

§ 13 could admit the alien in his discretion, the fine would still stand. We agree with the Circuit Court of Appeals in the view that § 13 (f) "preserves the fine against any discretionary admission."

Equally unavailing is the plea that the fine, as prescribed, is indivisible, and hence that no fine whatever can be imposed where the alien is admitted and the transportation company, for that reason, has not been required to return the passage money. It is true that the requirement of the payment of the passage money is for the benefit of the alien and the reason for that part of the penalty disappears on the alien's admission. But although admission in certain cases is contemplated by § 13, liability to fine under § 16 is none the less maintained. We think it follows that, in a case of admission, the fine of \$1000 can legally be imposed without requiring payment of the passage money and the fact that the latter has not been required gives plaintiff no ground for complaint.

Plaintiff was charged with knowledge of the statute and brought in the alien in violation of its provisions. Compare *Elting v. North German Lloyd*, 287 U.S. 324, 328, 329. The judgment is

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL
REVENUE, *v.* AMERICAN CHICLE CO.

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

No. 349. Argued February 6, 1934.—Decided March 5, 1934.

Under the Revenue Acts of 1921, 1924 and 1926, a corporation which acquired all of the assets and assumed all of the liabilities of another, and thereafter purchased in the open market some of the latter's bonds at less than their face value, *held* to have realized

a taxable gain in the difference between the face value of the bonds and the amount it paid for them. *United States v. Kirby Lumber Co.*, 284 U.S. 1. P. 430.
65 F. (2d) 454, reversed.

CERTIORARI, 290 U.S. 616, to review a judgment affirming a decision of the Board of Tax Appeals, 23 B.T.A. 221.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *Norman D. Keller* were on the brief, for petitioner.

Income may arise from the reduction of a liability as well as from an increase in value of the property subsequently realized by a sale or other disposition. Since the income tax laws are based upon the results of annual transactions, there is no need to await the sale of the property before taxing the gain realized upon the extinguishment of an obligation incurred in acquiring the property. Here there were separate and independent transactions. In the first, the assets were acquired and their cost was definitely fixed when the respondent assumed the obligation of the bonds. The bonds were retired in subsequent years in a separate series of transactions between the respondent and persons other than the corporation from which the property was acquired. Such separate transactions gave rise to taxable income in the years when they occurred. Since income may be derived by the receipt of property as well as cash, the difference in facts between this case and the *Kirby Lumber* case, 284 U.S. 1, should not lead to a different result. *Commissioner v. Coastwise Transp. Corp.*, 62 F. (2d) 332, supports petitioner's position. *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, was based on the fact that the whole of the property acquired had been lost, and that the subsequent favorable retirement was merely a diminution of the loss,—a situation which does not exist here.

Mr. William C. Breed, with whom *Mr. Paul L. Peyton* was on the brief, for respondent.

This case is simply a purchase of property coupled with a payment on the purchase price during the taxable years pursuant to the obligation assumed by respondent. There has been no completed transaction, no realization of any loss or gain to respondent, because respondent still owns the property on which it has settled a bond liability at less than the face amount, resulting in a lower cost of the entire property. No sale, exchange or parting with title has taken place, and there are no means of knowing whether respondent will realize a profit or a loss on the transaction until and unless it sells or disposes of the property in question.

In order to lay any basis for ascertaining a taxable gain or loss under petitioner's theory, it would seem there would have to be an appraisal of the property to determine whether the total cost was more or less than such appraised value. However, an attempt to determine a gain or loss on this theory, where no sale or parting with title has taken place and nothing has been realized upon the transaction, would be contrary to the notion underlying our system of taxation. Distinguishing *United States v. Kirby Lumber Co.* 284 U.S. 1.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Assessments by petitioner which treated as realized income the difference between the face value of certain bonds assumed by respondent in 1914 and the amount at which it purchased them in 1922, 1924 and 1925, were disapproved by the Board of Tax Appeals. The court below affirmed this action, and the matter is here by certiorari. The meager stipulated facts present only a narrow point; and to that our decision must be limited.

Respondent is a New Jersey corporation the nature of whose business is undisclosed. Its books are kept on the accrual basis.

The Sen Sen Chiclet Company, incorporated under the laws of Maine, also carried on an undisclosed business. In 1909 it issued a series of 20 year bonds—whether secured by a lien, or otherwise, does not appear. The indenture under which they issued required that \$50,000 be supplied each year which the trustee should use for purchasing outstanding bonds.

In 1914 respondent bought all assets of the Sen Sen Company. In part payment it assumed all outstanding liabilities of the seller—among them \$2,425,000 of the 1909 bonds. There is nothing in the record to show the nature of these assets, or what became of them, or the outcome of the transaction.

Respondent purchased in 1922 \$82,000 of the Sen Sen bonds for \$55,650.94—\$26,349.06 less than their face. During 1924 it and the trustee under the indenture purchased \$59,000 of the same bonds for \$47,602.10—\$11,397.90 below their par value. Likewise, during 1925 they purchased \$201,500 for \$186,146.31—\$15,353.69 less than their face.

The Commissioner treated these differences—\$26,349.06, \$11,397.90 and \$15,353.69—as income realized by respondent. The Board of Tax Appeals ruled otherwise and said—

“The payments involved in the transactions under consideration were payments on the purchase price of the Sen Sen Chiclet Company's assets, paid, under the conditions of the agreement, to the holders of that company's bonds. When all of the bonds have been retired by the petitioner its obligations to the Sen Sen Chiclet Company will have been satisfied in full, and whatever the total amount paid to retire the bonds, it will constitute a

part of the cost to petitioner of the Sen Sen Chiclet Co. assets."

In support of the same view, the Circuit Court of Appeals said—

"When a taxpayer gets money by issuing an obligation which he later discharges for less than its face, the transaction is completed, because money need not be sold or exchanged to be 'realized.' So we read *United States v. Kirby Lumber Co.*, *supra*, 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131. But if he buys property by an obligation in the form of a bond, note, or the like, and if it remains in kind after the debt is paid, there can be no 'gain.' The cost has indeed been definitively settled, but that is only one term of the equation; as long as the other remains at large, there is no 'realized' gain." 65 F. (2d) 455.

We know nothing concerning the nature of the assets acquired from the Sen Sen Company, have no means of ascertaining what has become of them, or whether any of them still exist. Nothing indicates whether respondent lost or gained by the transaction.

The case before us is this:

In connection with the purchase of the assets of another company, in 1914, respondent assumed—promised to pay—more than \$2,000,000 of the seller's outstanding bonds. During 1922, 1924 and 1925 it purchased a considerable number of these bonds in the market at less than their face. The Commissioner assessed the difference between these two amounts as income.

We find nothing to distinguish this cause in principle from *United States v. Kirby Lumber Co.*, 284 U.S. 1. The doctrine there announced is controlling here. *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170 is not applicable. The final outcome of the dealings was revealed—the taxpayer suffered a loss. Here, for aught we know, there was substantial profit—certainly, the record does not show the

contrary. Doubtless, respondent's books indicated a decrease of liabilities with corresponding increase of net assets.

Reversed.

CHASE NATIONAL BANK v. CITY OF NORWALK.

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

No. 290. Argued January 18, 19, 1934.—Decided March 5, 1934.

1. An injunction may not extend to persons who merely acquire notice of it but who are neither parties to the suit nor confederates or associates of the defendant. P. 436.
2. A decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit and who was not a party to it. P. 438.
3. In *quo warranto* brought by the State at the request of a city, but to which, under the state law, the city could not be made a party, there was a judgment of ouster against an electric power company using the city streets, upon the ground that its franchise, which it claimed to be perpetual, had in truth expired—*held*:

(1) That the trustee under an antecedent mortgage claiming a valid subsisting lien on the company's property, including the franchise which it claimed to be perpetual, and who was not a party to the *quo warranto* proceeding, was entitled to come into the federal court in a suit against the city alone, on the ground of diversity of citizenship, to protect its alleged property rights and to have its claims there adjudicated. P. 437.

(2) That a decree in the suit, enjoining the city, its attorneys, agents and confederates, (a) from removing the poles and wires without state warrant, and (b) from attempting to induce the State to enforce the judgment of ouster, would not be an injunction staying the proceedings in the state court, within the meaning of § 265 of the Judicial Code. P. 439.

4. Though one seeking an injunction against a judgment on the ground of fraud or mistake should show that he had no opportunity to correct the judgment in the original proceeding and was not lacking in diligence, such a showing is unnecessary where, be-