, of means of transportation or appropriate storage and of market demand, the contest would, as is made plain by the evidence and findings, result in surface waste of large quantities of crude oil.

In Oklahoma, as generally elsewhere, land owners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession, including that coming from land belonging to others; but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the State to prevent unnecessary loss, destruction or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas

pressure available for lifting the oil to the surface and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 77. *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 19 *et seq.; Brown* v. *Spilman,* 155 U. S. 665, 669. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300, 323. *Rich* v. *Doneghey,* 71 Okla. 204; 177 Pac. 86. *People* v. *Associated Oil Co.,* 211 Cal. 93, 100 *et seq.;* 294 Pac. 717.

It is not shown that the rule for proration prescribed in § 4 or any other provision here involved amounts to or authorizes arbitrary interference with private business or plaintiff's property rights or that such statutory rule is not reasonably calculated to prevent the wastes specified in § 3.

We put aside plaintiff's contentions resting upon the claim that § 2 or § 3 authorizes or contemplates directly or indirectly regulation of prices of crude oil. The commission has never made an order under § 2. The court found that none of the proration orders here involved were made for the purpose of fixing prices. The fact that the commission never limited production below market demand, and the great and long continued downward trend of prices contemporaneously with the enforcement of proration, strongly support the finding that the orders assailed have not had that effect. And if § 2 were to be held unconstitutional the provisions on which the orders rest would remain in force. The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 565. *Pollock* v. *Farmers' Loan &*

Trust Co., 158 U. S. 601, 635. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395–396. *Field* v. *Clark*, 143 U. S. 649, 695–696. Section 10 declares that the invalidity of any part of the Act shall not in any manner affect the remaining portions. That discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without regard to § 2. *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242. *Crowell* v. *Benson*, 285 U. S. 22, 63. *Utah Power & Light Co.* v. *Pfost, ante*, p. 165. The orders involved here were made under other sections which provide a complete scheme for carrying into effect, through action of the commission, the general rules laid down in §§ 3 and 4 for the prevention of waste. See *Julian Oil & Royalties Co.* v. *Capshaw*, 145 Okla. 237, 243; 292 Pac. 841. The validity of § 2 need not be considered.

2. Plaintiff contends that the Act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178. *Hope Gas Co.* v. *Hall*, 274 U. S. 284, 288. *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10. *Utah Power & Light Co.* v. *Pfost, supra.* No violation of the commerce clause is shown.

3. Plaintiff assails the proration orders as unauthorized, lacking basis in fact and arbitrary. But it failed to show that the orders were not based upon just and rea-

sonable determinations of the governing facts: namely, that proportion of all crude oil, which may be produced from a common source without waste, that the production of plaintiff's wells bears to the total production from such source. Gauges were taken to determine the potential production of each well under rules and regulations prescribed by the commission and not shown to be inappropriate or liable to produce arbitrary or discriminatory results. It does not appear that the agents—umpires and committees—employed by the commission with the consent of the governor to enforce the provisions of the Act, did more than to make investigations necessary to secure for the commission data required to make the proration directed by § 4 or that they acted otherwise than as faithful subordinates. Plaintiff has not shown that any act or omission of these agents subjected it to any disadvantage or that the prorations were arbitrary or discriminatory in any respect. Obviously the commission, without agents and employees, could not make or enforce proration as directed by the Act. The plaintiff is not entitled to have the commission's orders set at naught and the purposes of the Act thwarted merely because, in the absence of legislative appropriations therefor, the salaries and expenses of agents or employees were paid out of funds raised by operators interested in having proration established under the statutory rule.

Proration, required to prevent waste defined in § 3 and to give effect to the rule prescribed by § 4, changes according to conditions existing from time to time, and percentages valid at one time may be inapplicable, unjust and arbitrary at another. *Bluefield Co.* v. *Public Service Comm.*, 262 U. S. 679, 693. *Knoxville* v. *Water Co.*, 212 U. S. 1, 19. As plaintiff has failed to prove that any order in force at the time of the trial was not in accordance with the rule prescribed by § 4 or otherwise invalid, the part of the decree from which it appealed will be affirmed. But

such affirmance will not prevent it in an appropriate suit, a different state of facts being shown to exist, from having an injunction to restrain the enforcement of any order proved to be not authorized by the Act or unjust and arbitrary and to operate to plaintiff's prejudice. Cf. *Euclid* v. *Ambler Co.*, 272 U. S. 365, 395.

No. 486.

This is defendants' appeal from that part of the final decree that declares that §§ 8 and 9 are not valid and enjoins the attorney general and county attorney from enforcing them. In its conclusions of law the court below declares that these sections in terms impose penalties for violation of the Act, and not for violation of the orders of the commission; that §§ 1, 3, 4, 5 and 6 are too indefinite and uncertain to warrant the imposition of the prescribed penalties and that therefore both sections are invalid. The opinion points out that the Act is a penal statute and also a regulatory measure to be supplemented by rules, regulations and orders of the commission. It suggests that an operator or producer of oil from a common pool should not be required at the peril of severe penalties to determine whether in the operation of his oil well he is committing " economic waste " or producing in excess of the " reasonable market demands " because these terms are not defined in the Act and are of uncertain and doubtful meaning.

1. Defendants insist that no question concerning the validity of § 8 was before the court.

We do not find any direct or definite allegation in the record that defendants have threatened or are about to cause plaintiff to be prosecuted under § 8. The court found that no prosecution had been commenced against plaintiff, its officers or employees under that section. There is no finding, or evidence sufficient to require one, that any such prosecution was imminent or contemplated.

And the opinion states in substance that § 9 was the only provision of the Act as a penal statute that was before the court.

Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Terrace* v. *Thompson,* 263 U. S. 197, 214, and cases cited. The burden was upon plaintiff seeking to invoke that rule definitely to show that in order to protect its property rights it was necessary to restrain defendants from enforcing § 8. Indeed, the record before us indicates that plaintiff did not show that its rights were directly affected by any danger of prosecution under § 8 and therefore had no standing to invoke equity jurisdiction against its enforcement. *Oliver Iron Co.* v. *Lord, supra,* 180–181. *Massachusetts* v. *Mellon,* 262 U. S. 447, 488. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 446 *et seq.* Undoubtedly § 8, if invalid, may be severed from other parts of the Act without affecting the provisions under which the prorations were made. *Ohio Tax Cases,* 232 U. S. 576, 594. It follows that the lower court erred in passing upon the validity of that section, and the decree will be modified to declare that no question as to § 8 was before the court.

2. Defendants also maintain that no question as to the validity of § 9 was before the court.

The record shows that plaintiff having taken crude oil in excess of the quantities allowed by the orders, the at-

torney general, May 28, 1931, brought suit under § 9 in a state court to have a receiver appointed for its wells. And he procured that court to issue a temporary injunction restraining plaintiff from producing oil or violating the Act or proration orders pending the appointment of a receiver. On the next day plaintiff filed an amended and supplemental bill applying for a stay of enforcement of the proration orders pending the determination of the appeal, No. 122, to this court.

June 13 the lower court, upon plaintiff's application and affidavits submitted by the parties, found that plaintiff would suffer irreparable loss and injury unless the stay be granted. And it entered an order: restraining the commission from instituting proceedings under § 6 of the Act; restraining the attorney general and county attorney from prosecuting under § 9 receivership proceedings against plaintiff; allowing plaintiff, on conditions which need not be stated here, to produce up to 10,000 barrels daily, and requiring the attorney general immediately to have the state court injunction dissolved.

It is clear, if § 9 is invalid, that the enforcement of its provisions pending the trial of this case would, as plaintiff claimed and the lower court found, have inflicted irreparable loss and damage upon the plaintiff. Defendants do not show or claim that the evidence does not establish that finding. The lower court had authority to stay the enforcement of the assailed orders pending the determination of plaintiff's appeal from the denial of its motion for temporary injunction. *Hovey* v. *McDonald,* 109 U. S. 150, 161. *Cotting* v. *Kansas City Stock-Yards Co.,* 82 Fed. 839, 857. *Cumberland Tel. Co.* v. *Pub. Serv. Comm.,* 260 U. S. 212. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 669 *et seq.* The jurisdiction of the court was properly invoked to determine whether plaintiff was entitled to protection against the shutting down

and seizure of its wells and the sale of its oil pending the federal court's final decision.

The attorney general, though not required so to do, dismissed the suit in the state court, and here insists that, as no proceeding for a receiver was pending, the court erred in construing or passing on the validity of § 9. But, when regard is had to the facts and circumstances, it is clear that such dismissal did not require the court to hold that thereby the purpose of the attorney general and county attorney had changed or that prosecution under that section was no longer imminent. The court was therefore properly called upon to pass upon its validity.

3. Section 9 provides: "That in addition to any penalty imposed under the preceding section, any person, firm or corporation, violating the provisions of this act, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General, or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this act." The language used applies to violations of the Act and does not extend to violations of orders of the commission. It is plain and leaves no room for construction. A direct and unambiguous expression would be required to warrant an inference that the state legislature intended to authorize the seizure of producers' wells and the sale of their oil for a mere violation of an order.

The context and language used unmistakably show that the section imposes a penalty and is not a measure in the nature of, or in aid of remedy by, injunction to prevent future violations. By § 6 the commission—which in respect of such matters is a court of record (state constitution, Art. IX, § 19)—is empowered to punish as for contempt violation of the commission's orders by fines up to $500 per day during continuance of such violation.

§§ 3498, 3499, C. O. S. 1921. *Planters' Cotton & Ginning Co.* v. *West Bros.*, 82 Okla. 145, 147; 198 Pac. 855. And § 8 declares that, " in addition to any penalty " that may be imposed by the commission for contempt, one directly or indirectly " violating the provisions of this act " shall be guilty of a misdemeanor and be punished by fine or imprisonment. And similarly the liability under § 9 is for " violating the provisions of this act " and is " in addition to any penalty " imposed by § 8. Both deal with an act already committed. Moreover, liability under § 9 is not limited to seizure and operation of the offender's wells but extends to the marketing of his oil. Absolute liability arises from a single transgression, and prosecution therefor may be had after all occasion for restraint of production has ceased. There is nothing in the Act by which the duration of the receivership may be determined. An owner whose wells are so seized may not, as of right, have production reduced or withheld to await a better demand, or have any voice as to quantities to be produced, or continue to have his oil transported by means of his own pipelines or other facilities, or have it sent to his own refinery or delivered in fulfillment of his contracts. Plainly such a taking deprives the owner of property without compensation even if the moneys received for oil sold less expenses are accounted for by the receiver. The suit is prosecuted by the State to redress a public wrong denounced as crime. The provisions of § 9 are not consistent with any purpose other than to inflict punishment for violation of the Act and they must be deemed as intended to impose additional penalties upon offenders having oil producing wells. *Boyd* v. *United States,* 116 U. S. 616, 634. *United States* v. *Reisinger,* 128 U. S. 398, 402. *Huntington* v. *Attrill,* 146 U. S. 657, 667, 668.

As § 9 declares that one " violating the provisions of this act shall be subject " to the prescribed penalties, it is necessary to refer to the regulatory provisions here in-

volved. Section 1 prohibits "production of crude oil . . . in such manner and under such conditions as to constitute waste." Section 3 declares that, "in addition to its ordinary meaning," "waste" shall include "economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands." Section 4 provides that whenever full production from any common source can only be obtained "under conditions constituting waste" then one having the right to produce from such source may take therefrom only such proportion "that may be produced therefrom, without waste, as the production of the well or wells" of such taker "bears to the total production from such common source of supply."

There is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production. As shown above, § 9 does not cover violations of orders of the commission. The validity of its provisions must be tested on the basis of the terms employed. In *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, this court has laid down the rule that governs here: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The general expressions employed here are not known to the common law or shown to have any meaning in the

oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word "waste" necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the Act, the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in § 4 would require regular gauging of all producing wells in each field, a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the Act.

In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. *United States* v. *Cohen Grocery,* 255 U. S. 81, 89. *Small Co.* v. *Am. Sugar Rfg. Co.,* 267 U. S. 233, 239. *Connally* v. *General Construction Co., supra. Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 454. *Smith* v. *Cahoon,* 283 U. S. 553, 564.

No. 122, dismissed.
No. 485, affirmed.
No. 486, modified and as modified affirmed.

MacLAUGHLIN, COLLECTOR OF INTERNAL REVENUE, *v.* ALLIANCE INSURANCE CO.*

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

No. 548. Argued April 13, 14, 1932.—Decided May 16, 1932.

1. While increase in value of property, not realized as gain by its sale or other disposition, may, in an economic or bookkeeping sense, be deemed an addition to capital in a later period, it is nevertheless a gain from capital investment which, when realized by conversion into money or other property, constitutes income within the meaning of the Sixteenth Amendment, taxable as such in the period when realized. P. 249.
2. The tax being upon realized gain, it may constitutionally be imposed upon the entire amount of the gain realized within the taxable period, even though some of it represents enhanced value in an earlier period before the adoption of the taxing act. P. 250.
3. Gains realized by stock fire insurance companies from sale or other disposition of property, accruing after March 1, 1913, were taxable as income under the revenue acts of 1913–1918, but not under those of 1921–1926. The Act of 1928 taxed their income and by § 204 (b) defined their gross income as including "gain during the taxable year from sale or other disposition of property." *Held*, that the tax under the 1928 Act is on the entire gain realized within the taxable year, to be determined, pursuant to §§ 111–113, by deducting from the net selling price the cost of the property sold, or the fair market value on March 1, 1913, if acquired before that date. P. 251.

QUESTIONS certified in two cases pending in the court below upon appeals from judgments of the District Court in two suits to recover alleged overpayments of income taxes from the Collector. In both cases the District Court construed § 204 of the Revenue Act of 1928 as measuring taxable gains from the sale or other disposition of property on its fair market value as of January 1, 1928. In No. 547, it sustained the tax, computed on this

* Together with No. 547, *Insurance Company of Pennsylvania* v *MacLaughlin, Collector of Internal Revenue.*

basis, and in No. 548 it held the tax invalid because computed on the basis of value on March 1, 1913, or other basis as provided by § 113 of the Act, and not on the basis of value as of January 1, 1928. See 49 F. (2d) 361.

Mr. Robert T. McCracken, with whom *Messrs. Edward M. Biddle* and *Robert C. Walker* were on the brief, for the insurance companies.

The meaning of "income" in income tax acts is definitely settled. *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170; *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509.

Any increased value that accrued before January 1, 1928, the effective date of the new clause in question, is capital and not income. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359; *Hays* v. *Gauley Mountain Coal Co.,* 247 U. S. 189; *United States* v. *Cleveland, C., C. & St. L. Ry. Co.,* 247 U. S. 195; *Lynch* v. *Turrish,* 247 U. S. 221; *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330.

Until January 1, 1921, gain which had accrued subsequently to March 1, 1913, and had been realized in the taxable year by insurance companies was subject to income tax as in the case of all other corporations. Such gain, however, was omitted from the definition of gross income of life insurance companies and of insurance companies other than life or mutual in the taxing Acts from January 1, 1921, until January 1, 1928, the effective date of the Revenue Act of 1928. A change was then effected in respect to insurance companies other than life or mutual by an amendment to § 204 which provided that gross income should include "gain during the taxable year from the sale or other disposition of property." This amendment was in order that such insurance companies might be "put on the same basis" in this respect with mutual companies.

Section 204 is complete, in so far as the matters are concerned which it purports to cover, except where there are express cross-references. There is no such cross-reference in § 204 (b) (1)(b). The Supplement is also silent as to how such gain shall be computed.

There is entirely absent from the Act of 1928 and from the legislative history any evidence of an intent to penalize this type of insurance company by subjecting it to an income tax upon gain realized from the sale or other disposition of property during the taxable year, which had accrued five or ten years, or even longer, before the effective date of the Act. Even if such an intent had been clearly and unequivocally expressed, it would have exceeded the power of Congress. It would have been a tax on capital under the guise of an income tax and would have been arbitrary and capricious.

The proper interpretation of § 204 (b) (1)(b) is that the basis for determining gain from the sale or other disposition of property acquired before January 1, 1928, is the value of such property as of December 31, 1927.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Wm. H. Riley, Jr.,* were on the brief, for MacLaughlin, Collector.

The statute contemplates that the basis provided in § 113 shall be applicable to gains from sales of property by stock fire insurance companies. Section 111 provides that that basis shall apply "except as hereinafter provided in this section." There is no provision in the section excepting such insurance companies from its application. Although § 204 does not expressly refer to § 111 or § 113, it is clear from § 4 in the introductory provisions, as well as from the structure of the Act as a whole, that general provisions like those of §§ 111 and 113 are to ap-

ply to all taxpayers taxed on gains on sales of property unless some other specific provision forbids.

The legislative history of § 204 shows that Congress intended that in respect of gains, stock fire insurance companies should be treated in the same manner as mutual fire insurance companies.

The Commissioner's action accords with the construction of the Act which has been consistently adopted by the Treasury Department in formal regulations and other rulings.

The fact that some of the increase in value occurred during the period when no tax was levied on such gains is immaterial. The exemption enjoyed by stock fire insurance companies under the Acts of 1921, 1924 and 1926 did not deprive Congress of the power in 1928 to tax this class of taxpayers on such gains upon the same basis as other corporations. Cf. *Cooper* v. *United States,* 280 U. S. 409; *Taft* v. *Bowers,* 278 U. S. 470.

Mr. Justice Stone delivered the opinion of the Court.

Appellee in No. 548, a Pennsylvania stock fire and marine insurance corporation, brought the present suit in the District Court of Eastern Pennsylvania, to recover income tax for the year 1928, alleged to have been illegally exacted. Under the Revenue Acts of 1913, 1916, 1917 and 1918, stock fire insurance companies were taxed upon their income, including gains realized from the sale or other disposition of property, accruing subsequent to March 1, 1913; but by the Revenue Acts of 1921, 1924 and 1926, gains of such companies, from the sale or other disposition of property, were not subject to tax, and losses similarly incurred were not deductible from gross income.

Supplement G of the Revenue Act of May 29, 1928, 45 Stat. 791, 844, c. 852, § 204 (a) (1), effective as of January 1st of that year, taxed the income of insurance

companies, and by § 204 (b) (1), applicable to insurance companies other than life or mutual, gross income was defined as including "gain during the taxable year from the sale or other disposition of property." In 1928 appellant received a profit from the sale of property acquired before that year, upon which the Commissioner assessed a tax computed, on the basis prescribed by § 113 of the Act, by including in the taxable income all the gain attributable to increase in value after March 1, 1913, and realized in 1928. The District Court held that only the accretion of gain after January 1, 1928, was taxed, and gave judgment in the Company's favor for the tax collected in excess of the amount so computed. 49 F. (2d) 361. On appeal, the Court of Appeals for the Third Circuit certified a question to this Court under § 239 of the Judicial Code, as amended by the Act of February 13, 1925, as follows:

"Under the Revenue Act of 1928, is the basis to be used by an insurance company (other than a life or mutual insurance company) in computing 'gain during the taxable year from the sale or other disposition of property,' acquired before and disposed of after January 1, 1928, its fair market value as of January 1, 1928, the effective date of the Act?"

The Company contends that so much of the gain as accrued before the effective date of the taxing Act was capital, which could not constitutionally be taxed under the Sixteenth Amendment, and that in any case the constitutionality of a tax upon the previously accrued gain is so doubtful as to require the taxing act to be construed as not authorizing such a levy.

In No. 547, decided by the same District Court, and involving similar facts and the same taxing statutes, the Court of Appeals for the Third Circuit certified the following question:

"If the basis to be used by an insurance company (other than a life or mutual insurance company) in computing 'gain during the taxable year from the sale or other disposition of property,' acquired before and disposed of after January 1, 1928, the effective date of the Revenue Act of 1928, be the fair market value of such property as of March 1, 1913, or other basis provided by section 113 of the Act, is the quoted provision (Section 204 (b) (1), clause (B)) unconstitutional because it taxes capital?"

The tax under this and earlier revenue acts was imposed upon net income for stated accounting periods, here the calendar year 1928, see *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 363, and it is only gain realized from the sale or other disposition of property, which is included in the taxable income. Realization of the gain is the event which calls into operation the taxing act, although part of the profit realized in one accounting period may have been due to increase of value in an earlier one. While increase in value of property, not realized as gain by its sale or other disposition, may, in an economic or bookkeeping sense, be deemed an addition to capital in a later period, see *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, it is nevertheless a gain from capital investment which, when realized, by conversion into money or other property, constitutes profit which has consistently been regarded as income within the meaning of the Sixteenth Amendment and taxable as such in the period when realized. See *Lynch* v. *Hornby,* 247 U. S. 339; *Merchants' Loan & Trust Co.* v. *Smietanka, supra; Eldorado Coal & Mining Co.* v. *Mager,* 255 U. S. 522; *Goodrich* v. *Edwards,* 255 U. S. 527; *Walsh* v. *Brewster,* 255 U. S. 536; *Taft* v. *Bowers,* 278 U. S. 470; *Lucas* v. *Alexander,* 279 U. S. 573; *Willcuts* v. *Bunn,* 282 U. S. 216.

Here there is no question of a tax on enhancement of value occurring before March 1, 1913, the effective date of the income tax act of that year, for the Collector asserts no right to tax such increase in value. The fact that a part of the taxed gain, represented increase in value after that date, but before the present taxing act, is without significance. Congress, having constitutional power to tax the gain, and having established a policy of taxing it, see *Milliken* v. *United States,* 283 U. S. 15, 22–23, may choose the moment of its realization and the amount realized, for the incidence and the measurement of the tax. Its failure to impose a tax upon the increase in value in the earlier years, assuming without deciding that it had the power, cannot preclude it from taxing the gain in the year when realized, any more than in any other case, where the tax imposed is upon realized, as distinguished from accrued, gain. If the gain became capital by virtue of the increase in value in the years before 1928, and so could not be taxed as income, the same would be true of the enhancement of value in any one year after the adoption of the taxing act, which was realized and taxed in another. But the constitutionality of a tax so applied, has been repeatedly affirmed and never questioned. The tax being upon realized gain, it may constitutionally be imposed upon the entire amount of the gain realized within the taxable period, even though some of it represents enhanced value in an earlier period before the adoption of the taxing act. *Cooper* v. *United States,* 280 U. S. 409; compare *Taft* v. *Bowers,* 278 U. S. 470. See also *Glenn* v. *Doyal,* 285 U. S. 526, dismissing *per curiam,* for want of a substantial federal question, an appeal from a decision of the Georgia Supreme Court (reported sub nom. *Norman* v. *Bradley,* 173 Ga. 482; 160 S. E. 413), that a state income tax on the profits realized from a sale of corporate stocks, after the passage of

the act, was constitutional, though the gains had accrued prior to its enactment.

Doyle v. *Mitchell Brothers Co.*, 247 U. S. 179, and *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, on which the taxpayers rely, involved the construction, not the constitutionality, of the Corporation Excise Tax Act of 1909, and considerations which, in *Lynch* v. *Turrish*, 247 U. S. 221, and *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, led to the construction of the income tax act of 1913 as not embracing gains accrued before the effective date of that act, are not present here.

We think it clear that the Revenue Act of 1928 imposed the tax on the entire gain realized within the taxable year. Section 204 (b) (1) of Supplement G, which includes gain from the sale of property in the gross income of insurance companies (other than life or mutual), states no method of computing the gain. But the 1928 Act, like its predecessors, prescribed in other sections, §§ 111–113, that taxable gains from the sale of property should be determined by deducting from the net sales price the cost or the fair market value on March 1, 1913, if acquired before that date. These provisions are general in their terms, without any stated exception, and on their face are applicable alike to all gains from the sale of property taxed by the Act. They either control the computation of the gain referred to in § 204 (b) (1) or the word "gain" in that section, construed without their aid, must be taken in its ordinary sense as embracing the difference between net cost and net selling price, and so upon established principles would include in the taxable realized gain all which had accrued since the effective date of the income tax act of 1913, the first enactment adopted under the Sixteenth Amendment. See *Eisner* v. *Macomber*, 252 U. S. 189, 207; *Merchants' L. & T. Co.* v. *Smietanka*, *supra*, pp. 519, 520. For present purposes, the Revenue

Act of 1928 must be regarded as substantially an amendment and continuation of the Act of 1913.

The taxpayers insist that the omission from § 204 (b) (1) of any reference to §§ 111–113, in contrast to the inclusion in § 204 (c) of cross references to the general provisions of the Act defining deductions, evidences an intention to exclude the method of computing gains prescribed by §§ 111–113, and to adopt a different method with respect to gains taxed by Supplement G. But this argument disregards the function of the general provisions of the Act, including §§ 111–113, as complementing the provisions of Supplement G, and ignores the obvious necessity of defining the deductions authorized by § 204 (c), either by cross references made in that section to the general provisions of the Act or by other appropriate means, which did not obtain with respect to the definition of gains in § 204 (b) (1).[1]

This becomes evident upon an examination of the structure of the 1928 Act, which differed from that of any earlier revenue measure. "Title 1—Income Tax," with which we are now concerned, is divided into three subtitles designated:

"Subtitle A—Introductory provisions."
"Subtitle B—General provisions."
"Subtitle C—Supplemental provisions."

[1] It is true that §§ 204 (c), 205, and 206, relating to allowed deductions from gross income, define the deductions by specific cross references to like deductions defined in the general provisions of other sections, but as the listed deductions were intended to be exclusive, and as those allowed to insurance companies differ in many respects from those allowed to other corporations, it was an appropriate, if not necessary precaution, in enumerating them, to describe those which were allowed, either by repeating the appropriate language contained in the general sections or to incorporate it by reference. No such precaution was necessary with respect to § 204 (b). The "gain" included in gross income by that section was adequately defined by §§ 111–113, made applicable, by § 4 of Sub-title A, to the provisions of Supplement G.

Section 4 of Subtitle A provides in part: " The application of the General Provisions and of Supplements A to D, inclusive, to each of the following special classes of taxpayers, shall be subject to the exceptions and additional provisions found in the Supplement applicable to such classes, as follows: . . . (c) Insurance Companies,—Supplement G . . . ." The Act, by this section and by operation of its structural arrangement, thus provided that all of the general provisions of Subtitle B, and all the general provisions of Supplements A to D, including Supplement B, in which §§ 111–113 occur, were to apply to the special classes of taxpayers referred to in Supplements E to K, unless the provisions relating to a special class restrict the operation of the general provisions or are necessarily inconsistent with them. That such was the purpose to be accomplished by the rearrangement of the taxing provisions in the 1928 Act sufficiently appears from its legislative history.[2]

Section 204 is not, as the District Court thought, " a scheme or code of taxation complete in itself, . . . without reference to the general provisions of the act," unless specifically referred to and included by cross reference to such general provisions. An inspection of the Act discloses that Supplement G, dealing with insurance companies as a special class of taxpayers, would be unwork-

[2] See Report of the Joint Committee on Internal Revenue Taxation, December 22, 1927, Document No. 139, 70th Cong., 1st Sess., p. 2, appendix p. 7; Report of the Committee on Ways and Means, December 17, 1927, H. R. No. 2, 70th Cong., 1st Sess., pp. 1, 2, 11, 12; Report of Committee on Finance, Sen. Rep. No. 960, May 1, 1928, 70th Cong., 1st Sess., pp. 17, 18. Although the bill, as originally introduced, did not contain the provision for taxing gains of stock fire insurance companies, the bill was amended by the addition of § 204 (b) (1) (B) to Supplement G, for the declared purpose of placing such insurance companies on the same basis as mutual companies, which were already taxed upon gains from the sale or other disposition of property. Cong. Rec., May 21, 1928, Vol. 69, Part 9, p. 9337; Conference Report No. 1882, p. 18.

able without resort to the general provisions of the Act not specifically referred to in the Supplement.[3]

It would be going very far in the circumstances to say that the mere omission from § 204 of a cross reference to the definition of gain in §§ 111–113, made applicable by the general provisions of the Act, not only excluded that definition from § 204, but substituted a different one not specifically mentioned in that or any other section. The gain taxed by § 204 (b) (1) is therefore that defined by §§ 111–113, which may constitutionally be taxed.

Both questions are answered "No."

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

BLAKEY, RECEIVER, *v.* BRINSON.

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

No. 639. Argued April 21, 1932.—Decided May 16, 1932.

1. The relation between a bank and a depositor is that of debtor and creditor. P. 261.
2. A savings depositor of a national bank, pursuant to conversations with his bank's officer, increased his account, by deposit in the usual

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[3] Neither § 204, which deals with the taxation of insurance companies other than life or mutual, nor the other provisions of Supplement G, contain any directions concerning such essential parts of a system of taxation as the filing of returns, time of payment, or penalties for non-payment; and no express reference is made to the obviously applicable general provisions touching upon these matters: §§ 52, 56, 146. Other important and necessarily applicable general provisions, not included or referred to in Supplement G, may be found in §§ 105, 118, 141, 142, 271–277. The provision in § 207 of Supplement G that "gross income shall not be determined in the manner provided in Section 119," is a plain indication that the general provisions contained in § 119 would apply to insurance companies in the absence of the express exception.

way, to an amount sufficient to pay for some bonds, which the bank had undertaken to purchase for him. Thereafter the officer told him that he had his bonds, and handed him a charge slip showing the cost, including principal, accrued interest and commission. The total was charged against the depositor's account, and was credited as a "deposit" in a "bond account" appearing on the bank's books. When the bank soon afterwards closed its doors, it was discovered that in fact no bonds had been purchased, ordered, or received for the depositor.

Held that no trust had been created, and that the depositor continued to be a general creditor. P. 263.

52 F. (2d) 821, reversed.

CERTIORARI, 285 U. S. 531, to review the affirmance of a judgment against the receiver of a bank in a suit for money alleged to have been held by the bank on a trust.

Messrs. Henry Eastman Hackney and *George P. Barse,* with whom *Messrs. F. G. Awalt, Julius F. Duncan,* and *J. O. Carr* were on the brief, for petitioner.

The general rule is that distribution of the assets of a national bank must be made in accordance with § 5236, R. S., 12 U. S. C., c. 2, § 194, which requires a *pro rata* distribution amongst all creditors. *Cook County Nat. Bank* v. *United States,* 107 U. S. 445.

Except for preferences to the United States the statute contemplates absolute equality among creditors.

The courts have, however, established a basis for another class of preferred claims, namely, where the applicant can show that the receiver has, among the assets acquired by him, identifiable property belonging to the claimant. In working out the formula or procedure for establishing such claims, the federal courts have held generally that claimant must show that from his transaction with the bank before suspension (a) the bank received property of the claimant in trust, (b) that the property actually augmented the existing assets (as distinguished from the addition of a bookkeeping credit), and (c) that

the augmented assets, or the proceeds thereof, are traceable into the assets taken over by the receiver. See *Empire State Surety Co.* v. *Carroll County,* 194 Fed. 593; *Hirning* v. *Federal Reserve Bank,* 52 F. (2d) 382; *Mechanics Bank* v. *Buchanan,* 12 F. (2d) 891, cert. den. 273 U. S. 715; *Larabee Flour Mills* v. *First Nat. Bank,* 13 F. (2d) 330, cert. den. 273 U. S. 727. This same doctrine of augmentation and tracing is also established by the state courts of Massachusetts, Michigan, New Jersey, New York, Pennsylvania, South Carolina, South Dakota, and Washington.

The burden is upon the claimant to trace the proceeds to the receiver or trustee. See *Schuyler* v. *Littlefield,* 232 U. S. 707; *Cunningham* v. *Brown,* 265 U. S. 1; *St. Louis & S. F. R. Co.* v. *Spiller,* 274 U. S. 304.

There has been neither augmentation nor tracing to the receiver in this case.

It will be noted that the agreement between the parties contemplated the use of the deposit balance at a future date in the same manner as if at such future date the depositor had drawn a check to the bank for the amount of the contemplated purchase price of the bonds.

The use of the $2,100 check did not, on October 15, augment the assets of the bank, since it was used in the clearings to pay the bank's obligations. *Empire State Surety Co.* v. *Carroll County,* 194 Fed. 593, 606; *Farmers Nat. Bank* v. *Pribble,* 15 F. (2d) 175.

No presumption can be indulged that any of the fund from the correspondent bank reached the insolvent bank, or passed to the receiver. *Titlow* v. *McCormick,* 236 Fed. 209, 214. The burden of tracing the fund is upon the claimant, and once it is dissipated it can not be treated as reappearing in sums subsequently deposited to the credit of the same account. *Schuyler* v. *Littlefield,* 232 U. S. 707, 710.

The record does not disclose any express agreement that any portion of the bank's cash funds would be segregated, or that such funds would be impressed with a trust for that purpose. The existence of a trust agreement is entirely inconsistent with the deposit of the additional $2,100 in the savings account with the understanding that it should remain on deposit in that account and that the account would later be charged with the purchase price.

The theory of tracing trust funds or property necessarily implies that there is a fund or *res* to be followed. *Hirning* v. *Federal Reserve Bank,* 52 F. (2d) 382, 386.

An obligor can not be trustee either of his duties or of the obligee's rights under the obligation. American Law Institute, Trusts Restatement, § 75; Stone, in Col. L. Rev., Vol. XXI, p. 518.

The charge to the account of respondent and corresponding credit to the bank's bond account was not the equivalent of withdrawing cash and delivering the same in trust. *Beard* v. *Independent District,* 88 Fed. 375; *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co.,* 136 N. E. 333; *Mark* v. *Westlin,* 48 F. (2d) 609; *First Nat. Bank* v. *Williams,* 15 F. (2d) 585. Also see, in line with the foregoing federal decisions, *Miller* v. *Viola State Bank,* 121 Kan. 193; *Howland* v. *People,* 229 Ill. App. 23; *People* v. *Merchants & Mechanics Bank,* 78 N. Y. 269.

Mr. L. I. Moore for respondent.

Where there is a deposit in a bank for a specific purpose, it is universally held that the money thus deposited must be applied to the purposes for which it was deposited. Citing many cases, including: *Southern Exchange Bank* v. *Polk,* 152 Ga. 162; *Morton* v. *Woolery,* 189 N. W. 232; *Smith* v. *Sanborn,* 247 Iowa 640; *Lumber Co.* v. *Scandinavian-American Bank,* 130 Wash. 33.

The distinction between general and special deposits is recognized in *Marine Bank* v. *Fulton Bank,* 2 Wall. 252. See also, *Montague* v. *Pacific Bank,* 81 Fed. 602; *Moreland* v. *Brown,* 86 Fed. 259; *Merchants Nat. Bank* v. *School District,* 94 Fed. 708; *Davis* v. *McNair,* 48 F. (2d) 494; *Schumacher* v. *Harriett,* 52 F. (2d) 817; *Bartholf* v. *Millett,* 22 F. (2d) 538.

It being established that the money constituted a special deposit for a special purpose, the receiver was bound to restore it to the person to whom it of right belongs. The matter of augmentation of assets does not arise, and the authorities cited by the petitioner upon that subject are irrelevant. Distinguishing: *Schuyler* v. *Littlefield,* 232 U. S. 707; *Cunningham* v. *Brown,* 265 U. S. 1; *St. Louis & S. F. R. Co.* v. *Spiller,* 274 U. S. 304.

The doctrine announced in *Peters* v. *Bain,* 133 U. S. 670, clearly establishes the right of the plaintiff to recover. *Brennan* v. *Tillinghast,* 201 Fed. 609; *Poisson* v. *Williams,* 15 F. (2d) 582.

Messrs. George P. Barse and *F. G. Awalt,* by leave of Court, filed a brief on behalf of J. W. Pole, Comptroller of the Currency, as *amicus curiae.*

Mr. Justice Stone delivered the opinion of the Court.

Respondent brought suit against the petitioner, receiver of The First National Bank of New Bern, North Carolina, an insolvent national bank, to recover money alleged to have been paid to the bank upon trust for the purchase, for respondent, of United States bonds. Judgment of the United States District Court for the Eastern District of North Carolina for respondent, was affirmed by the Court of Appeals for the Fourth Circuit. 52 F. (2d) 821. This Court granted certiorari.

The case was tried to the court without a jury and the facts are not in dispute. Respondent maintained an in-

terest-bearing savings account with the bank, in which his credit balance on October 14, 1929, was $1,961.31. Shortly before that date, respondent had had conversations with an officer of the bank in the course of which the latter signified the willingness of the bank to purchase $4,000 of United States bonds for respondent. On October 10 he stated to respondent that the bank would send to Richmond for the bonds and asked him to bring to the bank on the 14th such amount, in addition to his credit balance, as would be required to pay for the bonds. On the latter date respondent drew a check for $2,100 upon another bank, which he deposited in his savings account, thus increasing his deposit balance to $4,061.31. On the 15th, the same officer of the bank informed respondent that the bonds had been ordered and on the 19th said to him, "I have your bonds," and handed to him a charge slip which stated: "This is to advise you that we have this day charged your account as follows:

"4,000 Fourth L. L. 4¼% Bonds.....	$3,960.00
Acc. Int.....	.60
Commission.....	4.00
	$3,964.60"

On October 21, the bank charged respondent's savings account on its books with $3,964.60, and credited a like amount as a "deposit" in a "bond account" appearing on its books. The bond account contained only a daily record of credits in the account of checks and deposits and their total, without any reference to respondent or any other customer of the bank. The nature and purpose of the account does not otherwise appear. When the bank closed its doors on October 26, it was discovered that in fact no bonds had been purchased, ordered, or received for the respondent. The only transactions had with respect to respondent or his account were the con-

versations with the officer of the bank and the entry of the debit and credit items mentioned.

On these facts, the District Court concluded that the bank had received the $3,964.60 in trust for the purpose of purchasing the bonds and that as the funds in the hands of the receiver had been augmented by the wrongful commingling of the trust fund with the other funds of the bank, respondent was entitled to payment in preference to the general creditors of the bank. The Court of Appeals thought that the trust arose only on the 19th, when the bank stated that respondent's account had been charged with the purchase price of the bonds, but reached the same conclusion as respects the increase of the funds in the hands of the receiver and the right of respondent to preferential payment.

The petitioner insists, as matter of law, that no trust ever came into existence as the result of these transactions. He also relies on the facts that the $2,100 check credited to respondent's account had been included in a clearing house settlement of the bank with a correspondent, and its proceeds in the form of a draft for the balance due upon the settlement had been endorsed and turned over by the New Bern bank to a third bank in settlement of its account with the latter. From this it is argued that the check did not augment the bank's funds, and that the proceeds could not be traced into the hands of the receiver; hence, as to them the respondent could not be preferred over general creditors.

As we conclude that petitioner's first position is well taken, it is unnecessary to consider the second. It would have been equally competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, or by establishing with it a credit to be debited with the cost of the bonds when purchased. But only if the former was the method adopted, could respond-

ent, upon the bank's insolvency and failure to purchase the bonds, recover the fund or its proceeds, if traceable, in preference to general creditors, see *Minard* v. *Watts,* 186 Fed. 245; *Fallgatter* v. *Citizens' National Bank,* 11 F. (2d) 383; *Northern Sugar Corp.* v. *Thompson,* 13 F. (2d) 829.

The relationship established between the bank and respondent by his savings account was, from its inception, that of debtor and creditor, and the credit balance of $1,961.31 in respondent's account on October 14 represented the amount of the bank's indebtedness to him. *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 501; *Phoenix Bank* v. *Risley,* 111 U. S. 125; *Manhattan Bank* v. *Blake,* 148 U. S. 412, 425, 426.

Although there had been anticipatory talk of the purchase of bonds, and the bank's officer had stated that they would be purchased, nothing said or done before the 14th purported to carry out the proposal or to alter the relationship established by the savings account. On that date respondent's credit balance was augmented by the deposit of the $2,100 check, made in conformity to the usual course of business with respect to deposit accounts. Respondent obviously did not alter the debit and credit relationship with respect to the $1,961.31 balance by asking the bank to purchase bonds, or by handing to the bank the deposited check of $2,100. All that happened on that date was equally inconsistent with any purpose to create a trust of the check or its proceeds, and showed unmistakably that the amount of the check, as in the case of any other deposit in the savings account, was to be added to the existing balance and treated like it. In making the deposit, respondent used the customary form of deposit slip and, in accordance with its instructions, the deposit was credited by the bank in the usual manner, both in his passbook and in his savings account on its own books.

After the deposit of the check, as before, the bank remained a debtor and the respondent a creditor for the amount of the credit balance.

The situation thus created continued without change until the 19th, when the bank's officer advised respondent that the bonds had been purchased. If the advice was true, as respondent believed it to be, he was then called upon to pay to the bank the amount of the purchase price, and the bank proceeded, with the assent of the respondent, to liquidate the supposed obligation by charging his savings account with the exact amount of the stated purchase price, with interest and commissions added. We can find in this method of discharging a supposed obligation no hint of an intended alteration of the debtor and creditor relationship, with which respondent had been content from the beginning, to that of trustee and *cestui que trust.*

The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; 85 Atl. 281; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash. 33; 225 Pac. 825; *State* v. *American Exchange Bank,* 112 Neb. 834; 201 N. W. 895. See, *contra, Beard* v. *Independent District of Pella City,* 88 Fed. 375, 381; *Mark* v. *Westlin,* 48 F. (2d) 609; *First National Bank* v. *Williams,* 15 F. (2d) 585; *Howland* v. *People,* 229 Ill. App. 23; *Miller* v. *Viola State Bank,* 121 Kan. 193; 246 Pac. 517; *People* v. *Merchants & Mechanics' Bank of Troy,* 78 N. Y. 269; *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co.,* 242 Mass. 181; 136 N. E. 333.

Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the rôle of creditor, had sought to establish a trust fund. But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it.

The debit entry may be disregarded, because respondent's assent to it was procured by a false statement; but the only consequence is that his status as a creditor is unaffected and he is entitled only to share in the funds of the bank on an equal footing with other creditors who similarly are the victims of its insolvency.

Reversed.

MacDONALD, TRUSTEE IN BANKRUPTCY OF CRAIG, REED & EMERSON, INC. *v.* PLYMOUTH COUNTY TRUST CO.

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

No. 714. Argued April 26, 1932.—Decided May 16, 1932

1. A proceeding by a trustee in bankruptcy to set aside voidable preferences under § 60 (b) of the Bankruptcy Act, which ordinarily must be by plenary suit, may be had summarily before the referee if the parties consent. P. 265.
2. The referee is a court within the meaning of §§ 23 (b) and 60 (b). P. 267.

53 F. (2d) 827, reversed.

CERTIORARI, 285 U. S. 533, to review the reversal of an order of the District Court, 46 F. (2d) 811, in a bankruptcy proceeding.

Mr. Robert A. B. Cook, for petitioner, relied on: *Taubel-Scott* v. *Fox,* 264 U. S. 426; *Mueller* v. *Nugent,* 184 U. S. 1; *May* v. *Henderson,* 268 U. S. 111; *Harrison* v. *Chamberlin,* 271 U. S. 191; *Foster* v. *Manufacturers' Finance Co.,* 22 F. (2d) 609, cert. den. 276 U. S. 633; *In re Hopkins,* 229 Fed. 378; *American Finance Co.* v. *Coppard,* 45 F. (2d) 154; *Whitney* v. *Barrett,* 28 F. (2d) 760; *Board of Education* v. *Leary,* 236 Fed. 521; *Gamble* v. *Daniel,* 39 F. (2d) 447; *In re White Satin Mills,* 25 F. (2d) 313; *In re Friedman Bros.,* 19 F. (2d) 243.

Mr. Joseph B. Jacobs for respondent.

A referee has no jurisdiction to hear a preference case. *Weidhorn* v. *Levy,* 253 U. S. 268; *Collette* v. *Adams,* 249 U. S. 545.

" Courts of Bankruptcy " means the District Court and does not include the referee. *In re Walsh Bros.,* 163 Fed. 352; *In re Ballou,* 215 Fed. 810; In re Overholzer, 23 A. B. R. 10.

The District Court fails to distinguish between " courts of bankruptcy " and " court " as defined in the Bankruptcy Act. These words are carefully used in the Act; and where the referee is not to be included, " court of bankruptcy " is always used. See §§ 2, 12 (b), 21 (a) and 34 (a).

No agreement of parties can confer jurisdiction. *Shwartz* v. *Kaplan,* 50 F. (2d) 947; *Nixon* v. *Michales,* 38 F. (2d) 420; *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413.

Mr. Justice Stone delivered the opinion of the Court.

In a bankruptcy proceeding pending in the District Court for Massachusetts, the trustee in bankruptcy, the petitioner here, filed a petition with the referee to set aside certain alleged transfers of property by the bankrupt to the respondent as voidable preferences within the

provisions of § 60 (b) of the Bankruptcy Act. The respondent appeared in the proceeding, denied the material allegations of the petition, but consented in open court that the trial of the issues proceed before the referee. The referee made an order, based on findings, granting in part the relief prayed. The District Court, on cross petitions to review the determination of the referee, modified his order in respects not now material. 46 F. (2d) 811. On appeal the Court of Appeals for the First Circuit reversed the order of the District Court, holding that as the issues before the referee were determinable only in a plenary suit, the referee, notwithstanding the consent of the parties, was without jurisdiction to decide them. 53 F. (2d) 827. This Court granted certiorari, to resolve a conflict of the decision below with that in *In re Hopkins* (C. C. A. 2d), 229 Fed. 378; see also *Arkansas Natural Gas Corp.* v. *Page,* 53 F. (2d) 27; *American Finance Co.* v. *Coppard* (C. C. A. 5th), 45 F. (2d) 154; *Board of Education* v. *Leary* (C. C. A. 8th), 236 Fed. 521; *Gamble* v. *Daniel* (C. C. A. 8th), 39 F. (2d) 447, appeal dismissed, 281 U. S. 705.

The only question, presented by the petition, which need be considered here, is whether, the issues raised being such as were triable in a plenary suit, the referee, the parties consenting, had jurisdiction to determine them. Under the applicable provisions of the Bankruptcy Act, the District Court below had jurisdiction to hear and determine the present suit. Section 60 (b) of the Bankruptcy Act confers on trustees in bankruptcy authority to maintain plenary suits to set aside voidable preferences as defined in that section. Section 23 (b), as originally enacted, provided, "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the

proposed defendant." An amendment of this section in 1903 removed its restrictions on suits brought under § 60 (b) by adding the words " except suits for the recovery of property under section sixty, subdivision b; . . ." At the same time § 60 (b) was amended, so as to confer jurisdiction over suits by the trustee to set aside voidable preferences in " any court of bankruptcy." By § 1 (8) " courts of bankruptcy " includes District Courts.

Jurisdiction over the present suit being thus vested in the District Court as a court of bankruptcy, the question with which we are immediately concerned is whether the referee appointed by the District Court where the bankrupt's estate is being administered, is a court within the meaning of § 23 (b), and is included in the phrase " any court of bankruptcy " in § 60 (b), and hence is vested with such jurisdiction that, the defendant consenting, he may try and determine the issues in the suit.

That he may not try such issues without the consent of the defendant has been often and uniformly held. *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 26; *Babbitt* v. *Dutcher,* 216 U. S. 102, 113; *Weidhorn* v. *Levy,* 253 U. S. 268, 273; *Harrison* v. *Chamberlin,* 271 U. S. 191, 193; see also *Daniel* v. *Guaranty Trust Co.,* 285 U. S. 154. In cases where the defendant made timely objection to a determination by the referee, it has been said that the referee is without power to hear the issues involved in a plenary suit, and that such a suit, if brought before him, must be dismissed for want of jurisdiction. See *Weidhorn* v. *Levy, supra.*

But a distinction is to be noted between the power of the referee to decide the issues in such a suit brought before him without objection, and his power to compel the litigation of them before him, over the objection of the proposed defendant. Where a suit by the trustee is plenary in character, as are those authorized by § 60 (b), both parties to it are entitled to claim the benefits of the

procedure in a plenary suit, not available in the summary method of procedure which, under the provisions of the Bankruptcy Act, is employed by the referee. A denial of those benefits would be in effect a denial of the right to a plenary suit, to which both parties are entitled under § 60 (b). But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived, see *Harrison* v. *Chamberlin, supra;* cf. *Patton* v. *United States,* 281 U. S. 276, and, being waived, that the referee is without the power given to courts of bankruptcy to decide the issues.

This Court has intimated, although it has never decided, that the referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee. See *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 431, 433, 434; *Harrison* v. *Chamberlin, supra.* See also, *Foster* v. *Manufacturers' Finance Co.,* 22 F. (2d) 609. And we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under § 60 (b) and § 23 (b), may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted. Cf. *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413, 419–421.

But the question remains, whether, the privilege of trial by plenary suit being waived, the referee possesses the power which courts of bankruptcy possess to hear and determine the issues presented. Section 23 (b), before its amendment, contemplated that the restrictions upon the choice of a court for the maintenance of suits by the trustee should be removed by consent of the proposed defendant. That is still its effect with respect to suits not enumerated in the amendment. Section 1 (7) provides that "'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." By the two sections read together, the District

Court in which the proceeding is pending is designated as a court where the trustee may bring the suit if consented to, and that court "may include the referee," to whom it has referred the proceeding.

Whether "courts" in § 23 (b), should be taken to include the referee, as § 1 (7) permits, is to be determined in view of the fact that under § 23 (b), as originally enacted, and in many instances since its amendment, the jurisdiction, either of court or referee, may be invoked only on consent, and that in any case plenary suits may not be summarily tried by the referee without consent. Section 38 (a) (4) contemplates that referees within their districts may be invested with the powers of courts of bankruptcy except as to questions relating to the discharge of the bankrupt, and General Order XII directs that after the appointment of the referee all proceedings shall be had before him except such as are specifically required to be had before the judge. These provisions, read in the light of the object sought to be attained by the Bankruptcy Act, and more particularly by § 23 (b) and § 60 (b) as amended, lead to the conclusion that the word "courts" as used in § 23 (b) and the words "any court of bankruptcy" in § 60 (b) must be taken to include the referee and vest in him the power possessed by courts of bankruptcy under §§ 23 (b) and 60 (b), to decide the issues in a suit brought under § 60 (b), where the parties join in presenting them to him for determination. While under the provisions of the Bankruptcy Act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed, as it was here, by the consent of the parties to a summary trial of the issue presented. The referee therefore had power to decide the issues, and the Court of Appeals below should have considered the appeal on its merits.

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

PAGE, TRUSTEE, *v.* ARKANSAS NATURAL GAS CORP.

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

No. 700. Argued April 25, 26, 1932.—Decided May 16, 1932.

Although the right of a trustee in bankruptcy to compel a conveyance of property of the bankrupt adversely claimed ordinarily may be asserted only in a plenary suit, a proceeding to that end may be had summarily before the referee if both parties consent. Bankruptcy Act, § 23 (a), (b); *MacDonald* v. *Plymouth County Trust Co., ante,* p. 263. P. 271.

53 F. (2d) 27, affirmed.

CERTIORARI, 285 U. S. 532, to review the affirmance of a decree quieting a title, which depended upon the jurisdiction of a referee, in an earlier bankruptcy proceeding, to order a conveyance.

Messrs. Frank J. Looney and *Yandell Boatner,* with whom *Mr. Judson M. Grimmet* was on the brief, for petitioner.

The referee had no jurisdiction to make the order. *Daniel* v. *Guaranty Trust Co.,* 285 U. S. 154; *Harrison* v. *Chamberlin,* 271 U. S. 191; *Taubel-Scott* v. *Fox,* 264 U. S. 426; *May* v. *Henderson,* 268 U. S. 111; *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Jacquith* v. *Rowley,* 188 U. S. 620; *First Nat. Bank* v. *Chicago Title Co.,* 198 U. S. 280; *In re Blum,* 202 Fed. 883; *Weidhorn* v. *Levy,* 253 U. S. 268; *Galbraith* v. *Vallely,* 256 U. S. 846.

The bankrupt did not have possession of the property.

Mr. John W. Davis, with whom *Mr. Robert S. Sloan* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner brought this suit in the Arkansas Chancery Court against respondent's predecessor in interest to quiet the title to an oil and gas lease. The cause was removed to the United States District Court for Western Arkansas, where a trial of the issues resulted in a judgment for respondent, which was affirmed by the Court of Appeals for the Eighth Circuit. 53 F. (2d) 27. Both courts held that the issue with respect to the ownership of the lease was *res adjudicata* by reason of a proceeding before a referee in bankruptcy, sitting in the district, in which the issues with respect to the title presented here, had been decided against the predecessor of petitioner and in favor of the trustee in bankruptcy, through whom respondent acquired its title to the lease.

The receiver in the bankruptcy proceeding, later appointed trustee, had gone into possession of the leasehold, claiming it as property of the bankrupt. Lyvers, petitioner's predecessor, filed a petition before the referee, claiming title to the lease, asking that he be put in possession and that the trustee be ordered not to sell the lease. The trustee answered, setting up that Lyvers was trustee of the lease for the bankrupt, and asking that Lyvers execute a deed of the property to the trustee. The matter was heard by the referee, who ordered Lyvers to execute the conveyance. The order was affirmed by the District Court and in conformity with it Lyvers then conveyed the lease to the trustee.

The attempt made in the present suit to relitigate the issues involved in the bankruptcy proceeding, is justified chiefly on the ground that the referee in bankruptcy was without jurisdiction to try the issues presented in the proceeding before him and that, for that reason, the order was void and could not operate to adjudicate the issues tendered in the present suit. This Court granted cer-

tiorari, to resolve the jurisdictional question. Many and complicated questions of fact are involved and were argued here, but as they have been found in favor of the respondent by both courts below, we do not review them, see *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, and we confine ourselves to the question of the jurisdiction of the referee in bankruptcy.

The court below held that the referee in bankruptcy had jurisdiction to decide the issues raised by the petition and answer, by virtue of the fact that the trustee had gone into possession of the leasehold, and that possession gave the referee as a court of bankruptcy jurisdiction to hear and determine all questions respecting the title, possesion, or control of the property. *Murphy* v. *John Hofman Company,* 211 U. S. 562. It also held that the referee had power to make the order, since Lyvers had participated in the litigation without objecting to its summary form until after the order had been made. We think that the judgment should be affirmed.

The right asserted before the referee by the trustee in bankruptcy to compel a conveyance to the bankrupt of property adversely claimed, is one which may be asserted by the trustee in a plenary suit. By § 23 (a) of the Bankruptcy Act and § 291 of the Judicial Code, District Courts of the United States, which by § 1 (8) of the Bankruptcy Act are courts of bankruptcy, are given jurisdiction of all controversies in law or equity between trustees and adverse claimants concerning the property claimed by the trustee. And by § 23 (b), "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant . . ." For reasons stated at length in the opinion in *MacDonald* v. *Plymouth County Trust Co.*, decided this day, *ante,* p.

263, we hold that the referee is a court within the meaning of § 23 (b) and that, respondent's predecessor having consented to litigate the issues presented by the petition and answer before the referee, the latter had jurisdiction to decide the issues presented. See *Murphy* v. *Hofman Co., supra.* The order of the referee, in the bankruptcy proceeding, affirmed by the District Court, therefore adjudicated those issues between the parties and they may not be relitigated in the present suit by their successors in interest. *Affirmed.*

BALTIMORE & OHIO R. CO. *v.* BERRY.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 703. Argued April 26, 1932.—Decided May 16, 1932.

When a freight train stopped at night to await the throwing of a switch, the caboose, occupied by the conductor and the rear brakeman, was resting on a trestle. The conductor ordered the brakeman to get out and go ahead, to fix a hot-box in a forward car which had demanded attention earlier in the trip; but he did not require him to alight from the caboose rather than from any of the other cars which were not in as dangerous a position. Taking his lantern, the brakeman stepped from the caboose, fell into a ravine and was hurt. It did not appear that either man knew that the caboose was on the trestle; their opportunities of observation were the same; and there was no evidence of any rule or practice making it the duty of a conductor to find safe landing-places for trainmen before requiring them to alight. *Held,* that there was no evidence of any breach of duty by the railroad company, and that if negligence was the cause of the accident, it was the negligence of the brakeman. P. 275.

43 S. W. (2d) 782, reversed.

CERTIORARI, 285 U. S. 532, to review a judgment sustaining a recovery from the railroad company in an action for personal injuries under the Federal Employers' Liability Act.

Mr. Rudolph J. Kramer, with whom *Messrs. Bruce A. Campbell, Morison R. Waite,* and *Wm. A. Eggers* were on the brief, for petitioner.

Mr. John S. Marsalek, with whom *Mr. Wm. H. Allen* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted to review a judgment of the Supreme Court of Missouri, 43 S. W. (2d) 782, sustaining a recovery by respondent in the Circuit Court of the City of St. Louis, under the Federal Employers' Liability Act. Respondent, who was employed by petitioner in interstate commerce as a flagman or rear brakeman on a freight train proceeding over its line from Illinois to Indiana, was injured by a fall when attempting to alight in the night-time from a caboose, which was standing on a bridge or trestle, so narrow as to afford no foothold to one getting off the train at that point. The state supreme court held that the trial court rightly overruled petitioner's demurrer to the evidence and correctly submitted to the jury the question of the petitioner's negligence, by its agents and servants, in ordering or permitting the plaintiff to alight from the caboose where it was dangerous to do so.

Respondent, an experienced railway brakeman, had been in the employ of the petitioner in that capacity for about nine years. For a number of years his regular run had been over petitioner's line where he was injured. The testimony was sharply conflicting, but the jury, if it believed the testimony most favorable to the respondent, could have found the following facts. The respondent was one of a crew of five men on a train consisting of engine, tender, forty-two cars and caboose, proceeding easterly in the direction of Xenia, Illinois. He was serving as rear brakeman and rode in the caboose with the conductor. The train was under orders, known to the crew, including the respondent, to enter a passing track at Xenia and wait there until it was passed by another train

going west. About three miles west of Xenia, respondent and the conductor observed a blazing hot box on one of the cars; the train was stopped on the main line, and both went forward to examine the hot box. The conductor then sent respondent to the engine to get a bucket of water to put out the fire, instructing him to say to the engineer that at the next stop, at Xenia, they would finish any necessary work on the box. Respondent communicated this message to the engineer; the fire was extinguished and the train proceeded on its way until it halted at Xenia. The stop there was made for the purpose of opening the switch, so that the train could enter the passing track, with the engine from one and one-half to three car lengths from the switch, and the caboose, at the rear end of the train, standing on the trestle. The respondent testified that he and the conductor were in the cupola of the caboose when it stopped and that the conductor then said: "Get out and go ahead and fix the hot box"; that he knew at the time that the train was not on the passing track; that he immediately took his lantern, walked down the caboose steps, from which he stepped into space and fell into the ravine which was spanned by the trestle.

The state supreme court held that under the instructions given by the trial court, the jury, in order to return a verdict for respondent, was required to find that the petitioner was negligent both in stopping the caboose on the trestle and in directing or permitting the respondent to alight there. It held, rightly, that there was no evidence that the petitioner was negligent in stopping the train where it did, but as it concluded that petitioner negligently directed or permitted respondent to alight at that point, it upheld the verdict as necessarily involving a finding of such negligence on the part of the conductor.

There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and, as they were together in the cupola of the caboose

when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence, there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by respondent. The conductor did not ask respondent to alight from the caboose rather than from one of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at the point chosen. There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight.

The state supreme court thought that it was the duty of the conductor to ascertain, by inspection, whether respondent could alight with safety, and to give warning of the danger if he could not. But there was no evidence of any rule or practice, nor do we know of any, from which such a duty could be inferred. The conductor could have no knowledge of such danger, nor was he in a position to gain knowledge, superior to that of other trainmen, whose duty it was to use reasonable care to ascertain, each for himself, whether, in doing his work, he was exposing himself to peril. A duty which would require the conductor, whenever the train was stopped and trainmen were required to alight, to inspect the place and warn of danger where each might get off the train, would be impossible of performance.

There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where

he alighted or to warn him of the danger. If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act.

Reversed.

LAWRENCE ET AL. *v.* STATE TAX COMMISSION OF MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 580. Argued April 18, 1932.—Decided May 16, 1932.

1. A State has constitutional power to tax its own citizens on their net incomes though derived wholly from activities carried on by them outside of the State. P. 281.
2. Domicile in itself establishes a basis for taxation. P. 279.
3. Whether the tax in question is called an excise by the state court or a property tax, is not material in this case, since this Court, in passing on its constitutionality, is concerned only with its practical operation. P. 280.
4. A constitutional question properly raised in a state court may not be evaded by a decision on a non-federal ground that is unsubstantial and illusory. P. 281.
5. Where the discrimination resulting from a statute creating exemptions from a tax is inconsistent with the equal protection clause of the Fourteenth Amendment, the constitutional rights of those not within the exception are infringed when they are taxed and the others are not assessed; and a refusal of the state court to decide the constitutional question, when properly before it, is as much a denial of those rights as an erroneous decision of it would be. P. 282.
6. A state tax on income resulting from activities outside of the State can not be adjudged to violate the equal protection clause of the Fourteenth Amendment merely because it applies to individuals but not to domestic corporations, though in competition with the individuals, in the absence of any showing of relevant local conditions and of how the provisions in question are related to the others by which a permissible divergency of state policy with respect to the taxation of individuals and corporations may be effected. P. 283.
7. The fact that the State has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income,

by taxing either the income of the corporation or the dividends of its stockholders, but not both, may afford a rational basis for excepting domestic corporations from a tax on income derived from extra-state activities which is imposed on individuals. P. 284.

8. The equal protection clause does not require the State to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial, or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. *Id.*

162 Miss. 338; 137 So. 503, affirmed.

APPEAL from a judgment upholding a state tax in an action to set aside the assessment.

Mr. Wm. H. Watkins for appellants.

The Supreme Court of Mississippi has expressly held the tax in question to be an excise. The construction is binding upon this Court.

The State was without authority to levy an excise on income earned beyond its borders. *First National Bank* v. *Maine,* 284 U. S. 312; *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123; *Farmers Loan & Tr. Co.* v. *Minnesota,* 280 U. S. 204; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Safe Deposit Trust Co.* v. *Virginia,* 280 U. S. 83; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Shaffer* v. *Carter,* 252 U. S. 37; *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 257; *Provident Savings Society* v. *Kentucky,* 239 U. S. 103; *Western Union* v. *Kansas,* 216 U. S. 1; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341; *Louisville & J. F. Co.* v. *Kentucky,* 188 U. S. 385; *Allgeyer* v. *Louisiana,* 165 U. S. 517; *Cleveland, etc. R. Co.* v. *Pennsylvania,* 15 Wall. 300; *Arpin* v. *Eberhardt,* 147 N. W. 1016. See Beale, "Jurisdiction to Tax," in Apr. 1919, Harv. L. Rev.

Since the State can not tax an occupation carried on beyond its borders, it can not tax the income earned in

that occupation, consistently with the Fourteenth Amendment. *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Gillespie* v. *Oklahoma,* 256 U. S. 501; *Indian Territory Co.* v. *Oklahoma,* 240 U. S. 522. Distinguishing: *Maguire* v. *Trefry,* 253 U. S. 12. Cf. *Hutchins* v. *Tax Commissioner,* 172 N. E. 605; *Opinion of the Justices,* 149 Atl. 321.

The income earned and the property with which it was earned were subject to taxation in Tennessee.

The taxing authorities have not attempted to impose any liability upon domestic corporations. Therefore, the Act violates the Fourteenth Amendment. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389.

The following authorities are directly in point: *Frost* v. *Corporation Comm.,* 278 U. S. 515; *Southern Ry. Co.* v. *Green,* 216 U. S. 400; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Chalker* v. *Railway Co.,* 249 U. S. 522. See also *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239.

An excise in the form of a tax upon net income must not include income from sources beyond the power of the State to tax. *Miller* v. *Milwaukee,* 272 U. S. 713; *Pacific Co.* v. *Johnson,* 285 U. S. 480; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *Educational Films Corp.* v. *Ward,* 282 U. S. 379.

Mr. J. A. Lauderdale, Assistant Attorney General of Mississippi, with whom *Mr. Greek L. Rice,* Attorney General, was on the brief, for appellee.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code, from a decree of the Supreme Court of Mississippi, 162 Miss. 338; 137 So. 503, upholding the Mississippi income tax law [c. 132, Miss. Laws of 1924, as amended in 1928, c. 124, 2 Miss. Code Ann. (1930) 2136], which, as applied

to appellant, is assailed as infringing the Fourteenth Amendment of the Federal Constitution. Sections 5027 and 5033 of the statute impose an annual tax on the net income of corporations and individuals. But paragraph (b) of § 5033, added by the Act of 1928, provides: "The term gross income does not include . . . (11) Income of a domestic corporation, when earned from sources without this state. . . ."

Appellant, a citizen and resident of Mississippi, brought the present suit to set aside the assessment of a tax upon so much of his net income for 1929 as arose from the construction by him of public highways in the State of Tennessee. The taxing statute was challenged on the ground that in so far as it imposes a tax on income derived wholly from activities carried on outside the state, it deprived appellant of property without due process of law, and that in exempting corporations, which were his competitors, from a tax on income derived from like activities carried on outside the state, it denied to him the equal protection of the laws.

The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Maguire* v. *Trefry,* 253 U. S. 12, 14, 17; *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498; *Shaffer* v. *Carter,* 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive

power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. *Kirtland* v. *Hotchkiss, supra.*

Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state, *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Frick* v. *Pennsylvania,* 268 U. S. 473, 488–489; but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there. See *Foreign Held Bond Case,* 15 Wall. 300, 319; *Frick* v. *Pennsylvania, supra,* p. 494. And the taxation of both by the state of the domicile has been uniformly upheld. *Kirtland* v. *Hotchkiss, supra; Fidelity & Columbia Trust Co.* v. *Louisville, supra; Blodgett* v. *Silberman,* 277 U. S. 1; *Maguire* v. *Trefry, supra;* compare *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *First National Bank* v. *Maine,* 284 U. S. 312.

The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, *Hattiesburg Grocery Co.* v. *Robertson,* 126 Miss. 34; 88 So. 4; *Knox* v. *Gulf, M. & N. R. Co.,* 138 Miss. 70; 104 So. 689, but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it. See *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387; *Pacific Co.* v. *Johnson,* 285 U. S. 480; *Shaffer* v. *Carter, supra,* pp. 54–55.

It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed

by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, see *Fidelity & Columbia Trust Co.* v. *Louisville, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra,* still, it could not tax the receipt of income upon payment of that same obligation. We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state. *Maguire* v. *Trefry, supra;* see *Fidelity & Columbia Trust Co.* v. *Louisville, supra.*

The Supreme Court of Mississippi found it unnecessary to pass upon the validity of so much of the statute, added by the amendment of 1928, as exempted domestic corporations from the tax on income derived from activities outside the state. It said that if the amendment were valid, appellant could not complain; if invalid, he would still be subject to the tax, since the act which it amended, § 11, c. 132, Laws of 1924, would then remain in full force, and under it individuals and domestic corporations are taxed alike. *Knox* v. *Gulf, M. & N. R. Co., supra.*

But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. See *Ward* v. *Love County,* 253 U. S. 17, 22; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 164; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651, 655. Upon one of the alternative assumptions made by the court, that the amendment is discriminatory, appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors. See *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239, 246. If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, see *Greene* v. *Louisville & Interurban R. Co.,* 244 U. S. 499, 508, 512 *et seq.; Smith* v. *Cahoon,* 283 U. S. 553, 564, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. The burden does not rest on him to test again the validity of the amendment by some procedure to compel his competitors to pay the tax under the earlier statute. *Iowa-Des Moines Nat. Bank* v. *Bennett, supra,* p. 247. See *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23. We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and

illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question.

The statute relieves domestic corporations from the tax only in so far as their income is derived from activities carried on outside the state. The appellant is thus compelled to pay a tax from which his competitors, if domestic corporations, are relieved, and this, it is urged, is so plainly arbitrary as to infringe the equal protection clause.

But, as there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates, acceptance of this contention would relieve the appellant from the burden which rests on him to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts, and would require us to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for distinguishing, for taxation purposes, between income of individuals and that of domestic corporations, derived from business carried on without the state. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–258.

What the local conditions are in Mississippi and its neighboring states with respect to businesses like the present, carried on across state lines by individuals and corporations, does not appear. How the statutory provisions now in question are related to others by which a permissible divergence in state policy with respect to the taxation of corporations and of individuals may be effected, is not shown. See *General American Tank Car Corp.* v. *Day*, 270 U. S. 367, 373; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251; *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 529 *et seq.* We cannot say that investigation in these fields would not dis-

close a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment, demonstrates that there may be.

Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both. See §§ 5033 (a), 5033 (b) (11), 5033 (b) (8). In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporation. That was held in *Franklin* v. *Carter,* 51 F. (2d) 345, to be a sufficient ground for upholding a statute of Oklahoma, assailed as denying the equal protection of the laws, which had substantially the same features as the present statute. See also *Conner* v. *State,* 82 N. H. 126, 132; 130 Atl. 357. The question presented thus differs from any raised in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, and *Royster Guano Co.* v. *Virginia,* 253 U. S. 412. Compare *White River Lumber Co.* v. *Arkansas,* 279 U. S. 692.

The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. *Ohio Oil Co.* v. *Conway,* 281

U. S. 146, 159; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537.

Affirmed.

MR. JUSTICE VAN DEVANTER dissents from so much of the opinion as concerns the equal protection clause of the Fourteenth Amendment.

TEXAS & PACIFIC RY. CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 634. Argued April 14, 1932.—Decided May 16, 1932.

The amount paid to a railroad by the Government under § 209 of the Transportation Act to make up the minimum of operating income guaranteed for the six months next following the relinquishment of federal control, was neither a gift nor a subsidy, but was income taxable under the Sixteenth Amendment and the Revenue Act of 1918. Pp. 288–290.

72 Ct. Cls. 629; 52 F. (2d) 1040, affirmed.

CERTIORARI, 284 U. S. 616, to review a judgment rejecting a claim for refund of money collected by the Government as income tax.

Messrs. John W. Davis and *Newton K. Fox,* with whom *Messrs. Adrian C. Humphreys* and *Chester A. Gwinn* were on the brief, for petitioner.

The condition of the railroads at the termination of federal control was such that rehabilitation was necessary to insure an adequate transportation system. The purpose of the Transportation Act, 1920, was to remedy this situation. *United States* v. *Guaranty Trust Co.,* 280 U. S. 478.

Congress recognized the immediate need of the railroads for additional "capital." Without any obligation

on the part of the Government, the Transportation Act was passed providing for a "guaranty" payment.

The "guaranty" payment was not income from operation of the railroad. *Birmingham Trust Co.* v. *Atlanta, etc. Ry. Co.*, 300 Fed. 173. The payment was in fact and was intended by Congress as a subsidy.

Being a subsidy, the "guaranty" payment is not income within the meaning of the Sixteenth Amendment. *Edwards* v. *Cuba R. Co.*, 268 U. S. 628. Every economic advantage or receipt of money does not result in "income." Mutuality and consideration did not remove the "guaranty" payment from the category of a subsidy or convert it into "income." *Edwards* v. *Cuba R. Co., supra; United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170. The provision for payment by the railroads to the Government of any excess over the "guaranty" was a limitation or condition to eliminate carriers not in need of the subsidy. It was not inserted as a money producing provision for the Government. It was designed primarily as an administrative measure to eliminate applications by carriers not in need of financial assistance and to save auditing expenses and delay.

The nature of the "guaranty" payment, and not the manner in which it might be spent, determines whether it is "income." *United States* v. *Merriam*, 263 U. S. 179. The "guaranty" payment was not derived from capital or labor, or from both combined. It was not "income" within the definition which this Court has adopted and consistently followed, *Eisner* v. *Macomber*, 252 U. S. 189, as a limitation upon the power of Congress under the Sixteenth Amendment.

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

The purpose of § 209 was to reimburse railways like the petitioner's on account of a decrease in their net railway operating income because of federal control. The legislative history shows that it was the intention of Congress to extend this aid in recognition of their financial necessities and to compensate for injury through federal control.

The payments made were taxable income just as was compensation paid under the Federal Control Act. The payments were derived because of the operation of a railroad and consequently come within the definition of income as "gain derived from capital, from labor, or from both combined."

The payments here were not capital subsidies like those involved in *Edwards* v. *Cuba R. Co.*, 268 U. S. 628.

The payments are not exempt from the income tax as "property acquired by gift." They were based upon moral and contractual obligations. The United States received consideration for the guaranty.

Congress could hardly have contemplated that the amount paid should be exempt from income tax. Such treatment would put the railroads receiving payments under § 209 in a better position than the roads which had no such reimbursement.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

During federal control of railways that of petitioner was operated by the Director General under the act of March 21, 1918.[1] Pursuant to the Transportation Act, 1920,[2] the Government relinquished the property March 1, 1920; petitioner accepted the provisions of § 209[3] of the act, and consequently received for the six months

[1] C. 25, 40 Stat. 451.

[2] Act of February 28, 1920, c. 91, 41 Stat. 456.

[3] 41 Stat. 464; U. S. C., Tit. 49, § 77.

period commencing March 1, 1920, an allowance awarded by the Interstate Commerce Commission to make good the guaranty embodied in that section. The company omitted this sum from taxable income returned for the year 1920. After audit the Commissioner of Internal Revenue added the amount to the petitioner's income and assessed a resulting additional tax, which was paid under protest. Upon rejection of a claim for refund, suit was brought in the Court of Claims to recover the portion of the tax attributable to the inclusion of the guaranty payment, petitioner asserting that the amount received was a subsidy or gift and therefore not income within the Sixteenth Amendment of the Constitution or § 213 of the Revenue Act of 1918.[4] Recovery was denied. This court granted certiorari.

By the terms of § 209 of the Transportation Act railroad companies which, like petitioner, had made contracts with the Director General for annual compensation during federal control, were guaranteed an operating income for the ensuing six months of not less than one-half the amount of such compensation. A minimum operating revenue was also assured to carriers not having such contracts, which had been under federal control or adversely affected thereby. Payment was conditioned on the carrier's acceptance of the provisions of the section, one of which was the agreement that if operating revenue for the period should exceed the guaranteed amount the excess should be paid into the Treasury. Petitioner signified its acceptance.

The statute in terms guarantees a "*minimum operating income*" for six months after relinquishment of federal control. The situation in which the railroads of the country were as a result of war-time Government opera-

[4] 40 Stat. 1057, 1065. "That for the purposes of this title . . . the term 'gross income' . . . (b) Does not include . . . (3) The value of property acquired by gift . . ."

tion is well described in *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 484. During that period their expenses had risen and there had been no commensurate increase in rates. While the Government had either paid or was obligated to pay just compensation for their requisition, the amount of it was known to be insufficient for rehabilitation of the roads as privately owned and operated organizations. Until rates could be adjusted to meet increased expenses, loans be negotiated, and operating forces realigned and reintegrated, the credit of the carriers must by some means be re-established. Thus the Government had a real obligation, not readily susceptible of accurate measurement, to assist in the restoration of normal conditions. The purpose of the guaranty provision was to stabilize the credit position of the roads by assuring them a minimum operating income. They were bound to operate their properties in order to avail themselves of the Government's proffer. Under the terms of the statute no sum could be received save as a result of operation. If the fruits of the employment of a road's capital and labor should fall below a fixed minimum then the Government agreed to make up the deficiency, and if the income were to exceed that minimum the carrier bound itself to pay the excess into the federal treasury. In the latter event the carrier unquestionably would have been obligated to pay income tax measured by actual earnings; in the former, it ought not to be in a better position than if it had earned the specified minimum. Clearly, then, the amount paid to bring the yield from operation up to the required minimum was as much income from operation as were the railroad's receipts from fares and charges.

The sums received under the act were not subsidies or gifts,—that is, contributions to the capital of the railroads,—and this fact distinguishes cases such as *Edwards* v. *Cuba Railroad Co.*, 268 U. S. 628, where the payments

were conditioned upon construction work performed. Here they were to be measured by a deficiency in operating income, and might be used for the payment of dividends, of operating expenses, of capital charges, or for any other purpose within the corporate authority, just as any other operating revenue might be applied. The Government's payments were not in their nature bounties, but an addition to a depleted operating revenue consequent upon a federal activity.

In a proper sense these payments constituted income to the carrier not exempt from taxation under the Sixteenth Amendment or the Revenue Act of 1918. The Court of Claims was right in denying the claim and the judgment must be

Affirmed.

CONTINENTAL TIE & LUMBER CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 560. Argued April 14, 1932.—Decided May 16, 1932.

1. The payments provided by § 204 of the Transportation Act to railroads which were not under federal control but which suffered deficits of operating income in that period, were intended as reimbursements for losses consequential on government operation of other railroads; they are neither subsidies nor bonuses, but are income within the intent of the Sixteenth Amendment and § 213 of the Revenue Act of 1918. P. 293.
2. The right to such an award was fixed by the passage of the Transportation Act, 1920; the function of the Interstate Commerce Commission in ascertaining the amount is ministerial. P. 295.
3. An award under § 204 *held* taxable as income for 1920, although it was not determined by the Commission and paid until 1923, since the railroad kept its books upon the accrual basis and had data, in 1920, from which it could have made a reasonably approximate estimate in its tax return for that year, subject to future adjustment by amended return, claim for refund, or additional

assessment, as the final award of the Commission might warrant. P. 295.

72 Ct. Cls. 595; 52 F. (2d) 1045, affirmed.

CERTIORARI, 284 U. S. 615, to review the denial of a claim based on an alleged overpayment of income tax.

Mr. George E. H. Goodner, with whom *Messrs. John G. Buchanan* and *Paul G. Rodewald* were on the brief, for petitioner.

Payments under § 204 of the Transportation Act do not constitute taxable income. *Eisner* v. *Macomber,* 252 U. S. 189; *Edwards* v. *Cuba R. Co.,* 268 U. S. 628.

Section 204 placed no obligation on the railroads. The obligation was on the Interstate Commerce Commission to ascertain and certify to the Secretary of the Treasury the amounts to be paid and on the Secretary of the Treasury to pay such amounts as were certified. If these payments had been obligations, the Government would doubtless have hastened settlement and payment.

This amendment discloses an intent on the part of Congress, not to fulfill an obligation of the Government, but to fix a time when its generosity should cease.

Even if taxable income, the payment was not income within the year 1920. The Railway Company had no enforceable claim against the United States in that year. The events which fixed the amount payable had not all occurred then.

No determination of any amount payable was made by the Interstate Commerce Commission until 1923.

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

The payment constituted income. The Government's moral obligation to make such reimbursement was gen-

erally recognized. Like the similar guaranty payments to the trunk lines under § 209, these sums were intended as compensation to the carriers, and were not considered gratuities by Congress. To hold those amounts tax-exempt would place the carrier with a low operating revenue during the federal control period in a better position than that occupied by the stronger short line which had no deficit.

The payment was income for the year 1920. The petitioner's books were on the accrual basis. The obligation to pay the carrier became a legal liability upon the passage of the Act in 1920. The petitioner, under the practice of the Bureau of Internal Revenue, should have accrued the gross amount, less estimated deductions, during 1920, when it was requested by the Interstate Commerce Commission to file a report of its deficit. The fact that the Commission was required to calculate the exact amount of these deductions is not significant, since the liability was already certain. It was possible for short lines like the petitioner's to secure payment under § 204 during the year 1920 by filing their reports promptly. That the reimbursement was not certified by the Commission until after 1920 was due to the tardy action of the petitioner.

Mr. Justice Roberts delivered the opinion of the Court.

For the year 1920 the petitioner filed a consolidated income tax return for itself and the Cimarron and Northwestern Railway Company and paid the tax shown as due. Subsequently a claim for refund was prosecuted, whereupon the Commissioner made a reaudit and added to the railway's income some $27,000. The refund granted was diminished by the amount of the additional tax resulting from the increase in income so determined. The petitioner objected to this reduction and brought suit

in the Court of Claims to recover the full amount claimed to be refundable. The railway company is a short-line carrier whose road was in possession and control of the United States and operated by the Director General of Railroads from December 28, 1917, to June 3, 1918, when it was relinquished, and thereafter throughout the remainder of the period of federal control operated by its owner. Approximately $25,000 of the additional income determined by the Commissioner consisted of a payment to the railway pursuant to an award of the Interstate Commerce Commission under the terms of § 204 of the Transportation Act, 1920.[1] This section provided for such an award and payment to a railroad which during any part of the period of federal control competed for traffic, or connected, with one under federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section. The Commission made an award and the Secretary of the Treasury paid the railway.

The petitioner asserted (1) that the sum received was not income within the intent of the Sixteenth Amendment or § 213 of the Revenue Act of 1918; (2) that if income, it was not taxable for 1920, as held by the Commissioner, but for 1923, the year in which the amount was determined and paid. The Court of Claims denied recovery.

What we have said in *Texas & Pacific Ry. Co.* v. *United States,* decided this day, *ante,* p. 285, is determinative of the first contention. Section 209 of the Transportation Act guaranteed the payment of any deficiency below a

[1] Ch. 91, 41 Stat. 456, 460.

fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of § 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within § 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by Government operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to § 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in *Texas & Pacific Ry. Co.* v. *United States, supra,* we hold that these payments were not subsidies or bonuses, but were income within the intent of the Amendment and the statute.

The petitioner kept its accounts upon the accrual basis. The Government insists, and the Court of Claims held, that the right to payment having ripened in 1920 the taxpayer should have returned the estimated award under § 204 as income for that year. The petitioner replies that a determination whether it would receive any award under the section and, if so, the amount of it depended on so many contingencies that no reasonable estimate could have been made in 1920, and that the sum ultimately ascertained should be deemed income for 1923, the year of the award and payment.

The Transportation Act took effect on February 28, 1920. On June 10 the Interstate Commerce Commission issued general instructions governing the compilation and submission of data by carriers entitled to awards under § 204. The petitioner correctly states that at the date of the Act's adoption no railroad had a vested right in any amount; until the Commission made an award nothing could be paid, no proceeding was available to compel an allowance, or to determine the elements which should enter into the calculation. In short, says the petitioner, the carrier had no rights, but was dependent solely upon the Commission's exercise of an unrestrained discretion, and until an award was made nothing accrued. But we think that the function of the Commission under the act was ministerial, to ascertain the facts with respect to the carrier's operating income by a comparison of the experience during the test period with that during the term of federal control. The right to the award was fixed by the passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid. Petitioner's right to payment ripened when the act became law. What sum of money that right represented is, of course, a different matter.

The petitioner says that at the date of the passage of the act it was impossible to predict that any award would be made to the railway, and, assuming one would eventuate, its amount could not be estimated, for the reason that the principles upon which awards were to be made had to be settled by the Commission and were not finally formulated until 1923. The Government insists that while adjustments or settlement of principles by the Commission might vary the amount to be awarded, the petitioner's case presented problems not differing from those confronting many business concerns which keep accounts on an accrual basis and have to estimate for the tax year the amount to be received on transactions undoubtedly

allocable to such year. Admitting there might be differences and discrepancies between the railway's estimate and the amount awarded by the Commission, these, says the Government, could, as in similar cases, have been adjusted by an additional assessment or a claim for refund after final determination of the amount due.

The case does not fall within the principle that where the liability is undetermined in the tax year the taxpayer is not called upon to accrue any sum (*Lucas* v. *American Code Co.*, 280 U. S. 445), but presents the problem whether the taxpayer had in its own books and accounts data to which it could apply the calculations required by the statute and ascertain the *quantum* of the award within reasonable limits.

The carriers kept their accounts according to standards prescribed by the Commission; and these necessarily were the source of information requisite for ascertainment of the results of operation in the two periods to be compared. In the calculation for two such brief periods allowance had to be made for the fact that certain operating charges entered in the books would not accurately reflect true income. Such, for instance, were maintenance charges and those to reserve accounts. The enormous increase in labor and material costs after the expiration of the test period had also to be considered in comparing charges for costs of repairs and renewals in the two periods. Section 204 incorporated by reference the terms of § 209 applicable to the method of treating such items, and the latter in turn referred to the relevant provisions of § 5 (a) of the standard operating contract between the Director General and the various railroads. As might have been expected, the general principles thus formulated did not cover in detail questions of fact, the solution of which required in some degree the exercise of opinion and judgment. Thus difference might fairly arise as to when re-

serve accounts ought to be closed out, as to how much of the sum actually expended for maintenance within a given time was properly allocable to that period, and how much to later years; at what price renewals and replacements should be charged in view of the rapidly mounting cost of material; what factor of difference should be allowed for the efficiency of labor in the pre-war and post-war periods. The petitioner points to the fact that these questions were raised by the railroads under § 209, that the Commission gave extended consideration to them, and that, as respects sundry of them, the applicable principles were not settled until 1921, 1922 and 1923. Petitioner might have added that the Commission, while attempting as far as possible to formulate general principles applicable to large groups of carriers, found it necessary in addition to consider the peculiar conditions and special circumstances affecting individual carriers in order in each case to do justice to the carrier and to the United States.[2] But in spite of these inherent difficulties we think it was possible for a carrier to ascertain with reasonable accuracy the amount of the award to be paid by the Government. Subsequent to its order of June 10, 1920, the Commission made no amendment or alteration of the rules with respect to the information to be furnished under § 204. Obviously the data had to be obtained from the railway's books and accounts and from entries therein all made prior to March 1, 1920. These accounts contained all the information that could ever be available touching relevant expenditures. Compare *United States* v. *Anderson,* 269 U. S. 422. The petitioner was promptly informed by the terms of § 209, as supplemented by the instructions issued by the Commission, of the method to be followed in allocating charges to operation during periods under in-

[2] Maintenance Expenses under Section 209, 70 I. C. C. 115.

quiry. It does not appear that a proper effort would not have obtained a result approximately in accord with what the Commission ultimately found.

Much is made by the petitioner of the fact that as a result of representations by the carriers the Commission from time to time during 1921, 1922 and 1923 promulgated rulings respecting the method of adjusting book charges to actual experience, and it is asserted that petitioner could not in 1920 have known what these rulings were to be. But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under § 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return.[3] From the record it would seem that in spite of the fact that its return was not made until November, 1922, the petitioner made up its claim by taking maintenance charges as appearing in its books without attempt at allocation as between the limited periods in which they were entered and the probable useful life of the installations. Petitioner must have known that the entire amounts charged to maintenance during the respective periods would not be properly allowable in ascertaining true income for each period. The books and accounts fixed the maximum amount of any probable award, and if petitioner had endeavored to make reasonable adjustments of book figures it could have arrived at a figure to be accrued for the year 1920. Any necessary adjustment of its tax could

[3] Norfolk Southern R. Co., 65 I. C. C. 798.

readily have been accomplished by an amended return, claim for refund, or additional assessment, as the final award of the Commission might warrant.

For these reasons the Court of Claims correctly held that the amount awarded was taxable income for the year 1920.

Judgment affirmed.

PIEDMONT & NORTHERN RAILWAY CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL.

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

No. 664. Argued April 22, 25, 1932.—Decided May 16, 1932.

1. A railroad run by electricity, which carries its passengers in cars housing their own motors, and connects with street railway systems in different cities, but whose trackage, except in small part, is outside of the cities, on private rights of way, and whose freight cars are of standard types and drawn in long trains by powerful electric locomotives; whose business is pre-eminently interchange freight business, national in character and in all essential respects conducted like the freight business of steam railroads in the territory served,—is not an "interurban electric railway" within the meaning of par. 22 of § 1 of the Interstate Commerce Act. P. 306.
2. The Transportation Act, being remedial legislation, should be liberally interpreted; but, for the same reason, exemptions from its sweep should be limited to effect the remedy intended. P. 311.

51 F. (2d) 766 (D. C.), affirmed.

CERTIORARI, 285 U. S. 531, to review a decree of the District Court enjoining the railway company from constructing an extension without a certificate of public convenience and necessity from the Interstate Commerce Commission. The Commission brought the suit and several railway companies were permitted to intervene on the same side. See also, *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469. The appeal to the Circuit

Court of Appeals had not been heard when the certiorari was granted.

Mr. W. S. O'B. Robinson, Jr., with whom *Mr. H. J. Haynsworth* was on the brief, for petitioner.

The District Court gave no consideration to the context of those provisions of the Interstate Commerce Act, as amended by the Transportation Act, in which the term "interurban electric railways" appears. To confine its meaning to carriers whose operations are of purely local interest, as distinguished from carriers of national importance, is probably in conflict with *Omaha & C. B. Street Ry. Co.* v. *Interstate Commerce Comm.*, 230 U. S. 324, and *United States* v. *Village of Hubbard*, 266 U. S. 474.

The court below carried the doctrine of *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, too far.

Mr. Nelson Thomas, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission, respondent.

The Piedmont & Northern, whose major operations are identical with those of the steam roads, whose revenues are 94 per cent. derived from freight, whose said freight is mostly carload traffic, mostly interchanged with the steam roads and mostly moving interstate, is not rendered an interurban electric railway within the meaning of the clause, which excludes street, suburban, or interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, merely because its motive power is electricity, because it operates between cities and because a very minor part of its service has characteristics peculiar to local electric railways.

The words "interurban electric railway" have no settled meaning at law, and they are not defined in the Act.

In determining whether new construction falls within the class excepted from Commission authority, the surest guide is furnished by the context and by the relation of the specific provisions to the railroad policy introduced by the Transportation Act, 1920. Compare *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266.

Under the terms of § 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates to yield a fair return on aggregate group property value; and § 15a and paragraphs (18)–(22) of § 1, herein involved, are among the interrelated amendments added by the Transportation Act, 1920, with the one objective of promoting a generally effective transportation service at just and reasonable rates, and the latter provisions, namely, those placing restrictions upon competitive and unneeded new construction, are particularly essential to the plan in order that the aggregate property value upon which rates paid by the public are to be based shall not be enlarged beyond the general transportation needs, and that the financial stability of established systems of transportation shall not be endangered.

While the fact that the electric interurbans excepted from the Commission's authority under § 15a to make group adjustment of rates are limited to those not engaged in general transportation of freight shows that uniformity of freight rates was regarded to be in all cases essential, the fact that the electric interurbans excepted from the Commission's authority over new construction and over the issuance of new securities are not so limited does not show that all railroads operating between cities with electric locomotives, whatsoever their character and purpose, are to be quit of the Commission's authority, but merely demonstrates that Congress desired to leave those matters to local authority, if such railroads are principally designed for the usual local electric railway purposes, even though to some extent intended for

general freight transportation; to give the difference in language a broader scope than this would frustrate the plan of Congress in essential particulars and would be contrary to the rule that excepting clauses should be narrowly construed so as not to destroy the remedial processes intended to be accomplished.

The "dovetail" relationship of the provisions comprising the plan of Congress for an effective and coördinated general transportation system refutes the Piedmont & Northern's position that it is permissible thereunder for it to avail itself of certain provisions, enabling it to become an important link with the steam roads in the general transportation chain, while at the same time refusing to submit itself to the restrictive provisions, essential to the good of the transportation system as a whole.

Mr. Sidney S. Alderman, with whom *Messrs. S. R. Prince, F. B. Grier, Carl H. Davis,* and *E. S. Jouett* were on the brief, for the respondents other than the Interstate Commerce Commission.

Mr. Justice Roberts delivered the opinion of the Court.

In 1910 a charter was granted under the laws of North Carolina for Piedmont Traction Company, as a street railway corporation, authorized to construct street railways in and near Gastonia, with the limited powers of such a company. In the same year the Greenville, Spartanburg and Anderson Railway Company was chartered under the laws of South Carolina, as a street railway corporation, with power to run between fixed termini, Anderson on the south and Spartanburg on the north. A syndicate was then formed which procured a charter for petitioner as a railroad corporation under the law of South Carolina, with full power of eminent domain and author-

ity to operate by electricity or otherwise. The Piedmont Traction Company built certain lines in North Carolina, put them into operation, acquired the street railway system of Charlotte and trackage rights over the street railway system of Gastonia. The Greenville, Spartanburg and Anderson Railway Company acquired a line from Belton to Anderson; built one from Greenwood to Greenville, and afterwards on to Spartanburg; secured trackage rights over the street railway systems in Greenville and Anderson and put all of them into operation in April, 1914. The Traction Company and the Railway Company then conveyed their respective properties to the petitioner.

Until the close of 1926 the petitioner owned and operated two separate and disconnected lines of railway, one in South Carolina extending from Greenwood to Spartanburg, about eighty-nine miles, with a branch from Belton to Anderson of eleven miles, and the other in North Carolina extending from Gastonia to Charlotte, about twenty-three miles, with a branch to Belmont, three miles.

In March, 1927, pursuant to corporate action, it proceeded to construct two extensions, one from Spartanburg, the then northern terminus of the South Carolina line, to Gastonia, the southern terminus of the North Carolina line, a distance of fifty-three miles; the other an extension from Charlotte northward to a new terminus at Winston-Salem, North Carolina, a distance of seventy-five miles. The Interstate Commerce Commission notified the company that appropriate application should be made for a certificate of public convenience and necessity authorizing these extensions and that this might be filed without prejudice to the petitioner's making a claim of exemption as an interurban electric railway under § 1, par. 22, of the Interstate Commerce Act. This course was followed. The Commission overruled the claim of exemption and denied a certificate on the merits. The company brought suit in the United States District Court under the Urgent

Deficiencies Act [1] to set aside and annul that portion of the Commission's order which denied it exemption as an interurban electric railway. A statutory court was convened, and after hearing dismissed the suit on the merits.[2] Upon appeal this court held that the order of the Commission, being negative in substance as well as in form, infringed no right of the petitioner, was beyond the scope of the remedy afforded by the Urgent Deficiencies Act, and therefore the suit should have been dismissed for want of jurisdiction.[3]

Thereafter the board of directors by resolution reaffirmed the intention to build both extensions and authorized the construction of the connecting link between Spartanburg and Gastonia. The Commission, upon being advised that work had actually started, brought the present suit in the District Court for Western South Carolina, alleging that the construction was illegal, since no certificate had been obtained as required by the Transportation Act of 1920, § 402, paragraph (18).[4] It sought an injunction pursuant to the terms of paragraph (20) of the section. Several interstate railroads were permitted to intervene as parties in interest. (See *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47.) The petitioner defended upon the grounds that the work had been undertaken within ninety days of the adoption of the Transportation Act and for that reason no certificate for the proposed extensions was required,[5] and that petitioner was within the exception to the Com-

[1] U. S. C., Tit. 28, § 47.

[2] 30 F. (2d) 421.

[3] *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469.

[4] Ch. 91, 41 Stat. 476.

[5] See § 402 (18) of the Transportation Act, 1920, 41 Stat. 477. "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, &c." The first eight words are omitted in U. S. C., Tit. 49, § 1 (18).

mission's jurisdiction over extensions and new construction, created by paragraph (22) of § 1 of the Act, as an interurban electric railway not operated as a part of a general steam railroad system of transportation. After a hearing on pleadings and proofs the trial court overruled both defenses and entered a decree enjoining the further work of construction until a certificate of convenience and necessity should be obtained. Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit, and we granted certiorari prior to hearing by that court.[6]

The petitioner has abandoned its first contention and stands only on the claimed exemption.

Section 1 of the Interstate Commerce Act, as amended by § 402 of the Transportation Act[7] provides:

"The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Paragraphs (18) to (21) authorize the Commission to grant a certificate for extensions of line or constructions of new line, or for the abandonment of lines, forbid such action without such certificate, and give the Commission or any party in interest the right to enjoin action in disregard of their provisions.

In support of the claimed exemption petitioner says its lines are exclusively electric, are not operated as parts of a general steam railroad system of transportation, were constructed, equipped, and are maintained and conducted as interurban electric railways, and that the proposed extensions would be of the same character and operated in

[6] U. S. C., Tit. 28, § 347.

[7] U. S. C., Tit. 49, § 1 (22).

the same manner. The concession is made that the company is engaged in the general transportation of freight and passengers in interstate commerce, that the proposed extensions would be so operated in connection with the existing lines, and that petitioner is therefore subject to the Interstate Commerce Act as amended by the Transportation Act, 1920, except those portions from the application of which interurban electric railways not operated as a part or parts of a general steam railroad system of transportation are expressly excluded. In summary the argument is that paragraph (22) in unambiguous terms excepts petitioner's road from the effect of paragraphs (18) to (21) of § 1, needing neither construction nor interpretation in its application; but that if there be question regarding this contention, the facts with respect to the railway bring it within the intent of the excepting clause, and, finally, that various governmental agencies have so classified it.

Emphasis is placed upon the aptness of the words used in the paragraph as descriptive of petitioner's railway. Thus it is said the road is "electric"; is "interurban," since it extends between cities; and is "not a part of any system of steam railroads." But this literal application is inconclusive, for it ignores the entire phraseology employed, which is, "street, suburban, or interurban electric railways" . . . The descriptive adjectives show that Congress had in mind a class of carriers differing essentially from those long recognized as the objects of national concern and regulation. A few illustrations will demonstrate the impossibility of the proposed narrow construction. It would hardly be contended that if an interstate steam railroad should electrify its entire system this would place it beyond the reach of paragraphs (18) to (21). Yet the road would become both electric and interurban in the etymological sense of the words, and would

not be operated as a part of a general system of steam railroad transportation. Should a new electric transcontinental system be projected, without question application for a certificate under those paragraphs would be required, though here again by mere verbal interpretation it would be exempt from the necessity.

We must therefore seek further to ascertain the distinguishing features which the legislature had in mind. No difficulty is encountered in defining a street or a suburban electric railway. These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads. It is clear that the phrase "interurban electric railway" was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars. It cannot be said, therefore, that if a railway is operated by electricity and extends between cities paragraph (22) clearly and unequivocally exempts it from the Commission's jurisdiction.

Petitioner, however, insists that examination of the facts with respect to its road demonstrates that it falls into the exempt class. The salient features to which reference is

made are that the lines connect and tie in with the street railway systems in the cities and towns on the system; that of the main line trackage fifteen miles are operated jointly with street car lines; that the street railways in the cities were acquired so that the interurban tracks might be connected with them for urban terminal and trackage facilities; that the motive power is exclusively electric; that the road is not a part of any steam railway system; that a lower voltage, a lighter overhead construction and power supply, and a smaller substation capacity are employed than those of standard steam railroad electric lines; that the signal system would not be suitable for use on a main line steam railroad; that the locomotives are lighter than the standard engines used by steam railroads which have electrified their systems; and that the passenger cars are motivated by self-contained motor units instead of being drawn by locomotives.

These alleged distinctions lose much of their significance when we consider other facts found by the trial court, without exception or assignment of error. These may be summarized. Only 2.9 miles of the present total trackage, or about 2.25 per cent, is located in city streets. The balance is built and operated on private right-of-way and goes around rather than through the cities. The tracks are standard gauge and of standard railroad construction, were, at the time they were laid, of higher class than those of the Southern Railway Company in the same territory, were intended for handling substantial interchange freight traffic in connection with steam railroads, have the same ruling grades as the latter in the same territory, and are of eighty pound rail. There are 17 electric locomotives, ranging from 55 to 100 tons weight; 287 freight cars are owned, which have no electric equipment, are the same in all respects as steam railroad freight cars, are interchangeable with steam rail-

roads, and are and have been regularly so exchanged. Foreign line freight equipment of every character flows freely over the road. As of December 31, 1929, the total investment in equipment since June, 1914, was $778,194, approximately 85 per cent of which represented expenditures for locomotives and interchangeable freight cars used exclusively in the carriage of freight. The electric locomotives are used only for freight. The freight yards are of standard steam railroad construction and equipment, and one of them is a joint facility with the Seaboard and Georgia & Florida, steam railroads. While the locomotives are lighter than those employed on standard steam railroads, they are adequate for the petitioner's traffic. By doubling, as many as 65 freight cars may be drawn, and trains of 40 and 50 cars are usual. Through and local freight trains are operated in the same manner as on steam railroads.

Methods of business solicitation, membership in traffic organizations, and tariffs published and concurred in, are national in scope. The road has filed seventeen general individual tariffs under I. C. C. serial numbers, is a party as initial carrier to 184 general tariffs, and as participating carrier in 364 tariffs published under powers of attorney given to the steam railroads. These tariffs embrace the entire country and parts of Mexico and Canada. From the beginning freight revenues have been large, while those from passenger traffic have progressively decreased. The freight revenues have increased from $496,772.39 for the year ending June 30, 1914, to $2,317,528.77 for 1929. The total passenger revenues for the year ending June 30, 1914, were $324,045.21, but were only $71,562.72 for 1929. For the latter year the freight revenues were 94.5 per cent and the passenger revenues 2.9 per cent of the total revenue. For 1929, 4.3 per cent of the total freight revenues were from local freight, and 95.7 per cent from inter-

line interchange freight. A comparison of interstate with intrastate freight shows that in 1929, 80.7 per cent was interstate and 19.3 per cent intrastate, the latter including freight interchanged with steam railroad connections but originating and destined to points within the same state. There is more than one loaded car of freight each day on petitioner's line for every passenger carried. The average interchange of carload freight with steam railroads of the territory is approximately 6,000 cars per month.

The petitioner now has a connection at its southern terminus with the Georgia & Florida, a steam railroad. See *Atlantic Coast Line R. Co.* v. *United States,* 284 U. S. 288, 291. If the proposed extensions were built it would have a similar connection at its northern terminus with the Norfolk & Western. Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways reached by the Norfolk & Western. If only the proposed extension to close the gap between Spartanburg, S. C. and Gastonia, N. C. should be built the same result would follow, except that the route from Charlotte to Winston-Salem and the connection there with Norfolk & Western would not be entirely over petitioner's own lines, but over a joint route on the Norfolk Southern to Norwood, and Winston-Salem Southbound to Winston-Salem. Petitioner's own estimate contained in its application to the Commission is that the extensions would gain new business diverted from steam railroads of 82,320 cars a year, including 12,300 cars of bridge traffic carried entirely over its lines as the interior connecting link in joint through routes, resulting in a gain of revenue of $3,890,000 for the first year. The estimated loss of revenue to competing carriers is con-

siderably greater. It thus appears that petitioner's business is pre-eminently interchange interstate freight traffic of national character, in all essential respects conducted as is the business of the steam freight carriers in the territory served. The differences in construction, equipment, operation and handling are incidental merely to the use of electric motive power in lieu of steam. The purely local traffic in freight, passengers, baggage and express, is relatively inconsequential.

In *Texas & P. R. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277–278, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an "industrial track," as that phrase is used in paragraph (22), although by strict construction it was such.

The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an "interurban" railway within the exemption of the same paragraph. The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to

effect the remedy intended. *Spokane & Inland Empire R. Co.* v. *United States,* 241 U. S. 344. In cases where an appreciation of the facts is requisite to proper classification it is not always easy to draw the line. Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception of paragraph (22). But this is not such a case. The facts clearly require a holding that petitioner's railway is not within the true intent and purpose of the exclusion intended by the paragraph.

Only a word need be said with respect to the contention that governmental agencies have heretofore classified the railway as an interurban electric line. It is true that in connection with quite diverse administrative functions the United States Labor Board, the Postmaster General, and the Interstate Commerce Commission have classified petitioner's railway as an interurban electric line in distinction to steam railroads. Neither the administrative nor the statutory classification has, however, been uniform, and in any event is not controlling in this litigation.

Attention is drawn to the fact that the same phraseology is used in other sections of the Interstate Commerce Act. But it is so used with other purposes in view.

We are of opinion that the District Court correctly held that petitioner falls within the terms of paragraphs (18) to (21) of § 1 of the Interstate Commerce Act, and was properly enjoined from proceeding with the construction of the proposed extensions in the absence of a certificate of convenience and necessity. The judgment of the District Court is

Affirmed

The CHIEF JUSTICE took no part in the consideration or decision of this case.

SOUTHERN RAILWAY CO. ET AL. *v.* YOUNGBLOOD, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 788. Submitted April 28, 1932.—Decided May 16, 1932.

1. A conductor on an engine had a definite written order to enter on a certain passing track and there to await the passing of a train coming from the opposite direction on the main line, but in disobedience of such order, proceeded beyond the meeting point and thus brought about a head-on collision, in which he was killed. *Held,* that his negligence was the proximate cause of his death, and the fact that, through oversight of other employees, a duplicate of the same order and an oral confirmation of it were not delivered to him when he arrived at the meeting point, did not render the railroad company liable. P. 316.
2. Where, of two trains dispatched on the same track in opposite directions, the one ordered to wait at a meeting point ran past it and collided with the other, which had the right of way, *held* that failure to deliver the passing instruction to the latter before it reached the place of collision was not causal negligence. P. 317.

166 S. C. 140; 164 S. E. 431, reversed.

CERTIORARI,* to review the affirmance of a recovery under the Federal Employers' Liability Act.

Messrs. H. O'B. Cooper, Sidney S. Alderman, Frank G. Tompkins, and *S. R. Prince* submitted for petitioners.

Mr. William C. Wolfe submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Respondent brought this action under the Federal Employers' Liability Act to recover for the death of her intestate, a conductor in petitioners' employ, who was killed in a head-on collision while riding on the engine of an

* See Table of Cases Reported in this volume.

extra train. Petitioners operate a single track railroad between Charleston and Columbia, South Carolina, through Branchville, Orangeburg, St. Matthews, and Fort Motte. Trains running from Columbia to Charleston are designated eastbound, and those from Charleston to Columbia westbound. On the morning of the accident the engine of a westbound freight train became disabled at Fort Motte, a station nineteen miles west of Orangeburg. A yard engine kept at Branchville, eighteen miles east of Orangeburg, was ordered to go to its relief. This locomotive, running light, was designated as Extra 483 West, and had a crew consisting of respondent's intestate as conductor, an engineer, and a fireman. A freight train known as Extra 723 East was moving eastwardly from Columbia to Charleston, and it was necessary for the two to meet and pass somewhere on the line. The train dispatcher at Charleston sent a telegraphic order to Branchville, the place of departure of Extra 483, and to Orangeburg, the selected passing point, as follows:

"Extra 723 East get this order and meet Extra 483 West at Orangeburg. Engine 483 run extra Branchville to Andrews."

Such an order is known as a form 31, which has to be signed for by the conductor when delivered to him. The order was transmitted and received by the operators at Branchville and Orangeburg as a "three copy" order and the operator at Branchville accordingly made three copies, one for his file and two which he delivered to respondent's intestate, who signed for the same and delivered one to the engineer. They read it in the presence of the fireman before leaving Branchville. There was nothing on the face of the order to indicate that No. 483 would be given additional copies of it, or would receive any other order, at Orangeburg, the designated passing point. The Charleston dispatcher intended that this order as transmitted to Orangeburg, and addressed at that point to "Extra 723

East and operator," should be what is known as a "five-copy" order—that is, that the operator at Orangeburg should make five copies, one for his file and two to be delivered to the conductor of each of the trains which were to pass at that point. Through some oversight the Orangeburg operator received the message as a three-copy order, one of which would be retained for his file and the other two given to the conductor of Extra 723 East. Thus there were no copies for delivery, as intended, to respondent's intestate, the conductor of Extra 483 West, as there would have been had the order been received and understood at Orangeburg as a five-copy one.

Under the rules of the company the eastbound train, 723, was the superior, and it was the duty of 483 to take the siding at Orangeburg and permit the other to pass on the main track. At that point the semaphore signal was located in front of the operator's office about seventy-five yards east of the east switch of the pass track, so that the westbound 483 approaching Orangeburg would necessarily have to pass this semaphore to reach the entrance of the pass track, which is about three-fourths of a mile long. As 483 was approaching the semaphore the Charleston dispatcher called the Orangeburg operator and inquired as to its whereabouts. The operator replied that it was then approaching. The dispatcher told the operator to "tell him to go to the west end of the pass track and wait on Extra 723." Engine 483 stopped just east of the semaphore and blew four blasts, a signal inquiring whether the operator has any orders for the train. In response the latter dropped the semaphore, which is an indication to the crew that there are no further orders and that they are to proceed under those they then have. The intended verbal instructions were not given. After leaving Branchville the crew of No. 483, having received no further or other orders with respect to passing Extra 723, were under a duty to follow the written orders received at Branch-

ville, which involved passing the semaphore at Orangeburg and going on the pass track to clear the main line for No. 723. Instead the train went up the main line, failing to enter the pass track at either the east or the west switch. As it approached the west switch a yard locomotive blew a warning blast and the engine stopped momentarily. The fireman then inquired of the conductor and engineer whether they were not going to go in on the pass track, to which the conductor replied that they had time to reach the switch at Stilton, some two miles beyond. They proceeded on the main track beyond Stilton, evidently missing the switch there because of a heavy fog. The engine collided head-on with Extra 723, killing respondent's intestate and the engineer, and three of the crew of 723.

There was no allegation of negligence on the part of the engineer of 483 or any member of the crew of Extra 723, the sole claims being with respect to the failure of the operator at Orangeburg to make a five-copy passing order and deliver two copies of it to the respondent's intestate, and the failure of the same operator to give the verbal instructions to respondent's intestate to run to the west end of the pass track and wait for 723. A request by petitioners for a binding instruction, on the ground that there was no evidence of negligence on the part of petitioners or their employee which in whole or in part caused the accident, was refused. The trial court submitted the case to the jury and a resulting verdict and judgment in favor of respondent was affirmed by the state supreme court.

Beyond peradventure respondent's intestate disobeyed a definite order which was not revoked or superseded by any other orders, verbal or written. By force of this order and the rules of the company No. 483 was bound to pass the semaphore at Orangeburg, run onto the pass

track, and not leave until 723 had passed on the main track. Copies were found on the persons of both the conductor and engineer after the collision. This crass disobedience of operating orders was the sole cause of the intestate's death. If the order respecting the passing of the trains had been made as a five-copy order the operator at Orangeburg would merely have handed the crew two copies in the same words as those of the order they then held, which then governed their conduct. If the operator at Orangeburg had verbally confirmed the order that 483 was to run to the west end of the pass track and wait there for 723 this verbal instruction would not in any wise have altered the duty of respondent's intestate under his existing written orders.

The suggestion is made that the dispatcher was negligent in not communicating the passing order to the crew of Extra 723 at some point west of Orangeburg, so that they would have known they were to pass Extra 483 at Orangeburg. But such a procedure would not have altered the running of Extra 723 in any particular. It would still have had the right of way over 483 to and through Orangeburg, and the accident occurred over three miles west of that point.

The case comes to this: that respondent's intestate had clear and definite orders which if obeyed would have avoided the accident and the disobedience whereof was the sole efficient cause of his death. As said in *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 142:

"A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

The record is destitute of any evidence of negligence on the part of the petitioners or their servants or agents

which was in any degree a cause of the death of respondent's intestate, and there was nothing to submit to the jury.

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

Reversed.

SOUTHERN RAILWAY CO. ET AL. *v.* DANTZLER, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 787. Submitted April 28, 1932.—Decided May 16, 1932.

Decided upon the authority of the case last preceding.

166 S. C. 148; 164 S. E. 434, reversed.

Messrs. H. O'B. Cooper, Sidney S. Alderman, Frank G. Tompkins, and *S. R. Prince* submitted for petitioners.

Mr. William C. Wolfe submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a companion case to No. 788, *Southern Ry. Co.* v. *Youngblood,* decided this day, *ante,* p. 313. The respondent's intestate was the engineer of the train known as Extra 483 West. He had on his person after the accident his copy of the orders received at Branchville. The negligence claimed is practically the same as in No. 788, and none is alleged as against any member of the decedent's crew or that of the train with which his engine collided. After the accident Dantzler was taken to a hospital, where before his death he stated to two persons that the accident was his fault—that he forgot his orders and ran past the point where he was directed to pass the other train.

For the reasons given in the opinion in No. 788 the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

WOOLFORD REALTY CO., INC. *v.* ROSE, COLLECTOR OF INTERNAL REVENUE.

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

No. 582. Argued April 19, 20, 1932.—Decided May 16, 1932.

1. The general principle underlying the income tax statutes ever since the adoption of the Sixteenth Amendment has been the computation of gains and losses on the basis of an annual accounting for the transactions of the year. P. 326.
2. A taxpayer who seeks an allowance for losses suffered in an earlier year, must be able to point to a specific provision of the statute permitting the deduction, and must bring himself within its terms. *Id.*
3. The popular or received import of words furnishes the general rule for the interpretation of public laws. P. 327.
4. A construction that would engender mischief should be avoided. P. 329.
5. Section 206 (b) of the Revenue Act of 1926, permitted any taxpayer who sustained a net loss in one year to deduct it in computing his net income for the next year and, if it exceeded that net income (computed without such deduction), to deduct the excess in computing the net income for the next succeeding ("third") year. By other provisions of the same Act, § 240 (a) and (b) affiliated corporations could make consolidated returns of net income upon the basis of which the tax was to be computed as a unit and then be assessed to the respective corporations in such proportions as they might agree upon or, if they did not agree, then on the basis of the net income properly assignable to each. *Held:*

   (1) Where one of two corporations which became affiliated in 1927 had no net income that year, its net losses for 1925 and 1926 were not deductible in their consolidated return of net income for 1927. P. 326.

   (2) Each of the corporations joined in a consolidated return is none the less a taxpayer. The deduction of net loss is not per-

mitted by § 206 (b) except from the net income of the corporation suffering the loss; and if there would be no net income for the current year though the earlier loss were to be excluded, there is nothing from which a deduction can be made. *Id.*

53 F. (2d) 821, affirmed.

CERTIORARI, 284 U. S. 615, to review the affirmance of a judgment, 44 F. (2d) 856, sustaining a demurrer to the petition in an action to recover money paid as income taxes.

Mr. Wm. A. Sutherland, with whom *Mr. Joseph B. Brennan* was on the brief, for petitioner.

Each separate corporation remains the "taxpayer." But the income of the affiliated corporations is consolidated and the tax is computed on this consolidated net income as though it were the income of a single corporation.

It is immaterial, so far as the practical result is concerned, whether the gross incomes are added together and all the deductions then added together and subtracted, or whether the net income of each separate corporation is computed by taking the gross income of each corporation and subtracting from it the deductions of that particular corporation and then combining the plus and minus figures thus obtained.

The only difficulty with the second view is that it requires the concept of "net income" as a minus quantity; but that difficulty is apparent only. "Net income" under the Act has the meaning defined by the Act, § 232. It is not "commercial net income."

Whichever of the two methods above suggested for the computation of consolidated net income is considered as required by Art. 635 of Regulations 69, the Treasury Department admits that none of the deductions under § 234 (a) is limited to the gross income of the particular corporation on whose account the deduction arose, but

that each of them is deductible in full in computing the statutory "net income" of the consolidated group, regardless of whether they would be deductible in computing commercial income or not.

The deduction allowable under § 206 is allowable in computing consolidated net income upon exactly the same terms and to the same extent as the deductions under § 234 and is not limited by the amount of the income of the corporation previously sustaining the "net loss."

There is no provision in § 206 (b) to limit the deduction in the "third year"; and there is no provision for carrying the "net loss" forward farther against the net income of the particular corporation sustaining the "net loss"; and there is no possibility of any double deduction.

The Government's argument is unsound because it fails to take into consideration the limitations placed upon the carrying forward of net losses of an individual corporation by its consolidation with other corporations, which in effect are given the benefit of a loss in a consolidated return. Section 206 (b) does not as a matter of fact provide that only such portion of the "net loss" as shall be necessary to eliminate the net income computed without the benefit of the "net loss" shall be deducted in the second year. It provides that the "net loss" shall be deducted in computing net income for the second year, but it goes ahead and provides that where a full benefit is not received from the loss because of the smallness of the taxpayer's income in the second year it may be carried forward to the third year.

It would be very fanciful to say that the deduction allowed by § 206 (b) to a "taxpayer" is personal to a particular corporation, but that the deductions allowed by § 234 (a) to a "corporation subject to the tax imposed by § 230" are not personal to the particular corporation. Under the clear general terms of §§ 232, 234, 206 and 240,

and Art. 635 of Regulations 69, there is absolutely no basis for treating the deduction allowed by § 206 (b) differently from the deductions allowed by § 234 (a) in computing consolidated net income.

That the deduction here claimed is not inappropriate to the general scheme of the income tax act is conclusively shown by regulations under the Revenue Act of 1928.

Equitable considerations impose no greater restriction upon the deduction of "net losses" in consolidated returns than in the return of a single corporation into which another corporation has been merged.

Losses currently realized are not limited by the Commissioner in consolidated returns because in substance suffered in other years or prior to affiliation.

Results under the consolidated returns section and the regulations thereunder, as under other provisions of the revenue acts, are to be determined by language of the statute and regulations and not by considerations of "equity."

Petitioner does not contend that a "net loss" can be deducted in computing a "net loss." A "net loss" from a preceding year is not among the deductions provided in § 206. But this has no bearing upon the question as to whether it can be deducted in computing "net income" so as to give a minus figure to go into consolidated "net income." "Net income," when a minus quantity, is not in any sense under the statute synonymous with "net loss."

Of course if the proper method of computing "consolidated net income" is to take the aggregate of the gross income minus the aggregate of the deductions, a "net loss" is not used to produce a minus quantity for any purpose, and therefore no one would even suggest that a "net loss" is being used in the computation of a "net loss."

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers,* and *Wilbur H. Friedman* were on the brief, for respondent.

Normal mode of computation for income-tax purposes is on the basis of an annual accounting of the business transactions during the taxable year. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359.

The privilege granted by § 206 (b), being in the nature of an exemption from the regular scheme, should not be extended by implication. Deduction of net losses of earlier years is limited to elimination of "the net income of the taxpayer . . . computed without such deduction"; and if "the taxpayer" has no net income computed without such deduction, these net losses may not be availed of in that taxable year, but must be carried forward to the next succeeding year.

Petitioner contends that the "net income" referred to in § 206 may be a minus quantity and that therefore the deduction may be taken even though "the taxpayer's" deductions under § 234 are in excess of the gross income. Congress could not have intended a meaning so repugnant to the common understanding of the word "income."

It is well settled that the affiliated group may not take a deduction in the consolidated return which is not available to the particular member corporations. *First Nat. Bank* v. *United States,* 283 U. S. 142; *Swift & Co.* v. *United States,* 38 F. (2d) 365; *Commissioner* v. *Ginsburg Co.,* 54 F. (2d) 238; Art. 635, Treas. Reg. 69. Corporations filing a consolidated return for a given taxable year may take advantage of net losses sustained by a member of the group before affiliation only to the extent that the member has net income for that year.

We find no inconsistency between this position and the fact, urged by petitioner, that all the deductions under § 234 may be taken upon the consolidated return

regardless of whether the particular corporations had net income.

There is nothing to countenance the view that the affiliated group becomes "the taxpayer" within § 206. The effect of the filing of the consolidated return is merely to make the group a tax-computing unit. The group does not itself become the taxable unit. The tax is assessed "upon the respective affiliated corporations." It is well settled that the members of the group remain the "taxpayers."

A basic reason for the enactment of § 240 was to prevent tax evasion. Sen. Rep. No. 617, 65th Cong., 3d Sess., p. 9; *Handy & Harman* v. *Burnet,* 284 U. S. 136. The affiliation provisions were obviously not designed to permit tax evasion by the purchase and sale of tax losses.

The primary purpose of the consolidated return provision was to require taxes to be levied according to the true net income resulting from a single business enterprise, even though it was conducted by means of more than one corporation. *Handy & Harman* v. *Burnet,* 284 U. S. 136.

By leave of Court, briefs of *amici curiae* were filed as follows: By *Messrs. Louis Titus* and *Henry M. Ward;* by *Messrs. Frederick L. Pearce* and *George M. Morris;* by *Messrs. Robert N. Miller* and *John G. Buchanan;* by *Messrs. Alfred S. Weill, Hugh Satterlee,* and *Albert S. Lisenby;* by *Mr. Rollin Browne;* and by *Messrs. Kingman Brewster, James S. Y. Ivins, Percy W. Phillips, O. R. Folsom-Jones,* and *Richard B. Barker.*

Mr. Justice Cardozo delivered the opinion of the Court.

Petitioner and Piedmont Savings Company are separate corporations organized in Georgia. They became affiliated in 1927 when the petitioner became the owner of 96% of the Piedmont stock. In March, 1928, the two corporations

filed a consolidated income tax return for 1927 under § 240 of the Revenue Act of 1926. Revenue Act of 1926, c. 27, 44 Stat. 9, 46. During 1927, the petitioner had a net taxable income of $36,587.62, and Piedmont had suffered during the same year a net loss of $453.80. Before its affiliation with the petitioner, it had suffered other and greater losses. Its net loss in 1925 was $43,478.25 and in 1926 $410.82, a total for the two years of $43,889.07. In the assessment of the tax for 1927, the commissioner deducted from the petitioner's net income for that year the loss of $453.80 suffered by its affiliated corporation in the course of the same year. The consolidated net taxable income as thus adjusted was $36,133.82, on which a tax of $5,026.22 was assessed and paid. On the other hand, the commissioner refused to deduct the Piedmont losses suffered in 1925 and 1926 before the year of affiliation. The deductions, if allowed, would have wiped out the tax. A refund having been refused, the petitioner brought this suit against the Collector to recover the moneys paid. The District Court sustained a demurrer to the petition, 44 F. (2d) 856, and the Court of Appeals affirmed. 53 F. (2d) 821. The case is here on certiorari.

Section 240 (a) of the Revenue Act of 1926 provides that "corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return."

Section 240 (b) provides that "in any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agree-

ment, then on the basis of the net income properly assignable to each. . . ."

The general principle underlying the income tax statutes ever since the adoption of the Sixteenth Amendment has been the computation of gains and losses on the basis of an annual accounting for the transactions of the year. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363. A taxpayer who seeks an allowance for losses suffered in an earlier year, must be able to point to a specific provision of the statute permitting the deduction, and must bring himself within its terms. Unless he can do this, the operations of the current year must be the measure of his burden.

The only section of the revenue act that made allowance in 1927 for the losses of earlier years was § 206 (b), upon which this controversy hinges. Its provisions are as follows:

"If, for any taxable year, it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the commissioner with the approval of the Secretary."

Under that section of the statute, the losses suffered by the Piedmont Company in 1925 might have been deducted from its net income in 1926, and might thereafter, if not extinguished, have been deducted to the extent of the excess from its net income in 1927, the year in which its shares were acquired by the petitioner. But

the Piedmont Company did not have any net income in 1927. Its operations for that year resulted in a loss. There was therefore nothing from which earlier losses could be deducted, for the net income without any such deductions was still a minus quantity. The tax for the year was nothing, and the losses of other years could not serve to make it less. The petitioner would have us hold that the minus quantities for all the years should be added together, and the total turned over by the company suffering the loss as an allowance to be made to the company realizing the gain. In that view of the statute, a net loss for a taxable year becomes for the purpose of determining the burdens of affiliated corporations, though not for any other, the equivalent of a net income, and deductions which the statute has said shall be made only from net income, may, none the less, by some process of legerdemain, be subtracted from the loss.

There are two fundamental objections to this method of computation. In the first place, an interpretation of net income by which it is also a net loss involves the reading of the words of the statute in a strained and unnatural sense. The metamorphosis is too great to be viewed without a shock. Certainly the average man suffering a net loss from the operations of his business would learn with surprise that within the meaning of the Congress the amount of his net loss was also the amount of his net income. "The popular or received import of words furnishes the general rule for the interpretation of public laws." *Maillard* v. *Lawrence,* 16 How. 251, 261; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560. In the second place, the statute has given notice to the taxpayer that the aggregate of minus quantities is not to be turned over as a credit to an affiliated company, but is to be used in another way. If the loss for the first year is more than the income for the second, the excess is to be carried over to a third year, and deducted from the net

income, if any, returnable for that year, at which time the process of carrying over is to end. Cf. report of Senate Committee in charge of the revenue act of 1924, Senate Report No. 398, 68th Congress, 1st Session, p. 20. Obviously, the direction to apply the excess against the income of a later year is inconsistent with a purpose to allow it to an affiliated company as an immediate deduction from income of the current year. Adherence to the one practice excludes adherence to the other. Cf. Treasury Regulations 69 promulgated under the act of 1926, Arts. 634, 635, 1622. The fact is not to be ignored that each of two or more corporations joining (under § 240) in a consolidated return is none the less a taxpayer. *Commissioner* v. *Ginsburg Co.*, 54 F. (2d) 238, 239. By the express terms of the statute (§ 240 b) the tax when computed is to be assessed, in the absence of agreement to the contrary, upon the respective affiliated corporations "on the basis of the net income properly assignable to each." "The term 'taxpayer' means any person subject to a tax imposed by this Act." Revenue Act of 1922, § 2a (9). A corporation does not cease to be such a person by affiliating with another.

The petitioner insists that a construction of § 206 (b), excluding the allowance of past losses except as a set-off against the income of the company sustaining them, is inconsistent with the accepted construction of § 234 of the same act whereby the deductions there enumerated are made from the net income exhibited by the consolidated return without reference to their origin in the business of one company or another. Section 234 provides that in computing the net income of corporations subject to a tax there shall be allowed as deductions "(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . . (2) All interest paid or accrued within the taxable year on its indebtedness . . . ; (3) Taxes paid

or accrued within the taxable year . . . .; (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise. . . . ; (5) Debts ascertained to be worthless and charged off within the taxable year." The points of difference between the allowances under § 206 (b) upon the one hand and those under § 234 upon the other are important and obvious. The deductions allowable under § 234 represent expenses paid or accrued or losses suffered during the same taxable year covered by the return. They are thus included in the net income according to the fundamental concept of such income reflected in the statute, instead of falling within an exception which, irrespective of its precise extension, is a departure from the general scheme. Even more decisive is the consideration that there is nothing in § 234 prohibiting the allowance by one unit of its current losses and expenses as a deduction for the benefit of the affiliated group, nor any statement that the use to be made of them shall follow other lines. On the other hand, § 206 (b) provides, as we have seen, that the excess of loss remaining over the current net income of the taxpayer who has suffered it shall be carried over into the next year and if need be into a third, and thereafter disregarded. Subtle arguments have been addressed to us in support of the contention that the loss of one affiliated company suffered in earlier years may be allocated to the other without infraction of the rule that the loss shall be carried forward. They are not lacking in plausibility, but we cannot hold that they comport with the directions of the statute " if we take words in their plain popular meaning as they should be taken here." *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3.

Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be engendered by any other ruling. A different ruling would mean that a prosperous corporation could buy the shares of one that

had suffered heavy losses and wipe out thereby its own liability for taxes. The mind rebels against the notion that Congress in permitting a consolidated return was willing to foster an opportunity for juggling so facile and so obvious. Submission to such mischiefs would be necessary if the statute were so plain in permitting the deduction as to leave no room for choice between that construction and another. Expediency may tip the scales when arguments are nicely balanced. True, of course, it is that in a system of taxation so intricate and vast as ours there are many other loopholes unsuspected by the framers of the statute, many other devices whereby burdens can be lowered. This is no reason, however, for augmenting them needlessly by the addition of another. The petitioner was prosperous in 1927, and so far as the record shows for many years before. Piedmont was unfortunate in 1927, and unfortunate in the years preceding. The petitioner, affiliating in 1927, has been allowed the loss suffered by Piedmont through the business of that year as a permissible deduction from the consolidated balance. What it claims is a right to deduct the losses that were suffered in earlier years when the companies were separate. To such an attempt the reaction of an impartial mind is little short of instinctive that the deduction is unreasonable and cannot have been intended by the framers of the statute. Analysis of the sections shows that there is no gap between what they wrote and what in reason they must have meant.

The petitioner refers us to the Revenue Act of 1928 (45 Stat. 791, 835) and to Treasury Regulations adopted thereunder as supporting its position. These provisions were adopted after the liability for the tax of 1927 had accrued, and they can have little bearing upon the meaning to be given to statutes then in force. The Revenue Act of 1928 (§ 141b) protects against unfair evasions in

the making of consolidated returns by increasing the discretionary power of the Commissioner in prescribing regulations. "The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability." Under the authority so conferred the Commissioner has adopted the following regulation (Treasury Regulations 75, art. 41), applicable only to the taxable year 1929, and to taxable years thereafter:

"A net loss sustained by a corporation prior to the date upon which its income is included in the consolidated return of an affiliated group (including any net loss sustained prior to the taxable year 1929) shall be allowed as a deduction in computing the consolidated net income of such group in the same manner, to the same extent, and upon the same conditions as if the consolidated income were the income of such corporation; but in no case in which the affiliated status is created after January 1, 1929, will any such net loss be allowed as a deduction in excess of the cost or the aggregate basis of the stock of such corporation owned by the members of the group."

The provision in this regulation limiting the deductions to the cost or value of the stock will make it profitless hereafter to purchase stock for the purpose of gaining the benefit of deductions in excess of what is paid.

In holding that the Piedmont losses of 1925 and 1926 were properly excluded from the consolidated return, we are in accord with the preponderance of authority in the other federal courts. *Swift & Co.* v. *United States,* 38 F. (2d) 365; *Sweets Co.* v. *Commissioner,* 40 F. (2d) 436;

Commissioner v. *Ginsburg Co.*, 54 F. (2d) 238. Only one decision has been cited to us as favoring a different view. *National Slag Co.* v. *Commissioner*, 47 F. (2d) 846.

The judgment is

Affirmed.

PLANTERS COTTON OIL CO., INC., ET AL. *v.* HOPKINS, COLLECTOR OF INTERNAL REVENUE.

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

No. 672. Argued April 20, 1932.—Decided May 16, 1932.

The owner of substantially all of the stock of two joint stock associations caused their assets to be transferred to three corporations which he formed for carrying on the business and of which he owned substantially all the shares. *Held* that in a consolidated income tax return of all the companies net losses suffered by the joint stock associations during the year preceding the affiliation were not deductible. *Woolford Realty Co.* v. *Rose, ante*, p. 319. P. 333.
53 F. (2d) 825, affirmed.

CERTIORARI, 285 U. S. 533, to review the affirmance of a judgment, 47 F. (2d) 659, dismissing the petition in an action to recover an alleged overpayment of income taxes.

Messrs. J. M. Burford and *Wm. A. Sutherland*, with whom *Messrs. Joe A. Worsham* and *J. L. Gammon* were on the brief, for petitioners.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Sewall Key*, *Norman D. Keller*, and *Wm. H. Riley, Jr.*, were on the brief, for respondent.

Messrs. Frederick H. Wood, *Hoyt A. Moore*, and *A. James Slater*, by leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Three corporations, Planters Cotton Oil Co., Inc., Waxahachie, Planters Cotton Oil Co., Inc., Ennis, and Farmers Gins, Inc., were organized under the laws of Texas in August and September, 1924. Two joint stock associations, Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, which had been organized in earlier years, retained their separate existence. One man, H. N. Chapman, was the owner of 98% of the shares of the unincorporated associations. He caused the assets of those associations, or substantially all of them, to be transferred to the newly organized corporations, and received in return substantially all the shares of stock.

For the fiscal year ending June 30, 1925, the three corporations and the two joint stock associations filed a consolidated income tax return wherein the corporations, which had earned a net income of $147,636.25, claimed a deduction of $78,399.25 for loss suffered by the associations during the year preceding the affiliation. The deduction was disallowed, and suit was brought by the corporation and the associations for the refund of the tax to the extent of the overpayment claimed. The District Court dismissed the petition, 47 F. (2d) 659; the Court of Appeals affirmed, 53 F. (2d) 825; and by certiorari the case is here.

The controversy is ruled by our judgment in *Woolford Realty Co.* v. *Rose, ante,* p. 319, unless the fact that in this case one shareholder, Chapman, was the owner of substantially all the shares of the five affiliated companies supplies an essential element of difference. We think it does not. Chapman was free, if he desired, to continue to do business in an unincorporated form. Preferring the

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.

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 ca-

pacity 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 com-

plaint 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.

2. The inaction of the conductor, if it amounted to negligence, was not such as to evoke the doctrine of last clear chance, since (1) it was not reckless indifference to a duty to counteract a peril perceived and understood, and (2) it was substantially concurrent with the engineer's negligence. P. 350.

184 Ark. 633; 43 S. W. (2d) 251, reversed.

CERTIORARI, 285 U. S. 531, to review the affirmance of a recovery from the railway company under the Federal Employers' Liability Act.

Mr. Harold R. Small, with whom *Mr. A. L. Adams* was on the brief, for petitioner.

There could be no recovery even though there was also a failure of some other employee to perform his duty. *Great Northern Ry. Co.* v. *Wiles,* 240 U. S. 444; *Frese* v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1; *Davis* v. *Kennedy,* 266 U. S. 147; *Yadkin R. Co.* v. *Sigmon,* 267 U. S. 577; *Unadilla Valley R. Co.* v. *Caldine,* 278 U. S. 139; *Virginian R. Co.* v. *Linkous,* 230 Fed. 88; *Blunt* v. *Pennsylvania R. Co.,* 9 F. (2d) 395; *Unadilla Valley R. Co.* v. *Dibble,* 31 F. (2d) 239; *Southern Ry. Co.* v. *Hylton,* 37 F. (2d) 843, cert. den., 281 U. S. 745; *Bradley* v. *N. W. Pac. R. Co.,* 44 F. (2d) 683; *Paster* v. *Pennsylvania R. Co.,* 43 F. (2d) 908.

Leading cases decided by the highest state courts are to the same effect. *Gillis* v. *New York, N. H. & H. R. Co.,* 113 N. E. 212; *Davis* v. *Payne,* 216 Pac. 195; *Washington, B. & A. E. Ry. Co.* v. *Cook,* 125 Atl. 172; *Hudson* v. *Norfolk & W. Ry. Co.,* 146 S. E. 525, cert. den., 279 U. S. 866; Roberts, Federal Liabilities of Carriers, 2d ed., vol. II, § 874, p. 1709; *Atlantic Coast Line R. Co.* v. *Davis,* 279 U. S. 34, 39.

That the last chance doctrine may be applicable the other servant must have actual knowledge of the peril. *Wheelock* v. *Clay,* 13 F. (2d) 972. Furthermore, that

doctrine could not apply here, because the engineer's violation of his order continued as a proximate cause of the collision up to the moment of the collision. *St. Louis & S. F. Ry. Co.* v. *Schumacher,* 152 U. S. 77; *Kansas City S. R. Co.* v. *Ellzey,* 275 U. S. 236; *Wheelock* v. *Clay, supra.* Distinguishing: *Missouri Pacific R. Co.* v. *Skipper,* 174 Ark. 1083.

Mr. Frank Pace for respondent.

In no one of the cases relied on by petitioner was the issue of discovered peril, or the doctrine of last clear chance, in any way involved. In each the contention of the party seeking recovery was that the injury was caused by the concurrent and contemporary negligence of the party injured and certain other servants of the railroad company, and recovery was sought under the doctrine of comparative negligence.

The doctrine of last clear chance, or discovered peril, applies in every case where the defendant discovers the negligence of the plaintiff and the peril thereby created, in time, by the exercise of reasonable care after discovering such peril, to avoid the injury, but fails to use the means available to him to prevent the injury. *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551; *Grand Trunk Ry. Co.* v. *Ives,* 144 U. S. 408; *Chunn* v. *City & Sub. Ry.,* 207 U. S. 302.

The conduct of the conductor brings this case within the doctrine of last clear chance, as defined in *Kansas City Sou. Ry. Co.* v. *Ellzey,* 275 U. S. 236, 241.

Mr. Justice Cardozo delivered the opinion of the Court.

The administratrix of the estate of Simpson, an employee of the petitioner, brought this action under the Federal Employers' Liability Act (Act of April 22, 1908,

c. 149, § 1, 35 Stat. 65; U. S. Code, Title 45, § 51) to recover damages for his death. She had a verdict in her favor in the Circuit Court of Prairie County, Arkansas, and the Supreme Court of the State affirmed. 184 Ark. 633; 43 S. W. (2d) 251. The case is here on certiorari.

Simpson was the engineer of No. 775, an extra train engaged in interstate commerce. Before leaving Pine Bluff, Arkansas, he received a written train order, No. 104, notifying him to proceed south to the cross-over at McNeil, Arkansas, and there wait upon a siding until another train, No. 18, going north, had arrived and passed. On arriving at McNeil, Simpson took his train, consisting of 43 freight cars, upon the siding at the cross-over, but did not wait there. He had received at McNeil another order (train order No. 132) notifying him that another train (second 18) was to meet him farther south at Stamps. The conjecture is offered that he confused train No. 18 with second No. 18, though there is no dispute that to a railroad employee the description was entirely intelligible, trains of the same number being designated as first, second, third and so forth. At all events, Simpson instead of waiting at the siding moved out upon the main track. About a mile away there was a head-on collision between his train and No. 18, in which he and others were killed.

The respondent admits, as she admitted on the trial, that the engineer was negligent and rests her right to recover upon what is characterized as the doctrine of "the last clear chance." To bring that doctrine into play she relies upon these facts: At the end of the long train of 43 freight cars was a caboose in which the conductor and two brakemen rode. The brakemen say that as the train left the siding, they remembered the first order and asked the conductor whether any new ones contradicting it had come into his hands. Not hearing of any, they called out

to apply the air brakes, and one of them offered to do so himself. This the conductor forbade, and said to bring him the written orders which were in the cupola of the caboose, so that he might read them again. This was done at once. While the orders were in the conductor's hands and he was reading them again, the collision occurred.

The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis* v. *Kennedy,* 266 U. S. 147, might have been written of this case. "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury due to his failure to act on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more." See also *Unadilla Ry. Co.* v. *Caldine,* 278 U. S. 139; *Frese* v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1, 3; *Great Northern Ry. Co.* v. *Wiles,* 240 U. S. 444, 448.

We do not need to inquire whether a different conclusion would follow if the conductor in the caboose had discovered that the engineer had gone upon the main track through a misunderstanding of a later order, and discovering this, had failed after a substantial interval of time to give warning of a peril that he could have easily averted. Nothing of the kind appears. There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place, the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory, and was looking at the written orders at the moment of the collision. Negligent he may have been, but not

recklessly indifferent to a duty to counteract a peril perceived and understood. *Woloszynowski* v. *N. Y. C. R. Co.*, 254 N. Y. 206; 172 N. E. 471; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558. In the second place, the negligence of the engineer and the negligence of the conductor were substantially concurrent. The negligence of the engineer was a continuing one (*St. Louis & San Antonio Ry. Co.* v. *Schumacher*, 152 U. S. 77, 81), for he was under a duty from the moment that he went out on the main track to return to a place of safety. The negligence of the conductor in failing to give warning was not separated by any considerable interval from the consequences to be averted, nor is there any satisfactory proof that warning, if given, would have been effective to avert them. The transaction from start to finish must have been a matter of seconds only. In the brief for the respondent nice calculations are submitted in an attempt to prove that if the conductor had applied the brakes at once, his train could have been stopped at a point that would have separated it by a space of approximately half a mile from train No. 18 rushing on from the south, and that if all this had happened, the engineer of No. 18 might have noticed the stationary train in time to stop his own and thus prevent collision. Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent. *Kansas City Southern Ry.* v. *Ellzey*, 275 U. S. 236, 241.

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

Reversed.

CONTINENTAL BAKING CO. ET AL. *v.* WOODRING, GOVERNOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 677. Argued April 25, 1932.—Decided May 23, 1932.

1. The use of public highways by private intrastate and interstate carriers of goods by motor may be conditioned by the State upon the carrier's obtaining a license, complying with reasonable regulations, paying a reasonable license fee and a tax, for expenses of highway administration and maintenance and reconstruction of the highways covered by the license, and upon the filing of an insurance policy as security against injuries from the carrier's negligent operations to persons and property other than the passengers and property he carries. P. 365.
2. In the exercise of its right to demand compensation for the special highway facilities it has provided, and of its power to regulate the use of its highways in the interest of the public safety, a State may properly treat motor vehicles as a special class, because of the special damage to the highways and special dangers to the public attending their operation. *Id.*
3. The Kansas Motor Vehicle Act taxes motor carriers on a basis of gross ton miles for the use of state highways, but exempts (a) those operating wholly within a city or village and (b) private motor carriers operating "within a radius of twenty-five miles beyond the corporate limits of such city, or any village." In the latter aspect it is construed as confined to carriers having an established place of business or base of operations within a city or village and exempting them as to their truck movements there and within the extended zone, but as subjecting them to the tax on mileage outside of the zone. *Held* that the exemption is not so uncertain as to render the tax void. P. 366.
4. The Kansas Motor Vehicle Act, the provisions of which apply in part to both common and private carriers using the state highways, but which makes a clear distinction between the two classes, in that the former, but not the latter, are required to obtain certificates of public convenience and necessity and are subject to rate-regulation, vests authority in a commission to "regulate and supervise accounts, schedules, service and method of operation," "to prescribe a uniform system and classification of accounts," to require

the filing of reports, etc., and generally to "supervise and regulate" all the carriers to which it applies "in all matters affecting the relationship" between such carriers and "the traveling and shipping public." *Held:*

(1) Apprehension that the commission may, under this authority, invade the constitutional rights of private carriers by regulations lawful only in respect of common carriers, is not ground for injunction in the absence of any action or threat of action on its part. *Smith* v. *Cahoon,* 283 U. S. 553, distinguished. P. 367.

(2) The provisions as to records, reports and accounts may, in the case of private carriers, be assumed to relate to the determination of the amount of gross ton mileage tax to which such carriers are properly liable. *Id.*

(3) The general grant of authority over both private and public carriers in all matters affecting their relationship with the traveling and shipping public, should be taken distributively. *Id.*

5. The declaration of this statute that all powers of the Kansas Public Service Commission over common carriers are thereby made applicable "to all such motor carriers," applies to public and not to private carriers. P. 369.
6. The duty of the commission under the Act to insist that motor vehicles shall be maintained in a safe and sanitary condition, to prescribe qualifications of operators as to age and hours of service, and to require the reporting of accidents, has manifest reference to considerations of safety. *Id.*
7. A state law regulating motor carriers and taxing them on a mileage basis is not offensive to the equal protection clause of the Fourteenth Amendment because it does not extend to those who operate wholly within a city or village and who are subject to the regulations of the municipality. P. 369.
8. It is also permissible classification to extend such exemption to private carriers, having headquarters or base of operations within the municipality, in respect of the movements of their delivery trucks within a zone surrounding the municipality, because of the slight use by such carriers of the state highways outside of the municipality, and because of the practical difficulty, and the cost, of keeping track of the mileage of the trucks for the purpose of assessing a mileage tax. P. 370.
9. Fixing the width of the zone in which the state Motor Vehicle Act shall not operate in such cases, at 25 miles beyond the municipality, was not arbitrary but a valid exercise of legislative discretion. *Id.*

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10. The provision in the Kansas Motor Vehicle Act that it shall not apply to "the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle," is likewise based on permissible classification. *Smith* v. *Cahoon,* 283 U. S. 553, distinguished. Pp. 371–373.
11. The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. P. 373.
12. The public interest in the transportation of children to and from school justifies exemption of that form of transportation from the statute. *Id.*

55 F. (2d) 347, affirmed.

APPEAL from a decree of the District Court of three judges which dismissed the bill in a suit to restrain enforcement of the Motor Vehicle Act of Kansas.

Messrs. Charles R. Wilke and *John C. Grover,* submitted for appellants.

The Act discriminates against appellants and other carriers in the following particulars:

Motor vehicles that operate wholly within a city or village are exempt from the tax, from the regulations of the Public Service Commission, and from the provisions as to license and insurance. These exemptions do not apply to appellants' trucks from plants outside the State, or not located in a city or village in the State, while operating in the same city or village.

Any non-exempted truck passing through a number of cities and villages, is taxed on mileage therein and the tax does not go to maintain the roads in such cities or villages. Yet the only constitutional justification for such a tax is as compensation for the use of the highways.

More motor vehicles operate in the cities and villages than operate on the state highways. To exempt this majority from license, regulation and compulsory in-

surance, where regulation is most important, is a discrimination against vehicles and their operators in regions where such requirements are less necessary.

The 25-mile limitation can not be justified on the basis of the cost of administration. It does not eliminate a small user should he get over the 25-mile limit, yet it permits the extensive user to operate within many hundred square miles without payment of the tax. The exemption from the requirement of insurance and from other provisions of motor safety regulation is a discrimination, and unconstitutional for the reasons set forth in the *Cahoon* case, 283 U. S. 553.

The purpose of this Act, as stated by the court in this and the *Louis* case, 53 F. (2d) 473, is to provide a tax for the use of the highways as additional compensation to the State over the present gasoline and other taxes. The cities and villages take care of their own roads and streets. Outside of the cities and villages the State must tax everyone uniformly and not arbitrarily for the use of the highways. To exempt one mile outside would be unfair and arbitrary. So of five, ten, fifteen, twenty-five or one hundred miles. If the tax is not to be discriminatory or arbitrary, the vicinity near the cities should be taxed as much as the outlying districts. The reason given by the court below, that the city or village itself would require bonds and licenses, does not apply to the outside zone, as no city or village has any jurisdiction outside its own limits. A truck having a city license and giving bond as protection to the public within the city, would have this territory outside of the city without any requirement of license or bond either under this Act or by the city. Cf. *Smith* v. *Cahoon,* 283 U. S. 553, 566, 567.

The exemption of the transportation of live stock and farm products to market by the owner thereof, or supplies

for his own use in his own motor vehicle, is also unconstitutional. *Smith* v. *Cahoon, supra.*

The public safety provision in the case of children is even more important than in that of adults. Why in the transportation of children should the Act exempt the driver of their vehicle from the regulatory measures of the Act?

Either §§ 2, 17, 19, 23, and 24 of the Act, taken in conjunction with the entire Act, impose upon the appellants obligations to which the State had no constitutional authority to subject them, or they failed to define such obligations with a fair degree of certainty, which is required of criminal statutes.

Sections 5, 8, 16, 17, 19, 22, and 23, in conjunction with the other provisions of the Act, give to the Public Service Commission excessive powers over private motor carriers of property—, equal to, or even exceeding, the powers which they have over common carriers of property. The legislature may not make a private carrier a common carrier and so compel it to devote its property to public use. *Producers Transport Co.* v. *Railway Commission,* 251 U. S. 228; *Michigan Pub. Util. Comm.* v. *Duke,* 266 U. S. 570; *Frost* v. *Railroad Commission,* 271 U. S. 583.

Section 21 of the Act, in requiring private motor carriers of property to take out and have approved by the Public Service Commission a liability insurance policy to adequately protect the interests of the public, unduly extends the power of the State in the regulation of private motor carriers of property. *Smith* v. *Cahoon,* 283 U. S. 553, 565.

Mr. Walter T. Griffin, with whom *Messrs. Roland Boynton,* Attorney General of Kansas, *Charles W. Steiger,* and *Earl H. Hatcher* were on the brief for appellees.

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

This is an appeal from a final decree of the District Court, composed of three judges as required by statute, which dismissed, on motion, the bill of complaint in a suit brought to restrain the enforcement of the Motor Vehicle Act of Kansas. Laws of 1931, c. 236; *Continental Baking Co.* v. *Woodring,* 55 F. (2d) 347.

Plaintiffs are "private motor carriers of property," operating bakeries in Kansas and other States and making deliveries to their customers by their own trucks. They contend that the statute, by reason of the obligations it imposes, and of its classifications, violates the due process and equal protection clauses of the Fourteenth Amendment, the provision as to the privileges and immunities of citizens (Art. IV, § 2), and the commerce clause (Art. I, § 8, par. 3), of the Federal Constitution.

The statute relates to motor vehicles, comprehensively defined, when used upon any public highway of the State for the purpose of transporting persons or property. It applies to those who are engaged in such transportation as "public motor carriers" of property and passengers, "contract motor carriers" of property and passengers, and "private motor carriers of property." "Public motor carrier" means one transporting "for hire as a common carrier having a [*sic*] fixed termini or route." "Contract motor carrier" of property means one who is not a "public motor carrier" and is engaged in transportation "for hire as a business." "Private motor carrier of property" means one transporting "property sold or to be sold by him in furtherance of any private commercial enterprise." § 1.[1] The Act does not apply

[1] "Section 1 (a). The term 'motor vehicle' when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven vehicle used upon any public

to (1) motor carriers operating wholly within any city or village of the State, (2) private motor carriers operating within a radius of twenty-five miles beyond the corporate limits of such city or village, (3) the transportation of livestock and farm products to market "by the owner thereof or supplies for his own use in his own motor vehicle," and (4) the transportation of children to and from school. § 2.[2] Public motor carriers are declared to be common carriers within the meaning of the public utility laws of the State and subject to regulation accord-

highway of this state for the purpose of transporting persons or property. (b) The term 'public motor-carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a [*sic*] fixed termini or route. (c) The term 'contract motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (d) The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (e) The term 'public motor carrier of passengers' when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (f) The term 'contract motor carrier of passengers' when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (g) The term 'public highway' when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public."

[2] "Sec. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

ingly, including that of rates and charges. § 3.[3] Public motor carriers, contract motor carriers, and private motor carriers of property are forbidden to operate motor vehicles for compensation on any public highway except in accordance with the provisions of the Act. § 4.[4] The public service commission is vested with supervision of these carriers in all matters affecting their relationship "with the traveling and shipping public" and, specifically, to prescribe regulations in certain particulars hereinafter mentioned. § 5.[5] All transportation charges made

[3] "Sec. 3. All 'public motor carriers of property or passengers' as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith."

[4] "Sec. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act."

[5] "Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public

by public motor carriers must be just and reasonable. § 6. Public motor carriers in intrastate commerce must obtain certificates of convenience and necessity. § 7. Contract motor carriers and private motor carriers of property "either in intrastate commerce or in interstate commerce" must obtain licenses. Application therefor must give information as to ownership, financial condition and equipment, and such further facts as the public service commission may request. The commission is required, upon receipt of this information and on compliance with the regulations and payment of fees, to issue a license. § 8.[6] In addition to license fees, public motor carriers, contract motor carriers, and private motor carriers of property must pay a tax of "five-tenths mill per gross ton mile," computed in the manner described, for the administra-

motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers' and 'private motor carriers of property,' in all matters affecting the relationship between such 'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers' and 'private motor carriers of property' and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided."

[6] "Sec. 8. It shall be unlawful for any 'contract motor carrier of property or passengers' or 'private motor carrier of property' to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant."

tion of the Act and for the maintenance and reconstruction of the public highways. § 13.[7] Every motor carrier covered by the Act must keep daily records, upon prescribed forms, of all vehicles used and must certify under oath summaries showing the ton miles traveled monthly and such other information as the commission may require. § 15.[8] The commission is empowered to enforce the provisions of the Act and to inspect the books and documents of all carriers to which the Act applies. § 16.[9]

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[7] "Sec. 13. In addition to the regular license fees or taxes imposed upon 'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers,' and 'private motor carriers of property,' there shall be assessed against and collected from every such carrier a tax of five-tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (a) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (b) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000."

[8] "Sec. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor, summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. . . ."

[9] "Sec. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: *Provided, however,* The total sum to be expended as provided in this section shall not exceed during the calendar year twenty per cent of the total gross sum collected under this act. . . ."

Of the moneys received under the provisions of the Act twenty per cent. is to be applied to administration and enforcement and the remainder is to be placed to the credit of the State's highway fund. § 18.[10] No certificate or license is to be issued by the commission to any of the described motor carriers until a liability insurance policy approved by the commission has been filed "in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier." No other or additional bonds or licenses than those prescribed in the Act are to be required by any city or town or other agency of the state. § 21.[11] The commission may pro-

[10] "Sec. 18. All moneys received under the provisions of this act shall be distributed: (a) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (b) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof."

[11] "Sec. 21. No certificate or license shall be issued by the public service commission to any 'public motor carrier of property,' 'public motor carrier of passengers,' 'contract motor carrier of property or passengers' or 'private motor carrier of property,' until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state."

mulgate rules relating to the maintenance of vehicle units in a safe and sanitary condition, and making provision as to qualifications and hours of service of operators and for the reporting of accidents. § 22.[12] Violation of the Act or of any order of the commission is made a misdemeanor. § 23.[13]

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[12] "Sec. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (a) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (b) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (c) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (d) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: *Provided,* That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (e) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission."

[13] "Sec. 23. Every carrier to which this act applies and every person who violates or who procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500. . . ."

The general situation to which the statute is addressed is thus described by the District Court, 55 F. (2d) at pp. 350, 351: "The State of Kansas has constructed at great expense a system of improved highways. These have been built in part by special benefit districts and in part by a tax on gasoline sold in the State and by license fees exacted of all resident owners of automobiles. These public highways have become the roadbeds of great transportation companies, which are actively and seriously competing with railroads which provide their own roadbeds; they are being used by concerns such as the plaintiffs for the daily delivery of their products to every hamlet and village in the State. The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the problem of maintenance well-nigh insoluble. The Legislature but voiced the sentiment of the entire State in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks are the menace of the highways."

It is apparent that Kansas, in framing its legislation to meet these conditions, did not attempt to compel private carriers to become public carriers. The legislature did not purport to put both classes of carriers upon an identical footing and subject them to the same obligations. See *Smith* v. *Cahoon,* 283 U. S. 553, 563; *Michigan Commission* v. *Duke,* 266 U. S. 570, 576–578; *Frost Trucking Co.* v. *Railroad Comm.,* 271 U. S. 583, 592. It recognized and applied distinctions. 'Public' or common carriers, and not private carriers, are required to obtain certificates of public convenience and necessity. The former, and not the latter, are put under regulations as to fares and charges. While, with respect to certain matters, both are placed under the general authority given to the public service commission to prescribe regulations, it does not appear from the bill of complaint that any regulation has

been prescribed, or that the commission has made any order, of which private carriers may properly complain. The statute itself, however, does impose certain obligations upon private motor carriers of property, and the first question is whether these provisions violate the constitutional restrictions invoked.

First. "Private motor carriers of property" must obtain a license, pay a tax and file a liability insurance policy. The public service commission has no authority to refuse a license if the described information is given with the application, the liability insurance policy is filed, and there is compliance with the regulations and payment of the license fee (§ 8).[14] It is not shown that either regulations or license fees are unreasonable. The tax and the license fees, over the expenses of administration, go to the highway fund of the State for the maintenance and reconstruction of the highways the carrier is licensed to use. The insurance policy is to protect the interests of the public by securing compensation for injuries to persons and property from negligent operations of the carriers. § 21.[15] The District Court approved an earlier decision, also by a District Court of three Judges, that this provision was not intended to require "security for passengers or cargoes carried, but only to protect third persons from injuries to their persons or property." 55 F. (2d) at p. 357; *Louis* v. *Boynton,* 53 F. (2d) 471, 473. This is an admissible construction and no different application of the provision appears to have been made by either the state court or the commission.

Requirements of this sort are clearly within the authority of the State, which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety. Reasonable regulations to that end are valid as to intrastate

[14] See Note 6. [15] See Note 11.

traffic and, where there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce. Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, "is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves." *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Kane* v. *New Jersey,* 242 U. S. 160, 167; *Michigan Commission* v. *Duke, supra; Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 250, 251; *Sprout* v. *South Bend,* 277 U. S. 163, 169, 170; *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337.

Objection to the tax is made on the score of uncertainty, in view of the exemptions of motor carriers operating wholly within a city or village, and of private motor carriers operating "within a radius of twenty-five miles beyond the corporate limits of such city, or any village." § 2.[16] This objection is distinct from that of unconstitutional discrimination, shortly to be considered. We perceive no uncertainty by reason of the first exemption, which definitely applies to cases of operation exclusively within the limits of a city or village. As to the second exemption, the state authorities assert, and it is not denied, that in the administration of the Act the public service commission has taken the exemption to mean that "so long as private carriers operate within a radius of twenty-five miles of their home city or base they are not subject to the payment of the fee. Even though they have made trips outside the twenty-five mile radius, which subjects them to the law and to the payment of tax for such trips, they are still not subject to the payment of a tax for trips made entirely within the

[16] See Note 2.

twenty-five mile zone." The District Court expressed the opinion that the provision " can and should be construed as intending to exempt from the tax those carriers who either have an established place of business or an established delivery point, with trucks domiciled in any city, and that such trucks may operate in that city and within a twenty-five mile radius free of any tax," and the court said that it agreed with the construction of the commission that " if such a truck goes beyond the twenty-five mile limit," " only the excess is taxable." 55 F. (2d) at p. 356. On this construction, it cannot be said that there is a fatal defect in definition. The tax itself is certain, as in the process of laying the tax it is necessarily made certain before any penalty can be imposed for non-payment. The tax is to be assessed and collected on the basis of gross ton miles and this mileage is to be computed in a prescribed manner. When the tax is assessed, the ordinary remedies will be available for contesting it, if the assessment is not in accordance with the law. No impropriety in assessment or in collection as to these appellants, or denial of remedy, is disclosed. Nor is the amount of the tax, which the State could lay in its discretion for the lawful purposes declared, shown to be unreasonable.

The objection to the authority given to the public service commission " to regulate and supervise the accounts, schedules, service and method of operation," " to prescribe a uniform system and classification of accounts," to require the filing of reports and data, and generally to " supervise and regulate " all the carriers to which the Act applies " in all matters affecting the relationship " between such carriers and " the traveling and shipping public " (§ 5)[17] similarly raises no question which can now be

[17] See Note 5.

considered, as there has been no action or threat of action, so far as appears, by the commission giving ground for the contention that the constitutional rights of the appellants have been or will be invaded. This is not a case like that of *Smith* v. *Cahoon, supra,* where the requirements of the statute itself, as distinguished from action of the state commission under it, had such an objectionable generality and vagueness as to the obligations imposed upon private carriers that they provided no standard of conduct that it was possible to know and exposed the persons concerned to criminal prosecution before any suitably definite requirement had been prescribed. In the instant case, the statute itself clearly distinguishes in fundamental matters between the obligations of public and private carriers and places upon the latter certain requirements which the State had power to impose. Whatever uncertainty may exist with respect to possible regulations of the commission will be resolved as regulations are promulgated. If any of these transcend constitutional limits, appellants will have their appropriate remedy. The provision as to keeping records and furnishing reports and information and as to maintaining uniform methods of accounting, may in the case of private carriers of property be assumed, until the contrary appears, to have relation, as the state authorities assert, to the determination of the amount of the tax to which the private carriers are properly liable. The general grant of authority to the public service commission over all the carriers described, including both public and private carriers, in all matters affecting their relationship with the traveling and shipping public, we think should be taken distributively in the light of the context and of the manifest distinctions in the relation of different sorts of carriers to the public. The distinction made by the statute between public and private carriers with respect to the obtaining of certificates of public con-

venience and necessity, and as to rates and charges, indicates the intention to keep separate the special responsibilities of public carriers from the more limited but still important duties which are owing as well by private carriers, in protecting the public highways from misuse and in insuring safe traffic conditions, and there is no reason to conclude that the authority given to the commission will not be viewed and exercised accordingly. We agree with the District Court that the last clause of § 5, providing that "all laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided," applies to public and not to private carriers.

The duty laid upon the commission (§ 22)[18] to insist that motor vehicles shall be maintained "in a safe and sanitary condition," to prescribe qualifications of operators as to age and hours of service, and to require the reporting of accidents, has manifest reference to considerations of safety. The terms of the statute do not require action by the commission which does not have reasonable relation to that purpose. In this respect, as well as in relation to the other matters above-mentioned, appellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration. *Smith* v. *Cahoon, supra,* at p. 562; *Dalton Adding Machine Co.* v. *State Corporation Comm.,* 236 U. S. 699, 700, 701; *Champlin Refining Co.* v. *Corporation Comm., ante,* p. 210.

Second. The challenged exemptions are set forth in § 2.[19] The first, which excludes from the application of the Act motor carriers who operate wholly within a city or village of the State, has an obviously reasonable basis, as such operations are subject to local regulations. In

[18] See Note 12.

[19] See Note 2.

protecting its highway system the State was at liberty to leave its local communities unembarrassed, and was not bound either to override their regulations or to impose burdensome additions.

The second exemption extends only to certain private motor carriers. Under the construction above stated, the exemption provides immunity from the provisions of the Act for carriers of that class who have an established place of business or base of operations within a city or village and operate within a radius of twenty-five miles beyond the municipal limits. The first question is whether the State, in legislation of this sort, may provide for such carriers an exempt zone contiguous to its municipalities. We find no difficulty in concluding that it may. As the District Court pointed out, there " is a penumbra of town " that is outside municipal limits, and delivery trucks, of those having establishments within the municipalities, in their daily routine repeatedly cross these limits " in going back and forth into these outlying additions." The court found that trucks of that class " use the state improved highways but slightly, for the streets of these outlying additions are not generally a part of the state system." The District Court also directed attention to the fact that " the practical difficulty of keeping track of the mileage of such delivery trucks as they cross back and forth is well-nigh insuperable " and that " the revenue to be gained from such use would be insignificant and the cost of collection large." We think that the legislature could properly take these distinctions into account and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the legislature in setting up such a zone would have to draw the line somewhere,

and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities. *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. This Court has frequently held that the mere selection of a mileage basis in the regulation of railroads cannot be considered a violation of the Federal Constitution. The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U. S. 96, 101; *Dow* v. *Beidelman,* 125 U. S. 680, 691; *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 633, 634; *Chicago, R. I. & P. Ry. Co.* v. *Arkansas,* 219 U. S. 453; *Chesapeake & Ohio Ry. Co.* v. *Conley,* 230 U. S. 513, 522; *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas,* 240 U. S. 518, 521; *Wilson* v. *New,* 243 U. S. 332, 341, 354; *Clark* v. *Maxwell,* 282 U. S. 811; *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 93. No controlling considerations have been presented to overcome the presumption attaching to the legislative action in this case in fixing the radius of the zone for the purpose of establishing an exemption otherwise valid.

The third exemption applies to "the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle." In *Smith* v. *Cahoon, supra,* the state statute, which applied to all carriers for compensation over regular routes, including common carriers, exempted from its provisions "any transportation company engaged exclusively in the transporting of 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." The stated distinction was thus established between carriers, and between private carriers, notwithstanding the fact that they were "alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route." The Court was unable to find any justification for this discrimination between carriers in the same business, that is, between those who carried for hire farm products, or milk or butter, or fish or oysters, and those who carried for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities.

The distinction in the instant case is of a different sort. The statute does not attempt to impose an arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. "The legislature knew," said the court "that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt 'contract carrier' employed by him. The legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles." 55 F. (2d) at p. 352. And the court properly excluded from consideration mere hypothetical

and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers," and that of "a farmer who hauls his wheat or livestock to town once or twice a year." The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. As the Court said in *Alward* v. *Johnson,* 282 U. S. 509, 513, 514: "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough." See, also, *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82; *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 73.

The fourth exemption is "of transportation of children to and from school." The distinct public interest in this sort of transportation affords sufficient reason for the classification. The State was not bound to seek revenue for its highways from that source, and, without violating appellants' constitutional rights, could avail itself of other means of assuring safety in that class of cases.

Appellants also refer to the provision of § 21, with respect to liability insurance, that "no other or additional bonds or licenses" shall be required "by any city or town or other agency of this State." The propriety of this avoidance of a duplication of security is apparent.

Decree affirmed.

SPROLES ET AL. *v.* BINFORD, SHERIFF, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 826. Argued April 27, 28, 1932.—Decided May 23, 1932.

1. A provision of the Motor Vehicle Act of Texas limiting net loads on trucks using the highways to 7,000 pounds was attacked upon the ground that damage to the highways from overweight can be prevented only by fixing a maximum gross load and providing for its proper distribution through axles and wheels to the highway surface, and that the limitation in question is unduly and arbitrarily restrictive of cargo. *Held:*

   (1) The limitation was within the broad discretion of the state legislature and does not violate the due process clause of the Fourteenth Amendment. P. 388.

   (2) In such matters the courts are not to apply scientific precision as a criterion of constitutional powers. *Id.*

2. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment; and its action within its range of discretion can not be set aside because compliance is burdensome. P. 388.

3. In the absence of national legislation governing the subject, non-discriminating regulations of the States limiting size and weight of vehicles on their highways may apply (if otherwise valid) to vehicles engaged in interstate commerce; and one State can not establish standards which would derogate from the equal power of other States to make regulations of their own. P. 389.

4. Contracts relating to the use of highways are made subject to the power of the State to regulate the weight of vehicles on its highways and are not protected from such regulation by the contract clause of the Federal Constitution. P. 390.

5. The Texas statute, *supra,* exempts "implements of husbandry" from the net load weight limitation. *Held* that, construed as confined to farm implements and machinery, the movements of which are relatively temporary and infrequent as compared with the ordinary uses of the highways by motor trucks, the exception is consistent with the equal protection clause of the Fourteenth Amendment. P. 391.

6. The same statute limits the length of motor vehicles to 35 feet and of combinations of vehicles to 45 feet. *Held* consistent with the equal protection clause, as a State has the right to discourage the use of such trains or combinations on the highways. P. 392.
7. Section 5 (b) of the Texas statute, *supra,* provides that the general limitations as to length of vehicles and weight of load shall not apply, and substitutes more liberal *maxima,* in the case of vehicles used to transport property from point of origin "to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination," etc. *Held* that it is not void for uncertainty, but refers to points at which common carriers customarily receive shipments, of the sort that may be involved, for transportation, or points at which common carriers customarily unload such shipments; and the meaning of "shortest practicable route" is sufficiently clear. P. 393.
8. The requirement of reasonable certainty in statutes affecting individuals does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. *Id.*
9. A classification allowing greater length and load to motor vehicles making short hauls to and from common carriers than to motor trucks generally, is consistent with the equal protection clause. P. 394.
10. The State has the right in such general motor vehicle regulations to foster fair distribution of traffic as between the highways and the railroads, to the end that all necessary facilities shall be maintained and that the public shall not be inconvenienced by inordinate uses of its highways for purposes of gain. *Id.*
11. Also, the State may constitutionally favor transportation of persons on the highways over transportation of property, by applying a load limit to trucks that is not applied to buses. P. 395.
12. The provision of the Texas Motor Vehicle Act authorizing the Highway Department to grant special permits, for limited periods, "for the transportation over state highways of such overweight or oversize or overlength commodities as can not be reasonably dismantled" and also for super-heavy and oversize equipment for the transportation of such commodities,—is not a delegation of legislative power, in violation of § 28, Art. I, of the Texas Constitution. P. 397.

56 F. (2d) 189, affirmed.

APPEAL by the plaintiffs and interveners from a decree of the District Court of three judges dismissing a bill to restrain the enforcement of the Motor Vehicle Act of Texas.

Messrs. Charles I. Francis, Frank H. Rawlings, and *LaRue Brown,* with whom *Mr. J. B. Dudley* was on the brief, for appellants.

Section (5) fixing a net load limit on trucks, is an unreasonable and arbitrary regulation, having no substantial relation to highway protection. The following facts show this:

(a) The provision repealed an old law which was truly designed to protect the highways from superheavy loads. In some instances, namely, with respect to passenger buses, it actually permits heavier gross loads.

(b) It places the heaviest traffic upon the cheapest constructed portion of the state highway system—the part least able to bear it. This is done by virtue of the privileges extended under § 7.

(c) When gross weight is restricted by the 600 pounds per inch of tire spread upon the highway, there is left a sufficient margin to carry greater cargoes than 7,000 pounds without any damage to the highway.

(d) Highway damage from overweight can only be prevented by regulations which fix a maximum gross load and provide for its proper distribution through axles and wheels to the highway surface.

(e) This Act substantially destroys the value of approximately $150,000,000 of property and the businesses of many citizens who have spent a lifetime in its development.

(f) This Act is out of line with the established standards of weight throughout the United States.

(g) It is contrary to every principle of sound engineering opinion, which teaches that the problem of high-

way damage from weight must be solved by regulating the wheel load under a restriction of certain permissible weight to the inch of tire spread upon the highway.

(h) While permitting the use of vehicles and combinations, of stated dimensions, it does not allow the economical use of this space, as seven thousand pounds is far below the safe load capacity of such vehicles.

(i) It is an apparent effort to throttle the economic advance of transportation by hampering a business (truck transportation) for the advantage and profit of its competitor (the railroads).

(j) An arbitrary selection of a net load limit without considering any other related factors does not, as a practical matter, acccomplish any public benefit.

Under § 7 of the Act, the privilege of transporting greater loads than seven thousand pounds is accorded to others who operate under substantially the same conditions as appellants; and no load limit is imposed on commercial buses operating under substantially the same conditions as appellants' trucks. This is forbidden discrimination. *Smith* v. *Cahoon,* 283 U. S. 553.

As to interstate operators, § 5 imposing the net limit, is an undue burden upon interstate commerce, and has no reasonable relation to the objects of the Act. If this type of legislation be sustained, one engaged in interstate commerce must be prepared to vary his load at each state line. This will lead to endless confusion and tremendous expense. It will virtually stop interstate transportation by truck. States can not regulate interstate commerce in subjects national in character and which admit and require uniformity of regulation affecting alike all the States. Problems of Texas relating to truck transportation by interstate operators, so far as the matter of length and weight of vehicles are concerned, are no different from those of other States. *Hall* v. *DeCuir,* 95 U. S. 485; *De Santo* v. *Pennsylvania,* 273 U. S. 34; *Buck* v. *Kuykendall,*

267 U. S. 307; *Louisville & Nashville R. Co.* v. *Eubank,* 184 U. S. 27. A State may not in any form or under any guise directly burden the prosecution of interstate business. *International Text Book Co.* v. *Pigg,* 217 U. S. 91.

Subdivision (f) of § 3 creates a classification which is unreasonable, arbitrary and discriminatory, and without any substantial relation to the purposes of the Act:

(a) In making a distinction between commodities which are boxed or bound in containers or binders and those not so boxed or bound; and,

(b) In making a distinction between commodities which are boxed or bound in bales or packages of thirty cubic feet or more in bulk and weighing more than five hundred pounds and those boxed or bound in bales or packages of less bulk and weight.

Trucks which are used as an incident to the business of farming are implements of husbandry. *Allred* v. *Engelman,* 40 S. W. (2d) 945 (writ of error denied by the Supreme Court of Texas). They make like use of the highways to that made by appellants. This act does not limit their size. Under the conditions named in § 7, vehicles are not restricted to the length limitations imposed by § 3. They may be fifty-five feet in length, while appellants' vehicles are restricted to thirty-five feet. Both make like use of the highways. This is unconstitutional discrimination.

By § 2 the Highway Department representatives are granted authority to issue ninety-day permits to transport commodities that can not be reasonably dismantled; they have the right to authorize the use of oversized equipment in transporting such commodities. This is a delegation of authority not permissible under the Fourteenth Amendment, or under § 28, Art. 1, of the Texas constitution. *Washington* v. *Roberge,* 278 U. S. 116. This permit clause being void, there is, therefore, an express in-

hibition against transporting any load over seven thousand pounds in weight without any valid provision for moving such articles, like oil-field boilers, as can not be reasonably dismantled. This section is so essential to the whole tenor of the Act relating to weight and length restriction as to render such restrictions null and void.

Sections 5 and 3 are invalid under the Contract Clause of the Constitution. Appellants can not comply with the obligations of valid contracts entered into prior to the passage of the Act, on account of the unreasonable length and weight restrictions imposed by said sections.

Sections 2, 3, and 5 of the Act are inseverable. If any one be not valid, or if they be invalid as to interstate carriers, all must be declared void, as contrary to legislative intent. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

Messrs. John H. Crooker and *R. C. Fulbright* filed a brief on behalf of W. T. Stevens, intervener-appellant.

Messrs. LaRue Brown and *Charles I. Francis* filed a brief on behalf of the Tennessee Dairies, Inc., intervener-appellant.

Mr. Elbert Hooper, Assistant Attorney General of Texas, with whom *Messrs. James V. Allred,* Attorney General, *T. S. Christopher,* Assistant Attorney General, *J. H. Tallichet, W. M. Streetman,* and *A. L. Reed* were on the brief, for appellees.

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

The District Court, composed of three judges, entered a final decree dismissing the bill of complaint which sought to restrain the enforcement of the Motor Vehicle

Act of Texas, House Bill No. 336, Chapter 282, 42d Texas Legislature. 56 F. (2d) 189. The decree was entered on pleadings and proofs, and the complainants and interveners appeal. The Act was assailed upon the ground that certain of its provisions violate the due process and equal protection clauses of the Fourteenth Amendment, and also the commerce and contract clauses (Art. I, § 8, par. 3; § 10, par. 1) of the Federal Constitution. The statute is an amendatory act and the provisions in question are found in §§ 2, 3, 5 and 7.

Section 2[1] prohibits the operation on any highway of any "vehicle" as defined, exceeding stated limitations of size, or any vehicle not constructed or equipped as required, and also the transportation of any load exceeding the dimensions and weights prescribed. The State Highway Department may grant permits, for ninety days, for the transportation "of such overweight or oversize or overlength commodities as can not be reasonably dismantled," or for the operation "of super-heavy and oversize equipment" for the transportation of such commodities, provided that hauls under these permits shall be made "by the shortest practicable route."

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[1] "Section 2. It shall be unlawful and constitute a misdemeanor for any person to drive, operate or move, or for the owner to cause or permit to be driven, operated, or moved on any highway, any vehicle or vehicles of a size or weight exceeding the limitations stated in this act or any vehicle or vehicles which are not constructed or equipped as required in this act, or to transport thereon any load or loads exceeding the dimensions or weight prescribed in this act; provided the Department, acting directly or through its agent or agents designated in each county shall have and is hereby granted authority to grant permits limited to periods of ninety (90) days or less for the transportation over State highways of such overweight or oversize or overlength commodities as cannot be reasonably dismantled or for the operation over State highways of super-heavy and oversize equipment for the transportation of such oversize or overweight or overlength commodities as cannot be reasonably dis-

Section 3 [2] limits the width of a vehicle, including load, to 96 inches, the height to 12½ feet, the length to 35 feet, and the length of a combination of vehicles, coupled together, to 45 feet. It forbids the transportation as a load, or as part of a load, of any commodity in containers having more than 30 cubic feet and weighing more than 500 pounds, where there are more than 14 of such containers carried as a load on "any such vehicle or com-

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mantled; provided, that any haul or hauls made under such permits shall be made by the shortest practicable route; . . ."

[2] "Section 3. (a) No vehicle shall exceed a total outside width, including any load thereon, of ninety-six (96) inches, except that the width of a farm tractor shall not exceed nine (9) feet, and except further, that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways.

"(b) No vehicle unladen or with load shall exceed a height of twelve feet six inches (12′ 6″), including load.

"(c) No motor vehicle, commercial motor vehicle, truck-tractor, trailer, or semi-trailer shall exceed a length of thirty-five (35) feet, and no combination of such vehicles coupled together shall exceed a total length of forty-five (45) feet, unless such vehicle or combination of vehicles is operated exclusively within the limits of an incorporated city or town.

"(d) No train or combination of vehicles or vehicle operated alone shall carry any load extending more than three (3) feet beyond the front thereof, nor, except as hereinbefore provided, more than four (4) feet beyond the rear thereof.

"(e) No passenger vehicle shall carry any load extending more than three (3) inches beyond the line of the fenders on the left side of such vehicle, nor extending more than six (6) inches beyond the line of the fenders on the right side thereof; provided, that the total over-all width of such passenger vehicle shall in no event exceed ninety-six (96) inches, including any and all such load.

"(f) Immediately upon the taking effect of this act, it shall thereafter be unlawful for any person to operate or move, or for any owner to cause to be operated or moved, any motor vehicle or combination thereof over the highways of this State which shall have as

bination," no load of any such containers to be carried in excess of 7,000 pounds. There are exempted from the limitation as to size "implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways."

Section 5 [3] prohibits any "commercial motor vehicle" (which the Act defines as one designed or used for the transportation of property), truck-tractor, or trailer from operating outside of an incorporated city or town with a load exceeding 7,000 pounds "on any such vehicle or train or combination of vehicles," and provides further that no motor vehicle (which includes passenger buses) shall operate outside a city or town with a greater weight than 600 pounds "per inch width of tire upon any wheel concentrated upon the surface of the highway."

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a load or as a part of the load thereon any product, commodity, goods, wares or merchandise which is contained, boxed or bound in any container, box or binding containing more than thirty (30) cubic feet and weighing more than five hundred (500) pounds where there are more than fourteen (14) of such containers, boxes or bindings being carried as a load on any such vehicle or combination thereof; provided, that no number of any such containers, boxes or bindings shall be carried as the whole or part of any load exceeding seven thousand (7000) pounds on any such vehicle or combination thereof; . . ."

[3] "Section 5. No commercial motor vehicle, truck-tractor, trailer, or semi-trailer shall be operated on the public highway outside of the limits of an incorporated city or town with a load exceeding seven thousand (7000) pounds on any such vehicle or train or combination of vehicles; and no motor vehicle, commercial motor vehicle, truck-tractor, trailer or semi-trailer having a greater weight than six hundred (600) pounds per inch width of tire upon any wheel concentrated upon the surface of the highway shall be operated on the public highways outside of the limits of an incorporated city or town; provided, however, that the provisions of this section shall not become effective until the first day of January, 1932."

Section 7 [4] inserts a paragraph to be known as § 5 (b) of the amended statute, providing that the foregoing limitations as to length of vehicle or combination of vehicles and weight of loads, and height of vehicle with load, shall not apply to vehicles " when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, provided said vehicle does not pass a delivery or receiving point of a common carrier equipped to transport such load," or when used to transport property " from point of origin to point of destination " when the latter is less distant from the point of origin " than the nearest practicable common carrier receiving or loading point equipped to transport such load." This provision is subject to the limitation that, except by special permit, as provided in the Act, the length of such vehicles shall not exceed 55 feet, or the weight of such loads 14,000 pounds, and also that the requirement as to the " weight per inch width of tire " shall still be applicable.

The District Court made comprehensive findings. These set forth the various interests of the complainant and interveners (common carriers and contract carriers, in intrastate and interstate commerce, and manufacturers and distributors of commodities), their large investments, the extent of their operations in highway transportation, the character and uses of their equipment, and the losses

[4] " Section 7. That Section 5 of said chapter be and the same is hereby further amended by adding thereto a new section to be known as Section 5 (b), which shall hereafter read as follows:

" Section 5 (b). The limitations imposed by this act as to length of vehicle or combination of vehicles and weight of loads and of height of vehicle with load shall not apply to vehicles when used only to transport property from point of origin to the nearest prac-

to which they would be subjected by requirements of the statute. Other findings may be summarized as follows:

Of all the registered vehicles on the highways, including trucks, buses and automobiles, less than four-tenths of one per cent. have a rated carrying capacity of more than 7,000 pounds; not more that 5,500 trucks, out of a total of 206,000, have such a capacity and are affected by the prescribed load limit. There are approximately 200,000 miles of state and county highways in Texas and less than 20,000 miles of these are State Designated Highways, the improvement of which represents a public investment of more than $250,000,000. The annual maintenance cost of State Designated Highways for the past three years averaged $12,000,000, and that of the more than 180,000 miles of county highways "is many millions of dollars annually." In enacting the statute, "the Legislature of Texas found as a fact that 7,000 pounds load weight, plus the weight of the vehicle, is the maximum load that should be allowed to pass over the Texas highways, taking into consideration the manner of past and present construction, probable future construction, cost of maintenance, strength of bridges, condition of traffic, etc.," and this finding of the Legislature is supported by the preponderance of the evidence before the court.

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ticable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination; provided, said vehicle does not pass a delivery or receiving point of a common carrier equipped to transport such load, or when used to transport property from the point of origin to point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load; provided, however, that in no event except by special permit, as hereinabove specifically provided, shall the length of said vehicles exceed fifty-five (55) feet or the weight of such loads exceed fourteen thousand (14,000) pounds; and provided further, that the limitations imposed by this act upon weight per inch width of tire shall apply to all such vehicles and loads; . . ."

There are highways of concrete and other rigid and semi-rigid types of construction, and also bridges, capable of carrying a greater load than 7,000 pounds, but these do not form a regularly connected system and are scattered throughout the State. There are all types of roads, "ranging from dirt, gravel, shell, asphalt and bitulithic to concrete and brick highways" of varying degrees of strength; the operations of complainant and interveners, and others similarly circumstanced, are conducted over all these types of highways, and bridges, except in some instances where operations may be over a regular route. The statute was enacted in the interest of the whole State, and the State highway system in particular, and the operations of complainant and interveners constitute a very small portion of the traffic which the highways bear.

The number of trucks in use in Texas has increased 300 per cent. in the last six years; official registrations show an increase from 65,536 in 1924 to 206,527 in 1930, not including the large increase in interstate truck traffic; and this increase in "truck density" justifies the dimensional and weight restrictions of the statute in the interest of public safety and convenience and highway protection. In 1930, there were only 900 passenger buses operating over the Texas highways, representing less than .004 of one per cent. of the total number of vehicles; these passenger buses, while similar in many respects in construction to trucks carrying freight, are specially equipped to haul passengers, operate under regulations of the railroad commission and under conditions wholly different from those of trucks; that the difference between these two types of vehicles and the number of each type, and in their operation, is ample justification for legislative classification. Excessive loads on trucks are damaging the highways and the limitation of the net load to 7,000 pounds will cause a saving to the State in maintenance costs. Heavily loaded trucks cause accidents and reduced loads will result in greater safety.

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On account of the width of traffic lanes, vehicles of greater width or length than that prescribed by the statute are hazardous for passing traffic, and the hazard will be materially reduced by a lighter load and a lesser width and length. There are low underpasses and bridge portals in Texas making necessary the prescribed height limit of 12½ feet; a low center of gravity makes a truck less likely "to topple over or spill on the highway," and for that reason less dangerous.

In order to carry on the business of farming, "implements of husbandry, plows, threshing machines, hay pressers, etc." must be moved from one place to another. The same is true of machinery for water-well drilling and highway construction. The uses of the highways for this sort of transportation are temporary only and essential to the public welfare.

The average distance traveled by trucks carrying property from points of origin to common carrier receiving points, or from common carrier unloading points to destination, is from four to eight miles; these hauls are universally short. Such operations are confined to small areas and greatly reduce the danger of traffic congestion or highway injury incident to truck transportation. Those persons coming under the exception permitted by § 5 (b) of the Act transport under distinctly different circumstances from complainant and interveners, who transport over fixed routes, and from other persons using the highways. This exception will have the effect of diverting from the highways generally a great deal of traffic and thus reduce congestion and danger.

There are a large number of commodities "such as boilers, transformers, telephone poles, etc,, as [*sic*] cannot be reasonably dismantled" and which it is necessary to transport. The State Highway Commission in the performance of its duty of issuing special permits under § 2

acts as an administrative, fact-finding body and under a prescribed standard.

Upon the facts found, the District Court concluded that the requirements of the statute, aside from § 3, subdivision (f), if independently considered, were reasonable and within the constitutional authority of the State.

The intervener W. T. Stevens, who is engaged in hauling uncompressed cotton, specifically complained of § 3, subdivision (f) as creating an arbitrary and unconstitutional discrimination against him, and the District Court made separate findings upon this point. The court found that the customary square bale of uncompressed cotton is of a greater size than 30 cubic feet and that the average "square bale of uncompressed cotton, when compressed to a standard density, is less than 30 cubic feet in size"; and that the average square bale of cotton whether uncompressed or compressed, weighs approximately 500 pounds or more. There is the further finding that there is no commodity commonly transported over the highways of Texas which conforms to the description—"contained, boxed or bound in any container, box or binding, containing more than 30 cubic feet and weighing more that 500 pounds"—other than square bales of uncompressed cotton. The court held that the limitation of the load to "fourteen packages, boxes, barrels or bales" exceeding the dimensions stated in § 3, subdivision (f), was reasonable and valid when construed in connection with the provision of § 5 (which became effective January 1, 1932) limiting loads to 7,000 pounds, and expressed the opinion that 14,000 pounds of uncompressed cotton may be transported under the provisions of § 7 (§ 5b). But the court also held that if § 3 subdivision (f), is construed independently of the provisions of § 5, the former "has no relation to the supposed mischiefs to be remedied and is unreasonable and unlawfully discriminatory" in its application to the intervener Stevens.

As the findings of the District Court, so far as they deal with matters of fact, are supported by the evidence, we pass to the consideration of the questions of law raised by appellants' contentions.

First. The limitation, by § 5,[5] of the net load on trucks to 7,000 pounds is attacked as an arbitrary regulation depriving appellants of their property without due process of law. Appellants urge that this provision repeals the former law which was properly designed to protect the highways and that the drastic requirement of the amendment is opposed to sound engineering opinion; that when gross weight is restricted by the 600 pounds per inch of tire spread upon the highway there is left a sufficient margin to carry greater cargoes than 7,000 pounds without causing damage; and that damage from overweight can be prevented only by regulations which fix a maximum gross load and provide for its proper distribution through axles and wheels to the highway surface.

In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature,

[5] See Note 3.

which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586; *Price* v. *Illinois,* 238 U. S. 446, 452, 453; *Hadacheck* v. *Los Angeles,* 239 U. S. 394, 410; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328. Applying this principle, this Court in *Morris* v. *Duby,* 274 U. S. 135, sustained the regulation of the Highway Commission of Oregon, imposed under legislative authority, which reduced the combined maximum weight in the case of motor trucks from 22,000 pounds, which had been allowed under prior regulations, to 16,500 pounds.[6] See, also, *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 73. The requirement in *Morris* v. *Duby,* related to the gross load limit, but we know of no constitutional distinction which would make such legislation appropriate and deny to the State the authority to exercise its discretion in fixing a net load limit. We agree with the District Court that the limitation imposed by § 5 of the statute does not violate the due process clause.

Second. The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in *Morris* v. *Duby, supra,* at p. 143, answered a similar objection to the limitation of weight by the following statement, which is applicable here: "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways

[6] In the instant case, there was evidence that the weight of an average motor truck would be about 11,000 pounds which, added to the 7,000 pounds allowed for net load, would make the limit of gross weight about 18,000 pounds. Other testimony was to the effect that a truck "usually weighs about the same as the net load," and upon this assumption it is said that the limit of gross weight would be 14,000 to 15,000 pounds.

in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. *Minnesota Rate Cases,* 230 U. S. 352, 399, 400. As this principle maintains essential local authority to meet local needs, it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own. See *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Kane* v. *New Jersey,* 242 U. S. 160, 167; *Michigan Commission* v. *Duke,* 266 U. S. 570, 576; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 250, 251; *Sprout* v. *South Bend,* 277 U. S. 163, 169; *Continental Baking Co.* v. *Woodring, ante,* p. 352.

Third. The conclusion that the State had authority to impose the limitation of § 5 for the purpose of protecting its highways meets the contention based on the contract clause of the Federal Constitution. Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State. With respect to the power of Congress in the regulation of interstate commerce, this Court has had frequent occasion to observe that it is not fettered by the necessity of maintaining existing arrangements which

would conflict with the execution of its policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 482; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603, 613, 614; *New York Central & Hudson River R. Co.* v. *Gray,* 239 U. S. 583; *Continental Ins. Co.* v. *United States,* 259 U. S. 156, 171. The same principle applies to state regulations in the exercise of the police power. *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 363; *Union Dry Goods Co.* v. *Georgia Public Service Comm.,* 248 U. S. 372, 375, 376; *Producers Transportation Co.* v. *Railroad Comm.,* 251 U. S. 228, 232; *Sutter Butte Canal Co.* v. *Railroad Comm.,* 279 U. S. 125, 137, 138; *Morris* v. *Duby, supra.*

Fourth. We are thus brought to the questions raised with respect to the discriminatory provisions of §§ 3, 5 and 7 of the Act, which are assailed as denying to appellants the equal protection of the laws.

Section 3 (a)[7] provides that the limitations as to size of vehicle shall not apply to "implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways." The District Court was of the opinion that the term "implements of husbandry" has reference to such implements as "tractors, plows, trucks, hay presses, etc." and that the use of the highways for this purpose, as well as for the movement of the described machinery, is but temporary. 56 F. (2d) at p. 190. Appellants urge that any implement, truck or vehicle used by a farmer is an "implement of husbandry," and hence, that under

[7] See Note 2.

this exception trucks used by farmers in connection with dairies or farms may be operated throughout Texas without any restriction as to size. We see no reason for attributing such a broad construction to the provision, if its validity can be saved by a narrower one, and we are informed that the Court of Criminal Appeals of Texas has held that the term "implement of husbandry" in this statute covers only farm machinery and not trucks used as an incident to the business of farming. *Reaves* v. *Texas*, 50 S. W. (2d) 286. Appellants also insist that the words "temporarily propelled or moved upon the public highways" apply only to "highway building and maintenance machinery" and not to "implements of husbandry." If the construction by the District Court of the term "implements of husbandry" is correct, it would follow that the movement would be relatively temporary and infrequent as compared with the ordinary uses of the highways by motor trucks. We think that the exception, in the light of the context and of its apparent purpose, instead of being arbitrary relieves the limitation of an application which otherwise might itself be considered to be unreasonable with respect to the exceptional movements described.

We do not find the provision of § 3 (c),[8] fixing approximately the same limit of length for individual motor vehicles and for a combination of such vehicles, to be open to objection. If the State saw fit in this way to discourage the use of such trains or combinations on its highways, we know of no constitutional reason why it should not do so.

Objection is made to § 7 (§ 5b)[9] permitting an additional length of vehicles and greater loads than 7,000

[8] See Note 2.

[9] See Note 4.

pounds (up to 14,000 pounds) when the vehicles are operated, as stated, between points of origin, or destination, and "common carrier receiving or loading," or unloading, points. Appellants urge that this provision, by reason of the use of the terms "nearest practicable common carrier receiving or loading point" and "shortest practicable route to destination," and "common carrier receiving or loading point equipped to transport such load," is so uncertain that it affords no standard of conduct that it is possible to know. We cannot agree with this view. The "common carrier receiving or loading points," and the unloading points, described, seem quite clearly to be points at which common carriers customarily receive shipments, of the sort that may be involved, for transportation, or points at which common carriers customarily unload such shipments. "Shortest practicable route" is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 109; *Nash* v. *United States,* 229 U. S. 373, 377; *Miller* v. *Strahl,* 239 U. S. 426, 434; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18. The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest *possible* route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it.

If taken to be sufficiently definite, appellants deny that the exception is justified. The District Court found that it relates to hauls that are universally short, averaging

from four to eight miles, and that those who come within the exception transport under distinctly different circumstances from other persons using the highways. Appellants contest the latter statement and urge that the former ground is insufficient. But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their extensive as well as constant use of the highways brought about the conditions making the regulations necessary. *Continental Baking Co.* v. *Woodring, supra.* It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the legislature, it does not follow that the classification as made in this case would be invalid. The State has a vital interest in the appropriate utilization of the railroads which serve its people, as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. This is not a case of a denial of the use of the highways to one class of citizens as opposed to another, or of limitations having no appropriate relation to highway protection. It is not a case of an arbitrary discrimination between the products carried, as in the case of *Smith* v. *Cahoon,* 283 U. S. 553, 567. The pro-

vision of § 7 permitting increased loads under the stated conditions applies to all persons and to all products. The discrimination is simply in favor of short hauls and of operations which, as the District Court found, are confined to small areas and greatly reduce the danger of traffic congestion and highway casualties. The limitation of the length of vehicles, covered by the exception, to 55 feet, and of the weight of their loads to 14,000 pounds, must be taken to be within the legislative discretion for the same reasons as those which were found to sustain the general limitation of size and weight to which the exception applies.

Another objection to classification is based on the fact that the limitation of § 5 [10] applies to "commercial motor vehicles" which, as defined in the Act, do not include passenger buses. The latter motor vehicles, while subject to the general limitation of "600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway," are not subject to a load limit. The District Court found, as above stated, that there were only 900 passenger buses operating over the Texas highways (representing less than .004 of one per cent. of the total number of vehicles) and that the difference between the two types of vehicles and number of each type and in the conditions of operations were such as to support the classification. Appellants press the contention that, as admitted by the District Court, the damage to the highways is as great from a load of persons as from a load of freight, and that the combined weight of vehicles and load in the case of passenger buses is greater than the combined weight of vehicles and load carrying freight where the net load is limited to 7,000 pounds. These considerations would be controlling if there were no other reasonable basis for classification than the mere matter

[10] See Note 3.

of weight. But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. *Silver* v. *Silver,* 280 U. S. 117, 123. The State is not bound to cover the whole field of possible abuses. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. The question is whether the classification adopted lacks a rational basis. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Carley* v. *Snook, supra; Smith* v. *Cahoon, supra.* We cannot say that such a basis is lacking in this instance.

In view of our conclusion that the limitation in § 5, and the exception in § 7 (§ 5b) are valid, it is unnecessary to consider the question which has been presented as to the validity of § 3 (f), if it were regarded as an independent provision, that is, in case the objections to § 5 were sustained. It appears to be conceded that under the ruling of the District Court as to § 5 and § 7 (§ 5b), which we have approved, motor transportation of uncompressed cotton is placed upon an equal basis with other articles of commerce. 56 F. (2d) at pp. 191, 193.

Fifth. Appellants also urge that § 2[11] is invalid as a delegation of power to the State Highway Department in violation of § 28, Art. I, of the Texas Constitution and of the Fourteenth Amendment of the Federal Constitution. We think that the objection is untenable. We agree with the District Court that the authority given to the department is not to suspend the law, but is of a fact-finding and administrative nature, and hence is lawfully conferred. See *Trimmier* v. *Carlton,* 116 Tex. 572, 591; 296 S. W. 1070. Under § 2, special permits may be granted by the department, for limited periods, for the transportation "of such overweight or oversize or overlength commodities" when it is found that they "cannot be reasonably dismantled," or for the operation of super-heavy and oversize equipment for the transportation of commodities ascertained to be of that character. This authorization, in our judgment, does not involve an unconstitutional delegation of legislative power. *Union Bridge Co.* v. *United States,* 204 U. S. 364; *United States* v. *Grimaud,* 220 U. S. 506; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 394; *Mutual Film Corp.* v. *Industrial Comm.,* 236 U. S. 230, 245; *Hampton & Co.* v. *United States,* 276 U. S. 394.

The decree of the District Court is affirmed.

Decree affirmed.

ADAMS ET AL. *v.* MILLS, DIRECTOR GENERAL, ET AL.

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

No. 581. Argued April 15, 18, 1932.—Decided May 23, 1932.

1. Commission merchants to whom, as factors, shipments of livestock were consigned for sale and who were obliged to pay unlawful unloading charges to carriers, for which they reimbursed themselves

[11] See Note 1.

out of the sales of the livestock in their accounts with the consignors, are proper parties to claim and sue for reparation, under §§ 8 and 16 (2) of the Interstate Commerce Act. P. 406.

2. The question whether a terminal service, in the particular facts and circumstances, is reasonably to be treated as additional to or as part of the service covered by the line-haul rate, is a question upon which the findings of the Interstate Commerce Commission, if supported by evidence, are conclusive. P. 407.
3. The evidence supports the findings of the Interstate Commerce Commission that the unloading of livestock at the Chicago Stockyards is, in virtue of long practice and because of the special conditions there, a transportation service, though, ordinarily, unloading is a duty of the consignee. P. 410.
4. The evidence also sustains the Commission's finding that the Chicago Stockyards Company, in unloading livestock into its pens, acts as agent of the line-haul carriers. *Id.*
5. The Commission was justified by the facts in its conclusion that line-haul carriers, which long had absorbed in their tariffs the Stockyards Company's charge per car for unloading, and the Stockyards Company, were guilty of an unfair practice in forcing consignees to pay an increase of that charge, which the Stockyards Company added to its tariff and which the line-haul carriers, though refusing to join in or absorb it, added to their freight bills, whereby it was collected for the Stockyards Company. P. 414.
6. The fact that the Stockyards Company is itself a common carrier and published in its tariff the increased charge for the unloading service, "as a carrier's agent," does not affect the above-stated conclusion, since the question concerned the lawfulness of the practice and not the reasonableness of the charge, and one carrier may act as agent for another. P. 415.
7. Evidence that while the line-haul railroads were under Federal Control the extra charge was added to their freight bills, and that the Stockyards Company collected the bills and paid over the entire proceeds to the railroads, and that the railroads subsequently compensated the Stockyards Company, supports the finding that the Director General participated in the "unjust and unreasonable practice," within the meaning of § 206 (c) of the Transportation Act. Pp. 415–416.
8. The Court will not entertain an objection which was not made either to the Commission in the proceedings for reparation, or to the court below in the action to enforce the reparation order. P. 416.

51 F. (2d) 620, reversed.

CERTIORARI, 284 U. S. 614, to review the affirmance of a judgment on a verdict directed for the defendants, in an action to enforce a reparation order, brought by numerous commission merchants against the Union Stockyard and Transit Company and the Director General of Railroads. For opinion of District Court, see 39 F. (2d) 80; C. C. A., *Adams* v. *Mellon*, 51 F. (2d) 620.

Mr. Franklin J. Stransky, with whom *Mr. Clair R. Hillyer* was on the brief, for petitioners.

This is an action in tort brought against respondents as joint tort-feasors on account of the exaction from petitioners of unlawful charges by means of an unlawful practice, resorted to by respondents in order to settle a controversy between themselves with reference to the extra charge.

The practice was unreasonable and unlawful for the following reasons:

(1) The published tariffs of the line-haul carriers undertook the complete transportation of live stock to the Yards for a through rate, including the unloading. The right of the shipper could be affected only by a change in those tariffs.

(2) The extra charge was not justified either by the published tariffs of the line-haul carriers or by the published tariffs of the Stock Yard Company.

(3) It is not consistent with the spirit and intent of the Act to Regulate Commerce that the identical service of unloading live stock, undertaken and charged for in the published tariffs of the line-haul carriers, should be also made the subject matter of the independent control and charge of the agency of those carriers performing that service.

Mr. Frank H. Towner, with whom *Messrs. Silas H. Strawn* and *Ralph M. Shaw* were on the brief, for the Union Stock Yard & Transit Co., respondent.

Under the theory of the law adopted by the Commission, the Yards Company was obliged to file with the Commission its tariff containing its charges for loading and unloading live stock. If this was so, the law required the Yards Company to assess, collect and retain those charges. The reasonableness and propriety of those charges was not in issue in any proceeding before the Commission. Notwithstanding this, the order sued on herein operated to reduce those charges and is, therefore, unlawful and void. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457; *United States* v. *U. S. Y. & T. Co.,* 192 Fed. 330, 226 Fed. 286; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, 196; *Armour & Co.* v. *United States,* 209 U. S. 56, 72; *Davis* v. *Portland Seed Co.,* 264 U. S. 403.

A finding of illegality in the charges of the Yards Company or of the Director General was a prerequisite to the Commission's order that any part of those charges should be refunded to petitioners. *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Baltimore & O. R. Co.* v. *United States,* 277 U. S. 291; *Florida East Coast R. Co.* v. *United States,* 234 U. S. 167.

Condemnation must be based upon an adequate record. *Baltimore & O. R. Co.* v. *United States,* 277 U. S. 291. The only effect of the order made, if complied with, would be to reduce respondents' tariff charges. This can not be done through indirection, but must result from a definite finding that those charges are unlawful. There is no such finding, nor would the record have supported one, if made. It follows that the practice of collecting those lawful charges could not have been unlawful. *Interstate Commerce Comm.* v. *Stickney,* 215 U. S. 98; *Interstate Commerce Comm.* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320.

The tariffs constituted notice to the world that during the reparation period, the shipper would be required to

pay 25 cents per car for the loading or unloading of his stock, this being the difference between the total amount of the Yards Company charge and the absorption by the Director General. *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94; *Keogh* v. *C. & N. W. R. Co.,* 260 U. S. 156; *Louisville & N. R. Co.* v. *Central Iron Works,* 265 U. S. 59; *New York Central R. Co.* v. *York & Whitney Co.,* 256 U. S. 406; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184.

The duty to load and unload was an obligation of the shipper or consignee. Even if this duty rested upon the line-haul carriers or the Director General, there can still be no recovery in this case from the Yards Company. Such a holding, if proper, would have required the payment of the charges of the Yards Company by the line-haul carriers or the Director General. The Yards Company, therefore, has only received an amount which had to be paid either by the shipper, the consignee or the Director General and there can be no recovery from it. *Covington* v. *Keith,* 139 U. S. 129, distinguished.

Claims for reparation before the Commission and in court must be brought in the names of the real parties in interest. Who may maintain a suit is a matter of law. Petitioners do not have such an interest as entitles them to maintain this suit, either in their own behalf or as factors in behalf of the shippers. They neither paid nor bore the charges sued for and were not damaged. *Mackay* v. *Randolph Macon Coal Co.,* 178 Fed. 881; *Fitkin* v. *Century Oil Co.,* 16 F. (2d) 22; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117; *Phillips Co.* v. *Grand Trunk W. Ry. Co.,* 236 U. S. 663. They are not parties in interest. Missouri Portland Cement Co. v. Director General, 88 I. C. C. 492; *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531; *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217; *Illinois Central R. Co.* v. *Vest,* 39 F. (2d) 658; General, etc., Corp.

v. Southern Ry., 169 I. C. C. 83; *Parsons* v. *C. & N. W. Ry. Co.*, 167 U. S. 447; *Knudson Co.* v. *Michigan Central R. Co.*, 148 Fed. 968; Southern Pine Lumber Co. v. Southern Ry. Co., 14 I. C. C. 195; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *Davis* v. *Portland Seed Co.*, 254 U. S. 403. Distinguishing: *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.*, 39 F. (2d) 661; *New York Central R. Co.* v. *York Co.*, 256 U. S. 406; *Kansas City Sou. Ry. Co.* v. *United States*, 252 U. S. 178; *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98.

Petitioners can not recover in this case as factors or agents for the shippers. *Hamilton* v. *Dillon*, 11 Fed. Cas. 332; *Smith & Son* v. *Blohm*, 159 Iowa 592; *Progress Farms* v. *Chicago Horse Sales Co.*, 153 Wis. 249; *Beardsley* v. *Schmidt*, 120 Wis. 405; *North American Co.* v. *St. Louis & S. F. R. Co.*, D. C. U. S., Eastern Division, E. D. Mo., (unreported); Memphis Freight Bureau v. St. Louis & S. F. Ry. Co., 57 I. C. C. 212.

The Yards Company never was under federal control. Notwithstanding, the Commission has awarded reparation in the order sued on herein against the Yards Company with respect to shipments which moved intrastate within Illinois.

The award of reparation made by the Commission herein was made in two separate proceedings before it. In one of those proceedings, the record fails to show that petitioners were parties complainant and how much reparation was awarded in each of the two proceedings. The order sued on is invalid in so far as it awards reparation in that proceeding in which the record fails to show that petitioners were complainants, and since there is no proof as to how much of the total award is thus invalid, there can be no recovery at all.

The Commission did not have before it any competent evidence upon which it could determine the amount of the reparation awarded by it and the order awarding such reparation is therefore void.

The reparation is void because the Commission, in making it, considered evidence not in the record before it.

Messrs. Sidney F. Andrews and *A. A. McLaughlin* for the Director General, respondent.

The published tariffs of the line-haul carriers covered transportation to the stock yards, but did not include unloading the stock.

The Yards Company was not the agent of the line-haul carriers in performing any transportation service or in publishing and enforcing its tariffs. *United States* v. *Union Stock Yards & Transit Co.*, 226 U. S. 286.

The Yards Company was a common carrier and required to file and maintain its tariffs. In its tariff increasing its charges, it recited in parentheses that its charges were "as a carrier's agent." The alleged agency was repudiated and did not exist, and the Commission so found.

The evidence was insufficient to show the duty of loading and unloading live stock at the stock yards was that of the line-haul carriers or that the line-haul carriers should assume the expense thereof.

The stock yards were not the terminals of the line-haul carriers.

The Yards Company was a common carrier subject to the jurisdiction of the Interstate Commerce Commission, and its tariffs prescribing charges for its transportation services furnish the legal rate therefor, which it was bound to collect. *United States* v. *Union Stock Yards & Transit Co.*, 226 U. S. 286; Chicago Livestock Exchange v. Atchison, T. & S. F. Ry. Co., 52 I. C. C. 209; s. c., 58 I. C. C.

164; *Louisville & N. Ry. Co.* v. *Maxwell,* 237 U. S. 94; *Keogh* v. *C. & N. W. Ry. Co.,* 260 U. S. 156; *Louisville & N. Ry. Co.* v. *Central Iron Works,* 265 U. S. 59.

Loading and unloading was a transportation service for which the carrier performing the service was entitled to compensation and for which the shipper was bound to pay. *Covington Stock Yards* v. *Keith,* 139 U. S. 128; *United States* v. *Union Stock Yards & Transit Co.,* 226 U. S. 286; Act to Regulate Commerce, § 1, par. 3; *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin,* 238 U. S. 491.

The increased charge of 25 cents per car was collected from the shipper by the Yards Company and the Circuit Court of Appeals correctly so held.

The making and collecting of the separate charge for unloading was not an unlawful or unreasonable practice. *Interstate Commerce Comm.* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320; *Interstate Commerce Comm.* v. *Stickney,* 215 U. S. 98; Act to Regulate Commerce, § 6, pars. 1, 7.

Congress did not consent that the agent appointed by the President might be proceeded against before the Interstate Commerce Commission for a tort, but only for damage resulting from the " collection or enforcement by or through the President during the period of federal control of rates, fares, charges, regulations and practices." *Davis* v. *Donovan,* 265 U. S. 257; Transportation Act, 1920, § 206–c.

The absorption tariffs of the line-haul carriers furnish the measure of their obligation and legal right to contribute to the payment of the Yards Company's charges. Act to Regulate Commerce, § 1, par. 6; § 6, par. 7.

The decision of the District Court that these petitioners had no right to maintain this action was correct. *Adams* v. *Mellon,* 51 F. (2d) 620.

The only party entitled to recover reparation is the one who paid and bore the charges on account of which recovery is sought. *Pennsylvania R. Co.* v. *International*

Coal Co., 230 U. S. 184; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *Parsons* v. *C. & N. W. Ry. Co.*, 167 U. S. 447; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412.

Messrs. Daniel W. Knowlton and *J. Stanley Payne*, by leave of Court, filed a brief on behalf of the Interstate Commerce Commission as *amicus curiae*.

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought, on December 10, 1928, in the federal court for northern Illinois to enforce an order of the Interstate Commerce Commission for reparations in the sum of $140,001.25, and interest. The plaintiffs, 103 in number,[1] members of the Chicago Live Stock Exchange, are commission merchants engaged in the business of buying and selling livestock at the Union Stock Yards, Chicago. The defendants are the Union Stock Yard and Transit Company, owner of the yards, and the Director General of Railroads, as agent of the President, being the officer against whom suit may be brought, under § 206 of the Transportation Act, 1920, 41 Stat. 461, on causes of action arising out of Federal control. The award was made on account of an extra charge of 25 cents a car for unloading livestock received at the yards from about 174,000 different shippers, during the period of Federal control, December 28, 1917 to February 29, 1920. The Commission held that the charge had been exacted under an unlawful practice; and awarded reparation to the plaintiffs, who as consignees had paid the charge found unlawful. See Chicago Live Stock Exchange *v.* Atchison,

[1] This is the figure stated in the opinions of both courts below, and in the briefs of counsel. The names of only 101 plaintiffs appear in the petition in the District Court and in the motion to amend the petition, as set out in the Transcript of Record.

T. & S. F. Ry. Co., 52 I. C. C. 209; 58 I. C. C. 164; 100 I. C. C. 266; 144 I. C. C. 175.

The case was tried in the District Court before a jury upon the evidence introduced before the Commission and additional evidence introduced by the parties at the trial. At the close of the evidence, each defendant moved, on many grounds, for a directed verdict. The District Judge granted the motions on the ground that the plaintiffs had no such interest in the claims for reparations as would entitle them to maintain an action under § 8 and § 16 (2) of the Interstate Commerce Act. 39 F. (2d) 80. The Circuit Court of Appeals affirmed the judgment; but, not being entirely satisfied that the reason assigned by the District Court was correct, rested its decision on the ground that the exaction of the extra 25-cent charge was a lawful practice. 51 F. (2d) 620. This Court granted a writ of certiorari. 284 U. S. 614.

First. The defendants contend that even if the exaction of the extra 25-cent charge was unlawful, the plaintiffs are not entitled to recover. The argument is that under § 8 of the Interstate Commerce Act the liability of the common carrier is "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation"; that before any party can recover under the Act he must show not merely the wrong of the carrier, but that the wrong has in fact operated to the plaintiff's injury; that here the award is to the plaintiffs individually, not as agents for the shippers; and that individually they suffered no pecuniary loss, since they paid the charges as commission merchants and reimbursed themselves for these, as for other, charges from the proceeds of the sale of livestock, remitting to their principals only the balance remaining. We think the argument unsound, for the reasons, among others, stated in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *Louisville & Nashville R. Co.* v.

Sloss-Sheffield Co., 269 U. S. 217, 234-238. See also Missouri Portland Cement Co. *v.* Director General, 88 I. C. C. 492, 495, 496; Doughty-McDonald Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 155 I. C. C. 47, 49; California Fruit Exchange *v.* American Railway Express Co., 155 I. C. C. 105, 107.

The plaintiffs were the consignees of the shipments and entitled to possession of them upon payment of the lawful charges. If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. *New York Central R. Co.* v. *York & Whitney Co.*, 256 U. S. 406, 407, 408. Compare *Union Pac. R. Co.* v. *American Smelting & Rfg. Co.*, 202 Fed. 720, 723. As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. See *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers. This proceeding does not involve a controversy between the consignors and the consignees; and the carriers can not be allowed to import one into it. Compare *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 238. The rights of the shippers in the proceeds of the action will not be affected by our decision. Compare *Jennison Bros. & Co.* v. *Dixon*, 133 Minn. 268; 158 N. W. 398. Those rights might have been asserted by intervention in the proceedings before the Commission. They may still be asserted independently in appro-

priate proceedings later. The plaintiffs have suffered injury within the meaning of § 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.

An additional reason for permitting this action is that the relation between the parties to the shipments in question was that of principal and factor, not simply that of consignor and consignee. The Commission found that, as commission merchants, the plaintiffs were empowered, by well-established usage, to pay the freight and related charges; to file claims for overcharges; and to settle with the carriers therefor. Being factors for the shippers, it was not only their right but their duty to resist illegal exactions. This duty did not, as the District Court suggested, terminate upon remission of the proceeds of the sale of the livestock, less the charges in fact paid. It persists, with the assent of the principals, until the claim for reparation shall have been prosecuted to a successful conclusion. It is urged, on behalf of the defendants, that the order of the Commission ran in favor of the plaintiffs, not as factors, but as individuals. The contention is contrary to the fact.[2] But the form of the order is without importance.

[2] The finding of the Commission in its report of June 2, 1925, was that the parties of record who "paid the charges" on the shipments involved "have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers." 100 I. C. C. 266, 270. The fact that "the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors," the report said, "would not affect the right of the complainant consignees to awards of reparation. There is a direct and well established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for

The Commission has recognized the right of a factor to maintain in his own name an action in the interest of his principal. See Memphis Freight Bureau *v.* St. Louis & San Francisco R. Co., 57 I. C. C. 212; Texas Livestock Shippers Protective League *v.* Director General, 139 I. C. C. 448. No useful end would be served by requiring the joining of 174,000 shippers in this proceeding; and § 8 of the Interstate Commerce Act is not to be so construed. Compare *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 134, 135.

Second. The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to

such shippers. . . . The right of factors in their representative capacity to recover reparation in their own names for unlawful and unreasonable charges is settled." *Ibid.*, at 269, 270.

That the subsequent order of the Commission, of December 12, 1927, fixing the amounts due the several complainants, made no reference to their position as factors is without significance. The order expressly incorporated the report; and in the report the Commission had already determined that the complainants, as factors, were entitled to recover in their own names. Nor is the form of the petition in the District Court material. The plaintiffs' right of recovery in this proceeding was defined by the finding and order of the Commission in their favor.

the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 221; *Los Angeles Switching Case,* 234 U. S. 294, 310, 311.

Third. There was ample evidence to sustain the findings of the Commission that the unloading of livestock at the stockyards was a part of the transportation provided for in the tariffs of the line-haul carriers.

(1) Throughout the United States, the duty of unloading carload freight rests ordinarily upon the consignee. See National Lumber Dealers' Assn. *v.* Atlantic Coast Line R. Co., 14 I. C. C. 154, 160. But continuously for fifty years prior to 1917, livestock had been unloaded at Chicago by the Stock Yards Company, without charge therefor to the shipper or consignee.[3] Compare *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136. For this service the company received 25 cents a car; but not from the shipper. Its charge was paid by the line-haul carriers, whose tariffs read: "Carriers as shown will pay the Union Stock Yards and Transit Company's charges as follows: Unloading (in cents per car) 25."

The history of the practice is this. The Union Stock Yard and Transit Company was organized in 1865 by the

[3] Transportation Act, 1920, § 418, 41 Stat. 486, enacted after the period here in question, provided that thereafter, with certain exceptions: "Transportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner. . . ."

railroads then entering Chicago; and until 1894 its shares were largely held by them. The company constructed stockyards and tracks connecting with those of the line-haul carriers. After 1897 the company's railroad property was operated under lease by the Chicago Junction Railway Company, which received from the line-haul carriers compensation for the use of its tracks. The line-haul carriers, using their own locomotives and crews, brought all inbound carload shipments of livestock to the unloading chutes of the Stock Yards Company; and collected from the shippers a terminal or switching charge of $2 per car, in addition to the line-haul rate.[4]

From the time when the cars were placed at the chutes, the course of business was substantially as follows: Employees of the Stock Yards Company unloaded the livestock into pens located upon the company's property and leased by it to the commission merchants who handled the stock for the shippers and who were invariably the consignees of the shipments. The Yards Company notified the commissionmen of the arrival of the shipment, prepared the official record of the receipt of the livestock, the contents of the car, and the condition of the animals—the record used by the line-haul carriers. After securing from the Western Weighing Association Bureau (a bureau of the line-haul carriers) data concerning the actual weight of the livestock, the company made a corrected record of the freight charges due from the commissionmen. These charges it collected for the line-haul carriers; and, in consideration of the prompt release of the livestock without surrender of the bill of lading and without payment of the charges, it guaranteed them. The

[4] The imposition of the $2 charge was the subject of much litigation before the Commission and the courts. *Interstate Commerce Comm.* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320; *Interstate Commerce Comm.* v. *Stickney,* 215 U. S. 98. Compare Chicago Live Stock Exchange *v.* Chicago Great Western Ry. Co., 10 I. C. C. 428.

practice was for the company to make collection from the consignees of all charges twice a week; and once a week to pay the whole amount thus collected to the railroads. Once a month the railroads paid the Yards Company its charges for unloading.

(2) Prior to the decision in *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286 (December 9, 1912), the unloading charges of the Yards Company had not been contained in any tariff filed by it with the Commission. After that decision the company filed with the Commission its Tariff No. 1, effective May 30, 1913, stating its charge to be 25 cents a car. That tariff remained in effect, without any attempt to change it, or the practice under it, until the Yards Company filed a so-called Tariff No. 2, to become effective May 21, 1917, which recited: "The charge made by this company for the service (as a carrier's agent) of . . . unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows: For unloading 50 cents (per car of any capacity)." [5]

The line-haul railroads did not join in the Yards Company's Tariff No. 2, or authorize it. They did not file new tariffs embodying the extra 25-cent charge. And they refused to absorb the extra charge. Upon such refusal, the Yards Company, in order to compel payment by the carriers, adopted the practice of withholding the sum demanded from the freight charges collected for them. In retaliation, the carriers threatened to collect those charges for themselves. The result of this controversy was an arrangement arrived at between the railroads and the Yards Company, whereby the former added the disputed charge to their freight bills, and the latter collected it from the shippers, despite their protest. These bills did not indicate that the extra charge imposed was one of the

[5] The tariff originally filed by the Stock Yards Company, May 30, 1913, did not contain the words in parenthesis, "as a carrier's agent."

Yards Company to the shipper.[6] As theretofore, the whole amount collected was turned over by the company to the railroads.

Meanwhile, the Yards Company, contending that because of certain changes made in its relation with the Chicago Junction Railway it was no longer a common carrier of interstate commerce, filed with the Commission a supplement to its tariffs, to be effective September 1, 1917, in which it undertook to cancel all its tariffs. The proposed supplement was suspended by the Commission under § 15 (7) of the Interstate Commerce Act; and, before any decision had been reached in the suspension proceedings, the Chicago Live Stock Exchange filed its complaint against the Yards Company and the line-haul railroads challenging the extra 25-cent charge. The proceedings were consolidated. Soon thereafter, the railroads passed under Federal control; and the Director General, who continued the arrangement instituted by the carriers with the Yards Company, became a party to the proceedings before the Commission. That arrangement continued to the end of the period of Federal control, as the order of the Commission declaring the practice unlawful was not entered until July 15, 1920, 58 I. C. C. 164.

(3) Thus, by the unbroken usage of fifty years the payment by shippers of livestock of the line-haul rate to Chicago, plus the terminal charge of $2, had covered all services performed in connection with the shipment up to

[6] The freight bills were made out upon forms, headed "United States Railroad Administration—Director General of Railroads," together with the name of the carrier; and, so far as appears, showed only the total charges, entered in a column marked "Freight Charges." The way-bills, however, contained itemized charges, as follows: "Total charges on Original Way-bill;" "Feed Charges at . . ."; "Yardage at . . ."; and "Inspection at. . . . ." In the last column was entered the terminal charge of $2; in the column for "yardage" was the entry, "Unabsorbed Unloading—25c."

and including the placing of the stock in the pens of the commissionmen. The Commission so found; and this Court has heretofore so recognized. See *Interstate Commerce Comm.* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, 327, 329, 336; *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98, 108. Beyond dispute, the Yards Company, in the services which it performed, regarded itself as the carriers' agent. This appears not only from the previous course of business, but from the terms of its second tariff, from its initial conduct with respect to collection of the additional charge and from its attempt to cancel all its tariffs. The carriers for years had paid the Yards Company all its charges; and there was testimony that both the $2 terminal charge and the line-haul rates were predicated upon such payment. The company's charges, moreover, which constituted its sole compensation, covered services, other than the mere unloading of cars,—services which were obviously performed for the benefit of the carriers rather than the shippers.

Whether, upon the company's demand for increased compensation, the carriers, under their tariffs, could lawfully join with it in shifting the burden of such increase to the shippers depended upon the question of fact whether the unloading of cars was the proper duty of the railroads or of the consignees. The basis of the usual practice requiring the consignee to unload carload freight is that the consignee can do it more effectively than the carrier. See National Lumber Dealers' Assn. *v.* Atlantic Coast Line R. Co., 14 I. C. C. 154, 160. The Commission found that, in view of the congested conditions in the Chicago stockyards and the great volume of traffic, it would have been physically impracticable, if not impossible, for the consignees themselves to unload their own shipments. Certainly the Commission could reasonably determine upon this evidence that the conditions with respect to livestock in Chicago justified a different rule there from that

obtaining in other places; that, in fact, a different practice had prevailed; and that no reason existed for permitting a departure from that practice.

Fourth. It is urged by the defendants that the Stock Yards Company had been found by this Court to be a common carrier, *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286; that this finding was adhered to by the Commission in the present proceeding despite the claim of a change in conditions; that as a common carrier the company was compelled to publish its tariffs; that the tariff, as published, has not been found by the Commission to be unreasonable; and that its collection, therefore, was mandatory and hence could not be unlawful. But the tariff, as published, authorized only the collection of the charge as a carrier's agent. The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto. Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.,* 268 U. S. 366; *Union Stockyards Co.* v. *United States,* 169 Fed. 404, 406.

Fifth. Certain additional grounds of defense, not considered by either of the courts below, are pressed here. The Director General urges that the terms of Congressional consent do not permit him to be proceeded against before the Commission for a tort, compare *Missouri Pa-*

cific R. Co. v. *Ault,* 256 U. S. 554, 559, but only for damage resulting from the " collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations or practices . . . which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial." Transportation Act, 1920, 41 Stat. 462, c. 91, § 206 (c). The contention that the acts of the Director General, found by the Commission, did not in any view constitute an " unjust or unreasonable practice " within the meaning of this provision, is manifestly untenable. The contention is really directed against the Commission's finding that the Director General participated in the practice. Ample support for this finding is furnished by the conceded fact that the extra charge was added by the railroads to their freight bills, and by the testimony that these bills were first collected by the Yards Company, that the entire proceeds were paid over to the railroads, and that the railroads subsequently compensated the company.

Sixth. The Stock Yards Company urges several independent grounds of defense, not joined in by the Director General. It is argued that the order sued on includes awards of reparation against the company on purely intrastate shipments moving during the period of Federal control; that the jurisdiction conferred on the Commission by Transportation Act, 1920, 41 Stat. 462, c. 91, § 206 (c), to grant reparation on claims arising out of intrastate traffic during Federal control does not permit the inclusion of such elements in an award against the Yards Company, which was never taken over by the Government; and that, the petitioners not having established by proper proof to what extent the award made was valid, the order must be declared invalid as a whole. The record, however, does not show that this objection was

urged either before the Commission or in the District Court; and it accordingly will not be entertained here.

The remaining contentions of the Yards Company relate to the sufficiency of the complaint in Docket No. 9977, to the competency of the evidence upon which the amount of the reparation awarded to each complainant was determined; and to a claim that the Commission acted upon evidence not in the record. We have considered these objections; and find them to be without merit.

The judgment of the Circuit Court of Appeals is reversed; and the case is remanded to the District Court with direction to enter judgment for the amount of reparation awarded, with interest, and for reasonable attorney's fees to be fixed by it.

Reversed.

MR. JUSTICE BUTLER is of the opinion that plaintiffs are not "persons injured" within the intention of § 8 and that the assailed "practice," if it is such within the meaning of the Act, was not unreasonable and that therefore the judgment should be affirmed.

NORTH AMERICAN OIL CONSOLIDATED *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 575. Argued April 20, 21, 1932.—Decided May 23, 1932.

1. Section 13 (c) of the Revenue Act of 1916, obliging receivers "operating the property and business of corporations" to make returns of net income "as and for such corporations," applied only where a receiver was in complete control of the entire properties and business of the corporation; otherwise the return must be made by the corporation. P. 422.

2. Part of an operating property was taken over by a receiver in a suit challenging the owner's title. *Held,* that the owner need not report income as of the year when it was collected by the receiver, while the right to it was in doubt, but must report it as income of the year when the amount collected was paid over to him and the bill dismissed. P. 423.
3. The fact that appeals from the decree were not determined in his favor until a later year did not defer the time for returning the income. P. 424.

50 F. (2d) 752, affirmed.

CERTIORARI, 284 U. S. 614, to review a judgment reversing a decision of the Board of Tax Appeals, 12 B. T. A. 68.

Mr. Herbert W. Clark for petitioner.

The impounded funds should have been reported by the receiver for taxation in 1916. *Ferguson* v. *Forstmann,* 25 F. (2d) 47, affirming 17 F. (2d) 659.

If taxable to the company, it was 1916 income or income reportable for 1922, the year in which the litigation was terminated. *Consolidated Tea Co.* v. *Bowers,* 19 F. (2d) 382.

A judgment is not deductible in the year in which it is entered in the lower court where an appeal is taken, but should be deducted upon the termination of the litigation. Farmers Nat. Bank v. Commissioner, 6 B. T. A. 1036; Jewell v. Commissioner, 6 B. T. A. 1040; Lehigh & H. R. Ry. Co. v. Commissioner, 13 B. T. A. 1154, affirmed by the Circuit Court of Appeals in 36 F. (2d) 719, as modified by 38 F. (2d) 1015, cert. den., 281 U. S. 748. Distinguishing *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359.

Unconditional right to income is not a condition precedent to the accruability of income. *Lucas* v. *American Code Co.,* 280 U. S. 445; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185; *Eisner* v. *Macomber,* 252 U. S. 189, 207;

United States v. *Anderson,* 269 U. S. 422; *Lucas* v. *North Texas Lumber Co.,* 281 U. S. 11.

The incident of the receivership should be disregarded. The receiver was a mere arm of the court, invested with no estate. *Converse* v. *Hamilton,* 224 U. S. 243; *Grant* v. *Mutual Life Ins. Co.,* 106 U. S. 429; *Obispo Oil Co.* v. *Welch,* 48 F. (2d) 872, 875.

There was evidence that the accounts were kept and the returns filed on the accrual basis. The burden was upon the Commissioner to prove the contrary. *Brunton* v. *Commissioner,* 42 F. (2d) 81, 82.

If unconditional right to income, and not claim under color of right, is at the foundation of the right to accrue, then it would seem to follow that unconditional right and not mere claim of right to income must exist to render it taxable as cash income.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour* and *Sewall Key* were on the brief, for respondent.

The receiver was not required to file an income tax return for 1916 in behalf of the petitioner and to report therein income impounded by him during that year. Cf. *Reinecke* v. *Gardner,* 277 U. S. 239, 241.

Settled administrative construction of similar statutory provisions relating to the filing of returns by receivers and trustees in bankruptcy of corporations is entitled to great weight.

There is no provision in the Acts for the consolidation of the return of the receiver of part of a corporation's property or business and the return of the corporation itself. *Forstmann* v. *Ferguson,* 17 F. (2d) 659, 25 *id.* 47, distinguished.

If, as appears, the taxpayer was on the cash basis, the income was taxable for 1917, when it was actually re-

ceived, and not for 1916 or 1922. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359. The theory of taxability of constructive income does not require a taxpayer to report income which it may never receive. *Burnet* v. *Logan,* 283 U. S. 404.

A taxpayer must report income which he has received under a claim of right, without restriction as to disposition, though others may claim it. *Board* v. *Commissioner,* 51 F. (2d) 73, cert. den., 284 U. S. 658. The annual period principle applies. *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301; *Burnet* v. *Sanford & Brooks Co.,* 283 U. S. 359; *De Loss* v. *Commissioner,* 28 F. (2d) 803.

If the taxpayer had lost its appeal and been obliged to account, it would have been entitled to a deduction for a loss in that year.

Limitations that may affect the right to dispose of income do not prevent it from being taxed when received. *Cleveland Ry. Co.* v. *Commissioner,* 36 F. (2d) 347, cert. den., 281 U. S. 743; *Newman* v. *Commissioner,* 40 F. (2d) 225, cert. den., 282 U. S. 858; *Rodrigues* v. *Edwards,* 40 F. (2d) 408.

Had the taxpayer been on the accrual basis, the receipts were nevertheless taxable for 1917.

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether the sum of $171,979.22 received by the North American Oil Consolidated in 1917, was taxable to it as income of that year.

The money was paid to the company under the following circumstances. Among many properties operated by it in 1916 was a section of oil land, the legal title to which stood in the name of the United States. Prior to that year, the Government, claiming also the beneficial

ownership, had instituted a suit to oust the company from possession; and on February 2, 1916, it secured the appointment of a receiver to operate the property, or supervise its operations, and to hold the net income thereof. The money paid to the company in 1917 represented the net profits which had been earned from that property in 1916 during the receivership. The money was paid to the receiver as earned. After entry by the District Court in 1917 of the final decree dismissing the bill, the money was paid, in that year, by the receiver to the company. *United States* v. *North American Oil Consolidated,* 242 Fed. 723. The Government took an appeal (without supersedeas) to the Circuit Court of Appeals. In 1920, that Court affirmed the decree. 264 Fed. 336. In 1922, a further appeal to this Court was dismissed by stipulation. 258 U. S. 633.

The income earned from the property in 1916 had been entered on the books of the company as its income. It had not been included in its original return of income for 1916; but it was included in an amended return for that year which was filed in 1918. Upon auditing the company's income and profits tax returns for 1917, the Commissioner of Internal Revenue determined a deficiency based on other items. The company appealed to the Board of Tax Appeals. There, in 1927 the Commissioner prayed that the deficiency already claimed should be increased so as to include a tax on the amount paid by the receiver to the company in 1917. The Board held that the profits were taxable to the receiver as income of 1916; and hence made no finding whether the company's accounts were kept on the cash receipts and disbursements basis or on the accrual basis. 12 B. T. A. 68. The Circuit Court of Appeals held that the profits were taxable to the company as income of 1917, regardless of whether the company's returns were made on the cash or on the

accrual basis. 50 F. (2d) 752. This Court granted a writ of certiorari. 284 U. S. 614.

It is conceded that the net profits earned by the property during the receivership constituted income. The company contends that they should have been reported by the receiver for taxation in 1916; that if not returnable by him, they should have been returned by the company for 1916, because they constitute income of the company accrued in that year; and that if not taxable as income of the company for 1916, they were taxable to it as income for 1922, since the litigation was not finally terminated in its favor until 1922.

First. The income earned in 1916 and impounded by the receiver in that year was not taxable to him, because he was the receiver of only a part of the properties operated by the company. Under § 13 (c) of the Revenue Act of 1916,[1] receivers who "are operating the property or business of corporations" were obliged to make returns "of net income as and for such corporations," and "any income tax due" was to be "assessed and collected in the same manner as if assessed directly against the organization of whose business or properties they have custody and control." The phraseology of this section was adopted without change in the Revenue Act of 1918, 40 Stat. 1057, 1081, c. 18, § 239. The regulations of the Treasury Department have consistently construed

[1]Act of September 8, 1916, 39 Stat. 756, 771, c. 463: "In cases wherein receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations . . . , subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations . . . , in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, trustees, or assignees shall be assessed and collected in the same manner as if assessed directly against the organizations of whose business or properties they have custody and control."

these statutes as applying only to receivers in charge of the entire property or business of a corporation; and in all other cases have required the corporations themselves to report their income. Treas. Regs. 33, arts. 26, 209; Treas. Regs. 45, arts. 424, 622. That construction is clearly correct. The language of the section contemplates a substitution of the receiver for the corporation; and there can be such substitution only when the receiver is in complete control of the properties and business of the corporation. Moreover, there is no provision for the consolidation of the return of a receiver of part of a corporation's property or business with the return of the corporation itself. It may not be assumed that Congress intended to require the filing of two separate returns for the same year, each covering only a part of the corporate income, without making provision for consolidation so that the tax could be based upon the income as a whole.

Second. The net profits were not taxable to the company as income of 1916. For the company was not required in 1916 to report as income an amount which it might never receive. See *Burnet* v. *Logan,* 283 U. S. 404, 413. Compare *Lucas* v. *American Code Co.,* 280 U. S. 445, 452; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 363. There was no constructive receipt of the profits by the company in that year, because at no time during the year was there a right in the company to demand that the receiver pay over the money. Throughout 1916 it was uncertain who would be declared entitled to the profits. It was not until 1917, when the District Court entered a final decree vacating the receivership and dismissing the bill, that the company became entitled to receive the money. Nor is it material, for the purposes of this case, whether the company's return was filed on the cash receipts and disbursements basis, or on the accrual basis. In neither event was it taxable in 1916 on

account of income which it had not yet received and which it might never receive.

Third. The net profits earned by the property in 1916 were not income of the year 1922—the year in which the litigation with the Government was finally terminated. They became income of the company in 1917, when it first became entitled to them and when it actually received them. If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. See *Board* v. *Commissioner,* 51 F. (2d) 73, 75, 76. Compare *United States* v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 403. If in 1922 the Government had prevailed, and the company had been obliged to refund the profits received in 1917, it would have been entitled to a deduction from the profits of 1922, not from those of any earlier year. Compare *Lucas* v. *American Code Co., supra.*

Affirmed.

UNITED STATES *v.* KOMBST ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 704. Argued April 26, 27, 1932.—Decided May 23, 1932.

1. In computing the federal estate tax under the Revenue Act of 1916, state succession taxes (distinguished from transfer taxes), are not deductible from the gross estate. *Leach* v. *Nichols,* 285 U. S. 165. P. 426.
2. Tax imposed by California Inheritance Tax Act, as amended in 1915, *held* a tax on succession, following decisions of the state court. *Id.*

72 Ct. Cls. 695; 50 F. (2d) 1030, reversed.

CERTIORARI, 285 U. S. 532, to review a judgment allowing a claim to recover part of an amount exacted as a federal estate tax.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour* and *H. Brian Holland* were on the brief, for the United States.

Mr. Frederick Schwertner, with whom *Mr. Clarence W. DeKnight* was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the sum of $261,811.42 paid to the State of California for inheritance taxes should have been deducted from the gross estate of the decedent before calculating the federal estate tax under the Revenue Act of 1916, as amended.

On April 25, 1917, Rosa von Zimmermann died in California, a German alien enemy, leaving a net estate valued at $1,927,610.88. Her will was probated there. Her executors, who were citizens of that State, paid in 1918 to the United States an estate tax of $144,889.78, and to California for inheritance taxes the sum of $261,811.42. In the same year, the Alien Property Custodian served notice and demand upon the executors to convey and pay over to him all interest, in the estate, of the residuary legatees, who were likewise German alien enemies. In 1922, the executors, having rendered a final account and turned over the residue of the estate to the Alien Property Custodian, were discharged. After March 4, 1923, the effective date of the Winslow Act, 42 Stat. 1511, c. 285, a claim for refund was filed with the Commissioner of Internal Revenue by Barnim Kombst and the other resid-

uary legatees. One of the grounds assigned was that the sum paid to California by way of an inheritance tax should have been deducted from the gross estate before calculating the federal estate tax. Subsequently, the Alien Property Custodian filed a like claim. The Commissioner rejected both claims. Thereupon, the legatees and the Alien Property Custodian brought this action in the Court of Claims to recover the amount alleged to have been wrongfully exacted. The court sustained their contention, and allowed recovery of $23,563.03, with interest. 52 F. (2d) 1030. Certiorari was granted, 285 U. S. 532. The Government contends that the sum paid to California was not deductible; and that even if it should have been deducted, there can be no recovery, because the claim for refund was not made within the period allowed by law.

The Revenue Act of 1916, § 203 (a) 1, under which the excise tax is laid, does not allow as a deduction from the gross estate a sum paid by way of succession tax, as distinguished from an estate tax.[1] *Leach* v. *Nichols,* 285 U. S. 165; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 350. Compare *United States* v. *Woodward,* 256 U. S. 632, 635. Whether the California tax was a succession tax or an estate tax is to be determined by reference to the decisions of its highest court. *Leach* v. *Nichols, supra; Keith* v. *Johnson,* 271 U. S. 1, 8. The California tax was levied under the Inheritance Tax Act of 1913,

[1] Act of September 8, 1916, 39 Stat. 756, 778, c. 463: "Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages . . . and such other charges against the estate, as are allowed by the laws of the jurisdiction . . . under which the estate is being administered. . . ."

Cal. Stats. 1913, p. 1066, as amended, Cal. Stats. 1915, pp. 418, 435. This Act differs in no substantial respect from its predecessors, Cal. Stats. 1905, p. 341, and Cal. States. 1911, p. 713, which have uniformly been held by the Supreme Court of the State to impose a tax upon the succession. *Estate of Kennedy,* 157 Cal. 517, 523; 108 Pac. 280; *Estate of Hite,* 159 Cal. 392, 394; 113 Pac. 1072; *Estate of Miller,* 184 Cal. 674, 678; 195 Pac. 413. Compare *Estate of Potter,* 188 Cal. 55; 204 Pac. 826; *Estate of Letchworth,* 201 Cal. 1; 255 Pac. 195. See *Stebbins* v. *Riley,* 268 U. S. 137, 144.

It is urged that the original and all later California inheritance tax acts were patterned after the New York Act; and that, under the New York Act, the tax is one upon the transfer. *Keith* v. *Johnson,* 271 U. S. 1. Compare *United States* v. *Mitchell,* 271 U. S. 9. As the highest court of California has construed its statutes as laying a succession tax, we have no occasion to consider the construction given by the courts of New York to its legislation. Compare *Stonebraker* v. *Hunter,* 215 Fed. 67, 69.

The Commissioner properly refused to allow as a deduction the amount paid to the State. We have, therefore, no occasion to consider the question whether the claim for refund was filed in time.

Reversed.

ATLANTIC CLEANERS & DYERS, INC., ET AL. *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 667. Argued April 28, 1932.—Decided May 23, 1932.

1. The presumption that identical words used in different parts of the same statute are intended to have the same meaning is not conclusive. Where the subject matter to which the words refer is

not the same, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. P. 433.

2. The power exercised by Congress in the enactment of the provision of § 3 of the Sherman Act relating to restraint of trade or commerce exclusively within the District of Columbia, was its plenary power, under Art. I, § 8, cl. 17 of the Constitution, to legislate for the District, and therefore the meaning of this provision, unlike § 1 of the Act, is not limited by the scope of the power to regulate commerce (Art. I, § 8, cl. 3). P. 434.
3. Under Art. I, § 8, cl. 17 of the Constitution, Congress, in legislating for the District of Columbia, possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a State in dealing with its affairs, so long as other provisions of the Constitution are not infringed. It therefore had power to forbid combinations and conspiracies to maintain prices and allot customers, between persons engaged in the District in the purely local business of cleaning, dyeing, and renovating clothes. Pp. 434–435.
4. The word "trade" is not necessarily limited in its meaning to the buying, selling or exchanging of commodities; it may be used in a broader sense. P. 435.
5. An agreement to fix prices and allot customers, entered into by persons engaged in the District of Columbia in the business of cleaning, dyeing, and renovating clothes, though these have already passed to the ultimate consumers, is in restraint of "trade" within the meaning of § 3 of the Sherman Act. P. 437.

Affirmed.

APPEAL from a decree granting an injunction in a suit brought by the United States under the Sherman Anti-trust Act.

Mr. Dale D. Drain, with whom *Messrs. Alvin L. Newmyer* and *Selig C. Brez* were on the brief, for appellants.

Many lines of business are not "commerce" as that term is used in the commerce clause of the Constitution.

Paul v. *Virginia,* 8 Wall. 168, 183; *Hooper* v. *California,* 155 U. S. 648, 655; *N. Y. Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, 510; *Kidd* v. *Pearson,* 128 U. S. 1, 20; *United States* v. *Knight Co.,* 156 U. S. 1, 12; *Hammer* v. *Dagenhart,* 247 U. S. 251, 272; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, 136; *United Leather Workers* v. *Trunk Co.,* 265 U. S. 457, 465; *Delaware, L. & W. R. Co.* v. *Yurkonis,* 238 U. S. 439, 444–445; *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436, 442; *U. S. Fidelity & Guaranty Co.* v. *Kentucky,* 231 U. S. 394, 398; *Federal Baseball Club* v. *National League Clubs,* 259 U. S. 200, 208–209.

"Trade or commerce," as used in the Sherman Anti-trust Act, connotes the transfer of something, whether it be persons, commodities or intelligence, from one place or person to another. *National League Clubs* v. *Federal Baseball Club,* 50 App. D. C. 165, 168; *Federal Baseball Club* v. *National League Clubs,* 259 U. S. 200, 208–209; Thornton, Combinations in Restraint of Trade, p. 167.

The business of dry cleaning and dyeing here involved consists solely of the performance of labor and the rendering of a service in respect of wearing apparel and other articles which have already passed into the hands of the ultimate consumer thereof and is not "trade or commerce" within the meaning of the Sherman Act. *Smith* v. *Jackson,* 103 Tenn. 673; *State* v. *Frank,* 114 Ark. 47, 56; *State* v. *McClellan,* 155 La. 38; *Tooke & Reynolds* v. *Bastrop Ice & Storage Co.,* 172 La. 781, 795; *United States* v. *Fur Dressers' Assn.,* 5 F. (2d) 869, 872; *State* v. *Board of Trade,* 107 Minn. 506.

The use of the term "restraint of trade" by courts in passing upon the enforceability of restrictive covenants affecting various businesses, occupations and professions is no support for the contention that such occupations or

professions are " trade or commerce " within the meaning of the Sherman Act.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher,* and *Messrs. Charles H. Weston, Russell Hardy,* and *George P. Alt* were on the brief, for the United States.

The business of purveying a standardized, nonpersonal service, where there is competition upon a price basis, is trade or commerce within the meaning of the Sherman Act. This view is supported by the decisions, by a consideration of the purposes of the Sherman Act, and by the history of the common-law doctrine of restraint of trade. *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290; *Western Union* v. *Pendleton,* 122 U. S. 347; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, cert. den., 285 U. S. 538; *General Electric Co.* v. *Federal Radio Commission,* 31 F. (2d) 630, certiorari dismissed, 281 U. S. 464; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *American Laundry Co.* v. *E. & W. Dry-Cleaning Co.,* 199 Ala. 154; *Buckelew* v. *Martens,* 156 Atl. 436; *Kansas City* v. *Seaman,* 99 Kan. 143; *California* v. *Tagami,* 195 Cal. 522. Distinguishing: *Federal Baseball Club* v. *National League Clubs,* 259 U. S. 200; *Hart* v. *Keith Vaudeville Exchange,* 12 F. (2d) 341, cert. den., 273 U. S. 703; *State* v. *Frank,* 114 Ark. 47; *State* v. *McClellan,* 155 La. 37; *Smith* v. *Jackson,* 103 Tenn. 673; *State* v. *Board of Trade,* 107 Minn. 506; *Kidd* v. *Pearson,* 128 U. S. 1.

It would be a strange reversal, after five centuries, to hold that the business of dyeing, which called forth the first announcement of the doctrine of restraint of trade (*Diers Case,* 2 Henry V, 5, pl. 26), is not within a statute, the terms of which, " at least in their rudimentary meaning, took their origin in the common law."

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought by the United States against appellants to enjoin them from continuing, in the District of Columbia, an alleged combination and conspiracy in restraint of trade and commerce in cleaning, dyeing and otherwise renovating clothes, contrary to § 3 of the Sherman Antitrust Act, c. 647, 26 Stat. 209; U. S. C., Title 15, § 3. Appellants answered, setting up affirmatively that they were engaged solely in the performance of labor and rendering service in cleaning, dyeing and renovating wearing apparel and other articles which had passed into the hands of the ultimate consumers thereof, and that this did not constitute trade or commerce within the meaning of the Antitrust Act. Upon motion the answer was stricken from the files, on the ground that the matter pleaded was not a valid defense. Appellants elected to stand upon their answers; and a decree was entered as prayed. The case comes here by appeal under the provisions of the Act of February 11, 1903, c. 544, 32 Stat. 823; U. S. C., Title 15, § 29. *Swift & Co.* v. *United States,* 276 U. S. 311, 322; *United States* v. *California Canneries,* 279 U. S. 553, 558.

Upon the facts which stand admitted and those affirmatively pleaded by the answers, the sole question to be determined is whether, within the meaning of § 3 of the Sherman Act, appellants are engaged in trade or commerce in the District of Columbia.

The facts, established as above, are that they are carrying on the business of cleaning, dyeing and renovating wearing apparel at plants located in the District, in part, and in some cases principally, at wholesale pursuant to contracts or engagements with numerous so-called retail

dyers and cleaners who maintain shops in the District for receiving from the public clothing to be cleaned, dyed or otherwise renovated. Appellants, in August, 1928, met together in the District and agreed to raise the then current prices charged for cleaning, dyeing and renovating clothes, and formulated and agreed upon certain minimum and uniform prices, which they, and each of them, should thereafter charge and receive for the performance of such service. They further agreed to assign and allot to one another the retail dyers and cleaners, who, thereupon, were to be held, respectively, as exclusive customers. The agreement to maintain prices and assign and allot customers has been and is being carried into effect.

Sections 1 and 3 of the Sherman Act provide as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. . . ."

The words describing the activity declared to be illegal are the same in both sections, namely, "restraint of trade or commerce." The contention on behalf of appellants is that the words, being identical, should receive the same construction in § 3 as in the preceding § 1; that § 1 rests solely on the commerce clause of the Constitution; that the words "trade or commerce" in § 1 cannot be broader than the single word "commerce" as used in that clause; and that commerce does not include a business such as that carried on by appellants.

Assuming, but not deciding, that if the acts here charged had involved interstate transactions appellants would not come within the provisions of § 1, because the scope of the words "trade or commerce" must there be limited by the constitutional power to regulate commerce, it does not follow that the same words contained in § 3 should be given a like limited construction. Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld* v. *Legh,* L. R., 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. See *State* v. *Knowles,* 90 Md. 646, 654; 45 Atl. 877; *Henry* v. *Trustees,* 48 Ohio St. 671, 676; 30 N. E. 1122; *Feder* v. *Goetz,* 264 Fed. 619, 624; *James* v. *Newberg,* 101 Oreg. 616, 619; 201 Pac. 212; *County-Seat of Linn Co.,* 15 Kans. 500, 527.

It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance. *Louisville & N.*

R. Co. v. *Gaines,* 3 Fed. 266, 277–278. Thus, for example, the meaning of the word " legislature," used several times in the Federal Constitution, differs according to the connection in which it is employed, depending upon the character of the function which that body in each instance is called upon to exercise. *Smiley* v. *Holm,* 285 U. S. 355. And, again in the Constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states. See *Groves* v. *Slaughter,* 15 Pet. 449, 505; *Steamship Co.* v. *Portwardens,* 6 Wall. 31, 32–33; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492. Compare *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 520–521.

Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words " trade " and " commerce " are there to be regarded as synonymous. On the other hand, § 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character. The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17 of the Constitution. Under that clause,

Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a state in dealing with its affairs, so long as other provisions of the Constitution are not infringed. *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 5. Undoubtedly, under that extensive power, it was within the competency of Congress to prohibit and penalize the acts with which appellants are here charged; and the only question is whether by § 3 it has done so.

A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. In passing § 1, Congress could exercise only the power conferred by the commerce clause; but in passing § 3, it had unlimited power, except as restricted by other provisions of the Constitution. We are, therefore, free to interpret § 3 dissociated from § 1 as though it were a separate and independent act, and thus viewed, there is no rule of statutory construction which prevents our giving to the word " trade " its full meaning, or the more extended of two meanings, whichever will best manifest the legislative purpose. See *United States* v. *Hartwell,* 6 Wall. 385, 396; *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 329–330.

We perceive no reason for holding that Congress used the phrase " restraint of trade " in § 3 in a narrow sense. It is true that the word " trade " is often employed as importing only traffic in the buying, selling or exchanging of commodities; but it is also true that frequently, if not generally, the word is used in a broader sense. This is pointed out in *The Schooner Nymph,* 1 Summ. 516, 517–518; 18 Fed. Cas. 506, No. 10,388. Construing § 32

of the Coasting and Fishery Act of 1793, c. 8, 1 Stat. 305, 316, which declares that any licensed ship, etc., which shall be employed in any other "trade" than that for which she is licensed shall be forfeited, Mr. Justice Story in that case said:

"The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade.* Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods."

A like view was taken by Pollock, B., in *Bank of India* v. *Wilson,* L. R., 3 Exch. Div. 108, 119–120.* See also

* One of the earliest decisions under the common law is *Diers Case,* 2 Henry V, 5, pl. 26, which arose in the time of Henry V (1414). There a weaver had bound himself for a moderate consideration not to follow his craft within the town for a limited time. Before the expiration of the time, however, his necessities sent him back to the loom, and an action against him for damages was brought. The learned Judge, in deciding the case, not only held the obligation to be void, but quite evidently considered it criminal as well. With some display of feeling he said—"The obligation is void as being contrary to the common law and by G— if the plaintiff were here he should go to prison until he paid a fine to the King." And even a century or two later, when the rule in respect of contracts in restraint of trade had become less strict, in *Mitchell* v. *Reynolds,* 1 Peere Williams 181, 193, Parker, C. J., referring to *Diers Case,* approved the indignation of the judge, "tho' not his manner of expressing it."

Buckelew v. *Martens,* 108 N. J. L. 339, 156 Atl. 436; *American Laundry Co.* v. *E. & W. D. C. Co.,* 199 Ala. 154; 74 So. 58; *Campbell* v. *Motion Picture M. Op. Union,* 151 Minn. 220, 231–232; 186 N. W. 781.

We think the word "trade" was used in § 3 of the Sherman Act in the general sense attributed to it by Justice Story and, at least, is broad enough to include the acts of which the Government complains.

Decree affirmed.

EX PARTE GREEN.

No. —, Original. Motion submitted May 2, 1932.—Decided May 23, 1932.

An admiralty court in which a suit is pending to limit the liability of a vessel owner in respect of a claim upon which an earlier common-law action for damages is pending against him in a state court, should restrain the prosecution of that action if the claimant persists in making the owner's right to limit liability an issue in it. *Langnes* v. *Green,* 282 U. S. 531. P. 440.

Motion denied.

MOTION for leave to file a petition for a writ of mandamus.

Messrs. Winter S. Martin and *Samuel B. Bassett* were on the brief for the motion.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a motion by Winfield A. Green for leave to file a petition for a writ of mandamus against the federal district court for the western district of Washington to show cause why the writ should not issue requiring the judge thereof to conform to the opinion of this court in *Langnes* v. *Green,* 282 U. S. 531. In that case Green had

brought an action against Langnes in a superior court of the State of Washington to recover damages for personal injury suffered while employed upon the "Aloha," a fishing vessel of which Langnes was the sole owner. Four months thereafter, while that action was pending, Langnes brought a proceeding in the federal district court, praying a limitation of liability under the appropriate provisions of the Revised Statutes. The parties stipulated that the vessel was of no greater value than the sum of $5,000. Upon the filing of the petition, the district court issued an order restraining further proceedings in the state court, and a monition to all claimants to present their claims within a time fixed. Green filed his claim in the amount of $25,000 for damages, which was the only claim ever filed, and thereupon moved to dissolve the restraining order. The district court denied the motion, and tried the cause in respect of respondent's claim, holding there was no liability and entering a decree accordingly. An appeal followed to the Circuit Court of Appeals for the Ninth Circuit. That court reversed the decree and remanded the cause upon grounds which need not now be stated.

We reversed the decrees of both courts, and remanded the cause to the district court for further proceedings. We held that the action was properly brought in the state court under § 24 (3) of the Judicial Code, U. S. C., Title 28, § 41 (3), which saves to suitors in all cases of admiralty "the right of a common-law remedy where the common law is competent to give it," and that the petition for a limitation of liability also was properly brought in the federal district court. The situation then being that one statute afforded the right to a common law remedy, and another the right to seek a limitation of liability, we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the state court

to proceed, or to retain complete jurisdiction; and, upon consideration of the matter, we held that such discretion should have been exercised so as to permit the state court to proceed.

But we also said that the district court, as a matter of precaution, should retain the petition for a limitation of liability "to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty."

As authority for that disposition of the matter we cited *The Lotta,* 150 Fed. 219, where Judge Brawley, dealing with a similar situation, had taken that course. We quoted from his opinion, among other things, the following (p. 223):

"All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. . . . if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question . . . and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability."

It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's

right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.

Notwithstanding the foregoing, Green, following the remission of the cause to the state court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the federal district court, and that court held that the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. In this the district court was right, and the motion for leave to file the petition for writ of mandamus must be denied.

The district court, however, gave Green until a time fixed to withdraw, in the state court, the issue as to the right to limited liability, in which event the restraining order was not to issue. That court, upon being seasonably advised of the proceeding here and of our disposition of it, will, no doubt, grant further reasonable time to allow Green to elect whether to withdraw the admiralty issue which he has raised in the state court; and the denial of the motion is made without prejudice to such action.

Leave denied.

ERIE RAILROAD CO. *v.* DUPLAK ET AL.

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

No. 608. Argued April 20, 1932.—Decided May 23, 1932.

A New Jersey statute denying to persons injured while walking, standing or playing on any railroad recovery of damages from the company *held* to bar recovery in an action for personal injuries

sustained by a five year old boy while playing upon a railroad bridge within the State. Following *Erie R. Co.* v. *Hilt,* 247 U. S. 97. P. 444.

53 F. (2d) 846, reversed.

CERTIORARI, 284 U. S. 616, to review a judgment affirming a judgment against the railroad company in an action in damages for personal injuries.

Messrs. Ralph E. Cooper and *George S. Hobart,* with whom *Mr. Duane E. Minard* was on the brief, for petitioner.

Mr. Jack Rinzler, with whom *Mr. Frederic B. Scott* was on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Michael Duplak, a boy five years of age, sustained personal injuries, resulting in the loss of a leg, while playing upon a railroad bridge built by petitioner over a canal in Passaic, New Jersey. The track crossing the bridge was used only for drilling freight cars—that is, for pulling them into and out from sidings. At the time of the accident the boy was resting on his right knee, looking down into the water of the canal, with his left leg extended over the rail and under one of a string of cars standing on the bridge. While he was in that position, other cars were backed against the standing cars, causing them to move and run over the boy's leg. A sign stood at one end of the bridge warning of danger and forbidding all persons to go upon the bridge. It appeared that from time to time boys had played upon the bridge and had put diving boards on the lower tiers which were used during the summer when the boys were swimming. Naturally, they were not in use in December, when the accident happened.

In an action brought in the name of the boy and his parents in a federal district court for New Jersey, a verdict and judgment were rendered against the petitioner, and affirmed on appeal by the court of appeals. 53 F. (2d) 846.

It is unnecessary to discuss the question of negligence. The case is ruled by a statute of the State of New Jersey, which makes it unlawful " for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or *playing* on any railroad . . . such person . . . shall not recover therefor any damages from the company owning or operating said railroad." Laws of New Jersey, 1903, c. 257, § 55. This statute has been construed by the supreme court of the state so as to deny recovery for the injury of a child twenty-one months old who had strayed upon the private right of way of a railroad company at a place not a public crossing, and who was there struck by a car, resulting in the loss of one of his legs. The court held that the statute barred recovery by any person who walked, stood or played upon a railroad, and applied to all persons alike without distinction as to age or physical or mental condition. *Barcolini* v. *Atlantic City & S. R. R. Co.*, 82 N. J. L. 107; 81 Atl. 494.

The rule of this decision was accepted and applied in *Erie R. Co.* v. *Hilt*, 247 U. S. 97. That was the case of a boy less than seven years old, who had been playing marbles near a siding of the railroad and was injured while endeavoring to reach a marble which had rolled under a car standing upon the siding. The Circuit Court of Appeals for the Third Circuit sustained a recovery. This court reversed on the New Jersey statute, *supra*,

as construed in the *Barcolini* case. An attempt is made to distinguish the instant case, but upon comparison of the facts here disclosed with those of the *Barcolini* and *Hilt* cases, we are unable to find any such difference as to constitute a substantial basis for making a distinction.

We find it unnecessary to consider whether the conduct of the railroad company amounted to an invitation to the boy to play upon the bridge. There was certainly no express invitation. The right of way was enclosed by a fence, so far as that could be done without interfering with the movement of cars, and a warning sign put up at one end of the bridge. However, the point is settled by the state law and effectually disposed of by the *Hilt* case. The facts there were before the court but are not fully recited in the opinion. As shown by the decision of the court of appeals (*Erie R. Co.* v. *Hilt,* 246 Fed. 800, 801), there was open ground next to the siding used as a driveway to the station and the siding. This had been used as a playground by children, some very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars standing on the rails. The practice was frequent and well known to the railroad. Children sometimes were driven or ordered away, but with little effect, since there was no barrier to keep them off. Notwithstanding that the bearing of the facts was more strongly against the railroad than is the case here, it was held that, in the face of the statute, there could be no recovery. "The statute," this court said (p. 101), "seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's

safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

In support of that statement, *Turess* v. *N. Y., Susq. & West. R. Co.*, 61 N. J. L. 314; 40 Atl. 614, among other cases, is cited. There the court rejected the contention that the railroad company was liable for an injury to a child who had come upon the property of the company and been injured while playing on a turntable, which was claimed to be an attractive nuisance. See also *Kaproli* v. *Central R. R. of N. J.*, 105 N. J. L. 225; 143 Atl. 343. The effect of the *Hilt* decision is to accept the state statute, as construed by the state court, as having put a negative upon the implied invitation and attractive nuisance doctrines; and the same statute necessarily controls here whatever, otherwise, might be the rule.

Judgment reversed.

HARDEMAN *v.* WITBECK.

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

No. 503. Argued April 12, 1932.—Decided May 23, 1932.

In order to avail of the preference right to a permit to prospect for oil and gas allowed by the Leasing Act to one who has erected a monument and posted the prescribed notice, applicant within thirty days thereafter must not only file his application but must also pay the application fee required by the regulations. P. 446.

51 F. (2d) 450, affirmed.

CERTIORARI, 284 U. S. 613, to review the reversal of a decree adjudging the present petitioner to be the beneficial owner of a prospecting permit that had been issued to the respondent by the Land Department.

Mr. Patrick H. Loughran for petitioner.

Mr. Sidney L. Herold, with whom *Mr. Francis W. Clements* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by petitioner in the district court for western Louisiana against respondent to have the former adjudged the beneficial owner of a permit issued May 6, 1925, by the Secretary of the Interior to respondent under § 13 of the Leasing Act,* granting the latter the right to prospect for oil and gas upon 40 acres of land in that State. That court entered a decree for petitioner. The Circuit Court of Appeals reversed. 51 F. (2d) 450.

Section 13 authorizes the Secretary, under such necessary and proper rules and regulations as he may prescribe, to grant to an applicant qualified under the Act a permit to prospect for oil or gas upon land wherein the deposits belong to the United States and are not within a known geological structure of a producing oil or gas field. It provides that, if one shall cause to be erected upon the land for which the permit is sought a monument and shall post a notice in specified form, he shall during the period of 30 days thereafter be entitled to a preference right over others to a permit on the land so identified. A regulation, § 5 (b), 47 L. D. 441, declares that, if no application is filed within that time, the land will be subject to any other application or to other disposal. Pursuant to authority given him by § 38 the Secretary prescribed a schedule of fees and commissions for transactions under the Act: For receiving and acting on each application for a permit filed in the district land office there shall be charged a fee in no case to be less than $10, to be paid

* Act of February 25, 1920, c. 85, 41 Stat. 437, 441.

by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver. § 31 (a), p. 461.

On November 12, 1923, respondent, complying with the law and regulations, applied for a permit to prospect upon the land and paid the required amount. December 11, petitioner, claiming the preference right given by the Act, filed an application for a permit to prospect upon the same tract. The substance of the application was that on November 11, he had erected the monument and posted a notice on the land as required by the statute. But he did not tender or pay the required fee until December 19. In the contest that followed it was finally held in an opinion promulgated by the Secretary that, petitioner having failed to pay the required amount within the time allowed, respondent was entitled to have the permit. 51 L. D. 36.

Petitioner's application was later than respondent's and he had no ground upon which to claim a permit in the absence of a preference right. In order to secure that right, full compliance with the law and regulations was necessary. The declaration that the fee is for "receiving and acting" on the application and is "to be considered as earned when paid" strongly confirms the inference, which would exist without it, that payment is essential to the completion of the application. When the thirty days expired, petitioner's preference right was at an end, and the land was subject to respondent's application for a permit.

As the Secretary rightly held petitioner not entitled to the permit, he has no standing to maintain this suit. *Fisher* v. *Rule,* 248 U. S. 314, 318. *Anicker* v. *Gunsburg,* 246 U. S. 110, 117.

Decree affirmed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD CO. *v.* BORUM.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 585. Argued April 18, 19, 1932.—Decided May 23, 1932.

The rule that the term "employee" in the Employers' Liability Act does not embrace one who entered the service of a railroad company by means of a fraudulent imposture in evasion of its health rules, which he was physically unable to pass, *held* inapplicable to the facts of the present case, where the plaintiff, in applying for employment, falsely gave his age below the age limit set by the rules respecting hiring, but where the actual difference of age had no relation to his physical fitness; where the false representation was not shown to have deceived the company or to constitute under its rules a ground for discharge; and where the plaintiff, at the time of his injury had worked for the company seven years and was still well under the age fixed by its rules for retirements. *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, distinguished. P. 451.

184 Minn. 126; 238 N. W. 4, affirmed.

CERTIORARI, 284 U. S. 615, to review the affirmance of a judgment on an award in an action under the Federal Employers' Liability Act.

Mr. Henry S. Mitchell, with whom *Mr. John E. Palmer* was on the brief, for petitioner.

Mr. Ernest A. Michel, with whom *Mr. Tom Davis* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In October, 1921, petitioner accepted respondent's application for work as a switchman, and the latter in December, 1928, was injured while employed in interstate

transportation. He brought this action in the district court of Hennepin county to recover damages under the Federal Employers Liability Act (45 U. S. C., §§ 51–59) and, after issue was joined, the parties made an agreement for arbitration under a statute of Minnesota (G. S. 1923, §§ 9513–9519) pursuant to which the company paid plaintiff $12,500 to be retained by him in any event. And it was agreed that, if the arbitrators found for plaintiff on the merits, the award should be $12,500 in addition to the amount so paid. The arbitrators made findings of fact and held that plaintiff's injuries were caused by defendant's negligence and that he was entitled to recover the stipulated amount. A motion made by defendant to vacate having been denied, the district court entered judgment for plaintiff in accordance with the award and the supreme court affirmed. 184 Minn. 126; 238 N. W. 4.

Defendant's contention here is that the state court erred in sustaining the finding that plaintiff was an employee within the meaning of the Act as construed in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock,* 279 U. S. 410.

Plaintiff made application in writing to defendant for employment as switchman. Then, and continuously thereafter while plaintiff worked for it, defendant had a rule, No. 16, promulgated to promote safety and efficiency in the operation of its railroad, which declared that no person over 45 years should be taken into the service. Another rule, No. 22, was to the effect that applications for employment in the yard service not rejected within 30 days would be considered accepted. And there was one, No. 4 (A), stating that all employees who attain the age of 65 will be retired.

When plaintiff made his application he was 49 years old and understood that defendant had a rule against accepting men over 45 to work in its train service. He falsely stated in his application that he was 38 years old and,

when submitting to a physical examination required of applicants for employment, he again so misrepresented his age. This statement was relied upon by the examining surgeon and was in part the basis of his finding and report that plaintiff was in good health and acceptable physical condition. It was a general practice of men, over the age specified in the rule, when applying for such work on the railroads of defendant and other carriers in the Northwest, falsely to represent their ages to be within the specified limit, and that practice was known to the defendant. The arbitrators were unable to find whether defendant knew plaintiff was over 45 years. They did not find, nor does the evidence require a finding, that defendant was deceived by plaintiff's false statements or that it accepted his application because of or in reliance upon them. The application was not rejected within 30 days and, under rule 22, must be deemed to have been finally accepted. Under the terms of the contract of hiring, defendant did not, without more, have the right to remove plaintiff from its service on account of such misrepresentation. Plaintiff worked for defendant as a switchman for about seven years and when injured was well under the age for retirement. His work was satisfactory. Neither his age nor his physical condition contributed to cause his injury.

In *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock, supra,* this Court held that one who obtained employment as a switchman for an interstate carrier by railroad by fraudulently evading the company's rule requiring applicants to submit to a physical examination and who suffered injury in the course of employment in interstate transportation, while the company remained unaware of the deception, was not as of right an employee within the meaning, or entitled to the protection, of the Federal Employers Liability Act, and could not maintain an action for injury under that statute.

Rock was an impostor. He applied for work under his true name and was rejected upon examination because his physical condition was found unacceptable under the carrier's reasonable rule and practice. Later, representing that he had not theretofore made application, he applied again but under a different name and procured another man to impersonate him and in his place to submit to the required physicial examination. And, by means of the surgeon's report upon that man's condition, Rock deceived the company and thereby secured the employment in which, about a year later, he suffered injury. The court said (p. 414): "The deception . . . set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest, because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the Act. . . . [p. 415] While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condition it required. The arbitrators did not find, and the evidence does not show, that plaintiff's false state-

ment of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition or that, if he had given his real age, the surgeon would have found otherwise. Indeed the surgeon's testimony shows that, save in exceptional cases, defendant, in accordance with its established rules, permits its switchmen to continue in the service until they are 65 years old without any physical examination after they are employed. Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees. The evidence indicates that, under its own interpretation of rule 22 together with the schedule constituting the agreement between defendant and its switchmen, defendant after the final acceptance of plaintiff's application was not free to discharge him on account of the false statement as to his age.

It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock, supra,* or the reasons upon which that decision rests.

Judgment affirmed.

RUDE *v.* BUCHHALTER.

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

No. 736. Argued April 28, 1932.—Decided May 23, 1932.

Upon cross appeals from a decree dismissing a suit over a fund deposited in escrow, *Held*—

1. The appellate court went beyond the record and the evidence in holding that the plaintiff depositor was guilty of fraud and

bad faith in bringing and maintaining the suit and that the other depositor should therefore have a lien on the fund for his expenses, including attorneys' fees, in the litigation. P. 460.

2. Nice distinctions as to which of these two parties was the more lacking in good faith or standards, towards others or towards each other, are not sufficient to warrant putting upon one any part of the expenses incurred by the other in waging the contest. P. 461.

3. By the granting of such a lien, when it was not applied for and when the plaintiff had no reason to apprehend that it would be considered, the plaintiff was denied an opportunity to be heard in respect of the authority of the court to make such an allowance and as to the facts touching the propriety or basis for making it. P. 460.

4. Petition for rehearing and its denial upon a reasoned opinion were not the equivalent of a hearing in advance of decision. *Id.*

5. The reasonable expenses, including attorneys' fees, incurred by the depositary in the suit and which are attributable to the discharge of its duty under the escrow agreement, properly may be made a first charge against the fund. P. 461.

6. The depositary is not entitled, as against the plaintiff depositor, to any allowance of expenses or counsel fees incurred to protect its own claim against the fund to secure a debt owing to it by the other depositor. *Id.*

54 F. (2d) 834, modified and affirmed.

CERTIORARI, 285 U. S. 535, to review the reversal of a decree dismissing the bill in a suit by one of two depositors of a fund to obtain judgment against the other and to make it a lien on the fund. Claims of attorneys and of the depositary were also involved.

Mr. Ernest Morris, with whom *Mr. Cass E. Herrington* was on the brief, for petitioner.

In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of the Fifth Amendment. *Hovey* v. *Elliott,* 167 U. S. 409; *Reynolds* v. *Stockton,* 140 U. S. 254; *Munday* v. *Vail,* 34 N. J. L. 418.

The decree awarding such fees and expenses is contrary to principle and to all precedent. "Fee bill" statute, 28 U. S. C., §§ 571–572.

In contemplation of law the fees prescribed in the fee bill are full indemnity for the litigation and, while a court of equity has discretion to award, withhold or apportion costs, the amount of costs which the court may award is limited by the statute. *Henkel* v. *Chicago, St. P., M. & O. R. Co.,* 284 U. S. 444; *Arcambel* v. *Wiseman,* 3 Dall. 306; *Hauenstein* v. *Lynham,* 100 U. S. 483; *The Baltimore,* 8 Wall. 377; *Motion Picture Co.* v. *Steiner,* 201 Fed. 63; *Guardian Trust Co.* v. *Kansas City Sou. Ry. Co.,* 28 F. (2d) 233, reversed 281 U. S. 1.

Lack of good faith in bringing the action is not enough. The case must be one where the plaintiff has made, but failed to sustain, gross charges of fraud and misconduct. *Kansas City Sou. Ry. Co.* v. *Guardian Trust Co.,* 281 U. S. 1.

The rules of the High Court of Chancery of England are no longer followed in this country. Hopkins, Fed. Eq. Rules, 7th ed., p. 42. The new Federal Equity Rules, adopted in 1912, no longer refer us to the English practice for any purpose. It was never the practice of the High Court of Chancery to allow "costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton, or oppressive."

There is no American authority for the allowance of expenses and attorney's fees, or either, in a case of this character. Distinguishing: *Danbury* v. *Robinson,* 14 N. J. Eq. 324; *Thome* v. *Allen,* 70 S. W. 410, 71 *id.* 431; *Trustees* v. *Greenough,* 105 U. S. 527.

The mere fact that the court has control over the fund does not authorize the payment therefrom of counsel fees and other expenses. Such payment is authorized only where the expenses incurred have been for the benefit of all interested. 15 C. J. 105; *Kimball* v. *Atlantic*

States Ins. Co., 223 Fed. 463; *Gund* v. *Ballard*, 80 Neb. 385; *Ryckman* v. *Parkins*, 5 Paige's Ch. (N. Y.) 543.

Where a court of equity grants relief upon conditions, the conditions must not be arbitrary, but must be "warranted by settled principles of equity jurisprudence." Lurton, J., in *Compton* v. *Jesup*, 68 Fed. 263, 316; Pomeroy, Eq. Jur., 4th ed., § 386; *Mantermach* v. *Studt*, 240 Ill. 464, 469; *Lindell* v. *Lindell*, 150 Minn. 295, 299; *Alexander* v. *Shaffer*, 38 Neb. 812, 816.

Even where conditions are proper they may not be absolute. The party should have his option to reject the whole decree. 21 C. J. 688, Equity, § 849; 1 Pomeroy, Eq. Jur., 4th ed., § 385; *Gage* v. *Thompson*, 161 Ill. 403, 407; *Alexander* v. *Merrick*, 121 Ill. 606, 614.

The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

Findings of the trial court are presumptively correct and will not be disturbed unless the trial court has either misapprehended the evidence or gone against the clear weight thereof. *Medsker* v. *Bonebrake*, 108 U. S. 66; *Tilghman* v. *Proctor*, 125 U. S. 136; *American Rotary Valve Co.* v. *Moorehead*, 226 Fed. 202; *Fineup* v. *Kleinman*, 5 F. (2d) 137.

Mr. Henry E. Lutz for respondent.

The Court of Appeals did no more than to apply to extraordinary facts the maxim "He who seeks equity must do equity."

The fee bill has never been construed to interfere with the free exercise of accepted jurisprudence or practice in equity. *Trustees* v. *Greenough*, 105 U. S. 527–528; *Guardian Trust Co.* v. *Kansas City Sou. Ry. Co.*, 28 F. (2d) 233; *In re Schocket*, 177 Fed. 583; *United States* v. *Equitable Trust Co.*, 283 U. S. 738.

Rude himself sought equity in the Court of Appeals on a hypothesis completely departing that sought to be

utilized by him in the trial court. The Court of Appeals did no more, no less, under the special facts, than to exact what it conceived to be equity from him who sought it.

State statutes allowing attorney's fees are enforced in the federal courts, and no conflict has been found with the fee bill statute. *Sioux County* v. *National Surety Co.,* 276 U. S. 238; *Henkel* v. *Chicago, St. P., M. & O. Ry. Co.,* 284 U. S. 444; *Dohany* v. *Rogers,* 281 U. S. 362–370.

It is submitted the federal statute relating to costs and attorney's fees has no more relationship to the maxim that " He who seeks equity must do equity," than it has to cases involving the recovery or preservation of trust funds or to any other instance of long established and generally accepted equity jurisprudence. Cf. *Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379, 384.

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the federal court for Colorado by petitioner against respondent, the First National Bank of Denver, and the members of a law firm to obtain judgment against respondent on an oral promise to pay a large sum and to establish and foreclose a lien therefor upon certain bonds and cash held by the bank in escrow. The principal controversy was between petitioner and respondent. The bank claimed a lien on the fund to secure payment of a small sum owing to it by respondent. The lawyers asserted a claim under an attachment to enforce payment of an amount to be fixed as their compensation for services in a proceeding in the state court. After trial at which much evidence was heard the court dismissed the complaint on the merits. Respondent appealed and petitioner took a cross appeal. On respondent's appeal the Circuit Court of Appeals remanded with

instructions for further proceedings in the district court, and on petitioner's appeal affirmed. 54 F. (2d) 834.

This writ brings here for review the part of the decree directing the district court to deduct from petitioner's share of the fund in escrow the expenses, including reasonable attorneys' fees to be fixed by the district court, to which respondent and the bank have been put in this litigation.

The evidence and findings disclose facts, occurring before those alleged in petitioner's complaint, that shed light upon the question presented. In June, 1929, at a state court receiver's sale he and one Bronstine each bought an undivided half of the property of the Colorado Pulp and Paper Company. The purchase price was paid in cash and in bonds of that company. Under an agreement between petitioner and respondent the former furnished $61,000 and the latter $53,922, making the total required to pay for the half interest bought by petitioner. It was transferred to petitioner and later a quarter interest was conveyed by him to respondent. Possession of the property was given to Bronstine who carried on the business for account of all concerned. Petitioner and respondent wanted to sell their interest and, in order to force Bronstine to buy them out, they pursued a course of hostile and threatening criticism of his management. And when a partition suit by Bronstine seemed imminent they, conspiring to embarrass and delay him should he seek relief by that means, falsely made it to appear of record that a quarter interest in the property was subject to a heavy incumbrance. For that purpose they caused to be made and recorded a deed transferring petitioner's quarter interest to respondent and also a trust deed to the public trustee purporting to secure a note made by respondent to petitioner for $67,500. Respondent soon succeeded in selling the half interest to one Binstock, an associate of Bronstine, for $28,080 in cash and $92,500 in

bonds of the Colorado Paper Products Company. Petitioner, as a condition of clearing the title of record, required that all the cash and bonds should be delivered to the bank to be held in escrow until he and respondent should agree in writing as to the disposition of the same. They promptly divided nearly all of the cash, but came to no agreement for division of the remaining money or the bonds.

Later, petitioner brought this suit claiming that the fictitious note and trust deed were valid and alleging that, when the cash was divided, respondent promised to pay him the full amount of the note and $7,500 out of the profits of the venture and that the bonds should be held in escrow until the balance alleged to be owing, $59,699.61, should be paid. And the complaint alleges that the lawyers had attached the interest of petitioner and respondent and claimed a prior lien on the fund. The prayer is that petitioner have judgment against respondent for the amount claimed; that the same be declared a lien upon the fund, and that the bank sell the bonds and apply the fund to the payment of the judgment. Respondent's answer alleges that the note and trust deed were fictitious, denies the alleged promise, avers that he and petitioner had approximately equal interest in the property and that the only agreement between them was that the sale of their half interest be joint and entire and the proceeds be equally divided between them, and prays that the complaint be dismissed on the merits. The lawyers' answer asserts that they have a lien upon the fund, denies that petitioner has any, and prays that he be denied relief. The bank's answer shows that the cash and bonds were deposited with it to be held in escrow until petitioner and respondent agree in writing as to the disposition of the same, sets forth the division of the cash, alleges that respondent assigned his interest in the fund to the bank as security for the payment of $1,250

and prays that it be declared to have a first lien on the fund, be instructed as to disposition of the balance and have costs and attorneys' fees incurred in this suit.

After hearing the evidence and before making findings under Equity Rule 70½, the district court filed a memorandum showing that petitioner had failed to make out his case. Then respondent submitted requests for findings of fact and, in addition to those negativing petitioner's cause of action, asked the court to find that petitioner and he entered into a campaign against Bronstine, including the making of the fictitious note and trust deed, to create difficulties and to force Bronstine to buy their interest in the property; that, by making the note the basis of his suit, petitioner attempted to perpetrate a fraud against respondent and to impose upon the court; and that petitioner's testimony is unworthy of belief. And respondent proposed as conclusions of law that petitioner by reason of the campaign against Bronstine did not come into court with clean hands, and that the bank should be directed to deliver the entire fund to respondent subject to its lien and the claim of the lawyers. The court, refusing to adopt any such condemnatory requests, made findings merely showing the respective amounts invested in the property by petitioner and respondent; that the fictitious note had been canceled; that pursuant to agreement the proceeds of the sale were to be held by the bank in escrow until respondent and petitioner agreed in writing as to the disposition of the same; that cash had been divided and that the escrow agreement had not been modified. As its conclusion of law the court declared that the complaint should be dismissed on the merits as to all defendants with costs to be taxed against petitioner, and entered its decree accordingly.

On his appeal respondent prayed not for reversal of any part of the decree but that it be made to declare that as against petitioner he was the owner of the fund and

to direct the bank to deliver it to him. The opinion of the court clearly shows that claim to be devoid of merit. Petitioner on his cross appeal merely prayed for the relief sought in his complaint. The decree was affirmed and that ruling is not questioned here. In his brief in that court, petitioner suggested that, if it held his suit was rightly dismissed below, it should direct distribution under the agreement.

First to be considered is the command of the Circuit Court of Appeals that the district court deduct from petitioner's share the "court costs and expenses to which Buchhalter" has "been put in this litigation including reasonable attorneys' fees to be determined by the trial court."

This is not a taxation of costs as between solicitor and client. Cf. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 28 F. (2d) 233; 281 U. S. 1. The only costs allowed to be included in the money judgment against petitioner are those taxable as between party and party; counsel fees or other expenses not so taxable are not to be included. The Circuit Court of Appeals found that, by reason of petitioner's wrongful and fraudulent demands and bad faith in bringing and maintaining this suit, he prevented the distribution of the fund according to the escrow agreement and put respondent and the bank to the expense of making their defense against a groundless claim. It concluded that, because of such inequitable conduct, the decree should impose upon petitioner's share a lien in favor of respondent and the bank for the expenses to which they were so put.

It is significant that the trial court, though specifically requested by respondent so to do, declined to find that petitioner in bringing this suit attempted to perpetrate a fraud against respondent or to impose upon the court or that he came with unclean hands or must have known that the cause of action he alleged was without founda-

tion in fact. Such refusal strongly suggests that the trial court who saw and heard these antagonists upon the witness stand was of opinion that no such condemnation was warranted by the evidence. Its findings appear to have been diligently restrained to those merely sufficient to show that petitioner failed to sustain the essential allegations of his complaint. Indeed, one of respondent's requests for findings reflects unwillingness on the part of petitioner to accept other than cash for his share and that there were reasons, other than matters of mere accounting, for the agreement that the cash and bonds should be held in escrow until petitioner and respondent "have agreed in writing concerning the disposition of the proceeds."

The Circuit Court of Appeals went beyond the issues presented by the record. Its opinion shows that determination of the appeals did not require findings as to the good faith of petitioner. Respondent, claiming the entire fund, necessarily opposed distribution under the agreement. A large part of the work of his attorneys is chargeable to the attempt to enforce his groundless claim to the entire fund. He made no application for a lien upon petitioner's share on account of expenses or attorneys' fees. Such allowances are not made as of course. And petitioner had no reason to apprehend that any such matter would be considered on either appeal. He had no opportunity to be heard in respect of the authority of the court to make such an allowance or as to the facts touching the propriety or basis of the same. Petition for rehearing and denial, as here, upon a reasoned opinion may not in such a matter fairly be regarded as the equivalent of a hearing in advance of decision.

The opinion below condemns the conduct of both parties in various details of the transaction out of which this litigation arose. The record discloses that when acting together in the pursuit of gain they were not governed by

proper standards and that where their interests came in conflict they disregarded considerations making for fair play. Nice distinctions as to which disclosed the greater lack of good faith are not sufficient to warrant a court of equity in putting upon one any part of the expenses incurred by the other in waging such a contest. Assuming that the matter was properly before the court for consideration, we are of opinion that the record does not warrant any such allowance in favor of respondent.

The bank is not entitled as against petitioner to any allowance on account of expenses or counsel fees incurred to protect its claim against the fund to secure the debt owing by respondent to it. But under settled principles applied in equity courts its reasonable expenses including a fair amount to pay the fees of its attorneys incurred in this suit and which are attributable to the discharge of its duty under the escrow agreement properly may be made a first charge against the fund as a whole. *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 744. The decree will be modified in accordance with this opinion, and the costs in this Court will be taxed against respondent.

Modified, and as modified affirmed.

PORTER, AUDITOR, *v.* INVESTORS SYNDICATE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 627. Argued April 22, 1932.—Decided May 23, 1932.

1. The power conferred by the Montana "Blue Sky Law" upon the Investment Commissioner to regulate investment companies and revoke their permits to do business if they fail to comply, is legislative; and the power that the statute grants to the state courts in actions brought within thirty days by any interested person against the Commissioner, "to set aside, modify or confirm" his decisions "as the evidence and the rules of equity may require," is likewise legislative. P. 468.

2. The capacity of the state court under this statute is none the less administrative because the proceeding is by suit in equity instead of an appeal from the Commissioner. P. 468.
3. In providing that "pending any such action" for review in the state court, the findings and decision of the Commissioner shall remain in full force and effect, the statute does not mean that the state court may not stay the enforcement of his decision by interlocutory order. Pp. 469–470.
4. The word "pending," in this connection, is to be interpreted as meaning "until," or while the time is running for bringing the action. *Id.*
5. In construing a statute, unconstitutionality must be avoided, if possible. P. 470.
6. One who would attack a decision and order of the Commissioner, upon the ground that the statute is unconstitutional, must exhaust the administrative remedy provided in the state courts before seeking an injunction from a federal court. Pp. 468, 471.

52 F. (2d) 189, reversed.

APPEAL from a decree enjoining the appellant, as Investment Commissioner, from revoking the appellee's permit to do business as an "investment company" for failure to obey a rule regulating the substance and form of its certificates.

Mr. T. H. MacDonald, Assistant Attorney General of Montana, with whom *Messrs. L. A. Foot,* Attorney General, and *James W. Freeman* were on the brief, for appellant.

Where a statute provides for an appeal to the courts on the reasonableness of the action of an executive officer, and does not expressly provide for notice and hearing before such officer before he takes action (such as the revocation of a permit), such notice, if necessary to due process, is an implied requirement.

"Due process" does not require that the legislature set up a definite standard of equity to apply to all cases. If the conditions were within the power of the legislature

to impose, they may in this case be ascertained by the Commissioner.

Imposition on credulity and ignorance, as well as fraud by active misrepresentation, may be prevented under the police power.

The plan of business of the plaintiff, in requiring the forfeiture shown on the certificate, is inequitable. Its bill does not state a cause of action in equity.

Mr. M. S. Gunn for appellee.

The right to a judicial review of an order made by an administrative board or officer, the effect of which is to deprive a party of property, is essential to due process of law. *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418; *Wadley S. R. Co.* v. *Georgia,* 235 U. S. 651; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

The due process clause is a protection against a temporary deprivation of property or of a right protected thereby, the same as against a permanent deprivation. *Prendergast* v. *N. Y. Tel. Co.,* 262 U. S. 43; *Love* v. *Atchison, T. & S. F. Ry. Co.,* 185 Fed. 321.

If the corporation's permit were revoked, its agents would, in view of the severe penalty provided in § 4049, refuse to sell its certificates. The business would be destroyed, at least pending a judicial review. If the revocation order were ultimately to be set aside, the corporation would have no recourse for the damage sustained through the suspension of its business, or for the injury to its reputation and future business.

It is not within the legislative power to regulate or prohibit the sale of securities, or the making of investment contracts, in order to protect the public against making investments which may not, in the judgment of the Investment Commissioner, promise or furnish a fair

return. The prevention of fraud is the purpose of Blue Sky Laws, and the only purpose which will justify such legislation.

If the Blue Sky Law is construed to authorize the Commissioner to prescribe the terms and provisions of contracts which investment companies may make, it is a clear delegation of legislative power and violative of the constitution of Montana.

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the decree of a specially constituted district court enjoining the enforcement of an order of the State Auditor, who is *ex officio* Investment Commissioner of Montana. Appellee is a Minnesota corporation engaged in the business of selling investment certificates for which the purchaser pays in instalments and which entitle him at a date therein named to receive their face value. The assumption is that the instalments of principal paid in will be augmented by interest thereon compounded at five and one-half per cent, so that the company will be able to pay the sum named in the certificate before the holder's payments reach that total.

Appellee was licensed in 1930 to do business in Montana pursuant to c. 264, Revised Code of 1921, popularly known as the Blue Sky Law, which defines investment companies (§ 4026), forbids their engaging in business without a permit from the state investment commissioner (§ 4032), requires them to apply for such permit and to submit certain information with the application (§ 4033), directs the commissioner to examine the data furnished and to issue or refuse a permit depending upon his determination that the applicant is solvent and its proposed plan of business fair, just and equitable (§ 4036), and to supervise and from time to time examine the affairs and business of all permittees (§ 4043). Sec-

tion 4045, which authorizes the revocation of permits, and § 4038 (as amended by c. 194, Session Laws 1931), which gives an action against the commissioner by a party aggrieved by any finding or decision of that officer, are those which affect the present litigation. They are quoted in the margin.*

Operating under permit appellee has built up a large business in Montana in the sale of its certificates. One form of these provides that in case of default in current payments during the first eighteen months, the purchaser shall forfeit all sums theretofore paid; for default after eighteen months, where payment of $148 on a thousand dollar certificate has been made, the holder is entitled to withdraw $42; after four years and payment of $370, the refund is $254; and after five years he is entitled to re-

* 4045. Revocation of Permits and Appointment of Receiver. Whenever it shall appear to the investment commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds, or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided in this act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit, and if he shall deem advisable, shall communicate such facts to the attorney-general, who shall thereupon at once make an investigation, and if the facts as presented to him by the investment commissioner are substantiated, he shall thereupon apply to a court of competent jurisdiction for the appointment of a receiver to take charge of and conclude the business and affairs of such investment company, and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

Section 4038. Any interested person, who has appeared, co-partnership, association or corporation being dissatisfied with any finding,

payment, without interest, of the whole amount theretofore paid.

On May 7, 1931, the appellant notified the appellee and others similarly engaged to attend a hearing relative to the proposed adoption of a rule applicable to their business. Appellee appeared by an officer and counsel and stated objections. As a result of the hearing a rule was promulgated June 22, 1931, effective July 22, 1931, forbidding the issuance of certificates extending the privilege of withdrawal before maturity unless they should permit withdrawal at any time after the first year of their

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findings or decision of the Commissioner made in accordance with the provisions of this Act, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published in some newspaper published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, copartnership, association or corporation interested in or opposed to said application may appear.

existence, on ninety days' notice in writing, and thereupon entitle the holder to receive the total amount of all instalments paid in, less a penalty not exceeding three and one-half per cent of the matured or face value of the certificate, plus interest compounded annually, at the rate at which the certificate was guaranteed to mature or represented to pay at maturity; and that the certificate and the application should have printed thereon the amount to be paid in, the withdrawal or surrender value, and the loan value, as of the end of each year after the date of issuance.

The commissioner claimed authority to promulgate this order under that portion of § 4045 which empowers him to revoke the permit of an investment company when it shall appear to him to be "conducting its business in an unsafe, inequitable or unauthorized manner." He asserted his intention to revoke appellee's permit if it failed to obey the rule; whereupon the latter brought action in the District Court to enjoin the appellant from revoking or purporting or attempting to revoke its permit for failure to comply with the order. After the taking of evidence upon a motion for a temporary restraining order the case was by stipulation submitted as upon final hearing. The court granted an injunction, holding that the challenged statute was violative of the due process clause of the Fourteenth Amendment, as lacking any provision for notice or hearing before the revocation of a license, and also because no rule or standard is fixed for the determination of adequate cause for revocation; and further the act constituted a delegation of legislative power contrary to the mandate of Section 1, Article V, of the Constitution of Montana. The appellant assigns these rulings as error, and in addition contends that there was no jurisdiction in a federal equity court to entertain the cause. If this position is sound we need not consider the other alleged errors.

We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge "may set aside, modify or confirm said . . . decision as the evidence and the rules or (*sic*) equity may require." The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 229-230; *Pacific Live Stock Co. v. Lewis,* 241 U. S. 440, 444, 450–451. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 438-442. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order.

But we are told that the commissioner asserted his intention to enforce the order, and that the statute forbids the state court to afford interlocutory relief. Thus, says the appellee, though trial might result in a decision vacating the commissioner's order, in the interval irreparable harm would have been done by the revocation of the company's permit, and its officers and agents rendered liable to criminal prosecution. Such a state of the law, it is insisted, amounts to a denial of due process to which one confronted with the possible loss of property is not bound to submit but may at once, if there be the requisite diversity of citizenship and amount in controversy, apply to a federal court for relief. Conceding the correctness of the premises, the conclusion is sound. *Pacific Telephone Co.* v. *Kuykendall,* 265 U. S. 196. The appellant, however, denies the asserted statutory prohibition, and says that the plaintiff in an action attacking a decision by the commissioner may upon a proper showing obtain a stay of its operation.

These opposing views require a construction of the act. Section 4038 as amended provides, so far as applicable:

"The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state. . . . [and] pending any such action the said findings or decision of said Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code

of Civil Procedure.* But it is said that the succeeding clause precludes such a remedy. The argument is that the words "pending any such action" mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word "pending" has the significance of "until," or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean that unless and until a person affected brings his action he may not disregard the order. We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler,* 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.

Where as ancillary to the review and correction of administrative action, the state statute provides that the

*§ 9243. Injunction Order—When Granted. An injunction order may be granted in the following cases: 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or, any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff; . . .

See also §§ 9244, 9245, 9246, 9247, 9250, 9251 and 9252, dealing with security to be entered on interlocutory injunction, motions to dissolve the same before trial, etc.

complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co.* v. *Russell,* 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.

The present case is not one in which the review of the commissioner's action is judicial in character. If it were, the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See *Bacon* v. *Rutland R. Co.,* 232 U. S. 134; *Prendergast* v. *New York Tel. Co.,* 262 U. S. 43; *Railroad Commission* v. *Duluth St. Ry. Co.,* 273 U. S. 625. As we have seen, under the Montana statute the administrative proceeding is not complete until the court shall have acted in revision and correction of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We can not so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

GREGG DYEING CO. *v.* QUERY ET AL.*

APPEALS FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 170. Argued December 10, 1931.—Decided May 31, 1932.

1. The constitutionality of a state taxing scheme is to be determined by substance rather than by form, and the controlling test is the operation and effect of the statute as enforced by the State. P. 476.
2. The question of constitutionality is not necessarily confined to the particular statute attacked, but may depend upon the resultant of that and other statutes. Pp. 479–480.
3. When the Supreme Court of the State has held that two or more statutes must be taken together, this Court accepts that conclusion as if written into the statutes themselves. P. 480.
4. A State may tax gasoline bought and imported from another State which has come to rest within the taxing State and is stored there by the purchasers for future use in their local business. P. 478.
5. Such a tax is not bad for discrimination against interstate commerce or for discrimination violative of the equal protection of the laws, if the same tax burden is in effect imposed on all other consumers of gasoline through a tax on local sales which is "passed on" to the purchasers. Pp. 480, 482.

166 S. C. 117; 164 S. E. 588, affirmed.

APPEALS from decrees dismissing the complaints in two suits to enjoin collection of taxes.

Mr. James M. Lynch, with whom *Messrs. P. F. Henderson, Shepard K. Nash,* and *B. A. Morgan* were on the brief, for appellants.

The following decisions cover the taxing of interstate importations of gasoline or oils: *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Askren* v. *Continental Oil Co.,* 252 U. S. 444; *Bowman* v. *Oil Co.,* 256 U. S. 646; *Texas Co.* v. *Brown,* 258 U. S. 470; *Sonneborn* v. *Cureton,* 262 U. S. 513; *Hart Refineries* v. *Harmon,* 278 U. S. 499; *Breece Lumber Co.* v. *Asplund,* 283 U. S. 788.

* Together with No. 245, *City of Greenville et al.* v. *Query et al.*

This gasoline tax act is repugnant to both commerce clause and equal protection clause, in that it discriminates against gasoline produced by other States and places a license tax only upon citizens of this State who import and store such gasoline.

The tax is unconstitutional as a license tax because it taxes both interstate importation and storage within the State.

The fact that the consumer must ultimately pay does not change the nature of the tax prescribed. Cf. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Eastern Air Transport* v. *Query,* 52 F. (2d) 456; affirmed, 285 U. S. 147; *Helson* v. *Kentucky,* 279 U. S. 245.

To stand the test of constitutionality, the statute must be constitutional within its four corners. Recourse may not be had to other statutes.

The Gasoline Tax Act of 1930 is plain and free from ambiguity. It taxes only gasoline brought into the State in interstate commerce. See *Heisler* v. *Colliery Co.,* 260 U. S. 259; *Los Angeles* v. *Lewis,* 175 Cal. 777–781.

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.

By these actions, within the original jurisdiction of the Supreme Court of South Carolina, appellants sought to restrain the enforcement of the state statute known as the "Gasoline Tax Act of 1930." Acts So. Car., 1930, p. 1390. The statute was assailed upon state and federal grounds, the latter being that the act violated the commerce clause (Art. I, § 8, par. 3), and the equal protection clause of the Fourteenth Amendment, of the Federal Constitution. The state court overruled these contentions and dismissed the complaints. The cases are brought here by appeal.

The provisions of the statute which give rise to the federal questions are found in sections one and six as follows:

"Section 1. . . . Every person, firm, corporation, municipality, . . . in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, . . . and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by acts of the General Assembly of the State of South Carolina, the same being Act No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products or petroleum; *Provided,* That this Act shall not impose a tax upon crude petroleum, residium [*sic*] or smudge oil: *Provided, further,* That one percent to cover loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act. . . .

"Section 6. Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce."

In the case of *Gregg Dyeing Company* (No. 170), the facts alleged in the complaint were admitted by demurrer and other facts were stipulated as if the complaint had set them forth. It thus appeared that plaintiff conducted a bleachery in Aiken, South Carolina, and used gasoline in its processes; that its practice is to buy gasoline in bulk from dealers outside the State of South Carolina and to have the gasoline shipped in interstate commerce to plaintiff's plant where the gasoline is unloaded and stored, and kept in storage, in plaintiff's tanks, for more than twenty-four hours and until it is needed for use, and in its entirety is used by plaintiff in its manufacturing business and for its own purposes, and is not brought into the State for resale and is not resold; that there is in Charleston, South Carolina, a refinery maintained by the Standard Oil Company at which large quantities of gasoline are produced; that much of the gasoline thus produced, and much that is brought into the State by oil companies for resale, is stored within the State for more than twenty-four hours before it is sold or used, and is not taxed for its importation and/or storage in South Carolina, but is taxed when it is used or sold in that State by such oil companies; and that such gasoline, produced

in the refinery above-mentioned, as is shipped to other States is not taxed in South Carolina. Final judgment was rendered in favor of defendants upon the demurrer.

In the case brought by the *City of Greenville* (No. 245), plaintiff alleged that it was a municipal corporation which had brought into the State of South Carolina gasoline in tank car lots, purchased outside the State, and thereafter had stored, and used and consumed it for public purposes. Defendants demurred, there was an agreed statement of facts in addition to the allegations of the complaint, and the judgment upon the demurrer thus raised the same federal questions as those presented in the case first mentioned.

In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 509, 510. The operation and effect of this tax act have been determined definitely by the state court in the instant cases. Construing the act, that court has said:

"The Act in question may be said to be complementary to the other statutes of South Carolina under which are assessed a gallonage tax on gasoline and other petroleum products. Indeed, it expressly excludes from its provisions all gasoline upon which a like tax has been paid under other statutes. It so declares in its title and specifically designates in its body the statutes, payment of the tax under which exempts from its burden. . . .

"In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline, vol. 32, Stat. at Large, p. 835. The tax then imposed was two

cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These statutes, however, only reached 'dealers' in this commodity. . . .

"Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown. Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in gasoline in quantities from without the State, and storing it for their own purposes, the Legislature in 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. . . . Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of 6 cents per gallon, no matter what the origin of, or State in which, the gasoline is produced. . . .

"On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. . . .

"The tax here imposed is an excise tax and not a property tax. . . . All oil companies in South Carolina, including the Standard Oil Company in Charleston, S. C. are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina, whether it be for operating their trucks upon the highways or otherwise (34 Stat. at Large, p. 197). . . .

"The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. . . . Mere storage after manufacture or production is not

enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina. Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C. manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other States. It is admitted that that company, like all others, is required to pay and does pay a tax of six cents on all of its products sold in South Carolina or used and consumed in its business."

We may lay aside, as not here involved, any question relating to importations from foreign countries. As to interstate commerce, the questions are (1) whether the Act as applied by the state court imposes a direct burden upon that commerce, and (2) whether, although the subject of the tax would otherwise be within the power of the State, the tax is invalid because it creates an unconstitutional discrimination against transactions in interstate commerce.

As to the first question, we are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority "to tax the products or their storage or sale." *Texas Company* v.

Brown, 258 U. S. 466, 478; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 519, 520; *Hart Refineries* v. *Harmon,* 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 648, 649. See *Hart Refineries* v. *Harmon, supra; Breece Lumber Co.* v. *Asplund,* 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. *Helson* v. *Kentucky,* 279 U. S. 245, 252; *Eastern Air Transport* v. *South Carolina Tax Comm.,* 285 U. S. 147. In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept within the State for use in their local enterprises. As the Court said, in *Hart Refineries* v. *Harmon, supra,* interstate transportation having ended, the taxing power of the State in respect of the commodity may, so far as the commerce clause of the Federal Constitution is concerned, " be exerted in any way which the State's constitution and laws permit." This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State.

The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question " taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed." But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional " within its four corners," that is,

considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert* v. *Louisiana,* 272 U. S. 312, 317. See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 73.

Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Company* v. *Brown, supra,* at p. 479; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 579. So far as dealers in gasoline within the State are concerned there appears to be no ground for appellants' claim of discrimination. The point with respect to appellants is that they are not dealers but users, consumers of gasoline in their business. They are required to pay the tax with respect to the gasoline they keep for such use and consumption within the State. As to such gasoline, they pay precisely the same amount per gallon as other consumers within the State are in effect required to pay through the tax on the dealers from whom such consumers buy. Discrimination is asserted in relation to manufacturers who produce gasoline within the State and consume it in their enterprises. Appellants have directed particular

attention to the case of a refining company which produces gasoline in South Carolina and consumes gasoline in its business and also sells it within the State. The state court, construing the applicable statute, has held that in such a case the producing company is taxed with respect to the gasoline it uses as well as with respect to the gasoline it sells. The decision is unequivocal that " all oil companies in South Carolina are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina." With respect, then, to the gasoline used by appellants in their business, there is in this aspect no discrimination against them because their gasoline has its origin in another State, as others either buying or producing gasoline within the State pay the tax at the same rate in relation to their consumption.

Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. *Shaffer* v. *Carter,* 252 U. S. 37, 55. Appellants' attack upon the tax comes to this, in the last analysis, that the tax in their case is laid with respect to the gasoline they have bought outside the State and keep in storage for use and consumption in their business, whereas others are taxed, not with respect to the gasoline they keep in store for use and consumption, but for the gasoline they use and consume. But appellants have admitted, as the state court has said, that " the only kind of storage affected " is that for the purpose of use and consumption. In this view the state court found no distinction of substance with respect to the practical operation of the taxing statutes in *pari materia,* as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gasoline they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have

not sustained. They have failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact.

The same considerations, with respect to discrimination, apply to the claim that the statute in question violates the equal protection clause of the Fourteenth Amendment. The statement of this Court in *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 373, is apposite: "In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary."

The right of the City of Greenville (No. 245) to raise the questions presented under the Federal Constitution does not appear to have been challenged or passed upon by the state court and has not been discussed at this bar. Accordingly, that question has not been considered here.

Judgments affirmed.

EDWARDS *v.* UNITED STATES.

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 790. Argued April 11, 1932.—Decided May 31, 1932.

Under § 7 of Art. I of the Constitution, a bill signed by the President within ten days (Sundays excepted) after it was presented to him, but after the final adjournment of the Congress that passed it, becomes a law. Pp. 485, 494.

RESPONSE to a question certified by the Court of Claims.

Attorney General Mitchell, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr.*

Erwin N. Griswold were on the brief, for the United States.

That the President may sign a bill during a short recess of the Congress was settled in *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, but the question arising at the end of a session was expressly reserved, and no mention was made of the situation arising when a Congress ends.

Respecting that situation there has been no long-continued practical construction of the Constitution which can be accepted as controlling. President Lincoln signed one bill after the final adjournment of the Congress which passed it, but subsequent legislation prevented a definite adjudication of the question. President Wilson approved a group of bills after the adjournment of a session in reliance on an opinion by Attorney General Palmer. 32 Op. Atty. Gen. 225. President Hoover, in March, 1931, in reliance on an opinion by the present Attorney General (36 Op. Atty. Gen. 403) approved eighteen bills including the one here involved, after the expiration of the 71st Congress. The question has been frequently debated, but the general practice of Presidents to sign bills during sessions of Congress has been induced by a purpose to avoid rather than to decide the question. The state of the precedents is such that the question is an open one to be resolved by a consideration of the constitutional provision.

Congress has no function to perform in respect of bills which have been approved, so there is no good reason why the President should not approve bills after adjournment. Public interest requires that he be given the full ten days contemplated by the Constitution to consider measures passed by Congress. In directing that every bill shall be presented to the President, the Constitution provides " if he shall approve, he shall sign it." It does

not expressly say when he shall sign it, or that he shall sign it while Congress is in session. The argument that if he may approve a bill after the adjournment he has an indefinite time to act, finds no support in the Constitution. That he must sign within ten days is necessarily implied; for, if he does not and Congress shall have adjourned, it is provided that the bill shall not become a law.

The argument that the President is a part of the legislative branch when acting on legislation and that his functions terminate when Congress finally adjourns is merely a political theory without any support in the words of the Constitution. Because of the large number of bills presented to Presidents at the end of sessions of Congress in modern times, public interest will be served by holding that he may approve bills after adjournment.

The reasoning of the Court in *Seven Hickory* v. *Ellery,* 103 U. S. 423, supports these conclusions.

Mr. M. Walton Hendry, for Edwards, cited: 36 Op. Atty. Gen. 403; *Orange Car & Steel Co.* v. *United States,* Ct. Cls., Feb. 8, 1932 (op. withdrawn when the present question was certified); *United States* v. *Weil,* 29 Ct. Cls. 523.

Mr. Hatton W. Sumners, by leave of Court, argued the cause on behalf of the Judiciary Committee of the House of Representatives, as *amicus curiae.*

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

Private Bill No. 510 of the 71st Congress (c. 595, 46 Stat. 2163) provided that the Court of Claims should have jurisdiction to adjudicate a certain claim of the plaintiff against the Government. The court states that the bill was approved by the President on March 5, 1931, that is,

within ten days (Sundays excepted) after it was presented to him, but after the final adjournment of the Congress which passed it. The following question is certified:

"Did the Act of March 5, 1931 (46 Stat. 2163), become law when it was approved by the President on March 5, 1931, after the final adjournment on March 4, 1931, of the Congress which had passed it?"

No difference of opinion between the parties as to the validity of the measure, as thus approved, is disclosed in the argument at bar. The President approved the bill upon the advice of the Attorney General (36 Op. A. G. 403) who, in accord with the plaintiff, submits that the certified question should be answered in the affirmative. In view of the opinion at one time expressed by the Judiciary Committee of the House of Representatives (H. R. Report No. 108, 38th Cong., 1st sess., June 11, 1864), the Attorney General advised the Judiciary Committee of that House of the pendency of the present cause, and we granted to Mr. Sumners, the Chairman of that Committee, at his request, leave to appear as *amicus curiae*. He has stated to the Court that the Judiciary Committee of the House of Representatives is now of the opinion that the President has the power asserted and he has presented an argument in support of the President's action. While no contention to the contrary has been urged upon us in the instant case, our attention has been directed to opposing views strongly held in the past, and these—no less than those now advanced—we have carefully considered in reaching our conclusion.

The question arises under the second paragraph of Section 7 of Article I of the Constitution, which reads as follows:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it,

with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

The last sentence of this provision clearly indicates two definite and controlling purposes: *First.* To insure promptness and to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence, the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. *Second.* To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose. As this Court said in *The Pocket Veto Case,* 279 U. S. 655, 677, 678: "The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised, lessened, directly or indirectly." The constitutional provision is explicit as to the consequences in case the bill is not signed by the President within the time fixed. The bill then becomes a law, unless the Congress by adjournment has prevented the return of the bill, and, in the latter event, it is not to be a law. But the provision is not explicit as to the consequence in case the bill is approved by the President

within the time fixed and in the meantime the Congress has adjourned.

The proceedings and debates of the Constitutional Convention throw no light upon this question. See *The Pocket Veto Case, supra,* at p. 675. Nor has the provision received a practical construction so positive and consistent as to be determinative. The general practice of Presidents, in being present at the Capitol for the purpose of signing bills during the closing hours of the sessions of the Congress, has indicated the existence of doubt and the desire to avoid controversy.[1] It appears that the question was raised during the administration of President Monroe, and, in view of a difference of opinion among his advisers, the bill in question was not signed.[2] .President

[1] See Memoirs of John Quincy Adams (1875), vol. 7, pp. 233, 234.

[2] John Quincy Adams gives the following account of this incident:

"Another question discussed was, whether the President could now sign the Act concerning the Florida wreckers, which was examined and actually announced to the House as having been signed, but accidentally, among forty or fifty other Acts approved the last evening before the close of the session, remained without his signature. Could the President sign an Act, Congress not being in session? Wirt thought he could. So did I. The article of the Constitution concerning the signature of the President to Acts of Congress was read and analyzed. Nothing in it requiring that the President should sign while Congress are in session.

"Calhoun said that uniform practice had established a practical construction of the Constitution.

"I observed that the practice had merely grown out of the precedents in the British Parliament. But the principles were different. The King was a constituent part of Parliament, and no Act of Parliament could be valid without the King's approbation. But the President is not a constituent part of Congress, and an Act of Congress may be valid as law without his signature or assent.

"Calhoun still thought that the uniform practice made the law. . . . And as the Act was to commence its operation only in October, and was not of an urgent character, it was concluded to be the safest course to leave the Act unsigned, and state the facts to Congress

Lincoln, on March 12, 1863, approved a bill after the Congress had adjourned *sine die* on March 4, 1863, the bill having been passed on March 3, 1863 (c. 120, 12 Stat. 820). This action was not left unchallenged. The Judiciary Committee of the House of Representatives made a unanimous report, in response to a resolution of the House, that the Act was not in force.[3] It does not appear that the House acted upon this report. But the Congress soon after passed an Act which referred to the Act of

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at their next session."—Memoirs of John Quincy Adams (1875), vol. 6, pp. 379, 380.

[3] The Committee said that the act had been approved by the President "under the belief that the last clause of the section of the Constitution, above quoted, was designed more especially to prevent Congress from enacting laws without the approval of the Executive, which might be done by the passage of bills by the two houses, followed by an adjournment, before the President could examine and return them, were it not for the declaration that in such cases the bills shall not be laws; and did not relate to cases wherein the Executive should approve bills sent to him by Congress within ten days, even though an adjournment should occur before the return of the bills.

"That there is force and plausability in this position, a little reflection will discover to any mind; but the committee cannot receive it as a correct interpretation of the Constitution.

"The ten days' limitation contained in the section above quoted refers to the time during which Congress remains in session, and has no application after adjournment. Hence if the Executive can hold a bill ten days after adjournment, and then approve it, he can as well hold it ten months before approval. This would render the laws of the country too uncertain, and could not have been intended by the framers of the Constitution.

"The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress.

"The committee, therefore, conclude that the act referred to, approved March 12, 1863, is not in force; and in this conclusion the committee are unanimous." H. R. Report No. 108, 38th Cong., 1st Sess., June 11, 1864.

March 12, 1863, as having been approved, and added to its provisions. Act of July 2, 1864, c. 225, 13 Stat. 375.[4] The Act of March 12, 1863, was the subject of several decisions of this Court, and in these no question appears to have been raised as to its validity in view of the time of its approval by the President.[5] President Johnson refused to sign a bill which he received on April 1, 1867, as the Congress had taken a recess from March 30, 1867, to July 3, 1867.[6]

It appears that President Cleveland was urged to approve a bill after the adjournment of the Congress, but he did not do so.[7] President Harrison, acting on the advice of Attorney General Miller (20 Op. A. G. 503), signed a number of bills during a recess of the Congress. Upon the opinion of Attorney General Palmer that the action was constitutional (32 Op. A. G. 225), President Wilson signed several bills after the adjournment *sine die*

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[4] Other references to the Act of March 12, 1863, as approved, are found in the Act of July 28, 1866, c. 298, § 8, 14 Stat. 329; Act of July 27, 1868, c. 276, § 3, 15 Stat. 243.

[5] *Mrs. Alexander's Cotton,* 2 Wall. 404, 420, 423; *United States* v. *Anderson,* 9 Wall. 56, 64; *Ex parte Zellner,* 9 Wall. 244, 245; *United States* v. *Padelford,* 9 Wall. 531, 540; *United States* v. *Klein,* 13 Wall. 128; *Carroll* v. *United States, id.,* 151; *Armstrong* v. *United States, id.,* 154; *Pargoud* v. *United States, id.,* 156. See *Hodges* v. *United States,* 18 Ct. Cls. 700; *United States* v. *Weil,* 29 Ct. Cls. 523.

[6] President Johnson filed the bill in the State Department with an endorsement, stating his belief that approval in these circumstances was not authorized by the Constitution. 4 Hinds' Precedents, § 3493. A resolution directing the re-enrollment of the bill was passed by the House of Representatives but not by the Senate. *Id.*

[7] The statement has been made that Attorney General Garland advised President Cleveland that he was without authority to sign bills after Congress had adjourned (see 32 American Law Review, p. 212), but we are informed that there is no record in the Department of Justice of any opinion by Attorney General Garland upon the subject. See 36 Op. A. G. at p. 404.

of the second session of the 66th Congress.[8] This precedent was followed in the instant case by President Hoover, relying upon the opinion of Attorney General Mitchell that there was no ground for a distinction as to the President's power in this respect between the case of adjournment at the close of a session and the final adjournment of the Congress.

The authority of the President to approve bills during a recess of the Congress, but within the time fixed by the Constitution, has been sustained by this Court. *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423. It appeared in that case that on December 22, 1892, two days after presentation of the bill to the President, the Congress had taken a recess until January 4, 1893. The bill was signed by the President on December 28, 1892. The Court expressly reserved the question, as one not before the court, whether the President could approve a bill " after the final adjournment of Congress for the session." But the reasoning of the opinion applies with as much force to the case of an adjournment, whether it is at the close of a session or is the final adjournment of the Congress, as to the case of a recess for a specified period.

The Court effectively answered the opposing contention based upon the legislative character of the President's function in approving or disapproving bills. See *Smiley* v. *Holm,* 285 U. S. 355. The fact that it is a legislative function does not mean that it can be performed only while Congress is in session. The President acts legislatively under the Constitution but he is not a constituent part of the Congress.[9] In the *La Abra* case the Court said

[8] The session adjourned *sine die* on June 5, 1920, 41 Stat. 363, 1639. The following bills were subsequently approved by the President: Act of June 10, 1920, c. 285, 41 Stat. 1063; Acts of June 14, 1920, c. 286, 287, 288, 289, 290 and 291; *id.,* 1077-1079. See 30 Yale Law Journal, 1.

[9] See Note 2.

(*id.* p. 454): "It is said that the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature; and this view, it is argued, conclusively shows that his approval can legally occur only on a day when both Houses are actually sitting in the performance of legislative functions. Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws which the Constitution requires him to execute. But that consideration does not determine the question before us. As the Constitution while authorizing the President to perform certain functions of a limited number that are legislative in their general nature does not restrict the exercise of those functions to the particular days on which the two Houses of Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the Executive." From this point of view, and so far as the character of the President's function is concerned, it obviously makes no difference whether the Congress has adjourned *sine die* or to a day named.

The Court's reasoning in the case cited also meets the objection that if the President may approve bills after adjournment, his action would be free of any limitation of time. The constitutional provision does not admit of such a construction. The intention is clearly shown that in any event the President must act within the prescribed ten days, and the opinion in the *La Abra* case is explicit as to the President's duty in this respect. The Court said (*id.*, pp. 453, 454): "The time within which he [the President] must approve or disapprove a bill is prescribed. If he approve a bill, it is made his duty to sign it. The Constitution is silent as to the time of his signing, except that his approval of a bill duly presented to him—if the bill is to become a law merely by virtue of such approval—must be manifested by his signature within ten

days, Sundays excepted, after the bill has been presented to him. It necessarily results that a bill when so signed becomes from that moment a law. But in order that his refusal or failure to act may not defeat the will of the people as expressed by Congress, if a bill be not approved *and* be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him." But if this limitation of time applies to the President's action when the Congress is in recess, it is apparent that the limitation equally governs his action when the Congress has adjourned. The constitutional provision affords no basis for a distinction between the two cases.

There is nothing in the words of the Constitution which prohibits the President from approving bills, within the time limited for his action, because the Congress has adjourned; and the spirit and purpose of the clause in question forbid the implication of such a restriction. The provision that a bill shall not become a law if its return has been prevented by the adjournment of Congress is apposite to bills that are not signed, not to those that are signed. There is no requirement that bills that are signed should be returned. No further action is required by Congress in respect of a bill which has been presented to the President, unless he disapproves it and returns it for reconsideration as the Constitution provides. We may quote again from the opinion in the *La Abra* case (*id.*): " It has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed or not by message from the President of the fact of his approval of it, the bill becomes a law, and is

delivered to the Secretary of State as required by law." [10]

Another objection has been raised that, if the authority of the President to approve bills continues after adjournment of the Congress, an incoming President might approve bills passed during the official term of his predecessor.[11] But it does not follow that because an incoming President, to whom a bill has not been presented by the Congress, cannot approve it, that a continuing President, to whom a bill has been presented by the Congress, must be debarred of his opportunity to give his approval within the time which the Constitution has prescribed.

Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. The importance of maintaining that opportunity unimpaired increases as bills multiply. The Attorney General calls attention to the fact that at the time here in question, that is, between February 28, 1931, and noon of March 4, 1931, 269 bills were presented to the President for his consideration, 184 of which were presented to him during the last twenty-four hours of the session. No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned. No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills in the closing hours of a session, with the result that bills may be approved which on further consideration would be dis-

[10] Compare *Seven Hickory* v. *Ellery*, 103 U. S. 423; *People* v. *Bowen*, 21 N. Y. 517; *State ex rel. Belden* v. *Fagan*, 22 La. Ann. 545; *Solomon* v. *Commissioners*, 41 Ga. 157; *Lankford* v. *Commissioners*, 73 Md. 105; 20 Atl. 1017; 22 Atl. 412.

[11] See opinion of Chief Justice Richardson in *United States* v. *Weil*, 29 Ct. Cls. 523, 549.

approved, or may fail although on such examination they might be found to deserve approval.

In the instant case, the President, to whom the bill was presented, approved it within the time prescribed by the Constitution, and upon that approval it became a law. The question certified is answered in the affirmative.

Question answered "Yes."

WYOMING *v.* COLORADO.

No. 15, Original. Argued December 3, 1931.—Decided May 31, 1932.

1. The decree in the earlier suit between Wyoming and Colorado, 259 U. S. 419, 496; 260 U. S. 1, defined and limited the quantity of water which Colorado and her appropriators may divert from the Laramie River and its tributaries and thus withhold from Wyoming and her appropriators. Pp. 506–508.
2. In a suit between two States to determine the relative rights of each and of their respective citizens to divert water from an interstate stream, private appropriators are represented by their respective States and need not be made parties to be bound by the decree. Pp. 508–509.
3. The bill in the present case shows that the diversions in Colorado, complained of as violating the former decree, are not merely the acts of private corporations and individuals not parties to this suit, but that they are acts done by or under the authority of Colorado; and it shows with sufficient certainty to require answer that the decree has been violated by diversions in Colorado to the damage of Wyoming and her water-users. Pp. 509–510.

Motion to dismiss bill, overruled.

On motion to dismiss an original suit brought for the purpose of enforcing a decree in an earlier suit between the two States.

Mr. Paul W. Lee, with whom *Messrs. Clarence L. Ireland,* Attorney General of Colorado, *Charles Roach,* Deputy Attorney General, *Fred A. Harrison,* Assistant Attorney General, *C. D. Todd, Wm. R. Kelly, George H.*

Shaw, Donald C. McCreery, Wm. A. Bryans, III, and *Lawrence R. Temple* were on the brief, for the defendant in support of the motion to dismiss.

Mr. James A. Greenwood, Attorney General of Wyoming, with whom *Messrs. Richard J. Jackson,* Deputy Attorney General, and *Philip S. Garbutt* and *George W. Ferguson,* Assistant Attorneys General, were on the brief, for complainant in opposition to the motion to dismiss.

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit brought by the State of Wyoming against the State of Colorado to enforce a decree of this Court (259 U. S. 419, 496; 260 U. S. 1), rendered in an earlier suit between the same States respecting their relative rights to divert and use for irrigation the waters of the Laramie River, a stream rising in Colorado and flowing northward into Wyoming.

In the present bill, shortly described, Wyoming alleges that Colorado is departing from that decree by permitting the diversion and use within her territory of waters of the Laramie in quantities largely in excess of those accorded to her by the decree; that these excessive diversions are preventing Wyoming from receiving and using the amount of water which the decree accorded to her; that Colorado, unless restrained by this Court, will continue to permit such excessive diversions and thereby will largely or entirely deprive Wyoming of the use of the water accorded to her in the decree; that the measuring devices installed by Colorado to measure the waters diverted within her territory do not accurately show the full quantities so diverted; and that Colorado refuses, although duly requested, to permit Wyoming to install other suitable devices or participate in the measurements.

The bill construes the decree as determining the rights of the two States in the waters of the Laramie by according to Colorado

1. 18,000 acre feet of water per annum by reason of the Skyline ditch appropriation;

2. 4,250 acre feet of water per annum by reason of certain meadowland appropriations;

3. A relatively small amount of water appropriated prior to 1902 through the Wilson Supply ditch from the headwaters of Deadman Creek, a Colorado tributary of the Laramie; and

4. 15,500 acre feet of water per annum by reason of the Laramie-Poudre tunnel appropriation, making an aggregate of 37,750 acre feet per annum, apart from the Wilson Supply ditch appropriation;

and by according to Wyoming 272,500 acre feet of water per annum by reason of appropriations in that State.

The relief sought is the protection and quieting of Wyoming's rights under the decree; provision for accurately and effectively measuring and recording the quantities of water diverted in Colorado; an injunction restraining Colorado from continuing or making any diversion in excess of the quantities of water accorded to her by the decree—in the event the injunction in that decree is held to relate only to diversion by reason of the Laramie-Poudre tunnel appropriation; and such other and full relief as may be just and equitable.

Colorado challenges the bill by a motion to dismiss in the nature of a demurrer. The principal grounds of the motion are, (1) that the bill proceeds upon the theory that the prior decree determined, as against Colorado and her water users, the full quantity of water which rightfully may be diverted from the stream within that State, and likewise the quantity which Wyoming and her water users are entitled to receive and use from the stream

within that State—all of which, it is insisted in the motion, is refuted by the record, opinion and decree in the prior suit; (2) that the bill shows that the acts complained of are not acts done by Colorado, or under her authority, but acts done by private corporations and individuals not parties to the present suit and with respect to which no relief can be had against Colorado; and (3) that, in any event, the bill fails to show with certainty any violation of the decree or any damage to Wyoming or her water users.

In the bill, Wyoming does take the position that the decree in the earlier suit determines the rights of each State as against the other, including their respective water users, respecting the diversion and use of the waters of the interstate stream—in other words, that the decree fixes and limits the quantities of water which Colorado, including her water users, is entitled to divert and use within that State and thus withhold from Wyoming, and likewise determines the amount of water which Wyoming, including her water users, is entitled to receive and use within her territory. Counsel for Colorado, recognizing that such is the position taken in the bill, say in their brief: "The principal purpose of the motion to dismiss is to join issue with the contention of the complainant that the whole matter has already been adjudicated by the former decree. The problem so presented is a law question and it is apprehended that this should be determined *in limine*." And, after indicating Colorado's purpose to answer if so required, they further say: "We insist, however, that the cause will be greatly accelerated and confusion be avoided by determining at the threshold the issues of law tendered by the complainant, and thereupon the issues of fact should be defined, if any are considered to stand for adjudication after passing upon the construction problem, which is the only substantial controversy

in the case." Evidently therefore the construction of the decree in the earlier suit is the chief matter in dispute.

That suit was brought by Wyoming against Colorado and two Colorado corporations. The corporations, with Colorado's authority and permission, were proceeding to divert water from the Laramie in Colorado and to conduct it through a proposed tunnel into the valley of the Cache la Poudre in Colorado, there to be used in irrigation. The project was designed to divert from the Laramie 56,000 acre feet per annum at first and 15,000 more later on. The purpose of the suit was to prevent the proposed diversion, and to that end the complaint set forth, among other things, that the doctrine of appropriation for beneficial use, whereby priority in time gives priority in right, was recognized and applied by both Colorado and Wyoming in adjusting conflicting claims to the use of waters of natural streams; that Wyoming and her citizens had been for many years irrigating and thereby making highly productive very large amounts of land along the Laramie and its tributaries in that State through the use of waters appropriated for that purpose from those streams, and expenditures running into millons of dollars had been made in the construction of reservoirs, canals and other appliances for the purpose of so using such waters; that these appropriations and this use had been maintained from a time long prior to the commencement of the Laramie-Poudre tunnel project in Colorado; that the date when that project was commenced was "on or about the first day of December, 1909"; that before that project was commenced Colorado and certain of her citizens had appropriated water from the Laramie in Colorado for the irrigation of lands (meadow lands) in that State adjacent to that stream, but that the total amount of water reasonably and beneficially used upon such lands did not exceed 6,000 acre feet per annum; that "no other appropriations or use of said waters of

said Laramie River or its tributaries had been made by the State of Colorado or its citizens, or within the said State of Colorado, prior to the appropriations of said waters by your orator and its citizens as herein set forth"; that prior to the commencement of the Laramie-Poudre tunnel project in Colorado, Wyoming and her citizens had appropriated all of the available waters of the Laramie and its tributaries for the actual irrigation of lands in Wyoming aggregating hundreds of thousands of acres and supporting thousands of people; that without the use of the waters so appropriated these lands would be to a large extent valueless and incapable of supporting any considerable population; and that the consummation of the proposed Laramie-Poudre tunnel diversion would deprive Wyoming and her citizens of a very large amount of water to the use of which they were rightly entitled in virtue of their appropriations, and would take from many of their lands much of their value.

The prayer was for an injunction preventing the defendants and each of them from making the proposed diversion, and for general relief.

Colorado, in answering the complaint, admitted that before the commencement of the Laramie-Poudre tunnel project certain of her citizens had appropriated water from the Laramie and its tributaries in that State for the irrigation of adjacent lands (meadow land), but averred that these appropriations amounted to about 8,000 acre feet per annum; alleged that "other appropriations of said waters of said Laramie River and its tributaries had been made by the State of Colorado and its citizens within the State of Colorado prior to the appropriations of said waters by complainant and its citizens"; averred that the right to the proposed Laramie-Poudre tunnel diversion was initiated, by commencement of construction, August 25, 1902, and that at the time of such initiation there was abundant water in the Laramie to satisfy all

prior appropriations then in existence in Colorado and Wyoming; denied that Wyoming and her citizens had appropriated all of the available waters of the Laramie and its tributaries prior to that threatened diversion, and averred that there was ample water in those streams to supply the threatened diversion and all prior rights in Wyoming; alleged that when the right to make that diversion was initiated, the appropriations effected or initiated in Wyoming did not exceed 50,000 acre feet; averred that the maximum diversion which could be made through the Laramie-Poudre tunnel project did not exceed 70,000 acre feet annually, and the topographical and physical conditions were such that "by the system sought to be enjoined herein, and all other available means, no more than 90,000 acre feet annually can be diverted from said stream and its tributaries for use upon lands lying within the State of Colorado"; and denied that the consummation of the threatened diversion would work any injury to Wyoming or her citizens or the lands in that State.

Thus the pleadings directly put in issue the priority and measure of the appropriations in each State as against those in the other State, and also the extent of the available supply of water whereon all of the appropriations depended.

Evidence was produced by both States directly bearing upon these issues. Colorado's evidence was addressed to showing all appropriations in that State, not merely the Laramie-Poudre tunnel appropriation; and that evidence dealt in detail with the dates and measure of the meadow-land appropriations referred to in the complaint and answer; with the existence, date and measure of the Skyline ditch appropriation and the Wilson Supply ditch appropriation; and even with an appropriation from Sand Creek, a small interstate stream nominally but not actually a tributary of the Laramie. Colorado's state engineer gave

4,250 acre feet per annum as the measure of the meadow-land appropriations, 18,000 acre feet per annum as the measure of the Skyline ditch appropriation, and 2,000 acre feet per annum as the measure of the Wilson Supply ditch appropriation. Some of her witnesses gave different measures. All who spoke of the Wilson Supply ditch agreed that it was used to divert water from the headwaters of Deadman Creek, a Colorado tributary of the Laramie, into Sand Creek, from which that water, or its equivalent, was rediverted at a lower point, along with other water from Sand Creek, through the Divide ditch and ultimately carried into the Cache la Poudre valley. Colorado's evidence indicated that the meadow-land, Skyline and Wilson Supply appropriations were earlier than the Laramie-Poudre tunnel appropriation and many of the Wyoming appropriations; and Wyoming recognized this difference in the dates of appropriation, although raising some question as to the quantity of water in the earlier appropriations so recognized.

In their briefs in that suit counsel for Colorado, while urging that the doctrine of appropriation was not applicable to a controversy between the two States, but only to controversies between private appropriators within the same State, recognized that the Court might hold otherwise; and on that basis they presented what they termed "a complete review of the evidence showing the respective priorities of diversion from the Laramie River in Colorado and Wyoming." In that review they listed the aforementioned meadow-land, Skyline, Wilson Supply and Sand Creek appropriations and the proposed Laramie-Poudre tunnel appropriation, as constituting the "diversions and use by Colorado and her citizens," and urged that Colorado be recognized as entitled to all of them under the rule of priority, if that rule was given effect.

With the issues, evidence and propositions of law here outlined submitted to it, the Court proceeded to a decision.

The influence to be given to the doctrine of appropriation was much considered, as the opinion shows, and in disposing of that question the Court said (259 U. S. 467, 468, 470):

"The lands in both States are naturally arid and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act which made reclamation by irrigation a condition to the acquisition.

. . . . . .

"In neither State was the right to appropriate water from this interstate stream denied. On the contrary, it was permitted and recognized in both. The rule was the same on both sides of the line. Some of the appropriations were made as much as fifty years ago and many as much as twenty-five. In the circumstances we have stated, why should not appropriations from this stream be respected, as between the two States, according to their several priorities, as would be done if the stream lay wholly within either State? By what principle of right or equity may either State proceed in disregard of prior appropriations in the other?

"Colorado answers that this is not a suit between private appropriators. This is true, but it does not follow that their situation and what has been accomplished by them for their respective States can be ignored. As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State.

Thus the interests of the State are indissolubly linked with the rights of the appropriators. To the extent of the appropriation and use of the water in Colorado a like situation exists there.

. . . . . .

"We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others.[1] Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned."

Respecting the available supply of water the Court found from the evidence that Sand Creek is nominally but not actually a tributary of the Laramie, and therefore not to be considered; that at Woods, a gauging station near the Colorado-Wyoming stateline, the natural flow of the Laramie after the "recognized Colorado ap-

[1] Followed and applied in *Weiland* v. *Pioneer Irrigation Co.*, 259 U. S. 498, 502.

propriations" are satisfied is such as to afford an available supply of 170,000 acre feet per year, but not more; that the stream receives below Woods contributions of 93,000 acre feet from the Little Laramie and 25,000 acre feet from smaller affluents, making the entire available supply 288,000 acre feet, apart from the quantities required to satisfy the "recognized Colorado appropriations"; and that

"The available supply—the 288,000 acre feet—is not sufficient to satisfy the Wyoming appropriations dependent thereon and also the proposed Colorado appropriation,[2] so it becomes necessary to consider their relative priorities.

"There are some existing Colorado appropriations having priorities entitling them to precedence over many of the Wyoming appropriations. These recognized Colorado appropriations are,[3] 18,000 acre-feet for what is known as the Skyline Ditch and 4,250 acre-feet for the irrigation of that number of acres of native-hay meadows in the Laramie valley in Colorado, the 4,250 acre-feet being what Colorado's chief witness testifies is reasonably required for the purpose, although a larger amount is claimed in the State's answer. These recognized Colorado appropriations, aggregating 22,250 acre-feet, are not to be deducted from the 288,000 acre-feet, that being the available supply after they are satisfied. Nor is Colorado's appropriation from Sand Creek to be deducted, that creek, as we have shown, not being a tributary of the Laramie."

From the evidence bearing upon the relative priorities of the proposed Colorado appropriation and the Wyoming appropriations the Court found that work on the former

[2] The reference is to the threatened Laramie-Poudre tunnel diversion.

[3] The Wilson Supply ditch appropriation should have been included here among the recognized Colorado appropriations and was included among them in a modified decree, as will appear later on.

was begun in the latter part of October, 1909, and was prosecuted with such diligence that the appropriation should be accorded a priority as of the date when the work was begun; that some of the Wyoming appropriations were senior and others junior to that appropriation; that those which were senior to it and dependent on the common source of supply amounted to 272,500 acre feet per annum; and that

"As the available supply is 288,000 acre-feet and the amount covered by senior appropriations in Wyoming is 272,500 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado."

After stating these findings, the Court's opinion concluded:

"A decree will accordingly be entered enjoining the defendants from diverting or taking more than 15,500 acre-feet per year from the Laramie River by means of or through the so-called Laramie-Poudre project."

Thereupon a decree was entered declaring (259 U. S. 496):

"It is considered, ordered and decreed that the defendants, their officers, agents and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie River and its tributaries in the State of Colorado more than fifteen thousand five hundred (15,500) acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that State,

"Provided, that this decree shall not prejudice the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State eighteen thousand (18,000) acre-feet of water per annum in virtue of and through what is designated in the pleadings and

evidence as the Skyline Ditch appropriation in that State; nor prejudice the right of that State, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State four thousand two hundred and fifty (4,250) acre-feet of water per annum in virtue of and through the meadowland appropriations in that State which are named in the pleadings and evidence; nor prejudice or affect the right of the State of Colorado or the State of Wyoming, or of any one recognized by either State as duly entitled thereto to continue to exercise the right to divert and use water from Sand Creek, sometimes spoken of as a tributary of the Laramie River, in virtue of any existing and lawful appropriation of the waters of such creek."

Colorado and her co-defendants presented a petition for rehearing on stated grounds, one of which was that the Wilson Supply ditch appropriation was inadvertently omitted, in both opinion and decree, from the recognized early Colorado appropriations. As the omission was in fact inadvertent, the decree was then so modified as to include that appropriation among the others which Colorado was recognized as having a right to continue. 260 U. S. 1. A change in the provision respecting costs also was sought in the petition, and was included in the modified decree. In other respects the original decree was adhered to and a rehearing denied. In that petition Colorado and her codefendants construed the decree as allotting the available supply between the two States according to priority in appropriation and limiting Colorado's allotment "to 37,750 acre feet annually—Skyline 18,000, plus Colorado meadows 4,250, plus Laramie-Poudre 15,500."

We are of opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the

relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion.

As appears from the opinion, the Court held that the doctrine, long recognized and enforced in both States, whereby priority of appropriation gives superiority of right, furnished the only equitable and right basis on which to determine the controversy between them shown in the pleadings and evidence.

And as further appears from the opinion, the Court made specific findings showing the amount of water in the available supply, its insufficiency to satisfy all asserted appropriations, the date when the proposed tunnel appropriation in Colorado was initiated, the names and amounts of the appropriations in Colorado which were senior to that appropriation, the amount of water included in the Wyoming appropriations which were senior to it, and the amount which would remain in the supply and be subject to that appropriation after deducting what was required to satisfy the senior appropriations in both States.

These findings were pertinent to the issues, and upon them the Court pronounced its decree. Under a familiar rule the facts thus determined are not open to dispute in a subsequent suit between the same States.[4]

As before shown, the modified decree (1) restricts diversion under the Colorado tunnel appropriation to 15,500 acre feet, the amount which under the findings would re-

[4] *Southern Pacific R. Co.* v. *United States*, 268 U. S. 1, 48; *Southern Pacific R. Co.* v. *United States*, 183 U. S. 519, 532.

main in the supply after deducting the quantities included in the senior appropriations in both States; (2) recognizes and protects the Skyline appropriation of 18,000 acre feet, it being a senior Colorado appropriation; (3) similarly sustains the meadow-land appropriations of 4,250 acre feet, they being senior Colorado appropriations; (4) recognizes and protects the small Wilson Supply ditch appropriation made prior to 1902, it being a senior Colorado appropriation inadvertently omitted from the list in the opinion but given its proper place by a modification of the original decree; and (5) saves from prejudice all appropriations of the waters of Sand Creek, found not to be a tributary of the Laramie.

The decree enjoins any diversion through the tunnel appropriation in excess of the 15,500 acre feet accorded to it—and this doubtless for the reason that there had been a declared and real purpose to divert from 56,000 to 71,000 acre feet under that appropriation. No showing appears to have been made indicative of any occasion at that time for a broader injunction. Of course, in the absence of such a showing, a broader injunction was not justified. Certainly the limited injunction which was granted does not warrant any inference that it marks the limits of what was intended to be decided. Such an inference would be inconsistent with other parts of the decree and with the opinion and the findings therein.

Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting

as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U. S. 468. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.[5]

The contention that the present bill shows that the acts complained of are not acts done by Colorado, or under her authority, but acts done by private corporations and individuals not parties to the present suit, is shown by the bill to be untenable. It is there alleged that Colorado in 1926 permitted a diversion from the Laramie through the Laramie-Poudre tunnel appropriation materially in excess of the 15,500 acre feet specified in the decree; that in 1926, 1927 and 1928, with the knowledge, permission and cooperation of Colorado, diversions were made from the Laramie and its tributaries through the Skyline ditch appropriation in stated amounts materially in excess of the 18,000 acre feet specified in the decree; that in 1926, 1927, 1928 and 1929, with the knowledge, consent and cooperation of Colorado, diversions were made from the Laramie and its tributaries through the meadowland appropriations in various amounts pronouncedly in excess of the 4,250 acre feet

[5] *Missouri* v. *Illinois,* 180 U. S. 208, 241; *Kansas* v. *Colorado,* 185 U. S. 125, 142; s. c., 206 U. S. 46, 49; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Pennsylvania* v. *West Virginia,* 262 U. S. 550, 591, 595; *North Dakota* v. *Minnesota,* 263 U. S. 365, 373; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 748; *Florida* v. *Georgia,* 17 How. 478, 494, 510, 522.

specified in the decree; and that Colorado has permitted other diversions from the Laramie and its tributaries in violation of the decree through the Bob Creek and other designated ditches, none of which were recognized or named in the findings or decree.

The contention that the bill fails to show with certainty any violation of the decree or any damage to Wyoming or her water users is largely refuted by the allegations just noticed, and is further refuted by an allegation that annually since the entry of the decree the amount of water in the Laramie available to Wyoming for its water users has been less than the 272,500 acre feet specified in the Court's findings, and this shortage has been caused by the excessive and otherwise unlawful diversions before described. It is true that some of the allegations purporting to state violations of the decree are uncertain and indefinite, but there are many which are not subject to this criticism, and plainly there is enough in the bill to require that the defendant be called upon to answer it.

An order will be entered overruling the motion to dismiss, permitting Wyoming to amend her bill within thirty days by making some of its allegations more definite and certain, if she be so advised, and permitting Colorado to answer the bill or amended bill, as the case may be, on or before the first day of September, next.

Motion to Dismiss Overruled.

COLORADO *v.* SYMES, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, ET AL.

No. 19, Original. Rule to show cause issued March 21, 1932. Return to rule submitted April 11, 1932.—Decided May 31, 1932.

1. The protection of Jud. Code, § 33, by which criminal proceedings begun in state courts against revenue officers on account of their

official acts, etc., may be removed to federal courts, extends to prohibition agents. 27 U. S. C., § 45. P. 517.

2. While this removal act should be construed liberally to effect its purpose of maintaining the supremacy of the federal laws, it must also be construed with the highest regard for the right of the States to make and enforce their own laws in the field belonging to them under the Constitution. *Id.*
3. A federal officer claiming removal from a state court of a prosecution against him charging murder, must plainly set forth, by petition made, signed and unequivocally verified by himself, all the facts relating to the occurrence, as he claims them to be, on which the accusation is based; and it must fairly appear from the showing made that his claim is not without foundation and is made in good faith. P. 518.
4. A federal prohibition agent who was charged by the State with murdering one Smith by intentionally striking him on the head with a gun, showed by his petition for removal that, in performance of his official duties, he and another agent went to a place to observe whether federal law was being violated and that the deceased entered and was about to take a drink of wine from a bottle; but the crucial occurrences that followed were disclosed only in such statements as that the petitioner "proceeded to take possession of said bottle" and to "arrest . . . Smith" and that thereupon Smith "did resist arrest" and attempt to destroy the bottle of wine and "did proceed to assault your petitioner" and did "attempt to escape" and that one Green did attempt to assist deceased to escape and that "in the scuffle that ensued" and while petitioner was engaged in the discharge of his duties, etc., it became necessary "in order to subdue . . . Smith for your petitioner to strike" him "on the head with your petitioner's gun." *Held* too vague, uncertain and incomplete a disclosure. P. 520.
5. The district judge, in his discretion, may permit a petition for removal under Jud. Code, § 33, to be amended. P. 521.

MANDAMUS to determine the jurisdiction of a district court to try a criminal prosecution removed from a state court. The case here was heard upon the State's petition and the return of the District Judge to a rule to show cause. See 284 U. S. 523, 528, and 530.

Messrs. Clarence L. Ireland, Attorney General of Colorado, *George A. Crowder,* Assistant Attorney General, and

Joel E. Stone, District Attorney, Arapahoe County, were on the brief of petitioner.

A writ of mandamus lies to compel the United States District Court to remand a criminal prosecution to the state court, in the absence of any other remedy. Jud. Code, § 234; *Virginia* v. *Rives,* 100 U. S. 313; *Virginia* v. *Paul,* 148 U. S. 107; *Kentucky* v. *Powers,* 201 U. S. 1; *Ex parte Harding,* 219 U. S. 363; *Ex parte Bradley,* 7 Wall. 364; *Maryland* v. *Soper (No. 1),* 270 U. S. 9.

A petition for removal under § 33 of the Judicial Code must set forth all the facts and circumstances, and show that they constitute a defense or immunity from punishment by the State. *Maryland* v. *Soper (No. 1),* and other cases *supra.*

Possession of intoxicating liquor is but a misdemeanor under the laws of the United States and of the State of Colorado.

What force may a federal prohibition agent or officer use in arresting for an alleged misdemeanor? The defendant, Dierks, alleges that he was protecting himself in the discharge of his duties when the act was committed, which is not sufficient to constitute self-defense. There is not an allegation of fact or circumstances to show that he was compelled to and did take the life of Smith because he believed he was in danger of receiving great bodily harm or death at the hands of his assailant, or any harm or injury. Colo. Comp. L., 1921, §§ 6675, 6676; *Campbell* v. *People,* 55 Colo. 302; *Starr* v. *United States,* 153 U. S. 614.

An officer should not assault or beat any individual under the color of his commission or authority without lawful necessity. Colo. Comp. L., 1921, § 6793; *People ex rel. Little* v. *Hutchinson,* 9 F. (2d) 275; *Brown* v. *Wyman,* 224 Mich. 360; *U. S. ex rel. McSweeney* v. *Fullhart,* 47 Fed. 802; *United States* v. *Kaplan,* 286 Fed. 963; *Castle* v. *Lewis,* 254 Fed. 917; *Scibor* v. *Oregon-*

Washington R. & N. Co., 70 Ore. 116; *State* v. *Lane,* 158 Mo. 572; *Meldrum* v. *State,* 23 Wyo. 12; *North Carolina* v. *Gosnell,* 74 Fed. 734; *Harding* v. *State,* 26 Ariz. 334; *Lane* v. *Butler,* 225 Ill. App. 382; *People* v. *Klein,* 305 Ill. 141; *Edward Foster's Case*—Lewin's Crown Cases, Vol. I, II, p. 187; *Presley* v. *State,* 75 Fla. 434.

A petition based upon mere recitals and conclusions is insufficient in law to warrant the removal under § 33 of the Judicial Code.

Solicitor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Mahlon D. Kiefer, John J. Byrne,* and *Erwin N. Griswold* were on the brief for respondents.

The removal petition is not open to the objections found in *Maryland* v. *Soper (No. 1),* 270 U. S. 9.

Section 33 does not confine the right to remove to cases where prosecution in the state court is for an act which the officer was authorized or required to do by his federal duty. That would require a complete justification by the officer, whereas under the statute it suffices that the act be done "under color of his office," that is, in the ostensible pursuit of his duties and within the apparent scope of his authority. The phrase "color of office" covers a claim which may later turn out to be groundless, as well as a claim which full investigation will show to have been well founded. See Bouvier, L. Dict., "Color of Office." *Virginia* v. *De Hart,* 119 Fed. 626; *Griffiths* v. *Hardenburgh,* 41 N. Y. 464; *Wilson* v. *Fowler,* 88 Md. 601; *Tennessee* v. *Davis,* 100 U. S. 257.

That the phrase "color of office" includes acts which are done outside the scope of the officer's authority, see *Swift Co.* v. *United States,* 111 U. S. 22; Cr. Code, § 85, 18 U. S. C., § 171; *Alcock* v. *Andrews,* 2 Espinasse 542; *Decker* v. *Judson,* 16 N. Y. 439; *Burrall* v. *Acker,* 23 Wend. 606.

State courts are substantially unanimous in holding that acts are done under "color of office" when they are

done under a pretense or claim of right, even though they are in fact wholly unwarranted. See *Mobile County* v. *Williams,* 180 Ala. 639; *Luther* v. *Banks,* 111 Ga. 374; *State* v. *Fowler,* 88 Md. 601; *Thomas* v. *Connelly,* 104 N. C. 342; *Smith* v. *Patton,* 131 N. C. 396. Cf. *McCain* v. *Des Moines,* 174 U. S. 168; *Iowa* v. *Des Moines,* 96 Iowa 521.

Where, therefore, an officer who is authorized to arrest for an offense committed in his presence, or to seize contraband property openly possessed in his view, is obstructed in arresting the offender or seizing the contraband, his act in overcoming such resistance to the exercise of his lawful authority is done " under color of his office," within the meaning of § 33, regardless of whether he used more force than was reasonably necessary to carry out his duty. *Maryland* v. *Ford,* 12 F. (2d) 289. See also, *Rhode Island* v. *Richardson,* 32 F. (2d) 301, motion for leave to file a petition for a writ of mandamus denied, *Ex parte Rhode Island,* 280 U. S. 530; *New York* v. *Walsh,* 40 F. (2d) 58.

Mr. Justice Butler delivered the opinion of the Court.

November 9, 1931, the prosecuting attorney of Arapahoe county, Colorado, filed an information in the state court charging that on November 7 Henry Dierks killed and murdered Melford Smith. A warrant issued, the accused was arrested thereon and admitted to bail. He filed a petition for a writ of *habeas corpus cum causa* in the United States district court alleging that he is a United States prohibition agent and other facts on which he claims immunity from prosecution in the state court and prayed removal of the case to the federal court under Judicial Code, § 33 as amended. 28 U. S. C., § 76. The district judge granted the writ, the marshal served it as required by the statute, and so the case was taken from the state court. The prosecuting attorney promptly

moved to remand on the ground that the petition is not sufficient to give the federal court jurisdiction. His motion was denied. 55 F. (2d) 371. Thereupon, leave having been granted, the State acting through its governor filed a motion in this court for a rule requiring the district judge to show cause why a writ of mandamus should not issue to compel him to remand the case. The motion was granted and the judge has made his response to the rule in which he maintains that mandamus should not be granted. The case is submitted by the State on the brief of its attorney general. The Solicitor General of the United States submits a brief in opposition.

As the prosecuting attorney did not join issue with any of the allegations of the petition for removal, the jurisdiction of the federal court and the validity of its action are to be determined upon the allegations of the petition.

Eliminating formal parts and much unnecessary verbiage, we give its full substance. After showing that Dierks was accused, arrested and admitted to bail the petition represents:

He has long been a prohibition agent and the act for which he was informed against was done by right of his office and while he was engaged in the discharge of his official duties " in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue laws, and reporting the results of said investigation, and in protecting himself in the discharge of his duty as follows ":

November 7, 1931, he and one Ellsworth, another prohibition agent, were directed by the administrator in charge to investigate a complaint of violations of the prohibition act and revenue laws reported as being committed at No. 3005 South Broadway, in Englewood. About 9.30 in the evening they went to that place for the purpose of investigating such violations. It was a hamburger stand or restaurant. Petitioner exhibited his badge and in-

formed the man in charge that he was a prohibition agent and had come to investigate reports of violations of the Act and was given permission to search the premises. While he "was in the act of observing and searching said premises, one Melford Smith entered . . . seated himself on an unoccupied stool at the counter . . . took out a pint bottle of wine from his inside coat pocket, and set the said bottle of wine on the counter . . . in full and open view of your petitioner, and . . . then proceeded to look for a drinking glass."

Upon seeing the bottle of wine and believing Smith engaged in violating the prohibition act and revenue laws, petitioner "proceeded to take possession of said bottle of wine, and to arrest . . . Smith; that thereupon . . . Smith did resist arrest, did attempt to destroy said bottle of wine, and did proceed to assault your petitioner and did attempt to escape, and that thereupon one Al Green did attempt . . . to help . . . Smith to escape, and that in the scuffle that ensued, and while your petitioner was engaged in the discharge of his official duties as such Federal Prohibition Officer in making, and attempting to make, said arrest of said Melford Smith, and in protecting himself in the discharge of his duties, and in attempting to seize said bottle of wine, it became necessary in order to subdue . . . Smith for your petitioner to strike, and he did strike, . . . Smith on the head with your petitioner's gun; that thereupon . . . Ellsworth, came to the assistance of your petitioner;" and that they "did arrest the said Melford Smith, the said Al Green, and one Leonard Carpenter, and did convey them to the" jail at Denver.

And the petitioner goes on to say that when Smith was placed in the jail he did not appear to have received injury, but that on the following day he became sick and died and petitioner "alleges that the said Melford Smith

did die from an injury to his head caused by a blow given . . . by your petitioner during the scuffle . . ." And petitioner states " he is not guilty of the crime of murder, or any other offense " and that the criminal proceeding " arises out of and solely by reason of the acts performed by your petitioner as an officer acting " under the authority of the revenue laws and the National Prohibition Act.

The protection afforded by § 33* extends to prohibition agents. 27 U. S. C., § 45. The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. *Tennessee* v. *Davis,* 100 U. S. 257. *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 32. *The Mayor* v. *Cooper,* 6 Wall. 247, 253. *Findley* v. *Satterfield,* Fed. Cas. No. 4,792. It scarcely need be said that such measures are to be liberally construed to give full effect to the purposes for which they were enacted. See *Venable* v.

* " When any . . . criminal prosecution is commenced in any court of a State against any officer . . . acting by authority of any revenue law of the United States . . . on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer . . . under any such law . . . for or on account of any act done under color of his office or in the performance of his duties as such officer . . . the said . . . prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the . . . prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State . . . or of the United States stating that, as counsel for the petitioner, he has

Richards, 105 U. S. 636, 638. *State* v. *Sullivan,* 50 Fed. 593, 594. And it is axiomatic that the right of the States, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law. Congress is not to be deemed to have intended that jurisdiction to try persons accused of violating the laws of a state should be wrested from its courts in the absence of a full disclosure of the facts constituting the grounds on which they claim protection under § 33.

Here the State of Colorado charges petitioner with deliberate murder. While homicide that is excusable or justifiable may be committed by an officer in the proper discharge of his duty, murder or other criminal killing may not. The burden is upon him who claims the removal plainly to set forth by petition made, signed and

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examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court . . . When it [the case] is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa . . . and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the . . . prosecution . . . shall be held to be removed to the district court. . . . If the defendant . . . be in actual custody . . . it shall be the duty of the marshal, by virtue of the writ . . . to take the body of the defendant into his custody, to be dealt with . . . according to law and the order of the district court . . . ."

unequivocally verified by himself all the facts relating to the occurrence, as he claims them to be, on which the accusation is based. Without such disclosure the court cannot determine whether he is entitled to the immunity. No question of guilt or innocence arises and no determination of fact is required, but it must fairly appear from the showing made that petitioner's claim is not without foundation and is made in good faith.

As said by Chief Justice Taft speaking for the Court in *Maryland* v. *Soper, supra,* 33: "It must appear that the prosecution . . . has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. . . . [p. 34]. In invoking the protection of a trial of a state offense in a federal court under section 33, a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the state, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based. He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies, so that the court may be fully advised and the state may take issue by a motion to remand." And the opinion pointed out (p. 35) that the allegations of the petition for removal there under consideration did not negative the possibility that the accused were doing other than official acts at the time or on the occasion of the alleged murder or "make it clear and specific that whatever was done by them leading to the

prosecution was done under color of their federal official duty. . . . In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer."

It appears from a mere inspection of the petition before us that it does not measure up to the required standard. The outstanding fact is that petitioner killed Smith by intentionally striking him on the head with a gun. That is the basis of the State's prosecution. The burden is on the accused to submit a "candid, specific and positive" statement of the facts so that the court will be able to determine the validity of his claim for removal. It is sufficiently shown that in performance of official duties he and another agent went into the place described to observe whether federal law was being violated and that the deceased entered and was about to take a glass of wine from a bottle that he carried in his pocket. These facts led up to the crucial occurrences the principal of which was the death blow. And as to these the statements are not such as would naturally be employed by one desiring fully to portray what happened. For example, it is said petitioner "proceeded to take possession of said bottle" and to "arrest . . . Smith" and that thereupon Smith "did resist arrest" and attempt to destroy the bottle of wine and "did proceed to assault your petitioner" and did "attempt to escape" and that Green did attempt to assist deceased to escape and that "in the scuffle that ensued" and while petitioner was engaged in the discharge of his duties, etc., it became necessary "in order to subdue . . . Smith for your petitioner to strike" him "on the head with your petitioner's gun."

While phrases such as those quoted may appropriately be used to characterize facts that have been disclosed,

they are not calculated to give specific information as to the details of the occurrence. The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential details of the defense he claims. They are not sufficient to enable the court to determine whether his claim of immunity rests on any substantial basis or is made in good faith. The narrative is manifestly incomplete in respect of matters known to the petitioner and which under the established construction of the statute he was bound to disclose. The motion to remand should have been granted.

The district judge, should he deem it proper so to do, may permit the accused by amendment to his petition and additional evidence or otherwise to show that he is entitled to removal authorized by § 33. If such permission be denied or if, leave being granted, petitioner shall fail to meet the requirements of that section, the case is to be remanded to the state court as upon a peremptory writ of mandamus.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO think the rule should be discharged.

DECISIONS PER CURIAM, FROM APRIL 12, 1932, TO AND INCLUDING MAY 31, 1932 *

No. 730. LANG *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Argued April 12, 1932. Decided April 18, 1932. *Per Curiam:* The writ of certiorari herein is dismissed as having been improvidently granted. *Messrs. Charles Dickerman Williams* and *Jerome A. Strauss* for petitioner. *Solicitor General Thacher,* with whom *Assistant Attorney General Youngquist,* and *Messrs. Wilbur H. Friedman, John J. Byrne,* and *W. Marvin Smith* were on the brief, for the United States. Reported below: 55 F. (2d) 922.

No. 530. GIRARD TRUST CO., TRUSTEE, *v.* OCEAN & LAKE REALTY CO. Appeal from the Supreme Court of Florida. Argued April 12, 1932. Decided April 18, 1932. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540, 541; *Cross Lake Club* v. *Louisiana,* 224 U. S. 632, 639, 640; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277, 278; *Hardin-Wyandot Lighting Co.* v. *Village of Upper Sandusky,* 251 U. S. 173, 178, 179; *McCoy* v. *Shaw,* 277 U. S. 302, 303. *Mr. Frank J. Wideman,* with whom *Mr. Manley P. Caldwell* was on the brief, for appellant. *Messrs. Francis P. Fleming, William W. Miller,* and *Henry J. O'Neill* were on the brief for appellee. Reported below: 101 Fla. 1324, 1337; 133 So. 569; 135 So. 795.

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* For decisions on applications for certiorari, see *post,* pp. 534, 542.

No. 537. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PEAVY-WILSON LUMBER CO.;

No. 538. SAME *v.* PEAVY-MOORE LUMBER CO.; and

No. 539. SAME *v.* PEAVY-BYRNES LUMBER CO. On writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued April 12, 13, 1932. Decided April 18, 1932. *Per Curiam:* The judgments of the Circuit Court of Appeals in these cases are reversed and the cases remanded to the Circuit Court of Appeals with instructions to remand to the Board of Tax Appeals for further proceedings in conformity with the opinion of this Court in *Handy & Harman* v. *Burnet, Commissioner of Internal Revenue,* 284 U. S. 136. *Mr. Whitney North Seymour,* with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers,* and *John MacC. Hudson* were on the brief, for petitioner. *Messrs. Sidney L. Herold* and *John B. Files* for respondents. Reported below: 51 F. (2d) 163.

No. 799. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* J. ROGERS FLANNERY & CO.;

No. 800. SAME *v.* FLANNERY BOLT CO.; and

No. 801. SAME *v.* VANADIUM METALS CO. On petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit. Submitted April 11, 1932. Decided April 18, 1932. *Per Curiam:* The petition for writs of certiorari in these cases is granted. The judgments of the Circuit Court of Appeals are reversed and the cases remanded to the Circuit Court of Appeals with instructions to remand to the Board of Tax Appeals for further proceedings in conformity with the opinion of this Court in *Handy & Harman* v. *Burnet, Commissioner of Internal Revenue,* 284 U. S. 136. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall*

Key and *Norman D. Keller* for petitioner. *Messrs. Kenneth N. Parkinson* and *David A. Pine* for respondents. Reported below: 54 F. (2d) 365.

No. 542. SOUTH CAROLINA POWER CO. *v.* SOUTH CAROLINA TAX COMMISSION ET AL.;

No. 566. BROAD RIVER POWER CO. *v.* QUERY ET AL.; and

No. 567. LEXINGTON WATER POWER CO. *v.* SAME. Appeals from the District Court of the United States for the Eastern District of South Carolina. Argued April 13, 1932. Decided April 18, 1932. *Per Curiam:* The orders denying interlocutory injunctions are affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel Gas Co.* v. *Public Service Commission,* 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338; *United Drug Co.* v. *Washburn,* 284 U. S. 593; *Binford* v. *J. H. McLeaish & Co.,* 284 U. S. 598. *Mr. Arthur R. Young,* with whom *Mr. M. Rutledge Rivers* was on the brief, for the South Carolina Power Co. *Mr. George M. Le Pine,* with whom *Messrs. C. Edward Paxson* and *W. C. McLain* were on the brief, for the Broad River Power Co. and the Lexington Water Power Co. *Messrs. John M. Daniel,* Attorney General of South Carolina, *Cordie Page,* Assistant Attorney General, and *J. Fraser Lyon* were on the brief for appellees. Reported below: 52 F. (2d) 515.

No. 557. OGDEN & MOFFETT CO. ET AL. *v.* MICHIGAN PUBLIC UTILITIES COMMISSION ET AL. Appeal from the District Court of the United States for the Eastern District of Michigan. Argued April 14, 1932. Decided April 18, 1932. *Per Curiam:* The order denying interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel Gas Co.* v. *Public Service*

Commission, 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338; *United Drug Co.* v. *Washburn,* 284 U. S. 593; *Binford* v. *J. H. McLeaish & Co.* 284 U. S. 598. *Mr. Percy J. Donovan* for appellants. *Messrs. Paul W. Voorhies,* Attorney General of Michigan, *Hugh E. Lillie,* Assistant Attorney General, and *K. F. Clardy* were on the brief for appellees. Reported below: 58 F. (2d) 832.

No. 553. BOARD OF COMMISSIONERS OF ALLEN COUNTY, OHIO, ET AL. *v.* OHIO EX REL. BOWMAN. Appeal from the Supreme Court of Ohio. Argued April 14, 1932. Decided April 18, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *County of Mobile* v. *Kimball,* 102 U. S. 691, 703, 704; *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262; *Joslin Mfg. Co.* v. *City of Providence,* 262 U. S. 668, 674; *Memphis & Charleston Ry. Co.* v. *Pace,* 282 U. S. 241, 245, 246; (2) *Doyle* v. *Atwell,* 261 U. S. 590, 591, 592; *McCoy* v. *Shaw,* 277 U. S. 302, 303; *Howat* v. *Kansas,* 258 U. S. 181, 185, 186. *Mr. H. E. Garling,* with whom *Messrs. Ernest M. Botkin, Melvin C. Light,* and *J. J. Weadick, Sr.,* were on the brief, for appellants. *Messrs. U. G. Denman* and *William H. Harris* were on the brief for appellee. *Messrs. Gilbert Bettman,* Attorney General of Ohio, and *Wm. S. Evatt,* by leave of Court, filed a brief on behalf of the State of Ohio, as *amicus curiae.* Reported below: 124 Oh. St. 174; 177 N. E. 271.

No. 716. ATLANTA LAUNDRIES, INC., ET AL. *v.* CITY OF NEWMAN ET AL. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted April 11, 1932. Decided April 18, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a final decree.

Gibbons v. *Ogden,* 6 Wheat. 448; *Verden* v. *Coleman,* 18 How. 86; *Moses* v. *The Mayor,* 15 Wall. 387; *Reddall* v. *Bryan,* 24 How. 420; *Brannan* v. *Harrison,* 284 U. S. 579; *Augusta Power Co.* v. *Savannah River Electric Co.,* 284 U. S. 574; *Gant* v. *Oklahoma City,* 284 U. S. 594. *Mr. B. J. Mayer* for appellants. *Mr. H. A. Hall* for appellees. Reported below: 174 Ga. 99; 162 S. E. 497.

No. 525. Hartford Accident & Indemnity Co. *v.* McPherson, Administrator. Appeal from the Supreme Court of North Carolina. Argued April 18, 1932. Decided April 25, 1932. *Per Curiam:* The appeal is dismissed for the want of a properly presented federal question. *Hartford Life Insurance Co.* v. *Johnson,* 249 U. S. 490, 493; *Nevada-California-Oregon Ry.* v. *Burrus,* 244 U. S. 103, 104, 105; *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 535; *Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51. *Mr. R. M. Robinson* for appellant. *Messrs. Frank P. Hobgood, Jr.,* and *Wm. S. Coulter* were on the brief for appellee. Reported below: 201 N. C. 303; 160 S. E. 283.

No. 657. Edward A. Thompson, Inc. *v.* Lumber Mutual Casualty Insurance Co. Appeal from the City Court of the City of New York, New York. Argued April 21, 22, 1932. Decided April 25, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 38; *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. Leo C. Weiler* for appellant. *Mr. Herbert G. Kraft* was on the brief for appellee. Reported below: 234 App. Div. (N. Y.) 841. See also 134 Misc. 370, 235 N. Y. S. 646; 137 Misc. 379, 244 N. Y. S. 20, 254 N. Y. S. 921, 1007.

No. 698. L'HOTE ET AL. *v.* CROWELL, DEPUTY COMMISSIONER, ET AL. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Submitted April 22, 1932. Decided April 25, 1932. *Per Curiam:* The judgment of the Circuit Court of Appeals herein is reversed and the cause is remanded to the District Court with directions to affirm the order of the Deputy Commissioner rejecting the claim of Zeb Payne. *Crowell* v. *Benson,* 285 U. S. 22. *Mr. Arthur A. Moreno* was on the brief for petitioners. *Messrs. H. W. Robinson* and *Daniel J. Murphy* were on the brief for Zeb Payne, respondent. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Claude R. Branch* and *W. Clifton Stone* were on the brief for Crowell, respondent. Reported below: 54 F. (2d) 212.

No. 786. LAVINE ET AL. *v.* CALIFORNIA. Appeal from the District Court of Appeal, 2d Appellate District, of California. Jurisdictional statement submitted April 18, 1932. Decided April 25, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Waters-Pierce Oil Co.* v. *Texas* (*No. 1*), 212 U. S. 86, 108–111; *Fox* v. *Washington,* 236 U. S. 273, 277, 278; *Miller* v. *Strahl,* 239 U. S. 426, 434; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501, 502, 503. In so far as the papers whereon the appeal was allowed seek review of the rulings of the District Court of Appeal upon questions of the asserted denial of rights under the Federal Constitution by the proceedings at the trial of this cause, not involving the validity of any statute of the state, such papers are treated as a petition for writ of certiorari (§ 237 (c), Judicial Code, as amended by the act of February 13, 1925, 43 Stat. 936, 938), and certiorari is denied. *Messrs. Morris Lavine* and *Francis Forrest Murray* for appellants.

Mr. U. S. Webb, Attorney General of California, for appellee. Reported below: 115 Cal. App. 289; 1 P. (2d) 496.

No. —, original. Ex parte Keogh. Submitted April 18, 1932. Decided April 25, 1932. The petition for the issue of a writ of mandamus herein is denied for the want of jurisdiction. *Luther* v. *Borden,* 7 How. 1, 42; *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U. S. 118, 150; *Marshall* v. *Dye,* 231 U. S. 250, 256, 257; *Massachusetts* v. *Mellon,* 262 U. S. 447, 483, 488. *Mr. John W. Keogh, pro se.*

No. 725. Wells *v.* Commissioner of Internal Revenue. On certificate from the Circuit Court of Appeals for the Eighth Circuit. Argued April 27, 1932. Decided May 2, 1932. *Per Curiam:* The certificate is dismissed upon the ground that the questions are not properly framed and that the statement in the certificate is inadequate. *United States* v. *Mayer,* 235 U. S. 55, 66; *White* v. *Johnson,* 282 U. S. 367, 371; *United States* v. *Worley,* 281 U. S. 339, 340. *Mr. James S. Y. Ivins,* with whom *Mr. Kingman Brewster* was on the brief, for Wells. *Solicitor General Thacher,* with whom *Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Sewall Key, Erwin N. Griswold,* and *Wilbur H. Friedman* were on the brief, for the Commissioner of Internal Revenue.

No. 837. Godfrey *v.* Godfrey, Executor. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted April 25, 1932. Decided May 2, 1932. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of jurisdiction. Section 237 (a)

Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari (§ 237 (c), Judicial Code, as amended, 43 Stat. 936, 938), certiorari is denied. *Mr. Joseph W. Robinson* for appellant. No appearance for appellee. Reported below: 164 Wash. 269; 2 P. (2d) 894.

No. 825. UNITED STATES *v.* CORRIVEAU. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. Submitted April 18, 1932. Decided May 16, 1932. *Per Curiam:* The petition for writ of certiorari herein is granted. The decree of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings in conformity with the opinions of this Court in *United States* v. *The Ruth Mildred,* 286 U. S. 67; *General Import & Export Co.* v. *United States,* 286 U. S. 70; *General Motors Acceptance Corp.* v. *United States,* 286 U. S. 49; and *United States* v. *Commercial Credit Co.,* 286 U. S. 63. *Solicitor General Thacher* for the United States. No appearance for respondent. Reported below: 56 F. (2d) 362. See also, 53 F. (2d) 735.

No. 784. CHANG CHOW *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Submitted May 2, 1932. Decided May 16, 1932. *Per Curiam:* The appeal to the Circuit Court of Appeals having been dismissed by that Court for want of a bill of exceptions, and it appearing, and being conceded by the Government, that the review of the Circuit Court of Appeals was by appeal according to the applicable practice prior to the Act of January 31, 1928, as amended (45 Stat. 54, 466), and that no bill of ex-

ceptions was necessary but that a duly authenticated record was required, the petition for writ of certiorari herein is granted, the judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that Court with directions to consider the sufficiency of the authentication of the record, and, if the record be found defective in this respect, to exercise its discretion, if proper application be made, to determine whether an opportunity should be afforded for authentication of the record so that the decision of the District Court may be reviewed by the Circuit Court of Appeals. *Mr. Chauncey F. Eldridge* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *Wilbur H. Friedman* for the United States. Reported below: 53 F. (2d) 637.

No. 785. YIM KIM LAU *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Submitted May 2, 1932. Decided May 16, 1932. *Per Curiam:* The appeal to the Circuit Court of Appeals having been dismissed by that Court for the want of a bill of exceptions, and it appearing, and being conceded by the Government, that the review of the Circuit Court of Appeals was by appeal according to the applicable practice prior to the act of January 31, 1928, as amended (45 Stat. 54, 466), and that no bill of exceptions was necessary but that a duly authenticated record was required, the petition for writ of certiorari herein is granted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to that court with directions to consider the sufficiency of the authentication of the record, and, if the record be found defective in this respect, to exercise its discretion, if proper application be made, to determine whether an opportunity should be afforded for authentication of

the record so that the decision of the District Court may be reviewed by the Circuit Court of Appeals. *Mr. Chauncey F. Eldridge* for petitioner. *Solicitor General Thacher*, and *Messrs. Whitney North Seymour, Harry S. Ridgely*, and *Wilbur H. Friedman* for the United States. Reported below: 53 F. (2d) 638.

No. 802. LAZAR *v.* PENNSYLVANIA. Appeal from the Court of Quarter Sessions of the Peace of Philadelphia County, Pennsylvania. Jurisdictional statement submitted May 16, 1932. Decided May 23, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Whitney v. California*, 274 U. S. 357, 371; *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359, 368, 369. *Messrs. Allen S. Olmsted, 2d, Walter Biddle Saul, Ira Jewell Williams*, and *Ira Jewell Williams, Jr.*, for appellant. *Messrs. James W. Tracey, Jr.*, and *Charles F. Kelley* for appellee. Reported below: 103 Pa. Super. 417; 157 Atl. 701.

No. 818. KERR GLASS MFG. CORP. *v.* SUPERIOR COURT OF WASHINGTON FOR KING COUNTY ET AL. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted May 16, 1932. Decided May 23, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 134; *Cleveland & Pittsburgh R. Co.* v. *Cleveland*, 235 U. S. 50, 53; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 344; *White River Co.* v. *Arkansas*, 279 U. S. 692, 700. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari (§ 237 (c), Judicial Code as amended, 43 Stat. 936, 938), certiorari is denied. *Messrs. W. V. Tanner, John P. Garvin, Walter*

Schaffner, and *A. E. Clark* for appellant. *Mr. Samuel B. Bassett* for appellees. Reported below: 166 Wash. 41; 6 P. (2d) 368.

No. —, original. Ex parte United States. Submitted May 16, 1932. Decided May 23, 1932. The motion for leave to file petition for writ of mandamus herein is granted and a rule is ordered to issue returnable on Monday, October 3 next. *Solicitor General Thacher* for the United States.

No. —, original. Ex parte Krentler-Arnold Hinge Last Co. Motion for leave to file petition for writ of mandamus. Submitted May 16, 1932. Decided May 23, 1932. The decree of this Court in *Leman* v. *Krentler-Arnold Hinge Last Co.,* 284 U. S. 448, reversed the final decree of the Circuit Court of Appeals for the First Circuit in this cause only in so far as it related to the allowance of profits. The decree of the Circuit Court of Appeals modifying that of the District Court in matters other than in relation to the allowance of profits remains unaffected by the decree or mandate of this Court. In this view it remains for the District Court, in its decree upon the mandate of this Court, to carry into effect so much of the decree of the Circuit Court of Appeals as is unaffected by the decree and mandate of this Court. The Circuit Court of Appeals has full authority, upon appropriate application to it, to secure enforcement of its decree to the extent that it was affirmed by this Court. In view of the existence of that remedy, the motion for leave to file petition for writ of mandamus in this Court is denied without prejudice. *Mr. Otto F. Barthel* for petitioner.

No. 455. Franklin-American Trust Co. *v.* St. Louis Union Trust Co. et al. On writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit. Argued February 18, 19, 1932. Decided May 31, 1932. *Per Curiam:* The writ of certiorari in this case is dismissed as improvidently granted. MR. JUSTICE BRANDEIS dissents from this order of the Court. *Mr. George B. Rose,* with whom *Messrs. D. H. Cantrell, J. F. Loughborough, A. W. Dobyns,* and *A. F. House* were on the brief, for petitioner. *Mr. Henry Davis,* with whom *Messrs. P. Taylor Bryan, George H. Williams,* and *Thomas S. McPheeters* were on the brief, for the St. Louis Union Trust Co., respondent. *Mr. Walter G. Riddick,* with whom *Mr. Charles T. Coleman* was on the brief, for Rorick, respondent. Reported below: 52 F. (2d) 431.

No. 24. TEXAS & PACIFIC RY. CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Texas. May 31, 1932. This cause is restored to the docket for reargument upon all questions involved.

No. —. EX PARTE KEOGH. Submitted May 16, 1932. Decided May 31, 1932. The motion that jurisdiction be assumed is denied. *Mr. John W. Keogh, pro se.*

DECISIONS GRANTING CERTIORARI, FROM APRIL 12, 1932, TO AND INCLUDING MAY 31, 1932

No. 799. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* J. ROGERS FLANNERY & CO.;

No. 800. SAME *v.* FLANNERY BOLT CO.; and

No. 801. SAME *v.* VANADIUM METALS CO. See same cases, *ante,* p. 524.

No. 773. INTERSTATE COMMERCE COMMISSION *v.* NEW YORK, NEW HAVEN & HARTFORD R. Co. ET AL. April 18, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Thomas M. Ross, Charles W. Needham, Robert E. Freer,* and *Miss Mary B. Linkins* for petitioner. *Messrs. John L. Hall* and *Charles O. Pengra* for respondents. Reported below: 60 App. D. C. 403; 55 F. (2d) 1028.

No. 753. LOUISVILLE & NASHVILLE R. Co. *v.* PARKER, ADMINISTRATRIX. April 18, 1932. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Mr. Robert E. Steiner, Jr.,* for petitioner. *Mr. W. A. Denson* for respondent. Reported below: 223 Ala. 626; 138 So. 231.

No. 787. SOUTHERN RAILWAY CO. ET AL. *v.* DANTZLER, ADMINISTRATRIX; and

No. 788. SAME *v.* YOUNGBLOOD, ADMINISTRATRIX. April 18, 1932. Petitions for writs of certiorari to the Supreme Court of South Carolina granted. *Messrs. H. O'B. Cooper, S. R. Prince, Frank G. Tompkins,* and *Sidney S. Alderman* for petitioners. *Mr. William C. Wolfe* for respondents. Reported below: 166 S. C. 148, 140; 164 S. E. 434, 431.

No. 809. EARLE & STODDART, INC. ET AL. *v.* ELLERMAN'S WILSON LINE, LTD. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. T. Catesby Jones* and *James W. Ryan* for petitioners. *Mr. Cletus Keating* for respondent. Reported below: 54 F. (2d) 913.

No. 819. WASHINGTON FIDELITY NATIONAL INS. CO. *v.* BURTON. April 18, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Walter C. Clephane, J. Wilmer Latimer,* and *Gilbert L. Hall* for petitioner. *Messrs. W. Gwynn Gardiner* and *George A. Maddox* for respondent. Reported below: 56 F. (2d) 300.

No. 824. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HARMEL. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. *Mr. Robert Ash* for respondent. Reported below: 56 F. (2d) 153.

No. 494. AMERICAN SURETY CO. *v.* BALDWIN ET AL. April 25, 1932. Petition for writ of certiorari to the Supreme Court of Idaho granted. *Messrs. Allan C. Rowe* and *Wm. Marshall Bullitt* for petitioner. *Mr. James F. Ailshie* for respondents. Reported below: 50 Idaho 606; 299 Pac. 341.

No. 821. GULF STATES STEEL CO. ET AL. *v.* UNITED STATES. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. John M. Perry, Augustus Benners, James P. McGovern,* and *John W. Drye, Jr.,* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, A. H. Conner,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 43.

No. 822. NEW YORK CENTRAL R. CO. *v.* FARMER, ADMINISTRATRIX. April 25, 1932. Petition for writ of cer-

tiorari to the Supreme Court of New York granted. *Mr. William Mann* for petitioner. *Mr. Henry S. Miller* for respondent. Reported below: 234 App. Div. 751, 853; 253 N. Y. S. 965, 1077.

No. 814. BALDWIN ET AL. *v.* AMERICAN SURETY CO. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. James F. Ailshie, Jr.,* for petitioners. *Messrs. Oliver O. Haga* and *Frank Martin* for respondent. Reported below: 55 F. (2d) 555.

No. 825. UNITED STATES *v.* CORRIVEAU. See same case, *ante,* p. 530.

No. 784. CHANG CHOW *v.* UNITED STATES. See same case, *ante,* p. 530.

No. 785. YIM KIM LAU *v.* UNITED STATES. See same case, *ante,* p. 531.

No. 727. NATIONAL SURETY CO. ET AL. *v.* CORIELL ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles H. Tuttle, Saul S. Myers, Selden Bacon,* and *Gregory Hankin* for petitioners. *Mr. Charles B. McInnis* for respondents. Reported below: 54 F. (2d) 255.

No. 841. GWINN *v.* COMMISSIONER OF INTERNAL REVENUE. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas A. Thatcher* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall*

Key, and *Erwin N. Griswold* for respondent. Reported below: 54 F. (2d) 728.

No. 881. SHAPIRO *v.* WILGUS ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Jacob Weinstein* and *Francis Biddle* for petitioner. *Mr. Sidney E. Smith* for respondents. Reported below: 55 F. (2d) 234.

No. 789. SOLEZ *v.* ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., LTD. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Frederic R. Coudert* and *Percy A. Shay* for petitioner. *Mr. Russell T. Mount* for respondent. Reported below: 54 F. (2d) 523.

No. 874. SUN OIL CO. *v.* DALZELL TOWING CO., INC. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Russell T. Mount* for petitioner. *Mr. Chauncey I. Clark* for respondent. Reported below: 55 F. (2d) 63.

No. 877. BROOKLYN EASTERN DISTRICT TERMINAL *v.* UNITED STATES. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Oscar R. Houston* and *Leonard J. Matteson* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, J. Frank Staley,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 54 F. (2d) 978.

No. 885. ELTING, COLLECTOR OF CUSTOMS, *v.* NORTH GERMAN LLOYD. May 23, 1932. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Bradley B. Gilman* for petitioner. *Mr. Melville J. France* for respondent. Reported below: 54 F. (2d) 997. See also, 48 F. (2d) 547.

No. 888. GRAU *v.* UNITED STATES. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Stephen L. Blakely* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 779.

No. 902. LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI *v.* ELTING, COLLECTOR OF CUSTOMS. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Delbert M. Tibbetts* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Bradley B. Gilman* for respondent. Reported below: 55 F. (2d) 1048.

No. 920. SGRO *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Irving K. Baxter* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 1083.

No. 979. GEBARDI ET AL. *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Wm. F.*

Waugh for petitioners. No appearance for the United States. Reported below: 57 F. (2d) 617.

No. 981. POWELL ET AL. *v.* ALABAMA;

No. 982. PATTERSON *v.* SAME; and

No. 983. WEEMS ET AL. *v.* SAME. May 31, 1932. Petition for writs of certiorari to the Supreme Court of Alabama granted. *Mr. Walter H. Pollak* for petitioners. *Mr. Thomas E. Knight, Jr.,* for respondent. Reported below: 224 Ala. 540, 531, 524; 141 So. 201, 195, 215.

No. 978. UNITED STATES *v.* GREAT NORTHERN RY. CO. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Charles H. Weston* and *Elmer B. Collins,* for the United States. *Messrs. F. G. Dorety, R. J. Hagman, W. W. Millan,* and *R. E. L. Smith* for respondent. Reported below: 57 F. (2d) 385.

No. 903. DOANE-COMMERCIAL TOWING CO. *v.* MEXICAN PETROLEUM CORP. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Albert T. Gould* for petitioner. *Messrs. Edward S. Dodge* and *Nathan W. Thompson* for respondent. Reported below: 55 F. (2d) 32.

No. 884. SEVIER COMMISSION CO. ET AL. *v.* WALLOWA NATIONAL BANK. May 31, 1932. Petition for writ of certiorari to the Supreme Court of Oregon granted. *Messrs. James G. Wilson* and *John F. Reilly* for petitioners. *Messrs. Robert Treat Platt* and *Harrison G. Platt* for respondent. Reported below: 138 Ore. 393; 5 P. (2d) 100.

No. 911. DALTON ET AL. *v.* BOWERS, EXECUTOR. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arnold Lichtig* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John Henry McEvers* for respondent. Reported below: 56 F. (2d) 16. See also, 53 F. (2d) 373.

No. 922. GENERAL ELECTRIC CO. ET AL. *v.* MARVEL RARE METALS CO. ET AL. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Lawrence Bristol* and *Charles Neave* for petitioners. *Mr. Harold Elno Smith* for respondents. Reported below: 56 F. (2d) 823.

No. 923. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HUFF. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. *Mr. Harry C. Weeks* for respondent. Reported below: 56 F. (2d) 788.

No. 955. MURPHY OIL CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Randolph E. Paul* and *Thomas R. Dempsey* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, J. P. Jackson,* and *Wilbur H. Friedman* for respondent. Reported below: 55 F. (2d) 17.

No. 977. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* COMMONWEALTH IMPROVEMENT CO. May 31,

1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Morton K. Rothschild* for petitioner. *Mr. Ellis Ames Ballard* for respondent. Reported below: 57 F. (2d) 47.

DECISIONS DENYING CERTIORARI, FROM APRIL 12, 1932, TO AND INCLUDING MAY 31, 1932

No. 856. JOYNER, ADMINISTRATOR, *v.* JEFFERSON STANDARD LIFE INSURANCE CO. April 18, 1932. 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. *Messrs. Carl H. Richmond* and *John W. Bennett* for petitioner. *Mr. Shepard Bryan* for respondent. Reported below: 53 F. (2d) 745.

No. 863. UNITED STATES EX REL. JACKSON *v.* MEYERING, SHERIFF. April 18, 1932. 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. Richard E. Westbrooks* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 621.

No. 864. LINDGREN, ADMINISTRATOR, *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORP. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob L. Morewitz* for petitioner. No appearance for respondent. Reported below: 55 F. (2d) 117.

No. 774. INDUSTRIAL COMMISSIONER OF NEW YORK *v.* IRVING TRUST CO., TRUSTEE; and

No. 775. SAME *v.* DUBERSTEIN, TRUSTEE. April 18, 1932. The petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit in the above-entitled cases is denied, the claimants not being parties to the application for the writs and it not appearing that petitioner has capacity to prosecute the application. *Mr. Joseph A. McLaughlin* for petitioner. *Mr. Godfrey Goldmark* for Irving Trust Co., Trustee. No appearance for Duberstein, Trustee. Reported below: 54 F. (2d) 338.

No. 705. ENRIGHT ET AL. *v.* UNITED STATES. April 18, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James D. Carpenter, Jr., John M. Enright, Eldon Bisbee,* and *George R. Shields* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *Bradley B. Gilman* for the United States. Reported below: 73 Ct. Cls. 416; 54 F. (2d) 182.

No. 748. KITAGAWA *v.* SHIPMAN, TREASURER. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Carl S. Carlsmith* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 313.

No. 749. MANA TRANSPORTATION CO., LTD., *v.* SHIPMAN, TREASURER. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Carl S. Carlsmith* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 313.

No. 754. MONTE RICO MILLING & MINING CO. ET AL. *v.* U. S. FIDELITY & GUARANTY CO. April 18, 1932. Petition for writ of certiorari to the Supreme Court of New Mexico denied. *Messrs. O. N. Marron* and *Francis E. Wood* for petitioners. *Mr. E. R. Wright* for respondent. Reported below: 35 N. M. 616; 5 P. (2d) 195.

No. 762. TRUST NO. 5833, SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, *v.* WELCH, COLLECTOR. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Stuart Chevalier* and *Melvin D. Wilson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *Wm. Cutler Thompson* for respondent. Reported below: 54 F. (2d) 323.

No. 778. LADOW, ADMINISTRATOR, *v.* BALTIMORE & OHIO R. Co. April 18, 1932. Petition for writ of certiorari to the Court of Appeals of Ohio, 1st Appellate District, denied. *Mr. Charles P. Taft, 2d,* for petitioner. *Mr. Benton S. Oppenheimer* for respondent. Reported below: 40 Ohio App. 458.

No. 780. INDEPENDENT OIL WELL CEMENTING CO. *v.* HALLIBURTON ET AL. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Arthur C. Brown* and *C. E. Hall* for petitioner. *Messrs. Leonard S. Lyon* and *Henry S Richmond* for respondents. Reported below: 54 F. (2d) 900.

No. 781. ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* NORKEVICH, ADMINISTRATRIX. April 18, 1932. Petition

for writ of certiorari to the Appellate Court of Illinois, 1st District, denied. *Messrs. E. E. McInnis* and *Homer W. Davis* for petitioner. *Mr. John K. Murphy* for respondent. Reported below: 263 Ill. App. 1.

No. 791. OWEN *v.* KINGSPORT PRESS, INC., ET AL. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Ellery Edwards* for petitioner. *Mr. Samuel H. Kaufman* for respondents. Reported below: 54 F. (2d) 497.

No. 792. UNCASVILLE MFG. CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John E. Hughes* for petitioner. *Solicitor General Thacher* for respondent. Reported below: 55 F. (2d) 893.

No. 794. OSTRANDER-SEYMOUR CO. *v.* POWERS-TYSON CORP. ET AL. April 18, 1932. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Wm. J. Hughes, Jr., Wm. E. Leahy,* and *Meyer Abrams* for petitioner. *Mr. Benn M. Corwin* for respondents. Reported below: 245 Mich. 669, 224 N. W. 609; 256 Mich. 311, 239 N. W. 323.

No. 803. GOSSETT, ADMINISTRATOR, ET AL. *v.* SWINNEY ET AL. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Alfred N. Gossett, Wm. S. Allen, John T. Harding,* and *Henry L. Jost* for petitioners. *Messrs. Arthur Mag, Roy B. Thomson,* and *Wm. S. Hogsett* for respondents. Reported below: 53 F. (2d) 772.

No. 804. MARTIN *v.* UNITED STATES. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Talma L. Smith* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 54 F. (2d) 554.

No. 806. MUIR, ADMINISTRATOR, *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Eugene Hubbard* for petitioner. *Mr. Wm. Marshall Bullitt* for respondent. Reported below: 53 F. (2d) 605; 55 *id.* 226.

No. 808. FIRE COMPANIES BUILDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James L. Fort* and *O. H. B. Bloodworth, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John Henry McEvers,* and *Wilbur H. Friedman* for respondent. Reported below: 54 F. (2d) 488.

No. 810. LOUISVILLE & NASHVILLE R. CO. *v.* LONG. April 18, 1932. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. James G. Johnson, James B. Wright,* and *Williston M. Cox* for petitioner. *Messrs. James A. Fowler* and *Jesse L. Rogers* for respondent.

No. 832. A. B. LEACH & CO., INC. *v.* GRANT, RECEIVER. April 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Messrs. Conrad H. Poppenhusen, Edward R. Johnston, and *Floyd E. Thompson* for petitioner. *Messrs. James P. Wilson* and *Andrew M. Henderson* for respondent. Reported below: 54 F. (2d) 731.

No. 786. LAVINE ET AL. *v.* CALIFORNIA. See same case, *ante,* p. 528.

No. 880. ISENBERG ET AL. *v.* SHERMAN ET AL. On petition for writ of certiorari to the Supreme Court of California. Submitted April 18, 1932. Decided April 25, 1932. The motion of the petitioner for leave to print an abbreviated record herein is denied, for the reason that the Court, upon examination of the unprinted record herein submitted, finds that the application for writ of certiorari was not made within the time provided by law. (Act of Feb. 13, 1925, § 8 (a), 43 Stat. 936, 940). The petition for a writ of certiorari is therefore also denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Messrs. Bartley C. Crum* and *John Francis Neylan* for petitioners. *Messrs. Oscar Sutro, Alfred Sutro, W. H. Lawrence,* and *Eugene M. Prince* for respondents. Reported below: 298 Pac. 1004; 299 *id.* 528; 212 Cal. 454; 7 P. (2d) 1006.

No. 872. MCCONLOGUE *v.* ADERHOLD, WARDEN. April 25, 1932. 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. Neil McConlogue, pro se.* No appearance for respondent. Reported below: 56 F. (2d) 152.

No. 765. UNION TRUST COMPANY, TRUSTEE, *v.* UNITED STATES. April 25, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Frederic D. Mc-*

Kenney, John S. Flannery, G. Bowdoin Craighill, and *Caesar L. Aiello* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, H. Brian Holland,* and *Erwin N. Griswold* for the United States. Reported below: 73 Ct. Cls. 315; 54 F. (2d) 152.

No. 812. First Union Trust & Savings Bank, Trustee, *v.* Consumers Co. et al. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Rush C. Butler* and *Frank E. Harkness* for petitioner. *Messrs. Edwin W. Sims, Franklin J. Stransky,* and *Cassius Prout* for respondents. Reported below: 53 F. (2d) 972.

No. 815. Aetna Casualty & Surety Co. *v.* Independent Bridge Co. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Edwin W. Smith* and *John C. Bane, Jr.,* for petitioner. *Mr. Edward G. Bothwell* for respondent. Reported below: 55 F. (2d) 79.

No. 816. Speers Sand & Clay Works, Inc. *v.* American Trust Co. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mary W. F. Speers* for petitioner. *Mr. Edward P. Keech, Jr.,* for respondent. Reported below: 52 F. (2d) 831.

No. 823. Wourdack *v.* Becker, Collector of Internal Revenue. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lon O. Hocker* for petitioner. *So-*

licitor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key, Wm. Cutler Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 55 F. (2d) 840.

No. 833. JACKSON IRON & STEEL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Richard S. Doyle* and *Charles D. Hamel* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Andrew D. Sharpe,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 54 F. (2d) 861.

No. 834. WELLS, TRUSTEE IN BANKRUPTCY, *v.* SIEGEL. April 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Albert A. Jones* for petitioner. *Mr. Milton Koblitz* for respondent. Reported below: 55 F. (2d) 877.

No. 840. SOVEREIGN CAMP, WOODMEN OF THE WORLD *v.* NEFF. April 25, 1932. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, denied. *Messrs. John T. Harding* and *David A. Murphy* for petitioner. *Mr. John G. Parkinson* for respondent. Reported below: 48 S. W. (2d) 564.

No. 873. MISSOURI-KANSAS-TEXAS R. CO. *v.* TSCHREPPEL. April 25, 1932. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Joseph M. Bryson, C. S. Burg, W. W. Brown,* and *Douglas Hudson*

for petitioner. *Mr. John A. Hall* for respondent. Reported below: 134 Kan. 251; 5 P. (2d) 845.

No. 837. GODFREY *v.* GODFREY, EXECUTOR. See same case, *ante*, p. 529.

No. 883. UNITED STATES EX REL MORAN *v.* HILL, WARDEN. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and the motion for leave to proceed further *in forma pauperis*, denied. *Mr. Eugene McCaffrey* for petitioner. No appearance for respondent. Reported below: 56 F. (2d) 146.

No. 835. CAPITAL NATIONAL BANK *v.* BOARD OF SUPERVISORS OF HINDS COUNTY; and

No. 836. SAME *v.* CITY OF JACKSON. Petition for writs of certiorari to the Supreme Court of Mississippi. May 2, 1932. The petitions for writs of certiorari in these cases are severally denied, upon the ground that the judgments sought here to be reviewed are joint and the records fail to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169; § 237 (b), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). *Mr. R. H. Thompson* for petitioner. *Messrs. Wm. H. Watkins* and *P. H. Eager, Jr.*, for respondents. Reported below: 162 Miss. 658; 139 So. 165, 163.

No. 798. BURNSTEIN ET AL. *v.* UNITED STATES. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Otto Christensen* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist*, and *Messrs. Martin A. Morrison, Paul D. Miller*, and *W. Marvin Smith* for the United States. Reported below: 55 F. (2d) 599.

No. 813. J. Chr. G. Hupfel Co., Inc. *v.* Anderson, Collector. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John G. Remey* for respondent. Reported below: 55 F. (2d) 1080.

No. 838. Chicago & Northwestern Ry. Co. *v.* State Board of Equalization & Assessment. May 2, 1932. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. Wymer Dressler* and *Samuel H. Cady* for petitioner. *Messrs. C. A. Sorensen* and *Hugh LaMaster* for respondent. Reported below: 121 Neb. 592; 237 N. W. 657; 238 N. W. 520.

No. 839. Milyonico et al. *v.* United States. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold J. Bandy* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, A. E. Gottschall, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 937.

No. 842. Security National Bank *v.* Young, County Treasurer, et al. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Perry F. Loucks* for petitioner. *Mr. Ray F. Drewry* for respondents. Reported below: 55 F. (2d) 616.

No. 846. Johnson et al. *v.* Burnet, Commissioner of Internal Revenue. May 2, 1932. Petition for writ

of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. Cutler Thompson,* and *Wm. F. Riley, Jr.,* for respondent. Reported below: 56 F. (2d) 58.

No. 848. 169 Bales Containing Wool *v.* United States. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Carl E. Whitney* and *Francis C. Lowthorp* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, Clinton M. Hester,* and *Wilbur H. Friedman* for the United States. Reported below: 56 F. (2d) 736.

No. 850. Chicago, Rock Island & Pacific Ry. Co. *v.* Squire, Administrator. May 2, 1932. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. John Barry, M. L. Bell, W. F. Dickinson, Thomas P. Littlepage,* and *W. R. Bleakmore* for petitioner. *Messrs. R. R. Bell, W. A. Ledbetter,* and *H. L. Stuart* for respondent. Reported below: 155 Okla. 53.

No. 852. St. Louis-San Francisco Ry. Co. et al. *v.* Fine. May 2, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward T. Miller, Harry P. Warner,* and *Cecil R. Warner* for petitioners. *Mr. David S. Partain* for respondent. Reported below: 184 Ark. 940; 44 S. W. (2d) 340.

No. 868. Albert Pick-Barth Co., Inc. *v.* Mitchell Woodbury Co., Inc., et al. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the

First Circuit denied. *Messrs. Edward F. McClennen* and *Jacob J. Kaplan* for petitioner. *Messrs. Edward O. Proctor* and *Mark M. Horblit* for respondents. Reported below: 57 F. (2d) 96.

No. 891. CAPONE *v.* UNITED STATES. May 2, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Michael J. Ahern, Albert Fink,* and *Frank K. Nebeker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 927.

No. 726. NATIONAL SURETY CO. ET AL. *v.* CORIELL ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles H. Tuttle, Saul S. Myers, Selden Bacon,* and *Gregory Hankin* for petitioners. *Mr. Charles B. McInnis* for respondents. Reported below: 54 F. (2d) 255.

No. 766. ERIE R. CO. *v.* UNITED STATES. May 16, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. M. B. Pierce* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Joseph H. Sheppard,* and *Bradley B. Gilman* for the United States. Reported below: 73 Ct. Cls. 307; 54 F. (2d) 173.

No. 843. CONSOLIDATED BOOK PUBLISHERS, INC. *v.* FEDERAL TRADE COMMISSION. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edw. W. Everett* for

petitioner. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Whitney North Seymour, Charles H. Weston, Wm. H. Riley, Jr., Robert E. Healy,* and *Martin A. Morrison* for respondent. Reported below: 53 F. (2d) 942.

No. 845. ROXANA PETROLEUM CORP. *v.* BOLLINGER ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Truman P. Young, Guy A. Thompson,* and *S. A. Mitchell* for petitioner. *Messrs. Oscar E. Carlstrom* and *Montgomery Winning* for respondents. Reported below: 54 F. (2d) 296.

No. 847. ROWE ET AL. *v.* UNITED STATES. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph A. Cantrel* for petitioners. *Solicitor General Thacher,* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 56 F. (2d) 747.

No. 851. COOPER, TRUSTEE, *v.* TAYLOR. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herbert S. Phillips* for petitioner. *Mr. N. B. K. Pettingill* for respondent. Reported below: 54 F. (2d) 1055.

No. 853. KOLIS *v.* MOSDEN. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert F. Cogswell* for petitioner. No appearance for respondent.

No. 854. CHILDS, TRUSTEE IN BANKRUPTCY, *v.* EMPIRE TRUST CO. May 16, 1932. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioner. *Messrs. Stuart McNamara* and *Leonard B. Smith* for respondent. Reported below: 54 F. (2d) 981.

No. 855. STIMPSON *v.* COMMISSIONER OF INTERNAL REVENUE. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George H. Moore* and *William M. Fitch* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Norman D. Keller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 55 F. (2d) 815.

No. 858. JOHN C. WINSTON CO. *v.* TRIMBLE ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marcellus Green, Wm. H. Watkins,* and *Garner W. Green* for petitioner. *Mr. L. T. Kennedy* for respondents. Reported below: 56 F. (2d) 150.

No. 860. GREAT NORTHERN RY. CO. *v.* SHELLENBARGER. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles A. Hart, Charles H. Carey,* and *Charles E. McCulloch* for petitioner. *Mr. Dan J. Malarkey* for respondent. Reported below: 54 F. (2d) 606.

No. 861. ATASCOSA COUNTY STATE BANK *v.* COPPARD, TRUSTEE, ET AL. May 16, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Victor Keller* for petitioner. *Mr. Sylvan Lang* for respondents. Reported below: 56 F. (2d) 1023.

No. 878. CORNELL STEAMBOAT CO. *v.* SHAMROCK TOWING CO.; and

No. 879. SAME *v.* JAMES A. MEENAN, INC. May 16, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioner. *Mr. Edward Ash* for Shamrock Towing Co. *Mr. John W. Griffin* for James A. Meenan, Inc. Reported below: 56 F. (2d) 740.

No. 818. KERR GLASS MFG. CORP. *v.* SUPERIOR COURT OF WASHINGTON, KING COUNTY, ET AL. See same case, *ante*, p. 532.

No. 952. NACHMAN *v.* UNITED STATES. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Jacob Nachman, pro se.* No appearance for the United States. Reported below: 57 F. (2d) 74.

No. 676. HART GLASS MFG. CO. *v.* UNITED STATES. May 23, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Charles D. Hamel, John Enrietto, Frank C. Olive,* and *Alan E. Gray* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Ralph C. Williamson, Bradley B. Gilman,* and *Wilbur H. Friedman,* for the United States. Reported below: 73 Ct. Cls. 32; 48 F. (2d) 435.

No. 776. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* BROWN; and

No. 797. BROWN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. May 23, 1932. Petitions for writs of

certiorari to the Circuit Court of Appeals for the First Circuit denied. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour* and *Sewall Key* for Burnet. *Mr. James Craig Peacock* for Brown. Reported below: 54 F. (2d) 563.

No. 817. KENTUCKY & INDIANA TERMINAL R. Co. *v.* COMMISSIONER OF INTERNAL REVENUE. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Edward P. Humphrey* and *Robert N. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Morton K. Rothschild,* and *Erwin N. Griswold* for respondent. Reported below: 54 F. (2d) 738.

No. 859. FLORIDA EX REL. DAVIS ET AL. *v.* ATLANTIC COAST LINE R. Co. May 23, 1932. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Theodore T. Turnbull* and *Cary D. Landis* for petitioners. *Messrs. F. B. Grier, Wm. E. Kay, Thomas B. Adams, J. L. Doggett,* and *Carl H. Davis* for respondent. Reported below: 103 Fla. 1204; 140 So. 817, 824.

No. 870. MORSE *v.* LEWIS, ADMINISTRATRIX. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry Simms* for petitioner. *Messrs. George E. Price* and *Robert S. Spilman* for respondent. Reported below: 54 F. (2d) 1027.

No. 875. DRYICE CORPORATION OF AMERICA ET AL. *v.* LOUISIANA DRY ICE CORP. ET AL.; and

No. 876. SAME *v.* BELT. May 23, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George F. Thompson* for petitioners. *Mr. Robert A. Hunter* for Louisiana Dry Ice Corp. et al. *Mr. Joseph S. Belt, pro se.* Reported below: 54 F. (2d) 882.

No. 882. PUTNAM *v.* CHRISTIE, ADMINISTRATRIX. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Oscar R. Houston, George S. Brengle,* and *Leonard J. Matteson* for petitioner. *Mr. Russell T. Mount* for respondent. Reported below: 55 F. (2d) 73.

No. 886. E. C. WARNER CO. *v.* W. B. FOSHAY CO. ET AL. May 23, 1932 Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John C. Benson* and *J. B. Faegre* for petitioner. *Mr. F. H. Stinchfield* for respondents. Reported below: 57 F. (2d) 656.

No. 887. LIGHTING FIXTURE SUPPLY, INC. *v.* FIDELITY UNION FIRE INS. CO. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. St. Clair Adams* for petitioner. No appearance for respondent. Reported below: 55 F. (2d) 110.

No. 893. BOSTON IRON & METAL CO. ET AL. *v.* UNITED STATES. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Sylvan Hayes Lauchheimer* for petitioners. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, J. Frank Staley,* and *Wilbur H. Friedman* for the United States. Reported below: 55 F. (2d) 126.

No. 894. MANDEL-WITTE CO., INC., ET AL. *v.* BROOKS. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Ballin* for petitioners. *Mr. Addison S. Pratt* for respondent. Reported below: 54 F. (2d) 992.

No. 895. DEAN, TRUSTEE, ET AL. *v.* JONES STORE CO. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Samuel W. Sawyer* for petitioners. *Messrs. Arthur Miller, Maurice Winger,* and *Charles W. German* for respondent. Reported below: 56 F. (2d) 110.

No. 912. MOTOR TUG HAAKONSEN NO. 2 *v.* NEW YORK TRAP ROCK CORP. ET AL. May 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George V. A. McCloskey* for petitioner. *Messrs. Frederick W. Park* and *Edward Ash* for respondents. Reported below: 57 F. (2d) 1082.

No. 949. FINN ET AL. *v.* RAILROAD COMMISSION OF CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California. May 31, 1932. The petition for writ of certiorari in this case is denied, because not filed within the time provided by law. The authority given to the Justices of this Court to extend the period for applying for a writ of certiorari not exceeding 60 days (§ 8 (a), Act of February 13, 1925, 43 Stat. 936, 940) is to be exercised upon application duly made to a Justice prior to the expiration of the statutory period, and where an extension has been granted, as provided, a further extension may be had only upon application duly made before the expiration of the extended period. *Mr. T. C. West* for petitioners. *Mr. Arthur T. George* for respondent.

No. 980. CRESSWELL EX REL. DI PIERRO *v.* TILLINGHAST, U. S. COMMISSIONER OF IMMIGRATION. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. May 31, 1932. The petition for writ of certiorari in this case is denied, because not filed within the time provided by law. The authority given to the Justices of this Court to extend the period for applying for a writ of certiorari not exceeding 60 days (§ 8 (a), Act of February 13, 1925, 43 Stat. 936, 940) is to be exercised upon application duly made to a Justice prior to the expiration of the statutory period, and where an extension has been granted, as provided, a further extension may be had only upon application duly made before the expiration of the extended period. *Messrs. Wm. H. Lewis* and *Matthew L. McGrath* for petitioner. No appearance for respondent. Reported below: 54 F. (2d) 459.

No. 862. HECHT *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Herbert C. Smyth* and *Frederic C. Scofield* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Ralph C. Williamson, Bradley B. Gilman,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 73 Ct. Cls. 579; 54 F. (2d) 968.

No. 871. COLONIAL TRUST CO., EXECUTOR, *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. C. C. Cochran, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *H. Brian Holland* for the United States. Reported below: 73 Ct. Cls. 549; 55 F. (2d) 512.

No. 896. ARKENBURGH *v.* BANK OF VASS. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Donald Meyer Newman* for petitioner. No appearance for respondent. Reported below: 55 F. (2d) 130.

No. 898. CITY NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. King* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, J. P. Jackson,* and *W. Marvin Smith* for respondent. Reported below: 55 F. (2d) 1073.

No. 899. GRANDIN, ADMINISTRATOR, *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Maynard Teall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, J. Louis Monarch,* and *Erwin N. Griswold* for respondent. Reported below: 56 F. (2d) 1082; 44 *id.* 141.

No. 901. VAN CAMP SEA FOOD CO., INC. *v.* COHN-HOPKINS ET AL. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Albert J. Fihe* for petitioner. *Mr. William S. Graham* for respondents. Reported below: 56 F. (2d) 797.

No. 904. GWIN *v.* JUNG ET AL. May 31, 1932. Petition for writ of certiorari to the Supreme Court of Louisi-

ana denied. *Mr. Purnell M. Milner* for petitioner. Mr. *Peter Jung, Sr.,* for respondents. Reported below: 174 La. 111; 139 So. 774.

No. 905. St. Louis-San Francisco Ry. Co. *v.* Martin. May 31, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward T. Miller* and *Alexander P. Stewart* for petitioner. *Mr. W. H. Douglass* for respondent. Reported below: 329 Mo. —; 46 S. W. (2d) 149.

No. 906. Texas Steel Co. *v.* Railroad Commission of Texas et al. May 31, 1932. Petition for writ of certiorari to the Court of Civil Appeals, Third Supreme Judicial District, of Texas, denied. *Mr. George W. Armstrong* for petitioner. *Messrs. Fred L. Wallace* and *Wm. E. Allen* for respondents. Reported below: 43 S. W. (2d) 137. See also, 27 S. W. (2d) 861.

No. 909. Angelus Building & Investment Co. *v.* Commissioner of Internal Revenue. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George Bouchard* and *Joseph D. Brady* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, A. H. Conner,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 57 F. (2d) 130.

No. 910. South Norfolk et al. *v.* Maryland Casualty Co. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. E. A. Bilisoly, Tazewell Taylor, Jr.,* and

James G. Martin for petitioners. *Messrs. Braden Vandeventer* and *J. W. Eggleston* for respondent. Reported below: 54 F. (2d) 1032; 56 *id.* 822.

No. 914. STEVENS, RECEIVER, *v.* COMPANIA PETROLERA CAPUCHINAS ET AL. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Francis L. Kohlman, Martin Conboy,* and *Saul J. Lance* for petitioner. *Mr. Wm. M. Chadbourne* for respondents. Reported below: 55 F. (2d) 905.

No. 915. LEE, EXECUTRIX, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John E. Laskey* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wilbur H. Friedman* for respondent. Reported below: 57 F. (2d) 399.

No. 917. ILLINOIS TERMINAL CO. *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Joseph H. Sheppard, Bradley B. Gilman,* and *W. Marvin Smith* for the United States. Reported below: 73 Ct. Cls. 263; 53 F. (2d) 904.

No. 918. SCHUETTE *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Gerald Donovan* for petitioner.

Solicitor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key,* and *F. Edward Mitchell* for respondent. Reported below: 55 F. (2d) 902.

No. 919. CHESAPEAKE & OHIO RY. CO. *v.* THOMAS. May 31, 1932. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. C. W. Strickling* for petitioner. *Mr. A. A. Lilly* for respondent. Reported below: 111 W. Va. 389; 162 S. E. 169.

No. 925. UNITED STATES *v.* FLENSBURGER DAMPFERCOMPAGNIE. May 31, 1932. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Thacher* for the United States. *Messrs. Maxwell C. Katz, Otto C. Sommerich,* and *Edwin M. Borchard* for respondent. Reported below: 73 Ct. Cls. 646.

No. 927. ERLANGER TREMONT THEATRE CORP. *v.* ELLSMORE. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Romney Spring* for petitioner. *Mr. George R. Farnum* for respondent. Reported below: 56 F. (2d) 809.

No. 931. DAVIS *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. J. Berne* for petitioner. *Solicitor General Thacher,* and *Messrs. John S. Pratt, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 55 F. (2d) 550.

No. 933. EASTERDAY ET AL. *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. W. W. Easterday* for petitioners. *Solicitor General Thacher,* and *Messrs. Paul D. Miller* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 57 F. (2d) 165.

No. 942. FERGUSON, COLLECTOR OF INTERNAL REVENUE *v.* NELSON. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Thacher* for petitioner. *Mr. William P. Chapman, Jr.,* for respondent. Reported below: 56 F. (2d) 121.

No. 943. LAWRENCE *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edwin W. Sims, Franklin J. Stransky,* and *Cassius Poust* for petitioner. *Solicitor General Thacher,* and *Messrs. Paul D. Miller, Erwin N. Griswold,* and *Hugh A. Fisher* for the United States. Reported below: 56 F. (2d) 555.

No. 944. GREATER CITY SURETY & INDEMNITY CORP. ET AL. *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis B. Boudin* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 57 F. (2d) 684.

No. 951. FOURNIER *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. Warner Parker* for petitioner. *Solicitor General Thacher,* and

Messrs. Paul D. Miller and *W. Marvin Smith* for the United States. Reported below: 58 F. (2d) 3.

No. 958. ERIE R. Co. *v.* BOOTH. May 31, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Welles V. Moot* for petitioner. *Mr. Hamilton Ward* for respondent. Reported below: 234 App. Div. 728; 251 N. Y. S. 997.

No. 961. COMERIATO ET AL. *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Raymond Gordon* for petitioners. No appearance for the United States. Reported below: 58 F. (2d) 557.

No. 968. BIEMER *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick W. Greene* for petitioner. No appearance for the United States. Reported below: 54 F. (2d) 1045.

No. 969. STANDARD ACCIDENT INS. CO., INC. *v.* MESSERVEY. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas R. Wheeler* for petitioner. *Mr. Wm. B. Mahoney* for respondent. Reported below: 58 F. (2d) 186.

No. 970. PELLEGRINO *v.* ADERHOLD, WARDEN. May 31, 1932. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. A. K. Shipe* for petitioner. No appearance for respondent. Reported below: 55 F. (2d) 1074.

No. 974. HELLER *v.* UNITED STATES. May 31, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Giles F. Clark* for petitioner. No appearance for the United States. Reported below: 57 F. (2d) 627.

No. 975. ROXBURGHE *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. May 31, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George M. Morris* and *Frederick L. Pearce* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John MacC. Hudson* for respondent. Reported below: 58 F. (2d) 693.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 12, 1932, TO AND INCLUDING MAY 31, 1932

No. 649. ADAMS GREASE GUN CORP. *v.* BASSICK MFG. CO. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 18, 1932. Dismissed with costs and mandate granted on motion of *Mr. Henry T. Hornidge* for petitioner. Reported below: 52 F. (2d) 36; 54 *id.* 285.

No. 892. UNITED STATES *v.* SOWELL. Appeal from the District Court of the United States for the Northern

District of Texas. April 25, 1932. Appeal dismissed and mandate granted on motion of *Solicitor General Thacher* for the United States.

No. 857. BECKLEY WATER CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL. Appeal from the Supreme Court of Appeals of West Virginia. May 31, 1932. Dismissed pursuant to Rule 12.

AMENDMENTS OF RULES

By order of May 31, 1932, parts of the Rules of the Court were amended to read as set forth in the order, effective September 1, 1932. The parts so amended are: Rule 5, par. 5; Rule 7, par. 3; Rule 10, pars. 1 and 2; Rule 12; Rule 13, pars. 2 and 9; Rule 38, pars. 2, 3 (a), and 4; Rule 41, pars. 4 and 5; and Rule 46, par. 2. The complete rules, including all amendments, will be found in this volume, pp. 575 *et seq.*

AMENDMENTS OF EQUITY RULES.*

ORDER, MAY 31, 1932.

Paragraph (b) of rule 75 of the rules of practice in equity heretofore promulgated by this Court (226 U. S., Appendix) is amended to read as follows:

"(b) The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (*a*) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly pre-

* The Equity Rules now in force were promulgated November 4, 1912, effective February 13, 1913. See 226 U. S. 629.

For other amendments, see 268 U. S. 709; 281 U. S. 773.

pared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

ORDER, MAY 31, 1932.

The rules of practice in equity heretofore promulgated by this Court (226 U. S., Appendix) are amended by including therein a new rule numbered 61½ and reading as follows:

"In all references to a master, either compulsorily by the court in cases where it has the power to make compulsory reference, or by consent of parties where consent is necessary, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the master shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: *Provided,* That when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the master as an arbitrator, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

AMENDMENT OF ADMIRALTY RULES.*

ORDER, MAY 31, 1932.

The rules of practice in admiralty heretofore promulgated by this Court (254 U. S., Appendix) are amended by including therein a new rule numbered 43½ and reading as follows:

"In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: *Provided,* That when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissioners or assessors as arbitrators, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

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* The Admiralty Rules now in force were promulgated December 6, 1920, effective March 7, 1921. See 254 U. S., appendix.

For another amendment, see 281 U. S. 773.

AMENDMENT OF BANKRUPTCY RULES.*

ORDER, MAY 31, 1932.

The General Orders in Bankruptcy heretofore promulgated by this Court are amended by including therein a new order, numbered XLVII, and reading as follows:

"The reports of referees in all cases and proceedings in bankruptcy shall be deemed presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: *Provided,* That when any matter is referred by consent of all parties in interest and the intention is plainly expressed in the consent order that the submission is to the referee as an arbitrator, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

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* The General Orders were last printed in the reports in 210 U. S., appendix.

For other amendments, see 280 U. S. 617; 283 U. S. 870.

REVISED RULES

OF

THE SUPREME COURT

OF

THE UNITED STATES

ADOPTED JUNE 5, 1928. EFFECTIVE JULY 1, 1928
AMENDED JUNE 1, 1931, AND MAY 31, 1932

(The Acts of February 13, 1925, c. 229, 43 Stat. 936, January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466, are printed in an Appendix.)

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Revised Rules of the Supreme Court of the United States*

Adopted June 5, 1928. Effective July 1, 1928.
Amended June 1, 1931, and May 31, 1932.

(The Acts of February 13, 1925, c. 229, 43 Stat. 936, January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466, are printed in an Appendix.)

FOR REVIEW ON APPEAL SEE RULES 9, 10, 12, 36 AND 46, AMONG OTHERS.

FOR REVIEW ON CERTIORARI SEE, AMONG OTHERS, RULES 38, 39, 41 AND 42.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

* The rules were last published in 275 U. S., Appendix. Rule 32, par. 6, has since been amended, by order of June 1, 1931 (283 U. S. 869). The order of May 31, 1932, effective September 1, 1932, amended the following rules: Rule 2, par. 5; Rule 7, par. 3; Rule 10, pars. 1 and 2; Rule 12; Rule 13, pars. 2 and 9; Rule 38, pars. 2, 3(a), and 4; Rule 41, pars. 4 and 5; Rule 46, par. 2. The present printing includes all these amendments. For amendments of Equity, Admiralty, and Bankruptcy rules, see *ante*, pp. 570 *et seq.*

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2. The clerk shall not permit any original record or paper to be taken from the office without an order from the court or one of the justices, except as provided by Rule 13, paragraph 4.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the State, Territory, District, or Insular Possession to which they respectively belong, and that their private and professional characters shall appear to be good.

2. In advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, and (2) his personal statement setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native born citizen, the date and place of his naturalization.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he knows, or after reasonable inquiry believes, the applicant possesses the necessary qualifications and has filed with the clerk the required certificate and statement.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

5. Where it is shown to the court that any member of its bar has been disbarred from practice in any State,

Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

3.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a member of this court shall practice as an attorney or counsellor in any court while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years shall have elapsed after such separation.

4.

LAW LIBRARY.

1. During the sessions of the court, any gentleman of the bar having a case on the docket, and wishing to use any books in the law library, shall be at liberty, upon application to the clerk, to receive an order to take the same (not exceeding four at any one time) from the library, he becoming thereby responsible for the prompt return of the same. And if the same be not so returned he shall be responsible for, forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond two days.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions and briefs therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

5.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress.

6.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney general, of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of such process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

7.

MOTIONS—INCLUDING THOSE TO DISMISS OR AFFIRM—SUMMARY DOCKET—MOTION DAY.

1. Every motion to the court shall be printed, and shall state clearly its object and the facts on which it is based.

2. Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed.

3. No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

A motion by appellee to dismiss an appeal will be received in advance of the court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3. When such a motion is made, the appellant shall have 20 days after service upon him within which to file in this court 40 printed copies of a brief opposing the motion, except that where his counsel resides in Californa, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be 25 days.

A motion by respondent to dismiss a writ of certiorari or by appellee to dismiss an appeal, after the court has ruled upon the jurisdictional statements and accompanying motions, if any (Rule 12, paragraph 5), will be received if not based upon grounds already advanced in opposition to the granting of the writ of certiorari or to the noting of jurisdiction of the appeal. Such motions, together with motions to dismiss certificates in case of questions certified, must be printed and 40 copies thereof must be filed with the clerk, accompanied by proof that a copy of the motion, and accompanying brief, if any, have been served upon counsel of record for the opposing party. The opposing party shall have 20 days from the date of such service within which to file a printed brief opposing the motion. When counsel for the opposing party resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be 25 days. Upon the filing of the opposing brief, or the expiration of the time allowed therefor, or express waiver of the right to

file, the motion and briefs thereon shall be distributed by the clerk to the court for its consideration.

The pendency of a motion to dismiss or affirm shall not preclude the placing of the cause upon the calendar of the court for oral argument or its being called for argument when reached.

4. The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The procedure provided in paragraph 3 of this rule for motions to dismiss shall apply to and control motions to affirm. A motion to affirm may be united in the alternative with a motion to dismiss.

5. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to the summary docket. The hearing of causes on such docket will be expedited from time to time as the regular order of business may permit. A cause may be transferred to the summary docket on application, or on the court's own motion. See Rule 28, paragraphs 3 and 6.

6. Monday of each week, when the court is in session, shall be motion day; and motions specially assigned for oral argument shall be entitled to preference over other cases.

8.

BILLS OF EXCEPTION—CHARGE TO JURY—OMISSION OF UNNECESSARY EVIDENCE

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required be-

fore the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

9.

ASSIGNMENT OF ERRORS.

Where an appeal is taken to this court from a state court, a district court or a circuit court of appeals (see sections 237(a), 238 and 240(b) of the Judicial Code as amended February 13, 1925), the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors (see Rev. Stat. sec. 997), which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition. See Rule 36.

10.

APPEAL—CITATION—RECORD—DESIGNATION OF PARTS TO BE INCLUDED IN TRANSCRIPT.

1. When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming and

Montana, when the time shall be sixty days. The citation must be served before the return day.

2. The clerk of the court from which an appeal to this court may be allowed, shall make and transmit to this court under his hand and the seal of the court a true copy of the material parts of the record always including the assignment of errors and any opinions delivered in the case.

To enable the clerk to perform such duty and for the purpose of reducing the size of transcripts and eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant, or his counsel, to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee, or his counsel, a *praecipe* indicating the portions of the record to be incorporated into the transcript. Should the appellee, or his counsel, desire additional portions of the record incorporated into the transcript, he or his counsel shall file with the clerk of the lower court his *praecipe,* within ten days thereafter (unless the time be enlarged by a judge of the lower court or a justice of this court), indicating the additional portions of the record desired to be included. See Equity Rules 75–77, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

The clerk of the lower court shall transmit to this court as the transcript of the record only the portions of the record covered by such designations.

The parties or their counsel may by written stipulation filed with the clerk of the lower court indicate the portions of the record to be included in the transcript, and the clerk shall then transmit only the parts designated in such stipulation.

In all cases the clerk shall include in the transcript all papers filed under authority of Rule 12. See Rule 12, paragraph 4.

If this court shall find that any portion of the record unnecessary to a proper presentation of the case has been

incorporated into the transcript at the instance of either party, the whole or any part of the cost of printing and the clerk's fee for supervising the printing may be ordered to be paid by the offending party.

3. No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers along with the usual transcript.

5. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, findings of fact and conclusions of law thereon, opinions of the court, final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper determination of such questions.

11.

DOCKETING CASES.

1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the ap-

pellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court.

2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument.

3. Upon the filing of the record brought up by appeal, the appearance of the counsel for the party docketing the case shall be entered.

12.

JURISDICTION OF THIS COURT TO REVIEW UPON APPEAL.

1. Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, (b) to the statute of the state, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute or treaty may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; and (c) to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented. The

statement shall show that the nature of the case and of the rulings of the court were such as to bring the case within the jurisdictional provision relied on, and shall cite the cases believed to sustain the jurisdiction.

If the appeal is from an interlocutory decree of a specially constituted District Court of the United States (Judicial Code, sec. 266; U. S. C., Tit. 28, sec. 380), the statement must also include a showing of the matters in which it is claimed that the court has abused its discretion in granting or denying the interlocutory injunction. (*Alabama* v. *United States*, 279 U. S. 229.)

2. If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.

3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3.

4. The clerk of the court possessed of the record shall include the statements and motions, required and permitted to be filed under the provisions of this rule, in the transcript of record prepared for the use of this court on the appeal, anything in the praecipes or stipulations of the parties (Rule 10, paragraph 2) to the contrary notwithstanding.

5. After the case shall have been docketed in this court by the appellant, and the transcript of record filed (Rule 11, paragraph 1), the clerk of this court shall forthwith print the appellant's statement required by paragraph 1 of this rule and the opposing statement, and motions, if any, permitted by paragraph 3 of this rule, and the clerk shall thereupon distribute such printed papers to the court for its consideration.

At the time of docketing the case the appellant shall make such cash deposit with the clerk, in addition to such deposit as may be required under Rule 13, paragraph 1, as shall be necessary to defray the cost of printing 40 copies of his statement filed pursuant to paragraph 1 of this rule; and the appellee, upon demand, shall forthwith deposit with the clerk a sum sufficient to cover the cost of printing 40 copies of any statement or motions filed under paragraph 3 of this rule.

6. If either appellant or appellee fails to comply with the provisions of this rule, the clerk of this court shall report such failure to the court immediately so that this court may take such action as it deems proper.

13.

PRINTING RECORDS—DESIGNATION OF POINTS INTENDED TO BE RELIED UPON AND OF PARTS OF RECORD TO BE PRINTED.

1. In all cases the appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor (see paragraph 9 of this rule), the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the

printing, and other probable fees, and shall furnish the same to the party docketing the case. If such estimated sum be not paid on or before a date designated by the clerk of this court in each case, it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 10, paragraph 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fees of the clerk, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fees shall exceed the estimate, the excess shall be paid to the clerk within forty days after notice thereof, and if it be not paid the matter shall be dealt with as if it were a default under paragraph 2 of this rule, as well as by rendering a judgment against the defaulting party for such excess.

7. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fees shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of a party or his surety, of having served on such party or surety a copy of the bill of fees due by him in this court, and showing that payment has not been made, an attachment shall issue against such party or surety to compel payment of such fees.

9. When the record is filed, or within five days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ten days after service of the statement and designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. He shall, however, omit all duplication, all repetition of titles and all other obviously unimportant matter, and make proper note thereof. The court will consider nothing but the points of law so stated and the parts of the record so designated. If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If either party shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 32, paragraph 6, shall be computed on the folios in the record as filed, and shall be in full for the performance of his duties in that regard.

14.

TRANSLATIONS.

Whenever any record transmitted to this court upon appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and printed with the record.

15.

FURTHER PROOF.

1. In all cases where further proof is ordered by this court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, requiring him to file cross-interrogatories within twenty days from the service of such notice.

16.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record

as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent.

17.

CERTIORARI TO CORRECT DIMINUTION OF RECORD.

No *certiorari* to correct diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown, if not admitted by the other party, by affidavit. All such motions must be made not later than the first motion day after the expiration of sixty days from the printing of the record, unless for special cause shown the court receives the motion at a later time.

18.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the marshal at least one month before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material, placed in the custody of the marshal must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the marshal to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the marshal shall destroy them, or make such other disposition of them as to him may seem best.

19.

DEATH OF PARTY—REVIVOR—SUBSTITUTION.

1. Whenever, pending an appeal or writ of certiorari in this court, either party shall die, the proper representa-

tive in the personalty or realty of the deceased, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such order, if appellee or respondent, shall be entitled to have the appeal or writ of certiorari dismissed; and if the party so moving be appellant or petitioner he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, District or Insular Possession, in which the case originated, for three successive weeks, at least sixty days before the expiration of the time designated for the representative of the deceased party to appear.

2. When the death of a party is suggested, and the representative of the deceased does not appear by the second day of the term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute an appeal or writ of certiorari to this court from any final judgment or decree, rendered in that court, and at the time of applying for such appeal or writ of certiorari the other party to the suit shall be dead and have no proper representative within the jurisdiction of that court, so that the suit can not be revived in that court, but shall have a proper representative in some State, Territory or District of the United States, the party desiring such appeal or writ of certiorari may procure the same, if otherwise entitled thereto, and may have proceedings on such judgment or decree superseded or stayed in the manner allowed by law and shall thereupon proceed with such appeal or writ of certiorari

as in other cases. And within thirty days after the time when such appeal or writ of certiorari is returnable, or if the court be not then in session within ten days after it next convenes, the appellant or petitioner shall make a suggestion to the court, supported by affidavit, that such party was dead when the appeal or writ of certiorari was allowed, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that such deceased party had a proper representative in some State, Territory or District of the United States—giving the name and character of such representative, and his place of residence; and, upon such suggestion and a motion therefor, an order may be obtained that, unless such representative shall make himself a party within a designated time the appellant or petitioner shall be entitled to open the record, and, on hearing have the judgment or decree reversed, if the same be erroneous: Provided, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the expiration of the time designated: And provided, also, That in every such case if the representative of the deceased party does not appear by the second day of the term next succeeding said suggestion, and the measures above provided to compel his appearance have not been taken as above required, by the opposite party, the case shall abate: And provided, also, That the representative may at any time before or after the suggestion, but before such abatement, come in and be made a party and thereupon the case shall be heard and determined as in other cases.

4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under

that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office.

20.

CALL AND ORDER OF THE DOCKET—MOTIONS TO ADVANCE.

1. Unless it otherwise orders, the court, on the first day of each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed with the argument, the case shall be continued to the next term or otherwise dealt with as provided in these rules.

2. Ten cases only shall be subject to call on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons supporting the motion.

4. Criminal cases may be advanced by leave of the court on motion of either party.

5. Cases once adjudicated by this court upon the merits, and again brought up, may be advanced by leave of the court.

6. Revenue and other cases in which the United States is concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may be advanced by leave of the court on motion of the Attorney General.

7. Other cases may be advanced for special cause shown. When a case is advanced, under this or any other paragraph, it will be subject to hearing with any other case subsequently advanced and involving a like question, as if they were one case.

8. Two or more cases, involving the same question, may, by order of the court, be heard together, and argued as one case or on such terms as may be prescribed.

9. If, after a case has been continued under paragraph 1 of this rule, both parties desire to have it heard at the term of the continuance, they may file with the clerk their joint request to that effect accompanied by their affidavits or those of their counsel giving the reasons why they failed to present their argument when the case was called and why it should be reinstated. Such a request will be granted only when it appears to the court that there was good reason for the previous failure to proceed and that the request can be granted without prejudice to parties in other cases coming on regularly for hearing.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

11. Cases on the summary docket will be heard specially as provided in paragraph 5 of Rule 7.

21.

NO APPEARANCE OF APPELLANT OR PETITIONER.

Where no counsel appears and no brief has been filed for the appellant or petitioner when the case is called for hearing, the adverse party may have the appellant or petitioner called and the appeal or writ of certiorari dismissed, or may open the record and pray for an affirmance.

22.

NO APPEARANCE OF APPELLEE OR RESPONDENT.

Where the appellee or respondent fails to appear when the case is called for hearing, the court may hear argument

on behalf of the party appearing and give judgment according to the right of the case.

23.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call, and there is no brief or appearance for either party, the case shall be dismissed at the cost of the appellant or petitioner.

24.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the appellant or petitioner, unless strong cause is shown for further postponement.

25.

SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. Any case may be submitted on printed briefs regardless of its place on the docket, if the counsel on both sides choose to submit the same in that manner, before the first Monday in May of any term. After that date cases may be submitted on briefs alone only as they are reached on the regular call.

2. When a case is reached on the regular call, if a printed brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

3. When a case is reached on the regular call and argued orally in behalf of only one of the parties, no brief for the opposite party will be received after the oral argument begins, except as provided in the next paragraph of this rule.

4. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave granted in open court after notice to opposing counsel.

26.

FORM OF PRINTED RECORDS, PETITIONS, BRIEFS, ETC.

All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed. The clerk shall refuse to receive any petition, motion or brief which has been printed otherwise than in substantial conformity to this rule.

27.

BRIEFS.

1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

(c) If paragraph 1 of Rule 12 has not been complied with, a concise statement of the grounds on which the jurisdiction of this court is invoked, embodying all that is required to be set forth in the statement described in that paragraph.

(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, e. g., (R. 12).

(e) A specification of such of the assigned errors as are intended to be urged.

(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon, and quoting the revelant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

3. The counsel for an appellee or respondent shall file with the clerk forty printed copies of his brief, at least one week before the case is called for hearing—such brief to be of like character with that required of the other party, except that no specification of errors need be given, and that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.

5. When, under this rule, an appellant or petitioner is in default, the court may dismiss the cause; and when an appellee or respondent is in default, the court may decline to hear oral argument in his behalf.

6. No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

28.

ORAL ARGUMENT.

1. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

3. Two counsel, and no more, will be heard for each party, save that in cases on the summary docket (see Rule 7, paragraph 5) only one counsel will be heard on the same side.

4. In cases on the regular docket (except where questions have been certified) one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing.

5. In cases where questions have been certified to this court three-quarters of an hour shall be allowed to each side for oral argument.

6. In cases on the summary docket one-half hour on each side, and no more, will be allowed for the argument.

29.

OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

30.

INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court.

4. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

31.

PROCEDENDO TO ISSUE ON DISMISSAL.

In all cases of the dismissal of any appeal or writ of certiorari in this court, the clerk shall issue a mandate, or other proper process, in the nature of a *procedendo,* to the court below, so that further proceedings may be had in such court as to law and justice may appertain. See Rules 34 and 35.

32.

COSTS.

1. In all cases where any appeal or writ of certiorari shall be dismissed in this court, costs shall be allowed to the appellee or respondent unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when only the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree by this court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. No costs shall be allowed in this court either for or against the United States, except where specially authorized by statute and directed by the court.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, ten dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, including filing of preliminary certificate and statement, fifteen dollars.

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 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.

For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

33.

REHEARING.

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly

and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

34.

MANDATES.

Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session. See Rules 31 and 35.

35.

DISMISSING CASES IN VACATION.

Whenever the appellant and appellee in an appeal, or the petitioner and respondent in a writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal or writ shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. See Rules 31 and 34.

36.

APPEALS—BY WHOM ALLOWED—SUPERSEDEAS.

1. In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court,

including a circuit judge assigned thereto, or by a justice of this court. In cases where an appeal may be had from a circuit court of appeals to this court the same may be allowed, in term time or in vacation by any judge of the circuit court of appeals or by a justice of this court. In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the requisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat., secs. 1000 and 1007, paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Equity Rule 74, 226 U. S. Appendix p. 22. For stay pending application for review on writ of certiorari see Rule 38, paragraph 6.

2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

37.

QUESTIONS CERTIFIED BY A CIRCUIT COURT OF APPEALS OR THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(See Sec. 239 of the Judicial Code as amended by the Act of February 13, 1925.)

1. Where a circuit court of appeals or the Court of Appeals of the District of Columbia shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in such a cause it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up so that it may consider and decide the whole matter in controversy as upon appeal.

3. Where application is made for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof.

38.

REVIEW ON WRIT OF CERTIORARI OF DECISIONS OF STATE COURTS, CIRCUIT COURTS OF APPEALS AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(See secs. 237(b) and 240(a) of the Judicial Code as amended by the Act of February 13, 1925.)

1. A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the Court of Appeals of the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court

to which the writ is asked to be directed. For printing record see paragraph 7 of this rule.

2. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. See *United States* v. *Rimer,* 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.,* 242 U. S. 430; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S. 387, 392; *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508. Forty printed copies of the petition and supporting brief shall be filed. The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925.

3. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the Clerk. If the United States, or any of its officers, is respondent and has been represented in the court below by the Attorney General of the United States or any of his subordinates, the service of the petition, record and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have twenty days, and where he resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, shall have twenty-five days, after notice, within which to file forty printed copies of an cpposing brief, conforming to Rules 26 and 27.

(a) If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within forty days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th.

4. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, record and briefs shall be distributed by the clerk to the court for its consideration.

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(c) Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or ap-

plication of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

6. Section 8 (d) of the Act of February 13, 1925, prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. See Rule 36.

7. The record must be printed conformably to Rule 26, with a suitable index, and thirty copies filed with the clerk. But where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there. When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court; but if the petition is granted the requisite additional printed copies must be promptly supplied, by further printing if necessary.

39.

CERTIORARI TO A CIRCUIT COURT OF APPEALS OR THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA BEFORE JUDGMENT.

(See sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case pending in a circuit court of appeals or the Court of Appeals of the District of Columbia, before judgment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons

for granting or refusing the application will be applied. That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.

40.

QUESTIONS CERTIFIED BY THE COURT OF CLAIMS.

(See sec. 3(a) of the Act of February 13, 1925.)

Where the Court of Claims shall certify to this court a question of law, concerning which instructions are desired for the proper disposition of a case, the certificate shall contain a statement of the case and of the facts on which such question arises. Questions of fact cannot be certified. The certification must be confined to definite and distinct questions of law.

41.

JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI

(See sec. 3(b) of the Act of February 13, 1925.)

1. In any case in the Court of Claims where both parties request in writing, at the time the case is submitted, that the facts be specially found, it shall be the duty of that court to make and enter special findings of fact as part of its judgment.

2. In any case in that court where special findings of fact are not so requested at the time the case is submitted, a party aggrieved by the judgment may, not later than twenty days after its rendition, request the court in writing to find the facts specially; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment. The judgment shall be regarded as remaining under the court's control for this purpose.

3. The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found.

4. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, judgment and opinion of the court, but not the evidence. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ, but may be accompanied by a brief to conform to Rules 26 and 27 as to form. The petition, brief and record shall be filed with the clerk and forty copies shall be printed under his supervision. The record shall be printed in the same way and upon the same terms that records on appeal are required to be printed. The estimated costs of printing shall be paid within five days after the estimate is furnished by the clerk and if payment is not so made the petition may be summarily dismissed. When the petition, brief and record are printed the petitioner shall forthwith serve copies thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

5. Within twenty days after the petition, brief and record are served the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs and record, shall be distributed by the clerk to the court for its consideration.

The provision of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

6. The same general considerations will control in respect of petitions for writs of certiorari to review judg-

ments of the Court of Claims as are applied to applications for such writs to other courts. See paragraph 5 of Rule 38.

42.

JUDGMENTS OF COURT OF CUSTOMS AND PATENT APPEALS OR OF SUPREME COURT OF PHILIPPINE ISLANDS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 195, Judicial Code, as amended, or sec. 7 of the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case from the Court of Customs and Patent Appeals or from the Supreme Court of the Philippines should conform, as near as may be, to the provisions of Rule 38. The same general considerations which control when such writs to other courts are sought will be applied to them.

43.

ORDER GRANTING CERTIORARI.

Whenever application for a writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith mail notice of the granting of the application to the court below and to counsel of record. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

44.

RULES, COSTS, FEES, ETC., ON CERTIORARI.

Where not otherwise specially provided, the rules relating to appeals, including those relating to costs, fees and interest, shall apply, as far as may be, to petitions for, and causes heard on, certiorari.

45.

CUSTODY OF PRISONERS PENDING A REVIEW OF PROCEEDINGS IN HABEAS CORPUS.

(See Rev. Stat. sec. 765 and Act of Feb. 13, 1925, sec. 6.)

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

46.

REVIEW ON APPEAL.

1. Appeals to this court from decrees in suits in equity in the district courts and in the circuit courts of appeals are not affected by the act of January 31, 1928,

or the amendatory act of April 26, 1928, both of which are copied in the appendix hereto. Such appeals, where admissible, must be sought, allowed and perfected as provided in other statutes and in the equity rules. See 226 U. S. appendix. The act of February 13, 1925, copied in the appendix hereto, shows when an appeal is admissible and when the mode of review is limited to certiorari.

2. Under the act of January 31, 1928, as amended by the act of April 26, 1928, the review which theretofore could be had in this court on writ of error may now be obtained on an appeal. But the appeal thereby substituted for a writ of error must be sought, allowed and perfected in conformity with the statutes theretofore providing for a writ of error. The appeal can be allowed only on the presentation of a petition showing that the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, a review could be had in this court on writ of error. The petition must be accompanied by an assignment of errors (see Rule 9), and statement as to jurisdiction (see Rule 12), and the judge or justice allowing the appeal must take proper security for costs and sign the requisite citation to the appellee. See paragraph 1 of Rule 10 and paragraph 1 of Rule 36. The citation must be served on the appellee or his counsel and filed, with proof of service, with the clerk of the court in which the judgment to be reviewed was entered. The mode of obtaining a supersedeas is pointed out in paragraph 2 of Rule 36.

47.

NO SESSION ON SATURDAY.

The court will not hear arguments or hold open sessions on Saturday.

48.

ADJOURNMENT OF TERM.

The court will at every term announce, at least three weeks in advance, the day on which it will adjourn, and

will not take up any case for argument, or receive any case upon briefs or upon petition for certiorari, within two weeks before the adjournment, unless otherwise ordered for special cause shown.

49.

ABROGATION OF PRIOR RULES.

These rules shall become effective July 1, 1928, and be printed as an appendix to 275 U. S. The rules promulgated June 8, 1925, appearing in 266 U. S. Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

APPENDIX TO RULES.

ACT OF FEBRUARY 13, 1925.
Chapter 229, 43 Stat. 936.
Effective May 13, 1925.

An Act To amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

SEC. 128. (a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

" First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.

" Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

" Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000, in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus pro-

ceedings; and in the district court for the Canal Zone in the cases and mode prescribed in the Act approved September 21, 1922, amending prior laws relating to the Canal Zone.

"Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings.

"Fifth. In the United States Court for China, in all cases.

"(b) The circuit court of appeals shall also have appellate jurisdiction—

[1] First. To review the interlocutory orders or decrees of the district courts, including the District Courts of Alaska, Hawaii, Virgin Islands, and Canal Zone, which are specified in section 129.

[2] Second. To review decisions of the district courts, under section 9 of the Railway Labor Act.

"(c) The circuit courts of appeal shall also have an appellate and supervisory jurisdiction under sections 24 and 25 of the Bankruptcy Act of July 1, 1898, over all proceedings, controversies, and cases had or brought in the distirct courts under that Act or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

"(d) The review under this section shall be in the following circuit courts of appeal: The decisions of a district

[1] As amended by sec. 1, Act of April 11, 1928, Chapter 354, 45 Stat. 422.

[2] As amended by sec. 13(a), Act of May 20, 1926, Chapter 347, 44 Stat. 587.

court of the United States within a State in the circuit court of appeals for the circuit embracing such State; those of the District Court of Alaska or any division thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

"(e) The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914.

"SEC. 129. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 239 and 240 shall apply to such cases in the circuit courts of appeals as to other cases therein: *Provided,* That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree,

and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof: *Provided, however,* That the district court may, in its discretion, require an additional bond as a condition of the appeal."

[3](a) In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the parties: *Provided,* That the same is taken within fifteen days after the entry of the decree: *And provided further,* That within twenty days after such entry the appellant shall give notice of the appeal to the appellee or appellees; but the taking of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just.

[4](b) That when in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals: *Provided,* That such appeal be taken within thirty days from the entry of such decree or from the date of this act; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal.

SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of

[3] Act of April 3, 1926, Chapter 102, 44 Stat. 233.

[4] Act of February 28, 1927, Chapter 228, 44 Stat. 1261.

the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded

and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 1010 of the Revised Statutes."

"SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

"(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

"(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

"(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set

aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) Section 316 of 'An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921."

"SEC. 239. In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the

instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

[5] SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; and under section 11 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

SEC. 3. (a) That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause.

(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal.

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[5] As amended by sec. 13(b) of Act of May 20, 1926, Chapter 347, 44 Stat. 587.

(c) All judgments and decrees of the Court of Claims shall be subject to review by the Supreme Court as provided in this section, and not otherwise.

SEC. 4. That in cases in the district courts wherein they exercise concurrent jurisdiction with the Court of Claims or adjudicate claims against the United States the judgments shall be subject to review in the circuit courts of appeals like other judgments of the district courts; and sections 239 and 240 of the Judicial Code shall apply to such cases in the circuit courts of appeals as to other cases therein.

SEC. 5. That the Court of Appeals of the District of Columbia shall have the same appellate and supervisory jurisdiction over proceedings, controversies, and cases in bankruptcy in the District of Columbia that a circuit court of appeals has over such proceedings, controversies, and cases within its circuit, and shall exercise that jurisdiction in the same manner as a circuit court of appeals is required to exercise it.

SEC. 6. (a) In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) In such a proceeding in the Supreme Court of the District of Columbia, or before a justice thereof, the final order shall be subject to review, on appeal, by the Court of Appeals of that District.

(c) Sections 239 and 240 of the Judicial Code shall apply to habeas corpus cases in the circuit courts of appeals and in the Court of Appeals of the District of Columbia as to other cases therein.

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(d) The provisions of sections 765 and 766 of the Revised Statutes, and the provisions of an Act entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, shall apply to appellate proceedings under this section as they heretofore have applied to direct appeals to the Supreme Court.

SEC. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme Court of the United States, upon the petition of a party aggrieved by the final judgment or decree, to require, by certiorari, that the cause be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought before it on writ of error or appeal; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review.

SEC. 8. (a) That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided,* That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

(b) Where an application for a writ of certiorari is made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judg-

ment or decree the application may be made at any time prior to the hearing and submission in that court.

(c) No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

(d) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

SEC. 9. That in any case where the power to review, whether in the circuit courts of appeals or in the Supreme Court, depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the cause or by other competent evidence.

SEC. 10. That no court having power to review a judgment or decree of another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out; but where such error occurs the same shall be disregarded and the court shall proceed as if in that regard its power to review were properly invoked.

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

SEC. 12. That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided,* That this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

SEC. 13. That the following statutes and parts of statutes be, and they are, repealed:

Sections 130, 131, 133, 134, 181, 182, 236, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and 252 of the Judicial Code.

Sections 2, 4, and 5 of "An Act to amend an Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911," approved January 28, 1915.

Sections 2, 3, 4, 5, and 6 of "An Act to amend the Judicial Code, to fix the time when the annual term of the Supreme Court shall commence, and further to define the jurisdiction of that court," approved September 6, 1916.

Section 27 of "An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands," approved August 29, 1916.

So much of sections 4, 9, and 10 of "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, as provides for a review by the Supreme Court on writ of error or appeal in the cases therein named.

So much of "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, as permits a direct appeal to the Supreme Court.

So much of sections 24 and 25 of the Bankruptcy Act of July 1, 1898, as regulates the mode of review by the Supreme Court in the proceedings, controversies, and cases therein named.

So much of "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917, as permits a direct review by the Supreme Court of cases in the courts in Porto Rico.

So much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii

So much of section 9 of the Act of August 24, 1912, relating to the government of the Canal Zone as designates the cases in which, and the courts by which, the judgments and decrees of the district court of the Canal Zone may be reviewed.

Sections 763 and 764 of the Revised Statutes.

An Act entitled "An Act amending section 764 of the Revised Statutes," approved March 3, 1885.

An Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899.

An Act entitled "An Act to amend section 237 of the Judicial Code," approved February 17, 1922.

An Act entitled "An Act to amend the Judicial Code in reference to appeals and writs of error," approved September 14, 1922.

All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith.

SEC. 14. That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect.

Approved, February 13, 1925.

ACT OF JANUARY 31, 1928.

Chapter 14, 45 Stat. 54.

An Act In reference to writs of error.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

SEC. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.

ACT OF APRIL 26, 1928.

Chapter 440, 45 Stat. 466.

An Act To amend section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"SEC. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS, FOR THE OCTOBER TERMS 1929, 1930, AND 1931

	ORIGINAL			APPELLATE			TOTALS		
	1929	1930	1931	1929	1930	1931	1929	1930	1931
Total cases on dockets	21	24	20	963	1, 015	1, 003	984	1, 039	1, 023
Cases disposed of during terms	3	8	1	791	892	883	794	900	884
Cases remaining on dockets	18	16	19	172	123	120	190	139	139

	TERMS		
	1929	1930	1931
Distribution of cases disposed of during terms:			
Original cases	3	8	1
Appellate cases on merits	232	326	282
Petitions for certiorari	559	566	601
Cases remaining on dockets:			
Original cases	18	16	19
Appellate cases on merits	119	76	60
Petitions for certiorari	53	47	60

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