# UNITED STATES REPORTS

VOLUME 291

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1933

FROM JANUARY 8, 1934 (CONCLUDED)
TO AND INCLUDING MARCH 19, 1934

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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.

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HOMER S. CUMMINGS, Attorney General.
J. CRAWFORD BIGGS, 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, 1933.

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## CONNELL ET AL. *v.* WALKER.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA.

No. 535. Submitted December 4, 1933.—Decided January 8, 1934.

1. Under § 67 (f) of the Bankruptcy Act, where an attachment of an insolvent's property was obtained within four months prior to the filing of a petition in bankruptcy against him, the trustee has the election of preserving it for the benefit of the bankrupt estate; it is not void at the election of the bankrupt alone. *Lehman, Stern & Co.* v. *Gumbel & Co.*, 236 U.S. 448; *Chicago, B. & Q. R. Co.* v. *Hall*, 229 U.S. 511, distinguished. P. 3.
2. A suit in a state court brought by a creditor of a bankrupt within four months prior to the filing of the bankruptcy petition, to set aside a fraudulent conveyance made by him more than four months prior to the petition, is not terminated by the mere existence of the bankruptcy proceeding, and the right of the creditor to maintain it under the state law is withdrawn only if the trustee elects under § 70 (e), to prosecute it for the benefit of the bankrupt's estate. P. 5.
3. The refusal of the state court to stay such a suit at the demand of the bankrupt upon the bare showing of the bankruptcy adjudication was not an abuse of the sound discretion permitted by § 11 (a) of the Bankruptcy Act, assuming that section applicable. P. 5.
4. Assuming that § 11 (a) does not apply under the circumstances of this case, but that the general scheme of the Act implies some duty of the state court to preserve the estate until the bankruptcy court had opportunity to assert its jurisdiction, still it has not been shown that such an opportunity has not been afforded. P. 6.

63 N.D. 622; 249 N.W. 726, affirmed.

46305°—34——1

CERTIORARI, 290 U.S. 620, to review the affirmance of a judgment in an attachment suit, setting aside, as in fraud of creditors, a conveyance of the land attached, and directing a sale, and application of the proceeds of sale to the plaintiff's claim.

*Mr. John A. Jorgenson* was on the brief for petitioners.

*Mr. Paul E. Shorb* was on the brief for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to review a judgment of the Supreme Court of North Dakota involving the application of certain provisions of the Bankruptcy Act. The respondent, a creditor of petitioner Connell, brought suit in the District Court of Ramsey County, North Dakota, to set aside, as in fraud of creditors, a conveyance by Connell to the other petitioners of land located in the state. The suit was begun by attachment of the land, and while it was pending in the trial court the petitioners, by a motion for stay of proceedings and by their amended answer, set up that within four months after the attachment petitioner Connell had filed a voluntary petition in bankruptcy in the District Court for Southern California, which had resulted in an adjudication of bankruptcy. It was not shown whether a trustee had been selected. The county court, upon the trial, found that the conveyance was in fraud of creditors and gave judgment for the respondent, which the Supreme Court of the state affirmed, 63 N.D. 622; 249 N.W. 726, directing that the land be sold and the proceeds applied to the satisfaction of the indebtedness to respondent. The relief granted was restricted to the sale of the attached land by a provision of the judgment that it should not be deemed to establish the personal liability of any of the petitioners.

Petitioners argue here, as they did in the state courts, that under § 67 (f) of the Bankruptcy Act, 11 U.S.C.A., § 107 (f), the lien of the attachment upon which the judgment was founded was a nullity because procured when the bankrupt was insolvent and within four months before the filing of the petition in bankruptcy, so that no judgment could be given or enforced against the attached property, and they insist that in any event the state court should have stayed the action until the termination of the bankruptcy proceedings.

We may assume, for present purposes, that the trustee in bankruptcy, if there is one, could have taken and may still take appropriate proceedings to set aside the attachment as invalid under § 67 (f), 11 U.S.C.A. § 107 (f),[1] either by intervention in the action in the state court, as authorized by § 11 (b), 11 U.S.C.A., § 29 (b); see *Lehman, Stern & Co.* v. *S. Gumbel & Co.,* 236 U.S. 448; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U.S. 734, or by procuring an order of the bankruptcy court staying any further proceedings by the state court to secure the

[1] § 67 (f). "That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect. Nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

benefit of the attachment, *Clarke* v. *Larremore,* 188 U.S. 486; see *Globe Bank* v. *Martin,* 236 U.S. 288; compare *Metcalf* v. *Barker,* 187 U.S. 165; *Straton* v. *New,* 283 U.S. 318, or that he might have avoided the attachment by the assertion of dominion over the property inconsistent with the continued existence of the lien, *Chicago B. & Q. R. Co.* v. *Hall,* 229 U.S. 511. But § 67 (f) also extends to the trustee the privilege of procuring an order of the bankruptcy court directing that the right under the lien of attachment be preserved for the benefit of the bankrupt's estate, and to secure its benefits he may, as provided in § 67 (c), be subrogated to all the rights of the lienor. See *Rock Island Plow Co.* v. *Reardon,* 222 U.S. 354; *Miller* v. *New Orleans Acid & F. Co.,* 211 U.S. 496, 505; *First National Bank* v. *Staake,* 202 U.S. 141.

Here the trustee, if any, is not a party to the suit and he is not shown to have made the election with respect to the attachment lien for which § 67 (f) provides. This privilege is one of substance, see *Rock Island Plow Co.* v. *Reardon, supra,* and the statute gives it to the trustee, not to the bankrupt or his creditors. A judgment of dismissal, as prayed by the petitioners, would have dissolved the attachment and thus would have enabled the bankrupt to cut off the privilege reserved to the trustee to preserve it. We do not think the statute can be construed to require that result.

Petitioners place reliance upon the language of the opinions in *Lehman, Stern & Co.* v. *Gumbel & Co., supra,* and in *Chicago, B. & Q. R. Co.* v. *Hall, supra,* which state in the broad words of the statute that liens acquired within four months of the filing of the petition are " void." But in the one case the receiver, by his intervention in the action in the state court, and in the other the trustee, by appropriate action taken in the bankruptcy court, had asserted the invalidity of the lien acquired by the local suit. In neither does the decision militate against the

conclusion which we reach here, that the bankrupt alone can not invoke a judgment which would preclude the exercise of the privilege reserved to the trustee to assert rights under the lien.

Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a non-bankruptcy court, to which the bankrupt is a party. *Pickens* v. *Roy,* 187 U.S. 177; *Jones* v. *Springer,* 226 U.S. 148; *Straton* v. *New, supra.* This is obviously the case where the suit like the present one is brought by a creditor to set aside a fraudulent conveyance of the bankrupt, made more than four months before the petition in bankruptcy. The right asserted is one given the creditor by state law which the Bankruptcy Act withdraws from him only upon the election of the trustee to assert the rights of the creditor, as he is privileged to do by § 70 (e), 11 U.S.C.A. § 110 (e), an election, which, in this case, does not appear to have been made. Compare *Sparhawk* v. *Yerkes,* 142 U.S. 1; *Dushane* v. *Beall,* 161 U.S. 513; *First National Bank* v. *Lasater,* 196 U.S. 115; *American Exchange Bank* v. *Goetz,* 283 Fed. 900; *Laughlin* v. *Calumet & Chicago Canal & Dock Co.,* 65 Fed. 441; and cf. *Thomas* v. *Sugarman,* 218 U.S. 129. Upon this record no case is made entitling the petitioners, under any provision of the Bankruptcy Act, to a judgment of dismissal.

The question remains whether, the trustee having failed to assert any rights with respect to the pending action, the state court was required to stay it by any provision or necessary implication of the Bankruptcy Act. We find it unnecessary to decide whether § 11 (a), 11 U.S.C.A. § 29 (a), authorizing a stay of certain suits pending against a bankrupt,[2] lays down a rule for non-bankruptcy

[2] § 11 (a). "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until

as well as bankruptcy courts,[3] or whether it is applicable to suits like the present one [4] or whether the bankrupt may invoke its provisions.[5] For, if applicable here, the authority given by that section to stay pending suits after adjudication, which has taken place here, is not mandatory, but permissive, to be exercised in the sound discretion of the court. There is no suggestion that there was any abuse of discretion by the state court in refusing to stay its hand on the bare showing by the fraudulent bankrupt that there had been an adjudication in bankruptcy. It does not appear that there is any creditor other than respondent, or that the trustee had not been advised of the suit, or that the bankrupt could not, by giving notice to the trustee, have afforded the trustee ample opportunity to assert his rights if there were other creditors to protect. On the other hand, if § 11 (a) does not apply, but if it be assumed that the general scheme of the Act implies some duty of the state court to preserve the estate until opportunity is given the bankruptcy court to assert its jurisdiction, see *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U.S. 300, 308; *In re Moore*, 42 F. (2d) 475, 478, still the petitioners have failed to show that there has been no such opportunity.

*Affirmed.*

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after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. . . ."

[3] See *Smith* v. *Miller*, 226 Mass. 187; 115 N.E. 243; *Star Braiding Co.* v. *Stienen Dyeing Co.*, 44 R.I. 8; 114 Atl. 129; Collier, Bankruptcy (13th ed.), 414.

[4] Cf. *Hill* v. *Harding*, 107 U.S. 631; but cf. Remington, Bankruptcy (4th ed.), § 3491.

[5] See *In re Geister*, 97 Fed. 322.

## WOLFLE *v.* UNITED STATES.

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

No. 338. Argued December 12, 1933.—Decided January 8, 1934.

1. In the absence of congressional legislation on the subject, the admissibility of testimony in the federal courts in criminal causes, is governed by common law principles, as interpreted and applied by those courts in the light of reason and experience. *Funk* v. *United States,* 290 U.S. 371. P. 12.
2. The basis of the rule of evidence excluding proof of confidential communications between husband and wife, is the protection of the marriage relation. P. 14.
3. As the privilege suppresses relevant testimony, it should be allowed only where it is plain that marital confidence can not otherwise be reasonably preserved. Pp. 14, 17.
4. A confidential communication by husband to wife through the medium of his stenographer, *held* admissible, upon proof of it by the stenographer testifying from the stenographic notes. P. 16.

64 F. (2d) 556, affirmed.

CERTIORARI, 290 U.S. 617, to review the affirmance of a conviction under an indictment charging unlawful uses of the mails for the purpose of effecting a scheme to defraud.

*Mr. George E. Flood,* with whom *Messrs. S. J. Wettrick* and *H. Sylvester Garvin* were on the brief, for petitioner.

The state statute preserves the common-law privilege of communications from husband to wife.

In courts of the United States the common law rule governs. *Connecticut Mut. Ins. Co.* v. *Schaefer,* 94 U.S. 457; *Liggett* v. *Glenn,* 51 Fed. 381; *Rosen* v. *United States,* 245 U.S. 467.

There is a conflict in the decisions as to the admissibility of privileged communications where testimony thereof is procured from witnesses other than husband or wife, attorney and client, or physician and patient. This turns

upon whether the particular court adopts one or the other of two tests: *First,* that if the communication originates in confidence and under circumstances intended to be privileged, and if the privilege is not consciously surrendered, the privilege will be enforced and the communication excluded; or, *second,* that regardless of the privileged origin and confidential nature, admissibility is purely a matter of custody of the communication; if it has been filched by any means, surreptitious or otherwise, the communication will be admitted. The first line of cases seek to consult the nature and the purpose of the communication and to carry out the policy of the principle. The second line of cases disregard the purpose and the policy and erroneously treat the privilege as if it were in derogation of the common law, seizing upon any circumstance, however slight, in order to defeat the privilege.

Among the cases repudiating this false doctrine are: *Gross* v. *State,* 61 Tex. Cr. Rep. 470; *Liggett* v. *Glenn,* 51 Fed. 381; *Mercer* v. *State,* 40 Fla. 716; *Scott* v. *Commonwealth,* 94 Ky. 511; *Henderson* v. *Chaires,* 25 Fla. 26; *Selden* v. *State,* 74 Wis. 271; *Wilkerson* v. *State,* 91 Ga. 729; *State* v. *McKie,* 165 Ga. 210.

The privilege extends not only to the attorney, but to the attorney's secretary, stenographers or clerks. Taylor, Evidence, §§ 920, 946. Cf. *Plunkett* v. *Coblett,* 1804, 29 How. St. Tr. 71; *Solomons* v. *Chubb,* 1852, 3 Carr & K. 75; *Forbes* v. *Samuel,* 1913, 3 K.B. 719, 82 L.K.J.B. 1135; *Taylor* v. *Foster,* 1825, 2 C. & P. 195, 172 E.R. 89; *DuBarre* v. *Livette,* Peake N.P.C. 78; *Parkins* v. *Hawkshaw,* 2 Stark. 239, 171 E.R. 633; *King* v. *Upper Bodington,* 1826, 5 L.J.M.C. 10 (1827); *Wartell* v. *Novograd,* 48 R.I. 296; *Hunt* v. *Taylor,* 22 Vt. 556; *Sibley* v. *Waffle,* 16 N.Y. 180; *In re Arnott,* 1888, 60 L.T.N.S. 109; *State* v. *Brown,* 1896, 2 Marv. 380.

Although the privilege between physician and patient is statutory, the courts do not construe the statutes

strictly, as in derogation of the common law, but very uniformly include within the privilege not only the patient and physician, but communications made to the physician's nurse, technician or X-ray specialist, or a communication made by the patient to the physician in the presence of any of the physician's necessary assistants. *Culver* v. *Union Pacific,* 112 Neb. 441; *Power & Light* v. *Jordan,* 132 So. 483; *Toole* v. *Franklin Investment Co.,* 158 Wash. 696; *Chicago, Lake Shore Ry. Co.* v. *Walas,* 192 Ind. 369; *Colorado Fuel & Iron Co.* v. *Cummings,* 8 Col. App. 541; *Owens* v. *Kansas City, C. C. & S. J. Ry. Co.,* 225 S.W. 234; *Sparer* v. *Travelers,* 173 N.Y.S. 673; *Price* v. *Standard Life & A. Ins. Co.,* 90 Minn. 264.

Federal cases support the rule that a privileged communication remains privileged, irrespective of custody. *Bowman* v. *Patrick,* 32 Fed. 368. Cf. *Liggett* v. *Glenn,* 51 Fed. 381; *Drier* v. *Continental Life,* 24 Fed. 670; *Connecticut Mutual* v. *Schaefer,* 94 U.S. 457.

For a recent expression upon the privilege between husband and wife, see *New York Life* v. *Ross,* 30 F. (2d) 80.

The stenographer in this case was an agent and representative, and not a stranger or third person. Wigmore, Evidence, 2d ed., § 2339. Distinguishing *id.,* § 2336; *Cotton* v. *State,* 87 Ala. 75; *People* v. *Dunnigan,* 163 Mich. 349; *Pearce* v. *Pearce,* 1847, 16 L.J.Ch. 153; *State* v. *Wilkins,* 72 Ore. 77; *State* v. *Nelson,* 39 Wash. 221; *State* v. *Falsetta,* 43 Wash. 159; *Commonwealth* v. *Everson,* 123 Ky. 330; *State* v. *Young,* 97 N.J.L. 501; *Hammons* v. *State,* 73 Ark. 495; *Hopkins* v. *Grimshaw,* 165 U.S. 342.

Under the great weight of authority today, the dictation of libelous statements to a stenographer, or the delivery of a written libelous communication to a stenographer, clerk, typist, or agent, do not constitute delivery or publication and are deemed privileged. This was not always the case. It is a modern growth and development in the law. See *Pullman* v. *Hill,* 1 Q.B. 524; *Boxius* v. *Goblet Freres,* 1894,

1 Q.B. 842; *Lawless* v. *Anglo-American Cotton Co.*, L.R. 4 Q.B. 262; *Edmondson* v. *Birch*, L.R. 1 K.B. 371, 1907; *Osborn* v. *Boulter* (C.A. 1930), 2 K.B. 226.

Many American cases have adopted the rule of *Edmondson* v. *Birch, supra,* repudiating *Pullman* v. *Hill, supra,* notably such cases as *Globe Furniture* v. *Wright,* 265 Fed. 873; *Owen* v. *Ogilvie,* 53 N.Y.S. 1033; *Cartwright-Caps Co.* v. *Fischel & Kaufman,* 113 Miss. 359; *Flynn* v. *Western Union Tel. Co.,* 199 Wis. 124; *Prince* v. *Holland N.A. Mortgage Co.,* 107 Wash. 206.

Privilege can not be defeated by secondary proof. *Dawkins* v. *Rokevy,* 1873, 44 L.J.R. Q.B. 63 (Ex.); *Atwood* v. *Chapman,* 1914, 3 K.B. 275; *Chatterton* v. *Secretary of State,* 1895, 2 Q.B. 189; *Bowman* v. *Norton,* 1931, 5 C. & P. 177; Taylor, Evidence, p. 622.

Courts will not sanction evidence violative of public policy or principles of law. See opinion of Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438; *Gouled* v. *United States,* 255 U.S. 298; *Boyd Case,* 116 U.S. 616; *Weeks Case,* 232 U.S. 383; *Amos Case,* 255 U.S. 313; *Silverthorne Case,* 251 U.S. 385.

*Assistant Solicitor General MacLean,* with whom *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for the United States.

The law applicable in determining the question of privilege is the law of Washington at the time Washington was admitted into the Union as a State.

Petitioner's stenographer was competent to testify as to the contents of the letter in question. Code of Washington Territory, 1881, § 392; Remington's Rev. Stats., Vol. 3, § 1214; *State* v. *Nelson,* 39 Wash. 221; *State* v. *Rasmussen,* 125 Wash. 176.

The Washington decisions are clearly in accord with the great weight of authority, whether the privilege be

urged under the common-law rule or under modern statutes. Wigmore, Evidence, 2d ed., Vol. 5, § 2336, pp. 89–90; § 2339, p. 98; § 2336, p. 77; Chamberlayne, Evidence, Vol. 5, pp. 5294–5296; Roscoe, Criminal Evidence, 13th ed., p. 104; Jones, Evidence, 2d ed., p. 920; Greenleaf, Evidence, 16th ed., p. 392; Phillips, Evidence, 5 Amer. ed. p. 64, note 4, pp. 65–66; annotation to *Nash* v. *Fidelity-Phenix Fire Ins. Co.,* 106 W.Va. 672, appearing in 63 A.L.R. pp. 101, 108 *et seq.,* notes II and III; 28 R.C.L. p. 528, par. 117; 40 Cyc., pp. 2358, 2359. See also *Dickerson* v. *United States,* 65 F. (2d) 824, cert. den., 290 U.S. 665; *United States* v. *Guiteau,* 1 Mackey (D.C. Rep.) 498.

The basis of the Washington and other like decisions was well stated in *State* v. *Wilkins,* 72 Ore. 77. See also *People* v. *Hayes,* 140 N.Y. 484.

As the tendency of the privilege is to prevent the full disclosure of the truth, it should be strictly construed. *Lloyd* v. *Pennie,* 50 Fed. 4; *Tutson* v. *Holland,* 50 F. (2d) 338; *O'Toole* v. *Ohio German Fire Ins. Co.,* 159 Mich. 187.

That the third person rule applies regardless of the intimacy of the relation between the person who acquires knowledge of a communication between a husband and wife and the spouse who makes the communication, finds ample demonstration in the cases. *Hopkins* v. *Grimshaw,* 165 U.S. 342; *State Bank* v. *Hutchinson,* 62 Kan. 9; *Nash* v. *Fidelity-Phenix Fire Ins. Co.,* 106 W.Va. 672; *Insurance Co.* v. *Shoemaker,* 95 Tenn. 72; *Commonwealth* v. *Everson,* 123 Ky. 330; *Martin* v. *Martin,* 267 Mass. 157; *Commonwealth* v. *Smith,* 270 Pa. 583; *Drew* v. *Drew,* 250 Mass. 41; *State* v. *Young,* 97 N.J.L. 501.

The cases cited by petitioner which hold that the privilege between attorney and client extends to an attorney's clerks, secretaries, and stenographers are obviously not apposite. Wigmore, Evidence, Vol. 5, § 2301.

Those decisions relied upon by petitioner which hold that a business man or merchant does not publish a libelous statement simply by dictating it to a stenographer are not in point. Their *ratio decidendi* was clearly explained in *Osborn* v. *Boulter* (C.A. 1930), 2 K.B. 226, 236.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to review a ruling of the District Court for Western Washington in a criminal trial, admitting in evidence against the accused, the petitioner here, a statement contained in a letter written by him to his wife, but proved by the testimony of a stenographer, reading from her notes, to whom petitioner had dictated the letter and who had transcribed it. The ruling was upheld and the conviction sustained by the Court of Appeals for the Ninth Circuit, 64 F. (2d) 566, which adopted as the test of admissibility of the evidence its interpretation of the statute in force in the territory of Washington at the time of its admission to statehood. § 392, Code of Washington, 1881; see *State* v. *Nelson,* 39 Wash. 221; 81 Pac. 721; *State* v. *Rasmussen,* 125 Wash. 176; 215 Pac. 332.

During the present term this Court has resolved conflicting views expressed in its earlier opinions by holding that the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk* v. *United States,* 290 U.S. 371. If any different rule with respect to the admissibility of testimony has been thought to apply in the federal courts, Wigmore on Evidence, 2d ed., § 6; compare *Alford* v. *United States,* 282 U.S. 687, it is clear that it

should be the same as that governing the competence of witnesses. So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute.

The statement to which the witness was permitted to testify in the present case was a relevant admission by petitioner, probative of his guilty purpose or intent to commit the crime charged. It was therefore rightly received in evidence unless it should have been excluded because made in a communication to his wife.

The government insists that confidential communications between husband and wife are privileged only when the testimony offered is that of one of the spouses, and that the privilege does not exclude proof of communications between them, however confidential, by a witness who is neither the husband nor the wife. The question thus raised remains open in the federal courts.[1] But we

[1] Mr. Justice Miller, sitting as Circuit Justice, excluded evidence of confidential communications in a letter written by the husband to his wife, found by the latter's administrator among her papers, although proved by a third party witness. *Bowman* v. *Patrick,* 32 Fed. 368; cf. *Lloyd* v. *Pennie,* 50 Fed. 4. A like decision was reached by the Circuit Court of Appeals for the Sixth Circuit, in *New York Life Ins. Co.* v. *Ross,* 30 F. (2d) 80. The Court of Appeals for the Eighth Circuit made the same ruling with respect to a communication between an attorney and client in *Liggett* v. *Glenn,* 51 Fed. 381, and a district court reached a similar conclusion with respect to communications between physician and patient in *Dreier* v. *Continental Life Ins. Co.,* 24 Fed. 670. Compare a dictum in *Hopkins* v. *Grimshaw,* 165 U.S. 342, 351. It seems that many state courts rule that a communication between husband and wife, however confidential, may be proved by the testimony of a third person who has acquired knowledge of it, even though without the assent of the spouse making the communication, at least where the spouse to whom the communication was made is not responsible for the disclosure. *Hammons* v. *State,* 73 Ark. 495; 84 S.W. 718; *Wilkerson* v. *State,* 91 Ga. 729; 17 S.E. 990; *O'Toole* v. *Ohio German Fire Ins. Co.,* 159 Mich. 187; 123 N.W. 795; *State* v. *Wallace,* 162 N.C. 622; 78 S.E. 1; cf. *People* v. *Hayes,* 140 N.Y. 484; 35 N.E. 951.

find it unnecessary to answer it here, for in the view we take the challenged testimony to the communication by the husband to his wife is not within the privilege because of the voluntary disclosure by him to a third person, his stenographer.

The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. See *Hammons* v. *State,* 73 Ark. 495, 500; 84 S.W. 718; *Sexton* v. *Sexton,* 129 Iowa 487, 489, ff; 105 N.W. 314; *O'Toole* v. *Ohio German Fire Ins. Co.,* 159 Mich, 187, 192; 123 N.W. 795; Wigmore on Evidence, 2d ed., § 2336. Hence it is that the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved. See *Gordon, Rankin & Co.* v. *Tweedy,* 71 Ala. 202, 210; *Wickes* v. *Walden,* 228 Ill. 56; 81 N.E. 798; *Southwick* v. *Southwick,* 49 N.Y. 510, 519; Wigmore on Evidence, 2d ed., §§ 2227, 2228, 2332, 2333.

Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. See *Caldwell* v. *State,* 146 Ala. 141, 143; 41 So. 473; *Parkhurst* v. *Berdell,* 110 N.Y. 386, 393; 18 N.E. 123; *Truelsch* v. *Miller,* 186 Wis. 239, 249; 202 N.W. 352. And, when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence. *Jacobs* v. *United States,* 161 Fed. 694; *Cocroft* v. *Cocroft,* 158 Ga. 714; 124 S.E.

346; cf. *Linnell* v. *Linnell,* 249 Mass. 51, 143 N.E. 813, with *Freeman* v. *Freeman,* 238 Mass. 150; 130 N.E. 220.

Here it is suggested that the voluntary disclosure to the stenographer negatives the confidential character of the communication. Cf. *State* v. *Young,* 97 N.J.L. 501; 117 Atl. 713. But we do not think the question which we have to determine is one of fact whether the petitioner's letter to his wife was intended to be confidential. We may take it that communications between husband and wife may sometimes be made in confidence even though in the presence of a third person, see *Robin* v. *King,* 2 Leigh (Va.) 140, 144; and that would seem especially to be the case where the communication is made in the presence of or through the aid of a private secretary or stenographer whose duties, in common experience, are confidential. Cf. *Edmondson* v. *Birch & Co.,* [1907] 1 K.B. 371, 382. Accordingly the question with which we are now concerned is the extent to which the privilege which the law concedes to communications made confidentially between the husband and wife embraces the transmission of them, likewise in confidence, through a third party intermediary, communications with whom are not themselves protected by any privilege. Cf. *Drew* v. *Drew,* 250 Mass. 41; 144 N.E. 763.

Petitioner invokes the authority of those cases where the privilege granted to communications between attorney and client has been held to exclude proof of the communication by the testimony of a clerk present when it was made, see *Sibley* v. *Waffle,* 16 N.Y. 180, 183; *Wartell* v. *Novograd,* 48 R.I. 296, 301; 137 Atl. 776; *Taylor* v. *Forster,* 2 C. & P. 195; cf. *State* v. *Brown,* 2 Marv. (Del.) 380, 397; 36 Atl. 458, and of those where the statutory privilege extended to the information gained by a physician from consultation with his patient has been deemed to exclude, by implication, proof of the condition of the

patient by testimony of a nurse who attended the consultation. See *Culver* v. *Union Pacific R. Co.*, 112 Neb. 441, 450; 199 N.W. 794; cf. *Mutual Life Ins. Co.* v. *Owen*, 111 Ark. 554; 164 S.W. 720. It is said that the stenographer here similarly stood in a confidential relationship to the petitioner and that the communication to her of the contents of petitioner's letter to his wife should, on grounds both of reason and convenience, be protected by the privilege which the law extends to confidential communications privately made between husband and wife.

We may assume for present purposes that where it is the policy of the law to throw its protection around knowledge gained or statements made in confidence, it will find a way to make that protection effective by bringing within its scope the testimony of those whose participation in the confidence is reasonably required. It may be that it would be of little worth to forbid the disclosure of information gained by a physician from the examination or consultation of his patient, if the nurse, necessarily present, could reveal it. See *Culver* v. *Union Pacific R. Co., supra; Mississippi Power & Light Co.* v. *Jordan*, 164 Miss. 174; 143 So. 483. It may plausibly be urged that the privilege of attorney and client would be as often defeated as preserved if it did not draw within its sweep the testimony of clerks in the lawyer's office. See *Sibley* v. *Waffle, supra.*

But it is unnecessary now to determine the latitude which may rightly be given to the privilege which the law confers upon either of these relationships, for no considerations such as those suggested apply to marital communications under conditions disclosed here. Normally husband and wife may conveniently communicate without stenographic aid and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the

testimony of third persons to whom such communications have been voluntarily revealed. The uniform ruling that communications between husband and wife, voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family within the intimacy of the family circle, are not privileged, *Linnell* v. *Linnell,* 249 Mass. 51; 143 N.E. 813; *Cowser* v. *State,* 70 Tex. Cr. Rep. 265; 157 S.W. 758; *Fuller* v. *Fuller,* 100 W.Va. 309; 130 S.E. 270, is persuasive that communications like the present, even though made in confidence, are not to be protected. The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved. Nothing in this case suggests any such necessity.

We do not intimate whether in the present circumstances the wife's testimony, not offered against her husband, would likewise be freed of the restriction. Cf. *Nash* v. *Fidelity-Phenix Fire Ins. Co.,* 106 W.Va. 672; 146 S.E. 726.

*Affirmed.*

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## FEDERAL COMPRESS & WAREHOUSE CO. ET AL. *v.* McLEAN, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 166. Argued December 11, 13, 1933.—Decided January 8, 1934.

1. Cotton produced locally, shipped into a warehouse, and there held at the exclusive disposition of its owners—the holders of negotiable warehouse receipts—retains its local status, although in the usual course the owners will ultimately order that it be compressed and delivered to a rail carrier for shipment to ultra-state destinations of their selection. P. 21.
2. The business of storing and compressing the cotton, in such circumstances, is local, and a non-discriminatory state tax upon it is consistent with the commerce clause of the Constitution. P. 21.

3. The fact that a contract between the warehouseman and the interstate rail carrier by which the cotton has been brought to storage and by which, in the ordinary course, it ultimately will be transported beyond the State at a single rate from point of origin to point of destination designates the warehouseman as the carrier's agent and the warehouse as the carrier's depot, can not convert what is a local business into an interstate business. P. 22.
4. Licensing of a warehouse under the United States Warehousing Act does not make of it a federal instrumentality or withdraw its business from state taxation. P. 22.
5. The mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. P. 23.

166 Miss. 739; 147 So. 325, affirmed.

APPEAL from the affirmance of a judgment in favor of a tax collector, based on a directed verdict, in an action seeking to recover moneys collected by him as privilege taxes.

*Mr. Garner W. Green,* with whom *Mr. Marcellus Green* was on the brief, for appellants.

*Mr. W. W. Pierce,* 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 case comes here on appeal, under § 237 of the Judicial Code, for review of a judgment of the Supreme Court of Mississippi upholding a state excise tax assailed as a forbidden imposition upon a federal instrumentality, and as infringing the commerce clause of the Federal Constitution. 166 Miss. 739; 147 So. 325. Sections 3, 57, 220, 221, 225, 242, of c. 88, of the General Laws of Mississippi of 1930 exact an annual license tax for the privilege of operating a cotton compress, which is graduated according to the number of bales of cotton compressed per annum.

Sections 3 and 63 levy a similar additional tax upon each person operating a warehouse, whether in conjunction with a compress or not, which is graduated according to the storage capacity of the warehouse.

Appellant, a Delaware corporation which maintains and operates a cotton warehouse and compress at Cleveland, Mississippi, brought the present suit to recover taxes imposed with respect to both classes of business, paid under protest to appellee, the tax collector, in 1932. The case was tried on an agreed statement of facts, from which it appears that the appellant is licensed by the Secretary of Agriculture to conduct a warehouse for the storage of agricultural products under the provisions of the United States Warehouse Act of August 11, 1916, c. 313, 39 Stat. 486, as amended, c. 10, Tit. 7, U.S.C.A. Appellant has given a bond for the faithful performance of the duties which are exacted of a licensed warehouseman by the Act and by the rules and regulations of the Secretary of Agriculture, and its business as a warehouseman is subject to his inspection and control as the statutes and regulations provide.

Cleveland is a shipping point for baled cotton in interstate and foreign commerce and is a market in which cotton is purchased by brokers and dealers from those who produce it within the state. The purchases are made for resale or to fulfill contracts for sale of cotton without the state. In the usual course of business the purchased cotton, after it is ginned, is transported to appellant's warehouse for storage and compression, about 25% arriving by automobile truck or wagon and the remainder by rail over the line of the single railroad serving Cleveland. Upon delivery appellant issues its negotiable warehouse receipts for the cotton, in the form and manner provided by the United States Warehousing Act. The right to demand delivery of the cotton or otherwise control its

disposition is reserved to the holders of the receipts. A small part of the stored cotton, from 1% to 10%, is resold within the state to buyers who sell it to purchasers without the state, but all except a negligible part of it is ultimately shipped to points outside the state. Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. The movement of the cotton out of the warehouse is directed by the owners of it, who hold the warehouse receipts. Its destination is not determined until the owner gives shipping instructions to appellant and shipment is not made until surrender of the warehouse receipts. The compress charges are paid by the carrier, which it adds to the charge for carriage, and in the case of cotton brought to the warehouse by rail carriage, the through interstate rail rate is applied from the point of origin to destination instead of the combination rate, which is the sum of the intrastate rate to Cleveland and the interstate rate from that point to destination. The identity of the cotton is not preserved in reshipping it and substitution is permitted with the understanding that the through rate from point of origin to destination without the state shall not be affected.

By written agreement with the railroad company, appellant is designated as the agent of the railroad to receive the cotton from and deliver it to the railroad and to load and unload cotton upon and from its cars. The agreement also provides for the use of the warehouse by the railroad as a cotton depot.

Upon this state of facts appellant argues that the tax upon the business both of warehousing and of compressing the cotton is a forbidden burden on interstate commerce, and that the warehouse tax is unconstitutional

because a direct tax upon a business conducted by appellant as a federal instrumentality, designated as such by its license under the United States Warehousing Act.

1. It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. *Coe* v. *Errol,* 116 U.S. 517; *Bacon* v. *Illinois,* 227 U.S. 504; *General Oil Co.* v. *Crain,* 209 U.S. 211; *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665, 669; *Minnesota* v. *Blasius,* 290 U.S. 1; cf. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U.S. 134.

A non-discriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation. *American*

*Manufacturing Co.* v. *St. Louis,* 250 U.S. 459; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U.S. 129; *Oliver Iron Mining Co.* v. *Lord,* 262 U.S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U.S. 284; *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165. Here the privilege taxed is exercised before interstate commerce begins, hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249. The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50.

The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. See *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 507–508; *Superior Oil Co.* v. *Mississippi,* 280 U.S. 390; *Browning* v. *Waycross,* 233 U.S. 16, 23.

2. Appellant's license under the United States Warehousing Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehousing Act confers upon licensees certain privileges and

secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. *Susquehanna Power Co.* v. *Tax Commission,* 283 U.S. 291; *Fox Film Corp.* v. *Doyal,* 286 U.S. 123; *Broad River Power Co.* v. *Query,* 288 U.S. 178, 180.

The fact that the license is used also as a means of government control of appellant's business does not call for a different conclusion. The national government has not assumed to tax the business or to exercise any control over the taxation of it by the state. The state does not tax the license itself and the tax upon petitioner's business, applied without discrimination to all similar businesses whether licensed or not, does not impair the control which the federal authority has chosen to exert. The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare *Susquehanna Power Co.* v. *Tax Commission, supra; Broad River Power Co.* v. *Query, supra.* See *Willcuts* v. *Bunn,* 282 U.S. 216, 226, 230.

*Affirmed.*

## CITY BANK FARMERS TRUST CO., EXECUTOR, *v.* SCHNADER, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 84. Argued November 9, 1933.—Decided January 8, 1934.

1. Where the state law permits an action at law for recovery of a tax paid under protest, the taxpayer may pursue the same remedy in the federal court, if the requisite diversity of citizenship and amount in controversy are present. P. 28.
2. Existence of a statutory remedy to test the validity of a tax appraisal by appeal to a particular state court, in which the party opposed to the taxpayer will be the State itself, will not affect the equity jurisdiction of the federal court to enjoin, since such a proceeding, even if regarded as an action at law, would be confined to the state court and would not be cognizable by the federal court, either originally or by removal. P. 29.
3. A proceeding in a state court, on appeal from a tax appraisal, wherein the court has jurisdiction to determine not only the valuation but also the validity of the tax, and which is tried as a case between the taxpayer and the State as adversary parties, and results in a final judgment appealable to a higher court, is to be classified as a judicial, rather than an administrative, proceeding. P. 29.
4. To such a proceeding the principle that administrative remedies under state laws must be exhausted before an injunction against state officers is sought in the federal courts on constitutional grounds, does not apply. P. 34.
5. A bill to enjoin the imposition and collection of a state inheritance tax as beyond the constitutional power of the State, *held* not premature, although the assessment had not yet been completed, it appearing clearly, by the allegations of the bill, that the defendant state taxing officials believed the tax valid and would proceed to impose it if not restrained. P. 34.

Reversed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill to enjoin the Attorney General and the Secretary of Revenue of the Commonwealth of

Pennsylvania from imposing and collecting an inheritance tax on personal property left by a New York decedent, which, as the plaintiff executor averred, had no taxable situs in the Commonwealth.

*Mr. Henry S. Drinker, Jr.,* with whom *Messrs. Leslie M. Swope, H. Gordon McCouch,* and *Wolcott P. Robbins* were on the brief, for appellant.

*Mr. Wm. A. Schnader,* Attorney General of Pennsylvania, with whom *Mr. Harris C. Arnold,* Deputy Attorney General, was on the brief, for appellees.

The District Court properly dismissed the bill for want of jurisdiction. *Matthews* v. *Rodgers,* 284 U.S. 521; *Keokuk & Hamilton Bridge Co.* v. *Salm,* 258 U.S. 122; *Bohler* v. *Callaway,* 267 U.S. 479; *Porter* v. *Investors Syndicate,* 286 U.S. 461.

By leave of Court, *Mr. Seth T. Cole* filed a brief on behalf of the Tax Commission of New York as *amicus curiae.*

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, by a bill filed in the District Court for Eastern Pennsylvania, sought to enjoin the appellees, who are officials of the Commonwealth of Pennsylvania, from attempting to impose and collect an inheritance tax. Diversity of citizenship and an amount in controversy exceeding, exclusive of interest, $3,000, were averred. The bill sets forth that Thomas B. Clarke, a citizen and resident of the state of New York, died there in 1931 leaving a will under which appellant qualified as executor; that at and before the time of Clarke's death there was on exhibition in Pennsylvania a collection of paintings owned by him, of the estimated market value at the date of his death of $714,750; that these paintings had been loaned

to the Pennsylvania Museum and School of Industrial Art, a non-profit corporation, so that they might be exhibited in the museum of that institution; that the loan was negotiated orally and was for an indeterminate period, but the pictures were to be returned to Clarke at any time upon his request. The bill then quotes the Act of Assembly of Pennsylvania [1] whereby a transfer inheritance tax of a specified percentage of value is laid upon transfers, by will or the intestate laws, of property located within the Commonwealth, from a decedent not a resident of the Commonwealth at the time of his death; describes the procedure for the collection of the tax, namely, that the Department of Revenue, whenever occasion may require, shall appoint an appraiser to appraise the value of the property, if subject to tax; appraisement shall be made after notice to the interested parties; the appraiser shall report his valuation in writing to the Department of Revenue; whereupon that Department is required to give notice to all interested parties, and any person not satisfied with the appraisement may appeal to the Court of Common Pleas of Dauphin County, which may determine all questions of valuation and the liability of the appraised estate for the tax. The bill recites the appointment of an appraiser, who duly notified the appellant of the proposed date of his appraisement; the making of a return, under protest, pursuant to instructions of the appellee Schnader, enumerating as property within the Commonwealth at the decedent's death the seventy-nine portraits in question, and denying taxable situs or taxability of the property in Pennsylvania; a hearing by the appraiser, who referred the question of taxability to the Department of Justice, of which the appellee Schnader is the head, and pending a decision by him postponed the appraisement indefinitely; and re-

[1] Act of June 20, 1919, P.L. 521; 72 Purdon's Penna. Stats. § 2301, as amended by Act of June 22, 1931, P.L. 690.

peated requests for an immediate determination of tax liability, in response to which the appellee Schnader orally advised the appellant its claim of nontaxability in Pennsylvania would be denied. The bill charges that if the statute be construed to impose an inheritance tax upon the paintings merely because they were temporarily within the Commonwealth at the time of the decedent's death, it is unconstitutional as depriving the appellant of property without due process and denying equal protection of the laws, in contravention of the Fourteenth Amendment; and if the statute be construed as not applying to the property, the threatened appraisal, assessment and collection by the defendants will unconstitutionally deprive the appellant of property without due process and deny it equal protection. It further charges that the threat of appraisement, assessment and collection, and the unlawful failure and refusal of the appellee Metzger to issue a waiver of taxes on behalf of the Commonwealth, have caused and are causing irreparable injury by interfering with the administration of the estate in the Surrogate's Court of New York, preventing distribution, compelling the executor to maintain large cash reserves at a low rate of interest to cover a possible Pennsylvania tax and costs of litigation; and also that the threatened tax constitutes a possible lien and a cloud upon the title of the plaintiff, interfering with the sale of the paintings as directed by the will. The bill avers the absence of any adequate remedy at law.

A temporary injunction was issued, an answer was filed admitting the facts stated, and a statutory court of three judges was convened and heard the case on the pleadings and an agreed statement which is immaterial to the questions presented.

The answer asserted, and the court found, that the appellant had an adequate remedy at law, as it could appeal from the appraisement, when made, to the Dauphin

County court, which has jurisdiction to pass on both the amount of the tax and the legality of its imposition. The bill was therefore dismissed for want of equity.

1. It is conceded that neither the statutes of Pennsylvania nor the decisions of its courts permit an action at law for the recovery of a tax paid under protest. If that procedure were permissible in the state courts, the appellant could pursue the same remedy in a federal court, there being the requisite diversity of citizenship and amount in controversy. *Matthews* v. *Rodgers,* 284 U.S. 521. Under the state law the only remedy afforded one who has paid a tax is an application for refund to the Board of Finance and Revenue, an administrative body; but the action upon the claim is final and no court may review or set aside the Board's decision.[2] The District Court, however, was of opinion that the taxpayer's right of appeal from the appraisal to the Court of Common Pleas of Dauphin County, constituted such a remedy at law as ousted the jurisdiction of a federal court of equity. The Act of Assembly[3] requires the appointment of an appraiser whose duty is to report his appraisement in writing to the Department of Revenue, which must then give immediate notice to all parties interested, and continues: "Any person not satisfied with the appraisement . . . may appeal within thirty days to the court of common pleas of Dauphin County, on paying or giving security to pay all costs together with whatever tax shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court."

[2] Act of April 9, 1929, P.L. 343, Art. V, § 503; 72 Purdon's Penna. Stats. § 503.

[3] Act of April 9, 1929, P.L. 343, § 1202; 72 Purdon's Penna. Stats. § 1202.

The appeal must be entered in a state court specifically designated by the statute, and is thus not an ordinary action at law, but a statutory proceeding. The Commonwealth has conditioned the right to implead it, upon resort to a forum of its choice. The taxpayer cannot, therefore, though a non-resident, appeal from the appraisement to a federal court. Moreover, in such cases, upon the perfecting of an appeal, the Commonwealth becomes the adverse party to the litigation in the common pleas court (*Commonwealth* v. *Taylor,* 29A Dauph. Co. Rep'r (Pa.) 102; *Commonwealth* v. *Taylor,* 32 Dauph. Co. Rep'r (Pa.) 207); and this fact would prevent removal of the case from the Dauphin County court to a federal court; Judicial Code, § 24, as amended; 28 U.S.C. § 41 (1); Judicial Code, § 28, as amended; 28 U.S.C. § 71; for the State is not a citizen within the purview of these statutes which define the jurisdiction of the federal courts and permit a removal to them (*Stone* v. *South Carolina,* 117 U.S. 430; *Postal Telegraph Co.* v. *Alabama,* 155 U.S. 482; *Arkansas* v. *Kansas & Texas Coal Co.,* 183 U.S. 185), nor is the controversy one arising under the laws of the United States. *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454; *Chicago, R. I. & P. Ry. Co.* v. *Nebraska,* 251 Fed. 279. As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames,* 169 U.S. 466, 516; *Chicago, B. & Q. R. Co.* v. *Osborne,* 265 U.S. 14, 16; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U.S. 378, 388; *Matthews* v. *Rodgers, supra,* p. 526.

2. Since the Dauphin County court is empowered, upon appeal from the action of the appraiser, to determine all questions, including both valuation and liability for the tax, the contention is made that its function is at

least in part administrative, and a suit for injunction may not be entertained by a federal court prior to the decision of the state court. *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210; *Porter* v. *Investors Syndicate,* 286 U.S. 461. The statutes under consideration in those cases delegated legislative power of regulation to an administrative body and vested a revisory power in a court. As has repeatedly been held, the action of the court in such a matter is legislative rather than judicial, so that one who has not pursued the legislative process to a conclusion cannot turn to a court of equity for relief from a regulatory order which is not the final word of the constituted state authority. But other decisions make it clear that, while the action of the appraiser in a case like the present is purely administrative, the function of the court upon appeal is judicial in character, if, when the case is brought into the court, the Commonwealth becomes plaintiff and the taxpayer defendant, and the action is tried as an ordinary action, resulting in a judgment, which is final and binding on the parties, subject only to appeal to a higher state court, as permitted by the Act. This renders the proceeding judicial, and gives it the character of a suit or action at law.

In *Boom Co.* v. *Patterson,* 98 U.S. 403, it appeared that the state law authorized the Boom Company to exercise the right of eminent domain. The statutes required an application to a court for the appointment of commissioners to appraise the value of the land to be taken. Should the award of the commissioners prove unsatisfactory to the company or to the land owner, an appeal lay to the district court, where the cause was to be entered by the clerk as a case upon the docket, the owner of the land being designated plaintiff and the corporation seeking condemnation defendant. The act required the court to proceed to "hear and determine said case in the same

manner as other cases are heard and determined in said court." Of this procedure it was said, p. 406:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court."

To the same effect see *Searl* v. *School District No. 2,* 124 U.S. 197; *Mason City & Ft. Dodge R. Co.* v. *Boynton,* 204 U.S. 570.

In *Delaware County* v. *Diebold Safe Co.,* 133 U.S. 473, the question was as to a proceeding for the collection of a claim against the county. The statute directed that any person having a claim against a county should file it with the county auditor, who should present it to the board of commissioners, and they were required to examine the claim and allow it in whole or in part. No court was to have original jurisdiction of any claim against a county, but if the claimant felt aggrieved by the decision of the commissioners he might appeal to the circuit court of the county. Thereupon the auditor was to make a transcript of the proceedings before the board and deliver it to the clerk of the court. The appeal was to be docketed like other cases pending in the court, heard, and tried as an original cause. This court said, p. 486, that although the proceedings of the county commissioners are in some respects assimilated to proceedings before a court, and the commissioners' decision, if not appealed from, is not

subject to collateral attack, yet the proceedings are in the nature not of a trial *inter partes,* but of an allowance or disallowance, by officers of the county, of a claim against it. The court added that " the trial in the Circuit Court of the county was ' the trial ' of the case, at any time before which it might be removed into the Circuit Court of the United States, . . ."

*Chicot County* v. *Sherwood,* 148 U.S. 529, involved procedure for the collection of county bonds. State legislation declared that a county could not be sued or proceeded against in any court except as in the act provided. Demands against the county were to be presented to the county court for allowance or rejection. From the order of that court appeals were allowed as provided by law. If in any such appeal the judgment of the county court was reversed, the reversal was to be certified by the superior court to the county court, which was required to enter it as its own judgment. This court said, p. 532:

" If, however, the presentation of a demand against the county, duly verified, according to law, to the county court thereof, ' *for allowance* or *rejection* ' is not the beginning of a suit or does not involve a trial *inter partes,* it is *then* only a preliminary proceeding to a suit or controversy which, by the appeal of either side, is or may be carried to an appellate court, before which there is an actual trial between the parties interested. The right to maintain this revisory trial in the state court . . . will be sufficient to maintain a like suit by original process in a federal court where the requisite diverse citizenship exists."

In *Smith* v. *Douglas County,* 254 Fed. 244, it appeared that a Nebraska statute imposed a tax on inheritances, for the benefit of the county of the decedent's residence, at a stipulated rate upon the appraised value of the property. The method of levying the tax was, that the county judge appointed an appraiser to report the valuation to the

judge, who then fixed the value and the amount of tax and gave notice to all interested parties. Anyone dissatisfied with the judge's finding might appeal within sixty days to the county court upon filing bond to cover costs and the tax which might be fixed by the court. The statute provided that county courts should have jurisdiction "to hear and determine all questions in relation to all taxes arising under this article." It will be noted how closely the procedure resembles that prescribed with respect to the tax in controversy. It was held that the proceeding was *ex parte* until it reached the county court; but thereafter became a controversy *inter partes*, and the court's action in determining all questions in relation to the tax was not merely administrative, but judicial.

If the Dauphin County court were by the act of Assembly granted only the right to revise the valuation of the appraiser, and precluded from considering any other question, its proceedings would be purely administrative, and the contention that the appellant had failed to pursue to the end its administrative remedy would be sound (*Upshur County* v. *Rich*, 135 U.S. 467), at all events where the valuation is a subject of controversy.

The court below relied upon *Keokuk & Hamilton Bridge Co.* v. *Salm*, 258 U.S. 122, where a bill to enjoin collection of a state tax was held to lack equity. That case is, however, distinguished by the fact that before resorting to any court the taxpayer could have appealed to the board of review to correct the assessment of which he complained, and the record failed to show that he had pursued the administrative remedy so afforded him (p. 125).

The Acts of Assembly of Pennsylvania direct the Department of Revenue to collect, and the Attorney General to bring suit for, the amount of the tax, if it is not paid within one year of assessment. If, therefore, the appel-

lant should omit to take an appeal to the Dauphin County common pleas court, the assessment would become final and the appellant liable to suit for the amount of the tax.[4] As the Commonwealth is the plaintiff in the action, the cause could not be removed, for reasons already stated.

We are of opinion that upon the making of the appraisement the administrative procedure is at an end, and the appellant can thereafter resort to a federal court of equity to restrain further action by the state officers if in violation of constitutional rights.

3. The question, then, is whether the bill was prematurely filed. In view of what has been said, the appellant's cause of action in equity will not, strictly speaking, arise until an appraisement is made and certified to the Department of Revenue and notice of the fact is given appellant. However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity. Compare *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 592. Moreover, no purpose would be served by dismissing the bill, if, as we hold, the moment the proposed assessment is made another suit may be instituted in the federal court.

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[4]Act of April 9, 1929, P.L. 343, § 203 (h), § 1406; 72 Purdon's Pa. Stats. § 203 (h), § 1406.

The decree of the District Court is reversed and the cause remanded with instructions to reinstate the bill and proceed to a hearing upon the merits.

*Reversed.*

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## FREULER, ADMINISTRATOR, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.*

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

No. 129. Argued December 8, 1933.—Decided January 8, 1934.

1. Under § 219 of the Revenue Act of 1921, the fiduciary of a trust estate, in computing the net income for the taxable year, makes the same deductions from gross income that are allowed in cases of individual income, including deductions for depreciation; those parts of the net income which, by the instrument or order governing the distribution, are distributable during the tax year to beneficiaries, are specified in the fiduciary's return, but they are income of the beneficiaries as of the time of their receipt by the fiduciary and are returnable by and taxable to the beneficiaries, whether distributed to them or not; if, by mistake, the fiduciary omits to make proper deductions for depreciation, and so overstates the net income of the estate and overpays a beneficiary, the excess received by the latter is no part of his income and need not be included in his return. P. 40.
2. A decree of a state court having jurisdiction of a trust, determining that annual deductions for depreciation of the trust property should have been taken from gross income before making distributions to

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* Pursuant to stipulation, the decisions in the following cases are reversed on the authority of this case: Nos. 130 and 131, *Freuler, Administrator,* v. *Helvering,* on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit; No. 139, *Marguerite T. Whitcomb* v. *Helvering;* No. 140, *Charlotte A. W. Lepic* v. *Helvering;* No. 141, *Marie M. E. G. T. Whitcomb* v. *Helvering;* Nos. 142 and 143, *Charlotte A. W. Lepic* v. *Helvering;* and No. 144, *Marie M. E. G. Whitcomb* v. *Helvering,* on writs of certiorari to the Court of Appeals of the District of Columbia.

life income beneficiaries, and requiring them to make restitution accordingly, establishes the rights of the parties and is an "order governing the distribution" of the income within the meaning of § 219 (d) of the Revenue Act of 1921. Pp. 43, 45.

3. Proceedings in a state court resulting in such a decree, *held* not to have been collusive. P. 45.

4. Retention by the income beneficiaries of the excess paid them by the trustee, under an agreement with the possible remaindermen permitting substitution of promissory notes, *held* not to have rendered it taxable as income from the trust. P. 45.

62 F. (2d) 733, reversed.

CERTIORARI, 290 U.S. 610, to review a judgment reversing, on appeal, a decision of the Board of Tax Appeals, which had set aside a deficiency assessment of income tax. 22 B.T.A. 118.

*Messrs. Claude R. Branch* and *Felix T. Smith,* with whom *Messrs. W. W. Spalding* and *Robert A. Littleton* were on the brief, for petitioner.

*Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *John MacC. Hudson* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

A. C. Whitcomb, a resident of California, died in 1889, and by his will, probated in that State, gave the residue of his estate in trust, one-third of the income to be paid to his widow for life, with limitations in remainder. The petitioner is the administrator of the estate of Mrs. Whitcomb, who died in 1921. The will of A. C. Whitcomb contained no direction for the computation of trust income, none for the keeping of the trustee's accounts, and none for any allowance or deduction representing depreciation. Beginning about 1906, the trustee converted trust assets into real estate and other forms of investment

subject to depreciation. In fiduciary income tax returns for 1921 and subsequent years, the trustee deducted from gross income an amount representing depreciation, but failed to withhold from the beneficiaries, to whom he paid income, the amount of the depreciation deduction, so that each beneficiary was paid his or her full ratable share of income for the taxable year. As Mrs. Whitcomb died in 1921, a portion of the year's income was paid to her and a portion to the petitioner as her administrator. Neither the petitioner, as administrator of Mrs. Whitcomb, nor any of the other beneficiaries, included in their returns, as income received, that proportion of the income represented by the depreciation deduction shown on the trustee's fiduciary return.

The applicable sections of the Revenue Act of 1921 [1] are:

"219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or any kind of property held in trust, including . . . (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

"(d). In cases under paragraph (4) of subdivision (a) . . . the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, . . ."

In the belief that these provisions warranted his action, the Commissioner of Internal Revenue increased the income shown on the petitioner's return by so much of the amount received as reflected the proportionate share of

[1] Revenue Act of 1921, c. 136, § 219, 42 Stat. 246.

the depreciation deducted by the trustee in his fiduciary return, and determined a deficiency accordingly. The petitioner appealed to the Board of Tax Appeals.[2]

In 1928, while the case was pending before the Board, the trustee, who had annually rendered income statements to the beneficiaries, but had filed no accounts as trustee, lodged in a California court having jurisdiction of the trust, an account for the period 1903–1928, and prayed its approval. Due notice of the proceeding was given the parties in interest. Certain remaindermen objected to the account, on the ground that the trustee had paid the entire income to beneficiaries without deducting and reserving proper amounts for depreciation and for capital losses sustained. The matter coming on for hearing, the court sustained the objection concerning depreciation and overruled that as to capital losses; found the amounts which should have been reserved for depreciation; refused to surcharge the trustee, but decreed that the life beneficiaries (including the estate of Louise P. V. Whitcomb) repay to the trustee the amounts which he should have withheld annually for depreciation. The sum fixed for the year 1921 was $43,003.16, which the Board of Tax Appeals has found was the correct amount, a pro rata share of which the petitioner had deducted from the reported income of Louise P. V. Whitcomb. Pursuant to this decree the petitioner repaid $10,700 to the trustee, which was more than petitioner's share of the required repayment for the year 1921. Since, however, Mrs. Whitcomb's estate owed additional amounts for each of the

[2] The propriety of taxing the full amount of the annual distributions of income in this estate in the years 1918–1920 was tested by certain of the beneficiaries. *Whitcomb* v. *Blair,* 58 App.D.C. 104; 25 F. (2d) 528; *Appeal of Louise P. V. Whitcomb,* 4 B.T.A. 80. It was held in those cases that the beneficiaries must return what they in fact received and that depreciation, as it affected only capital assets, and not income, could not be deducted by the life beneficiaries.

years 1913–1928, the balance was adjusted by a promissory note of her next of kin. Other beneficiaries also gave notes in settlement of amounts due the trustee.

The Board of Tax Appeals reversed the Commissioner.[3] The state court's judgment was held conclusive of the fact that no part of the sums paid to the beneficiaries out of the amount required to be deducted by the trustee for depreciation belonged to them; and the conclusion was, therefore, that the amount distributable to the petitioner's decedent for 1921 was the income of the trust due her, less her proportionate share of the sum representing depreciation of the trust property.

The Commissioner petitioned the Circuit Court of Appeals to review the decision, and, after hearing, the court reversed the Board and sustained the Commissioner's ruling.[4] The case is here on writ of certiorari.[5]

The petitioner insists the plain meaning of § 219 is that an income beneficiary of a trust shall pay tax, not on so much of the income as he actually receives, but on the amount he should properly have received in any tax year. His position is that if the amount of income properly "distributable" to him is in excess of the amount paid, he must return and pay tax on the larger amount, irrespective of when in the future he may actually re-

[3] 22 B.T.A. 118.

[4] 62 F. (2d) 733.

[5] Other beneficiaries prosecuted like appeals to the Board with like result. The Circuit Court of Appeals for the Ninth Circuit reversed the Board and the taxpayers were granted certiorari in Numbers 130 and 131. The Court of Appeals of the District of Columbia reversed the Board in the cases of six beneficiaries, 65 F. (2d) 803, 809. These cases are also here on certiorari as Numbers 139–144, inclusive. By a stipulation filed in this Court, November 15, 1933, if the judgment of the Circuit Court of Appeals be affirmed in this case, the like judgment shall be entered in the other cases enumerated, and if the judgment in this case be reversed, the like judgment shall be entered in the others.

ceive the balance due him for the year in question. In this view the respondent concurs. But conversely, says the petitioner, if in any year the beneficiary is actually paid more than is properly distributable to him, he should not return and pay tax on the excess to which he was not entitled. The respondent disagrees with this proposition. If the question be decided in favor of the respondent we need go no further; but if in favor of the petitioner, we must inquire what are the criteria for determining whether the sum actually paid was in fact distributable. On this matter also the parties are in disagreement.

1. Section 219 (a) declares that the income of estates and property held in trust is to bear the same tax as the income of individuals. The tax is measured by the gross income received by the fiduciary, less certain allowable deductions, as in the case of an individual. To clarify and emphasize this purpose it is stated that income received by a decedent's estate in course of administration, income to be accumulated for unborn or unascertained persons, income to be held for future distribution, income to be distributed periodically to beneficiaries, and income received by a guardian, to be held or distributed as the court may direct, is included in the taxable income of the estate or trust. Paragraphs (1) to (4).

Sub-section (b) puts upon the fiduciary the duty of making a return and directs what it shall contain. As respects income which is to be distributed periodically to beneficiaries the return is to include " a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made."

Sub-section (c) requires the fiduciary to pay the tax on all net income of the estate or trust, save that which is

distributable periodically, but sub-section (d) directs, as respects the sort of income last mentioned, " the tax shall not be paid by the fiduciary," but in computing the income of each beneficiary there shall be included " that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, . . ."

Sub-section (e) covers a case where the total income to be returned by a fiduciary is made up of two classes, as e. g. a portion to be held and accumulated and a portion to be distributed periodically to beneficiaries. The fiduciary must then prepare his return as if he were required to pay the tax on the whole and enter " as an additional deduction " (in addition, that is, to the usual deductions allowed all taxpayers by the other sections of the Act) that part of the estate or trust income " which, pursuant to the instrument or order governing the distribution, is distributable during its [the fiduciary's] taxable year to the beneficiaries." To remove all doubt of the intent of the Act, a sentence is added to the effect that in such case each beneficiary's personal income shall include the portion of the trust's income which " pursuant to the instrument or order governing the distribution, is distributable " to him.

Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. This the fiduciary may be required to accumulate; or, on the other hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the Act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's. But as the tax on the entire net income of the trust

is to be paid by the fiduciary or the beneficiaries, or partly by each, the beneficiary's share of the income is considered his property from the moment of its receipt by the estate. This treatment of the beneficiary's income is necessary to prevent the possibility of postponement of the tax to a year subsequent to that in which the income was received by the trustee. If it were not for this provision the trustee might pay on part of the income in one year and the beneficiary on the remainder in a later year. For the purpose of imposing the tax, the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. The test of taxability to the beneficiary is not receipt of income, but the present right to receive it. Clearly, an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, not on the amount paid, but on that payable. If the trustee should have deducted a sum for depreciation from the year's gross income before ascertaining the amount distributable to Mrs. Whitcomb and the other beneficiaries, but failed to do so, he paid her more than was properly distributable for the taxable year. Both the language used and its aptness to effect the obvious scheme for the division of tax between the estate and the beneficiary seem so plain as not to require construction. The administrative interpretation has been in accord with the meaning we ascribe to the section; [6] and no decision to the contrary has been brought to our attention.

The respondent suggests that income distributable within the meaning of the section is income which was reasonably regarded by the parties as distributable at the time it was distributed. We think such a construction would do violence to the plain import of the words used.

The respondent relies on *North American Oil Consoli-*

[6] Treasury Regulations 62, ed. 1922, Arts. 345 and 347.

*dated* v. *Burnet,* 286 U.S. 417. That case, however, involved the receipt of income in 1917 through a money award of a court. An appeal was taken and the award was not confirmed by the appellate court until 1922. The taxpayer's claim that the possibility of reversal shifted the receipt of the income to the later year was overruled. Section 219 had no bearing upon the question presented.

2. The will of A. C. Whitcomb contains no direction, and the statutes of California make no provision, as to depreciation of trust assets. In the absence of either, the Circuit Court of Appeals thought the decision of the state court inconclusive in the administration of the federal Revenue Act, and interpreted the will according to the general law of trusts, which was held to forbid deductions from distributable income on account of depreciation, and to place upon the remaindermen the burden of any shrinkage of capital value of that nature. The petitioner challenges the ruling, insisting upon the binding force of the state court's decree. Obviously that decree had not the effect of *res judicata,* and could not furnish the basis for invocation of the full faith and credit clause of the Federal Constitution in the present case. The petitioner, however, says that it furnishes the standard for the application of § 219, since the section plainly so declares; but even if this be not true, the decision settles the property rights of the beneficiaries which § 219 intended should be observed in distributing the burden of the tax.

The first position is supported by citation of the language of sub-section (d) that "there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not . . ." The decree of the state court is said to be the order governing distribu-

tion of this estate. The respondent reads the language as making the terms of the trust instrument controlling where there is one, and resorting to an order only where there is no instrument governing payments of income; and he adverts to the language of sub-section (a) (4) exempting the fiduciary from returning "income collected by a guardian of an infant to be held or distributed as the court may direct," as explaining the use of the word "order" in sub-section (d) and rendering it applicable only to income collected by a guardian. But a moment's reflection will show this is an error. The whole of a minor's income received by his guardian is taxable to the minor irrespective of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. This is the reason that a fiduciary in receipt of such income is not bound to return it as trust income. Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust.[7]

The word "order" must be given some meaning as applied to trust income which is to be distributed periodically; and we think it clear that the section intended that the order of the court having jurisdiction of the trust should be determinative as to what is distributable income for the purpose of division of the tax between the trust and the beneficiary. We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and, as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the distribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should

[7] See Regulations 62, ed. 1922, Arts. 347, 403, 422.

not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the Act.

Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying § 219 of the Act of 1921.

The respondent suggests that the proceeding in the state court was a collusive one—collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax. We cannot so hold, in view of the record in the state court which is made a part of the record here. The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. The court ruled against the remaindermen on one point, and in their favor on another—that here involved,—but refused to surcharge the trustee, for reasons stated, and ordered repayment by the life tenants of overpayments of income consequent on the trustee's failure to withhold sums for a depreciation reserve.

But, it is said, the life beneficiaries gave their notes for the indebtedness due by them to the trust, as determined by the state court, some of which were jointly executed

by those who would take in remainder, and therefore these beneficiaries are permitted to retain and enjoy the full amounts distributed to them without reference to proper deductions for depreciation, and are therefore taxable thereon as income distributed.

After the decree had been entered two of the life beneficiaries delivered their own notes to the trustee. One life beneficiary, who may become possessed of an interest in remainder, gave her note. Louise P. V. Whitcomb's daughter, a life beneficiary, executed her note, in which her two children, who are possible takers in remainder, joined. The notes were without interest, and were payable to the order of those who should be entitled in remainder at the termination of the trust. The persons so entitled are the descendants of the two children of the testator, per stirpes. What persons if any may fill this description is of course unknown. In the event of the failure of issue the ultimate remainder is to Harvard College.

The parties evidently proceeded upon the theory that if the fund were restored to the trust it would be invested and the life beneficiaries would receive the income from it, and that a satisfactory settlement of the matter would be to have the life beneficiaries give their notes payable at the termination of the trust. At most this form of settlement amounted to a concession or gift on the part of the remaindermen to the life beneficiaries. Any advantage obtained by the latter through the adjustment was obviously not effected by the state court's decree, but by the voluntary action of the remaindermen. The decree was a judgment which fixed the rights of the remaindermen and the obligations of the life tenants. If the parties in interest chose to adjust these obligations in some manner other than by present payment of cash, their action in no wise altered the quality of the trustee's overpayments of income. We cannot seize on the form of

the settlement made between the parties either to impugn the good faith and judicial character of the state court's decree, or to ignore the decree and its conclusiveness as to what was in fact and in law income distributable to the beneficiaries under the trust.

The judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE CARDOZO, dissenting.

I assume for present purposes that the duty of the trustee under the will of Mr. Whitcomb has been adjudicated without fraud or collusion by the Superior Court of California, and that the taxing officers of the United States as well as the parties to the accounting must govern themselves accordingly.

I dissent from the conclusion that the effect of the adjudication is to diminish the taxable income of the life beneficiaries to the extent of the difference between the amount actually distributed and the amount that would have been distributed if the trustee had done his duty.

By the decree in its first form, the court adjudged that the trustee was at fault in failing to make an annual reserve for depreciation for the years 1913 to 1927 inclusive, but also adjudged that he had acted in good faith after obtaining the advice of counsel, and should therefore be relieved of any personal liability. By the same decree the recipients of the income were directed to repay to the trustee the excess payments (amounting in all to $622,-440.90) "by making, executing and delivering to said Trustee their respective promissory notes payable without interest at the termination of said trust to the order of the remaindermen under said trust as they may be determined at the time of the termination of said trust."

By an amended decree made the same day (September 19, 1928) the direction to make payment by the delivery of promissory notes was omitted, and the decree there-

upon stood as one commanding payment simply, without statement of the time or manner.

The recipients of the income reverted at once to the method of payment prescribed by the original decree, and did so with the approval of the trustee and the presumptive owners of the remainders. Charlotte A. Lepic, a daughter of the testator, and a life beneficiary, made her promissory note for $305,867.06, payable without interest at the termination of the trust, and her two children, Napoleon and Charlotte, whose interest was solely as remaindermen, were co-makers with her. Louise Whitcomb, a daughter of a deceased son of the testator, made a note for $118,353.85, signing by her guardian. Her interest was partly that of a beneficiary, and partly as the presumptive owner of an estate in remainder. Lydia, whose interest was the same as that of Louise, made her note for a like amount. Marie, the widow of the deceased son, made her note for $69,159.35. Her interest was in income only. All the notes were payable to the order of " the remaindermen under the said trust as they may be determined to be " when the trust is at an end. All were without interest. The sum total of the notes is substantially equal to the total overpayments, except for $10,700, paid in cash by the administrator of the widow of the testator who died during the pendency of these proceedings. There is nothing to show that the cash was applied upon account of the overpayment due for the years covered by the assessment. In the absence of such evidence, the law appropriates the payment to the items first in point of time. The conclusion therefore follows that as to any overpayments made by the trustee during the years of the contested liability for taxes, the limit of any obligation now resting on the beneficiaries of the trust is the payment of these promissory notes to the

persons entitled in remainder when the trust shall terminate.

I assume in aid of the petitioner that an enforcible duty of repayment existing at the time of an assessment of a tax will call for the reduction of the taxable income to the same extent as if repayment has been actually made, though much can be said in support of another view. The existence of a duty is, however, an indispensable condition. If money distributed to a beneficiary is to be freed from taxation on the ground that, though received and enjoyed, it will have to be returned, the recipient must make it plain that burden and benefit are exact equivalents. He must show that the effect of the fulfilment of the obligation to repay will be to cancel all the gain, and leave him in the same position as if the income had never been received.

At the time of the review of these assessments by the Board of Tax Appeals, the California court had announced by its decree that the trustee had distributed to the beneficiaries more income than was due; but the presumptive owners of the remainders had exonerated the recipients from any duty of repayment until the end of the trust, and then without interest upon moneys overpaid. In effect, the act of the fiduciary had been adopted and confirmed to a proportionate extent.* Whether there was ratification or confirmation in a strict and narrow sense is not decisive of the controversy. The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels. *Burnet* v. *Harmel*, 287 U.S. 103. If the testator had stated in so many words that there should be no deduction for depreciation in distribut-

* Cf. American Law Institute, Restatement of the Law of Trusts, § 210.

ing the income, but that at the termination of the trust the beneficiaries would owe to the remaindermen without interest a sum equivalent to the deduction that would otherwise have been made, the result in its practical aspect would have been identical with the one achieved under this will through confirmation or consent. Here the parties by agreement have made their own rule, which relates back to the year when the income was received.

To put the case in another way: the remaindermen might have signed an order before the income was paid over directing the trustee to make no deduction for depreciation of the trust. They did not do so then, but by relation backwards they did it afterwards. Without the aid of the agreement the decree of the California court would have imposed upon the trustee a duty to use diligent endeavor to collect without delay the moneys misapplied. Through the acceptance of these notes the presumptive owners of the remainders absolved him from that duty and thus confirmed his action. Consent or confirmation may supplement a will or deed of trust, with the result that income "distributed" will have become "distributable" also. It may work a like result where the meaning of the instrument has been established by an "order" of a court. The order is no more than evidence of preëxisting rights and duties. If the obligation to make restitution had been extinguished for all time, and the agreement extinguishing it had been proved to the assessing officers before the assessment became final, a court would listen with little patience to the taxpayer's complaint that a tax was not due because there had been an interval during which the money would have been reclaimable if the law had run its course. The situation is not different in principle where the benefits confirmed to the recipients of the income are something less than they would be if the duty to return had been extinguished altogether.

For the benefits, though not complete, are not illusory or trivial. The Commissioner's assessment is supported by a presumption of correctness. If a taxpayer would overthrow it, he has the burden of proving it erroneous, and of fixing in dollars and cents the amount of the error. By the decision just announced, the taxpayer is relieved of that burden. He has received upon account of his taxable income an allowance of the face amount of an indebtedness payable in the future without deduction for the benefits resulting from the time and manner of the payment. How substantial those benefits are will be obvious if we let them pass before us in review.

The beneficiaries, instead of restoring the overpaid income to the corpus of the estate, are permitted to retain it until the termination of the trust and to dispose of it as their own. They gain thereby the benefit of investing or consuming, with the opportunity for profit or enjoyment that goes along with such a privilege. If gain is derived, it is theirs without accountability to any one. If a loss ensues and the money is used up, a court of bankruptcy is open to them, in the event of their insolvency, to discharge the liability. At the making of the notes, their resources may have been adequate to enable them to restore what had been unlawfully obtained. At the time when the notes become due, they may find themselves without a dollar except their interest in the trust estate.

But this does not exhaust the catalogue of benefits. In any reckoning of these, account must be taken of the relation of kinship between makers and payees. Except in remote contingencies the notes will be payable either to the children or descendants of the makers, or to the makers themselves. If the makers are dead at the termination of the trust, they will have had it in their power to write a clause into their wills requiring their descendants who elect to take under the wills to cancel any claim

that has accrued upon the notes. If the makers are then alive, they will have put their names to notes that will be payable to themselves. There is grave doubt, to say the least, whether any one of them will ever have to pay a dollar.

Up to this, attention has been confined to terms of the notes that have to do with the restitution of the principal. The postponement of payment of the principal was, however, accompanied by a provision that there should be no liability for interest. On its face this was a gain. The argument is made, however, that the gain is unreal for the reason that the overpayments, if restored, would be accretions to the corpus of the trust, and that the income on the accretions would be due to the same persons absolved from liability for interest. But this is only a part truth. The makers gained the difference between interest at the legal rate upon the principal of the notes and the lower rate of income likely to be earned by a trustee who invests the funds of a trust in conformity with law. What is even more important, they gained the privilege in the meantime of retaining for themselves what would otherwise be principal in the hands of the trustee and of using it as they pleased.

These are important benefits. They would be unhesitatingly recognized as such by any investor or by any man of business. Some account should be taken of them before we say that the income of the trust was not income in the hands of the beneficiaries, who received it as their own and who for all that appears may never come under a duty to pay it back to any one.

I think the Court of Appeals did not err in upholding the assessment and that its decree should be affirmed.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this dissent.

## LOUISE A. WHITCOMB *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.*

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 145. Submitted December 8, 1933.—Decided January 8, 1934.

Decided upon the authority of *Freuler* v. *Helvering, ante,* p. 35. 65 F. (2d) 803, 809, reversed.

CERTIORARI, 290 U.S. 610, to review a judgment reversing, on appeal, a decision of the Board of Tax Appeals, which had set aside a deficiency assessment of income tax. 22 B.T.A. 118.

*Messrs. Claude R. Branch, Felix T. Smith, W. W. Spalding,* and *Robert A. Littleton* were on the brief for petitioner.

*Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *John MacC. Hudson* were on the brief for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case was brought here by writ of certiorari.[1] The petitioner is a beneficiary of the trust created by the will of A. C. Whitcomb, and her status[2] differs from that of

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* Pursuant to stipulation, the decisions in the following cases are reversed on the authority of this case: No. 146, *Lydia L. Whitcomb* v. *Helvering;* No. 147, *Louise A. F. E. Whitcomb* v. *Helvering;* Nos. 148 and 149, *Lydia L. I. Whitcomb* v. *Helvering;* and No. 150, *Louise A. F. E. Whitcomb* v. *Helvering,* all on writs of certiorari to the Court of Appeals of the District of Columbia.

[1] See 22 B.T.A. 118; 65 F. (2d) 803, 809.

[2] Companion cases in the Board of Tax Appeals and the Court of Appeals of the District of Columbia, which involve the tax liability

the petitioner in No. 129 (*ante*, p. 35) only in the respect that she has a vested remainder, subject, in certain events, to be divested in favor of Harvard College. The Court of Appeals did not make that circumstance the basis of any distinction between her case and that of Freuler (No. 129). The petitioner therefore makes the same contentions which are there considered; but claims also, if her interest in the trust corpus by way of remainder is given effect, it does not follow that an affirmance in No. 129 requires the like result in her case. As we reverse the judgment in No. 129 and the reasons given in our opinion apply in this case, we have no occasion to pass upon the added feature presented by the remainder interest of the petitioner.

For the reasons set forth in the opinion in No. 129 the judgment must be reversed.

*Reversed.*

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO, dissent.

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## R. H. STEARNS CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 133. Argued December 5, 6, 1933.—Decided January 8, 1934.

1. When a taxpayer, in filing a claim for overpayment of income taxes for several years, asks that the amount overpaid be credited against an unpaid tax, the collection of which has not yet been barred by time, he, in effect, requests the taxing authorities to postpone the collection of that tax until the claim has been acted on, during (at least) the statutory period for assessment of the latest tax involved

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of other beneficiaries of the same trust, under like circumstances, were brought up by certiorari. They are Nos. 146 to 150, inclusive. By stipulation filed in this court, the parties agree that if the judgment in No. 145 is reversed a like judgment shall be entered in the other cases; and if that judgment is affirmed a like judgment shall be entered in the others.

in the claim; and where, within that period, the Commissioner has found an overpayment and has applied it to the unpaid tax as requested, the taxpayer is estopped from claiming the amount as still due him upon the ground that collection of the unpaid tax had in the meantime been barred by limitation. P. 59.

So *held* where the practice of the collector's office was to treat such a claim as a stay of collection of unpaid taxes against which credit was asked, until the Commissioner had adjudged the claim; and where the taxpayer had at first accepted without protest the application of the credit and paid the resulting balance.

2. The provision of the Revenue Act of 1928 (§ 609) declaring that a credit against any liability for any taxable year shall be void if made against a liability barred by limitation, applies where the credit is made by the Commissioner *in invitum*, not where it is done, as in this case, at the taxpayer's request. P. 60.
3. Under the provision of the Revenue Act of 1921, § 250 (d), that no suit shall be begun after the expiration of five years succeeding the filing of the return "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection," any writing, formal or informal, is sufficient to show the Commissioner's consent if his approval may be gathered from it as a reasonable inference. P. 62.
4. A taxpayer suing for a refund upon the ground that the crediting of the amount against an earlier tax took place after the collection of that tax had become barred by limitation, has the burden of producing evidence to show that a consent to extension of the collection period, filed by him, was not assented to in writing by the Commissioner. P. 62.
5. The word "waiver" written on an assessment list attached to a certificate of assessment signed by the Commissioner, together with a date indicative of the tax referred to, *held* evidence in this case of the Commissioner's consent to a waiver filed by the taxpayer. P. 63.
6. Choice between two doubts as to which of two waivers was intended by such entries, should be so made as to favor the presumption of official regularity. P. 64.
7. Action to recover an overpayment of taxes, on the ground of illegal assessment or collection, is barred by R.S., § 3226; 26 U.S.C., § 156, on the expiration of five years from the time of payment. P. 64.
8. To constitute an account stated, a balance must have been struck in such circumstances as to import a promise of payment on the one side, and acceptance on the other. P. 65.

9. Mere rendition to the taxpayer of a certificate of overassessment did not evince a promise to refund, when by his request the overpayment was to be applied against another tax, and this was subsequently and in due course accomplished, and the results accepted by him. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, distinguished. P. 66.

77 Ct. Cls. 264; 2 F.Supp. 773, affirmed.

CERTIORARI, 290 U.S. 611, to review a judgment rejecting a claim for an overpayment of income and profits taxes.

*Messrs. Howe P. Cochran* and *James S. Y. Ivins,* with whom *Messrs. Frederick S. Winston* and *Richard B. Barker* were on the brief, for petitioner.

*Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs* and *Assistant Attorney General Wideman* were on the brief, for the United States.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Upon the footing of an account stated the petitioner sues the Government for taxes overpaid.

Income and profits tax returns for the fiscal year ending July 31, 1917, were filed by the taxpayer in September, 1917. The tax shown by these returns as well as by amended returns for the same year was paid in full.

Income and profits tax returns for the fiscal year ending July 31, 1918, were filed in October, 1918, and again the tax was promptly paid.

Following the practice of the Bureau, the Commissioner proceeded to audit the returns to the end that the assessments might be increased or reduced according to the facts.

In February, 1921, the taxpayer signed and filed a waiver of any statutory period of limitation as to the assessment and collection of the tax for the calendar year

1917. It did this in order to be assured that the audit by the Commissioner would be deliberate and thorough. In the absence of such a consent the period of limitation would have expired in April, 1923. The extension was approved in writing by the Commissioner in February, 1923. The waiver on its face had no limit in respect of time, but under a regulation adopted in April, 1923, it spent its force on April 1, 1924, unless continued or renewed.

In February, 1923, the taxpayer signed a second waiver applicable to the fiscal years 1917 and 1918, and extending the period for collection until March 1, 1925. This waiver was not signed by the Commissioner within the term of its duration, though it was signed, years afterwards, on April 7, 1930. However, in June, 1923, while both waivers were on file, the Commissioner made an additional assessment for the fiscal year ending July 31, 1917, and on the attached assessment list wrote the word "waiver" opposite the item affecting the petitioner. The additional assessment for 1917 was reduced by a credit of an overassessment for 1916, and when so reduced amounted to $20,757.14. Payment of this amount was demanded by the Collector on August 3, 1923.

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years 1918, 1919, 1920, and 1921, amounting in the aggregate to $35,727.10, and asked that the unpaid balance for 1917 be set-off against the claim for overpayment and that the remainder be refunded. At that time it was the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim.

On March 1, 1924, the Commissioner approved a schedule of overassessments which included an overassessment in favor of the petitioner for the fiscal year ending July

31, 1918, in the sum of $14,928.07, and sent this schedule to the Collector for action in accordance with the directions appearing thereon. On June 12, 1924, the Collector, following these instructions, signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits, certifying the application of $14,928.07 as a credit. On June 28, 1924, the Commissioner signed the schedule of refunds and credits, by which act for the first time he definitively announced his allowance of the claim. *Girard Trust Co.* v. *United States,* 270 U.S. 163, 170; *United States* v. *Swift & Co.,* 282 U.S. 468, 475. Before doing this, and on or after March 1, 1924, he had transmitted to the petitioner a certificate of overassessment for the fiscal year ending July 31, 1918, in the sum of $14,928.07, which sum was credited in June upon the taxes overdue. This overassessment for 1918, applied as a credit upon the unpaid tax for 1917 ($20,757.14), reduced the liability of the taxpayer to $5,829.07. Demand for the payment of this balance with accrued interest was made by the Collector on September 1, 1924. Two weeks later, the petitioner complied with the demand, accepting without protest the application of the credit, and paying the resulting balance.

For nearly six years the transaction was allowed to stand unopened and unchallenged. In April, 1930, the petitioner learned through an attorney that the second waiver had not been signed by the Commissioner until after it had expired. With this knowledge it filed with the Commissioner a claim for refund of the overpaid tax for 1918 ($14,928.07) which had been collected through application as a credit upon the tax for the year before. The basis for the claim was this, that at the time of the credit the first waiver had expired, that the second waiver was ineffective because not signed by the Commissioner, that collection by credit after the term of limitation was as much prohibited as collection at such a time by suit

or by distraint, and hence that the overpaid tax certified by the Commissioner in the schedule of overassessment was an undischarged indebtedness, still owing from the Government. Four days later this action was begun. The Court of Claims gave judgment in favor of the Government, 2 F.Supp. 773, and a writ of certiorari brings the case here.

1. In auditing the tax for 1918 and crediting the overassessment for that year upon the tax for the year before, the Commissioner acted at the request of the petitioner, which was valid till revoked.

For the decision of this case we do not need to rule whether a "waiver" by a taxpayer consenting to the enlargement of the time for assessment or collection is ineffective unless approved by the Commissioner in writing.* There was here more than a waiver, an abandonment of a privilege to insist upon the fulfilment of a condition (*Stange* v. *United States,* 282 U.S. 270, 275, 276; *Florsheim Bros. Co.* v. *United States,* 280 U.S. 453, 456); there was a positive request, which till revoked upon reasonable notice had the effect of an estoppel.

On August 3, 1923, the Collector made demand upon the petitioner for the payment of $20,757.14, the tax balance then due for the year 1917. There is no dispute that the demand was timely, and that collection would have been enforced unless the taxpayer had done something to postpone the hour of payment. Waivers were then on file, one of them signed by the Commissioner, the other unsigned, but the petitioner did not rest upon these, nor would these without more have availed to avert the threatened levy. On August 9, 1923, the petitioner filed with the Commissioner a request to withhold the

* See: *Commissioner* v. *U.S. Refractories Corp.,* 64 F. (2d) 69; affirmed by an equally divided court, 290 U.S. 591; *Atlantic Mills* v. *United States,* 3 F.Supp. 699; *contra: Commissioner* v. *Hind,* 52 F. (2d) 1075; *John M. Parker Co.* v. *Commissioner,* 49 F. (2d) 254.

process of collection until credits were adjusted. In substance the request was this: Please do not collect the tax for 1917, until you have completed the audit for the years 1918 to 1921 inclusive, and if there has been overassessment for those years, set it off as a credit.

Now, the time for assessment and collection of the 1921 tax did not expire till 1925, and this without the aid of any waiver or extension. In such circumstances, request by the taxpayer that the Commissioner withhold collection for 1917 until there had been an audit of the tax for 1921 was at least equivalent to a request that he delay until the assessment for 1921 was due under the statute. But before that time arrived, i. e., before 1925, the Commissioner had acted. On March 1, 1924, he had completed the reaudit, and had discovered an overassessment for one of the years covered by the petitioner's request. Within a reasonable time thereafter (June 12, 1924) he had received from the Collector a report that $20,757.14 was still unpaid upon the tax for 1917. Promptly thereafter (June 28, 1924), he had complied with the petitioner's instructions by offsetting the overpayment for the one year in reduction of the balance owing for the other. The whole process had been completed within the time fixed by implication in the petitioner's request, within the time when assessment was due for the last of the group of years (1918 to 1921) to be covered by the audit.

The petitioner makes the point that by the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875, § 609), a credit against a liability in respect of any taxable year shall be "void" if it has been made against a liability barred by limitation. The aim of that provision, as we view it, was to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval or with an approval falling short of inducement or request. Cf. *Stange* v. *United States, supra;* Revenue Act of 1928, § 506 (b) (c), c. 852, 45 Stat. 791, 870, 871. If nothing

more than this appeared, there was to be no exercise *in invitum* of governmental power. But the aim of the statute suggests a restraint upon its meaning. To know whether liability has been barred by limitation it will not do to refer to the flight of time alone. The limitation may have been postponed by force of a simple waiver, which must then be made in adherence to the statutory forms, or so we now assume. It may have been postponed by deliberate persuasion to withhold official action. We think it an unreasonable construction that would view the prohibition of the statute as overriding the doctrine of estoppel (*Randon v. Toby,* 11 How. 493, 519) and invalidating a credit made at the taxpayer's request. Here, at the time of the request, the liability was still alive, unaffected as yet by any statutory bar. The request in its fair meaning reached forward into the future and prayed for the postponement of collection till the audits for later years had been completed in the usual course. This having been done, the suspended collection might be effected by credit or by distraint or by other methods prescribed by law. Congress surely did not mean that a credit was to be void if made by the Government in response to such a prayer.

The applicable principle is fundamental and unquestioned. "He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.'" *Dolan* v. *Rodgers,* 149 N.Y. 489, 491; 44 N.E. 167; and *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447, 457; 127 N.E. 263; quoting *West* v. *Blakeway,* 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one

shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. *Imperator Realty Co.* v. *Tull, supra.* A suit may not be built on an omission induced by him who sues. *Swain* v. *Seamens,* 9 Wall. 254, 274; *United States* v. *Peck,* 102 U.S. 64; *Thomson* v. *Poor,* 147 N.Y. 402; 42 N.E. 13; *New Zealand Shipping Co.* v. *Société des Ateliers,* [1919] A.C. 1, 6; Williston, Contracts, Vol. 2, §§ 689, 692.

2. If we assume in favor of the petitioner that the credit is a nullity in the absence of a written waiver, approved by the Commissioner, the record supports the inference that at the time of the set-off such approval had been given.

The statute provides that no suit or proceeding shall be begun for the collection of the tax after the expiration of five years succeeding the filing of the return "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection." Revenue Act of 1921; c. 136, 42 Stat. 227, 265, § 250 (d). In this case, consent by the taxpayer in due form is found and indeed conceded. The only question is whether there was consent by the Commissioner. But the statute does not say that the evidence of consent shall be embodied in a single paper. Cf. *Eclipse Lawn Mower Co.* v. *United States,* 1 F.Supp. 768. Its one requirement in respect of form is that the consent shall be in writing. *Sabin* v. *United States,* 70 Ct. Cls. 574; 44 F. (2d) 70. There is left a wide range of administrative discretion. Any writing, formal or informal, is sufficient if made for the purpose of recording the Commissioner's approval, and if approval may be gathered therefrom as a reasonable inference.

The burden was on the petitioner, seeking a refund of its tax, to prove its allegation that the overassessment for 1918 had been illegally credited upon the tax for 1917.

At the outset it might have stood upon the fact that the credit had been made after the normal term of limitation, casting the burden on the Government of going forward with evidence in proof of an extension. When its own waiver had been proved, however, the case took on another aspect. At that stage the presumption of official regularity was sufficient to sustain the inference that the Commissioner on his side had done whatever was appropriate to give support to his own act and thus validate the credit. Acts done by a public officer " which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." *Bank of the United States* v. *Dandridge,* 12 Wheat. 64, 70; *United States* v. *Royer,* 268 U.S. 394, 398; *Knox County* v. *Ninth National Bank,* 147 U.S. 91, 97; *Mandeville* v. *Reynolds,* 68 N.Y. 528, 534; *Demings* v. *Supreme Lodge Knights of Pythias,* 131 N.Y. 522, 527; 30 N.E. 572; Wigmore, Evidence, Vol. 5, § 2524. No doubt the presumption of regularity is subject to be rebutted. It stands until dislodged.

Now, the petitioner has failed to show that the Commissioner did not approve in writing. On the contrary the evidence is persuasive that he did. A certificate of an additional assessment for the fiscal year ending July 31, 1917, was signed, as we have seen, on June 26, 1923; and on the assessment list attached thereto, opposite the entry of the assessment against the petitioner, the following appears: " 7/31/17 Fisc. 1753361. O.L. 4/17/23; waiver." The Commissioner did not sign his name below the memorandum, but the memorandum was attached to a certificate which the Commissioner did sign, and his name subscribed to the certificate authenticates also the documents attached to it, if we assume in favor of the petitioner that signing is essential. The Court of Claims was of the opinion that the word " waiver " on this list had relation to

the second of the two consents on file with the Commissioner. The context and the circumstances lend support to that conclusion. The fiscal year for the petitioner ended July 31. Probably through inadvertence, the first waiver refers to a tax for the calendar year ending December 31. This might have seemed to exclude the first six months of the year ending July 31, 1917, i. e., the period from July 31, 1916 to January 1 following. We do not say that the courts would uphold so literal a construction. Almost certainly the objection, if made, would be put aside as hypercritical. See 39 Stat., c. 463, p. 770, § 13. Even so, the memorandum may well be allocated to the waiver that fits it precisely in preference to the one that fits it imperfectly. We turn, then, to the documents in order to relate them to one another. If we look only to its letter, the memorandum does not refer to a waiver for the calendar year ending December 31, 1917. It refers, on the contrary, to a waiver for the fiscal year ending July 31, 1917 (7/31/17). The only waiver corresponding to this description in form as well as in substance is the one filed with the Commissioner February 19, 1923, which covers the year ending July 31, 1917, as well as the year after.

The inference, therefore, is legitimate that the second of the two waivers is the one that the Commissioner had in view when he wrote this memorandum indicative of assent. At the very least the effect of the entry is to leave the purpose of the writer doubtful. Choice between two doubts should be made in such a way as to favor the presumption of official regularity.

3. The petitioner has failed to make out the existence of an account stated for its benefit, and its claim, even if otherwise valid, is barred by limitation.

Payment of the tax for the fiscal year ending July 31, 1918, was made by the petitioner, partly in 1918, and

partly in 1919. Five years from the date of payment, a statute of limitations set up a bar to a suit for the recovery of the tax on the ground of illegal assessment or collection. R.S. § 3226; 26 U.S.C. § 156; *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, 265. The petitioner, conceding this, maintains that in June, 1924, there was a statement of an account, giving rise to a new cause of action with a new term of limitation. *Daube* v. *United States,* 289 U.S. 367, 370; *Bonwit Teller & Co.* v. *United States, supra.* This suit was not brought till May, 1930. In the absence of an account stated in its favor the petitioner must fail.

A recent judgment of this court recalls the essentials of an account stated as they were long ago defined. *Daube* v. *United States, supra.* A balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other. But plainly no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion. The taxpayer knew that the Commissioner had been requested, after determining the overassessment, to set it off against the tax for an earlier year. The taxpayer knew also that the set-off or credit would not appear on the face of the certificate of overassessment, but would require reference to another and later document, the schedule of refunds and credits. The diverse functions of these documents were pointed out by this court in *United States* v. *Swift & Co.,* 282 U.S. 468, 475 and *Girard Trust Co.* v. *United States,* 270 U.S. 163, 170. The taxpayer knew also that it had signed a formal waiver extending the term of collection until March, 1925, and it had no reason to believe that this waiver had not been signed by the Commissioner, if it be assumed for present purposes that such a signature was necessary.

Plainly, in such circumstances the certificate of overassessment without more does not import a promise by the Commissioner to refund the amount there certified instead of applying it as a credit upon the tax of an earlier year. At most the promise to be implied is one to refund the excess after there has been a computation of the taxes unpaid for other years and an ascertainment of the balance. The statement of the account is not unconditional and definitive. It is provisional and tentative. Finality was lacking until there was an agreement as to credits. *Newburger-Morris Co.* v. *Talcott,* 219 N.Y. 505, 512; 114 N.E. 846.

The events that followed confirm this interpretation of the effect of the transaction. Upon a computation of the credits the final balance was ascertained to be in favor of the Government. The balance thereby fixed was reported to the taxpayer. After the schedule of refunds and credits had been signed by the Commissioner, the Collector transmitted to the taxpayer a new statement of account by which it was clearly made to appear that the overassessment had been credited upon the tax for 1917, and that after such credit there was still owing from the taxpayer a balance of $5,829.07, which, together with the accrued interest, was thereupon collected. Then for the first time was there a final ascertainment of the balance upon consideration of both sides of the account, the debits and the credits. The taxpayer did not object to the account as submitted in its final form. Far from objecting, it paid the resulting balance, and by this act as well as by silence conceded the indebtedness. Indeed, there was more than an account stated; by force of voluntary payment there was also an account settled. *Lockwood* v. *Thorne,* 18 N.Y. 285, 292. The statute of limitations is a bar to the recovery by the petitioner of the balance paid to the Government upon the demand of the Collector.

This is not disputed. It is equally a bar to the recovery of any item that entered into the account and determined the balance as thus definitively adjusted.

The judgment is

*Affirmed.*

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

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## FEDERAL TRADE COMMISSION *v.* ALGOMA LUMBER CO. ET AL.

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

No. 240. Argued December 14, 15, 1933.—Decided January 8, 1934.

1. The Federal Trade Commission Act makes the Commission's findings of fact conclusive if supported by evidence; and, upon appeal from the Commission's order, the Circuit Court of Appeals is not at liberty to make its own appraisal of the testimony and pick and choose for itself among uncertain and conflicting inferences. P. 73.
2. The Commission ordered Pacific Coast lumber dealers to desist from the practice of selling, under the trade name of "California White Pine," lumber made from "Western Yellow Pine" (*Pinus ponderosa*), finding it an unfair and prejudicial method of competing with lumber made from the true White Pines (*Pinus strobus* and closely related species), a product of better quality and commanding a higher price. *Held:*

   (1) That the evidence supported the Commission (a) in finding that the lumber sold by the trade name "California White Pine" is inferior to the true white pine lumber; (b) in finding that the trade name is misleading and causes both confusion and prejudice to retailers, architects, builders, and consumers. Pp. 76, 77.

   (2) The fact that "California White Pine" is listed as a trade equivalent of *Pinus ponderosa* in a list of standard commercial names for lumber, forming part of a report of "Simplified Practice Recommendations" issued by the Bureau of Standards, is of little weight as evidence, considering the nature of the Bureau's function and the basis and purpose of its recommendations. P. 73.

3. In being sold a substitute in the name of a better article, the consumer is prejudiced, even though he save money by it; the public is entitled to get what it chooses, though the choice may be dictated by caprice, or by fashion, or perhaps by ignorance. P. 78.
4. The practice of marketing a cheaper kind of lumber under the name of a better and more expensive kind, is prejudicial to honest dealers and manufacturers; orders that would come to them if the lumber were rightly named, are diverted to others whose methods are less scrupulous. P. 78.
5. The facts that a deceptive trade name was adopted without fraudulent design and has long been in use, are not a defense under the Act if its continued use is in the circumstances unfair and prejudicial to the public interest. P. 79.
6. In this case the evidence contradicts the proposition that the name "California White Pine," misleading in the beginning, had acquired an independent or secondary meaning rendering it innocuous. P. 80.
7. A trade name, legitimate in one territory, may generate confusion when carried to another, and must be given up. P. 81.
8. A method of competition may be unfair without being fraudulent in law; but equity perceives a kind of fraud in clinging to a benefit begot of misrepresentation, however innocently made. P. 81.
9. The contention that the proceedings of the Trade Commission in this case were not "to the interest of the public," based on the thought that, by encouraging the use of *Pinus ponderosa* the eastern forests of *Pinus strobus* would be conserved,—is rejected. P. 81.
10. In requiring that the word "White" be omitted from the name of respondent's product, the Commission did not abuse its discretion. P. 81.

64 F. (2d) 618, reversed.

CERTIORARI, 290 U.S. 607, to review a judgment of the Circuit Court of Appeals annulling an order of the Federal Trade Commission.

*Assistant Attorney General Stephens,* with whom *Solicitor General Biggs* and *Messrs. Robert E. Healy, Martin A. Morrison,* and *Eugene W. Burr* were on the brief, for petitioner.

*Mr. Allan P. Matthew,* with whom *Messrs. Warren Olney, Jr.,* and *Carl I. Wheat* were on the brief, for respondents.

By leave of Court, *Mr. Edward S. Rogers* filed a brief as *amicus curiae.*

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In May, 1929, the Federal Trade Commission filed and served complaints against a group of fifty manufacturers on the Pacific Coast charging "unfair competition in interstate commerce" in violation of § 5 of the Federal Trade Commission Act. 38 Stat. 717, 719, c. 311, § 5; 15 U.S.C. § 45.

After the service of answers the proceedings were consolidated and many witnesses examined. The outcome was a series of reports sustaining the complaints as to thirty-nine manufacturers, with orders to "cease and desist" from the practice challenged as unfair. Twelve companies thus enjoined petitioned the Circuit Court of Appeals for the Ninth Circuit to review the orders of the Commission. Such review being had, the orders were annulled. 64 F. (2d) 618. A writ of certiorari brings the case here.

The practice complained of as unfair and enjoined by the Commission is the use by the respondents of the words "California white pine" to describe lumber, logs or other forest products made from the pine species known as *Pinus ponderosa.* The findings as to this use and its effect upon the public are full and circumstantial. They are too long to be paraphrased conveniently within the limits of an opinion. We must be content with an imperfect summary.

The respondents are engaged in the manufacture and sale of lumber and timber products which they ship from

California and Oregon to customers in other states and foreign lands. Much of what they sell comes from the species of tree that is known among botanists as *Pinus ponderosa.* The respondents sell it under the name of "California white pine," and under that name, or at times "white pine" simply, it goes to the consumer. In truth it is not a white pine, whether the tests to be applied are those of botanical science or of commercial practice and understanding.

Pine trees, the genus "Pinus," have for a long time been divided by botanists, foresters and the public generally into two groups, the white pine and the yellow. The white pine group includes, by common consent, the northern white pine (*Pinus strobus*), the sugar pine and the Idaho white pine. It is much sought after by reason of its durability under exposure to weather and moisture, the proportion of its heartwood as contrasted with its sapwood content, as well as other qualities. For these reasons it commands a high price as compared with pines of other species. The yellow pine group is less durable, harder, heavier, more subject to shrinkage and warping, darker in color, more resinous, and more difficult to work. It includes the long leaf yellow pine (*Pinus palustris*), grown in the southern states, and the *Pinus ponderosa,* a far softer wood, which is grown in the Pacific coast states, and in Arizona and New Mexico, as well as in the "inland empire" (eastern Washington, Oregon, Idaho, and western Montana).

Of the varieties of white pine, the northern or *Pinus strobus* has been known better and longer than the others. It is described sometimes as northern white pine, sometimes as white pine simply, sometimes with the addition of its local origin, as Maine white pine, Michigan, Wisconsin, Minnesota, Canadian, New Brunswick. It is native to the northeastern states and to the Great Lakes region, as far west as Minnesota. It is found also in Canada and

along the Appalachian highlands. It was almost the only building material for the settlers of New England, and so great is its durability that many ancient buildings made from it in the seventeenth and eighteenth centuries survive in good condition. The sugar pine is native to the upland regions of California, southern Oregon and parts of Nevada. The Idaho white pine grows in the mountainous sections of Idaho, Washington and Oregon and in parts of British Columbia. The white pine species "still holds an exalted reputation among the consuming public" and "in general esteem is the highest type of lumber as respects the excellences desired in soft wood material." "It is coming more and more to be a specialty wood, largely devoted to special purposes, as it becomes scarcer and higher in price. It is in great demand."

About 1880 the *Pinus ponderosa,* though botanically a yellow pine, began to be described as a white pine when sold in the local markets of California, New Mexico, and Arizona, the description being generally accompanied by a reference to the state of origin, as "California white pine," etc. By 1886, sales under this description had spread to Nevada and Utah, with occasional shipments farther east. About 1900, they entered the middle western states, and about 1915 had made their way into New England, though only to a small extent. The pines from the "inland empire" traveled east more slowly, and when they did were described as western white pine, a term now generally abandoned. The progress of the newcomers, both from the coast and from the "inland empire" was not wholly a march of triumph. In their movement to the central and eastern markets they came into competition more and more with the genuine white pine, with which those markets had been long familiar. Mutterings of discontent were heard. In 1924, partly as a result of complaints and official investigations, many of the producers, notably those of the "inland empire," as well as

some producers in California and Arizona, voluntarily gave up the use of the adjective "white" in connection with their product, and adopted the description "pondosa pines," pondosa being a corruption or abbreviation of the ponderosa of the botanists. "Pondosa pine is the term employed for ponderosa by the representatives of producers of slightly more than half of the ponderosa marketed." The respondents and others, however, declined to make a change. During the next five years California white pine and its equivalents became an even more important factor in the lumber markets of the country. Accumulating complaints led to an inquiry by the Commission, which had its fruit in this proceeding.

The confusion and abuses growing out of these interlocking names have been developed in the findings. Many retail dealers receiving orders for white pine deliver California white pine, not knowing that it differs from the lumber ordered. Many knowing the difference deliver the inferior product because they can buy it cheaper. Still others, well informed and honest, deliver the genuine article, thus placing themselves at a disadvantage in the race of competition with the unscrupulous and the ignorant. Trade has thus been diverted from dealers in white pine to dealers in *Pinus ponderosa* masquerading as white pine. Trade has also been diverted from dealers in *Pinus ponderosa* under the name pinus pondosa to dealers in *Pinus ponderosa* under the more attractive label. The diversion of trade from dealers of one class to dealers of another is not the only mischief. Consumers, architects and retailers have also been misled. They have given orders for the respondents' product, supposing it to be white pine and to have the qualities associated with lumber of that species. They have accepted deliveries under the empire of that belief. True indeed it is that the woods sold by the respondents, though not a genuine

white pine, are nearer to that species in mechanical properties than they are to the kinds of yellow pine indigenous to the south. The fact that for many purposes they are half way between the white species and the yellow makes the practice of substitution easier than it would be if the difference were plain. Misrepresentation and confusion flourish in such a soil. From these findings and others the Commission was brought to the conclusion that the respondents compete unfairly in transacting business as they do, and that in the interest of the public their methods should be changed.

"The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U.S.C. § 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U.S. 52, 61, 63) forbid that exercise of power.

*First.* The argument is made that unfair competition is disproved by the "simplified practice recommendations" of the Bureau of Standards when read in conjunction with the testimony as to the comparative utility of the genuine white pine and *Pinus ponderosa.*

The Court of Appeals concedes that the recommendations of the Bureau will not avail, without more, to control the action of the Commission. Cf. *Brougham* v. *Blanton Mfg. Co.*, 249 U.S. 495, 499; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n*, 286 U.S. 299, 312. The view was expressed, however, that alone they are in a high degree persuasive, and that in conjunction with other evidence they are even controlling. In

particular that result was thought to follow in this case because the substituted wood, in the judgment of the court, is so nearly equal in utility that buyers are not injured, even though misled.[1]

Such a holding misconceives the significance of the Government's endeavor to simplify commercial practice. It misconceives even more essentially the significance of the substitution of one article for another without notice to the buyer.

(a) The Bureau of Standards is a branch of the Department of Commerce. At its instance representatives of manufacturers, sellers, and users of lumber, as well as architects, engineers and others, met in conference at various times between 1922 and 1928 in an endeavor to simplify methods of business in the lumber industry. Following these conferences the Bureau in 1929 issued a report entitled "Lumber, Simplified Practice Recommendations." Many subjects that were considered are without relation to this case. The report dealt with standards of size, of inspection, of structural material, and other cognate themes. One of its subdivisions, however, enumerates the standard commercial names for lumber of many types. Sixteen names of pines are stated in the list, and among them is the name "California white pine" with its botanical equivalent, *Pinus ponderosa.*

The recommendations of the Bureau of Standards for the simplification of commercial practice are wholly

[1] "It would not necessarily follow . . . that a yellow pine might be sold as a white pine if such sales were unfair to the trade and injurious to the public, notwithstanding the Bureau of Standards had specified a name such as 'California white pine' in a list of 'Standard commercial names' for pine lumber. It would be different, however, if the particular lumber sold under such name possessed substantially the same qualities possessed by the white pines of commerce as distinguished from certain well known commercial yellow pines." 64 F. (2d) 618 at p. 620.

advisory. Dealers may conform or diverge as they prefer. The Bureau has defined its own function in one of its reports. The Purpose and Application of Simplified Practice, National Bureau of Standards, Department of Commerce, July 1, 1931, pp. 2, 7, 10, 17. "Simplified practice is a method of eliminating superfluous variety through the voluntary action of industrial groups." "The Department of Commerce has no regulatory powers" with reference to the subject and hence "it is highly desirable that this recommendation be kept distinct from any plan or method of governmental regulation or control." There is nothing to show that in making up the list of names the Bureau made any investigation of the relation between *Pinus ponderosa* and the white pines of the east. Certainly it had no such wealth of information on the subject as was gathered by the Commission in the course of this elaborate inquiry. There is nothing to show to what extent its advice has been accepted by the industry. The record does show that the recommendation does not accord with the practice of other governmental agencies. For example, the United States Forest Service in its publications and forest signs describes the ponderosa species as western yellow pine. In such circumstances the action of the Bureau was at most a bit of evidence to be weighed by the Commission along with much besides. It had no such significance as to discredit in any appreciable degree a conclusion founded upon evidence otherwise sufficient. The powers and function of the two agencies of government are essentially diverse. The aim of the one is to simplify business by substituting uniformity of methods for wasteful diversity, and in the achievement of these ends to rely upon coöperative action. The aim of the other is to make the process of competition fair. There are times when a description is deceptive from the very fact of its simplicity.

(b) The wood dealt in by the respondents is not substantially as good as the genuine white pine, nor would sales under the wrong name be fitting if it were.

The ruling of the court below as to this is infected by a twofold error. The first is one of fact. The supposed equivalence is unreal. The second is one of law. If the equivalence existed, the practice would still be wrong.

The Commission found as a fact that the genuine white pine is superior for many reasons to *Pinus ponderosa,* and notably because of its greater durability. The court held the view that the difference in durability had not been proved so clearly as to lay a basis for the orders, and this, it seems, upon the ground that though the superiority exists, the evidence fails to disclose its precise degree. "What the testimony appears to establish is that Northern white pine has relatively a greater durability for exterior use without establishing any comparative degree of such durability." 64 F. (2d) 618 at p. 622.

Court and counsel for the respondents lean heavily at this point upon the testimony of the Director of the United States Forest Products Laboratory at Madison, Wisconsin, and his assistant Mr. Hunt. The Director testified that he did not know the comparative durability of the pines, and would refer any inquirer to specialists, of whom Mr. Hunt was one. The testimony of Mr. Hunt is that there have been no tests in a strict sense, but that the comparison between the white pines and *Pinus ponderosa* has been based upon observation and opinion. He continues: "The general experience with the use of the white pines, during the two hundred years since they began to be used, indicated that those pines had moderately high durability. The general experience with *Pinus ponderosa* indicated that that wood had low durability in contact with the ground or any place favoring the growth of decay. That is a matter of common knowledge." Inquirers at the Laboratory were accordingly advised that "the

heartwood of the white pine has more decay resistance, will give longer service under conditions favoring decay than the heartwood of pinus ponderosa," and " the mill run of the white pine probably would average higher in durability under decay producing conditions."

This testimony, even if it stood alone, would tend to sustain rather than to discredit the findings by the Commission that the genuine white pines are materially superior to the woods that the respondents are selling as a substitute. It is fortified, however, by evidence from many other sources. To be sure there is contradiction which we have no thought to disparage. For present purposes we assume the credibility of those who spoke for the complainants. Wholesalers, retailers, manufacturers, lumber graders, laboratory experts and others bore witness to the comparative merits of the woods, stating their own experience as well as common opinion among their fellows in the industry. If all this may be ignored in the face of the findings of the Commission, it can only be by turning the court into an administrative body which is to try the case anew.

What has been written has been aimed at the position that *Pinus ponderosa* is as good or almost as good as the white pines of the east. We have yet to make it plain that the substitution would be unfair though equivalence were shown. This can best be done in considering another argument which challenges the finding of the Commission that there has been misunderstanding on the part of buyers. To this we now turn.

*Second.* The argument is made that retailers and consumers are not shown to have been confused as to the character of the lumber supplied by the respondents, and that even if there was confusion there is no evidence of prejudice.

Both as to the fact of confusion and its consequences the evidence is ample. Retailers order " white pine " from

manufacturers and take what is sent to them, passing it on to their customers. At times they do this knowing or suspecting that they are supplying California white pine instead of the genuine article, and supplying a wood that is inferior, at least for the outer parts of buildings. Its comparative cheapness creates the motive for the preference. At times they act in good faith without knowledge of the difference between the California pines and others. Architects are thus misled, and so are builders and consumers. There is a suggestion by the court that for all that appears the retailers, buying the wood cheaper, may have lowered their own price, and thus passed on to the consumer the benefit of the saving. The inference is a fair one that this is not always done, and perhaps not even generally. If they lower the price at all, there is no reason to believe that they do so to an amount equivalent to the saving to themselves.

But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U.S. 212, 216; *Carlsbad* v. *W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Comm'n* v. *Winsted*

*Hosiery Co.*, 258 U.S. 483, 494.[2] The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

*Third.* The argument is made that the name for the respondents' lumber was adopted more than thirty years ago without fraudulent design, and that a continuation of the use is not unfair competition, though confusion may have developed when the business, spreading eastward, attained national dimensions.

The Commission made no finding as to the motives animating the respondents in the choice of the contested name. The respondents say it was chosen to distinguish their variety of yellow pine from the harder yellow pines native to the southern states. We may assume that this is so. The fact remains, however, that the pines were not white either botanically or commercially, though the opportunity for confusion may have been comparatively slight when the sales were restricted to customers in local markets, buying for home consumption. Complaints, if there were any, must have been few and inarticulate at a time when there was no supervisory body to hold business to its duty. According to the law as then adjudged, many competitive practices that today may be suppressed (*Federal Trade Comm'n* v. *Winsted Hosiery Co., supra*), were not actionable wrongs, the damage to the complainants being classified often as collateral and remote. *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 Fed. 281, 286.[3] The Federal Trade Commission was not organized till 1914, its jurisdiction then as now confined to interstate and foreign commerce. Silence up to that time is

[2] The many cases in which the Federal Trade Commission has acted to prevent misbranding or like misrepresentation will be found collected in Henderson, The Federal Trade Commission, p. 182, *et seq.*

[3] The cases are reviewed by Henderson, The Federal Trade Commission, p. 179, *et seq.*

not even a faint token that the misapplied name had the approval of the industry. It may well have meant no more than this, that the evil was not great, or that there was no champion at hand to put an end to the abuse. Even silence thereafter will not operate as an estoppel against the community at large, whatever its effect upon individuals asserting the infringement of proprietary interests. *French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427. There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake, unless submission has gone so far that the occasion for misunderstanding, or for any so widespread as to be worthy of correction, is already at an end. Competition may then be fair irrespective of its origin. This will happen, for illustration, when by common acceptation the description, once misused, has acquired a secondary meaning as firmly anchored as the first one. Till then, with every new transaction, there is a repetition of the wrong.

The evidence here falls short of establishing two meanings with equal titles to legitimacy by force of common acceptation. On the contrary, revolt against the pretender, far from diminishing, has become increasingly acute. With the spread of business eastward, the lumber dealers who sold pines from the states of the Pacific Coast were involved in keen competition with dealers in lumber from the pines of the east and middle west. In the wake of competition came confusion and deception, the volume mounting to its peak in the four or five years before the Commission resolved to act. Then, if not before, misbranding of the pines was something more than a venial wrong. The respondents, though at fault from the beginning, had been allowed to go their way without obstruction while the mischief was not a crying one. They were not at liberty to enlarge the area of their business without adjusting their methods to the needs of new con-

ditions. An analogy may be found in the decisions on the law of trade marks, where the principle is applied that a name legitimate in one territory may generate confusion when carried into another, and must then be given up. *Hanover Milling Co.* v. *Metcalf,* 240 U.S. 403, 416; *United Drug Co.* v. *Rectanus Co.,* 248 U.S. 90, 100. More than half the members of the industry have disowned the misleading name by voluntary action and are trading under a new one. The respondents who hold out are not relieved by innocence of motive from a duty to conform. Competition may be unfair within the meaning of this statute and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. *Redgrave* v. *Hurd,* L.R. 20 Ch.D. 1, 12, 13; *Rawlins* v. *Wickham,* 3 De G. & J. 304, 317; *Hammond* v. *Pennock,* 61 N.Y. 145, 152. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

*Fourth.* Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see *Federal Trade Comm'n* v. *Royal Milling Co., supra*), but to the contrary that the public interest will be promoted by increasing the demand for *Pinus ponderosa,* though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.

The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly.

The finding of unfair competition being supported by the testimony, the Commission did not abuse its discretion in reaching the conclusion that no change of the

name short of the excision of the word "white" would give adequate protection.

The judgment is

*Reversed.*

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## MORRISON ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 487. Argued December 12, 13, 1933.—Decided January 8, 1934.

1. The Alien Land Law of California forbids that an alien who is neither a citizen nor eligible for naturalization shall occupy land for agricultural purposes, unless permitted by treaty; makes conspiracy of two or more persons to violate the prohibition a crime; and further provides that where the State proves occupation or use of such land by any defendant, and the indictment alleges his alienage and ineligibility, the *onus* of proving his citizenship or eligibility shall devolve upon the defense.

(1) Where two persons, charged with such a conspiracy, were convicted upon proof merely that one of them, alleged to be an alien Japanese, ineligible to citizenship, had gone upon agricultural land and used it under an agreement with the other, whose citizenship was not involved, *held* that the conviction, as to both, was without due process of law:

(a) In the case of the lessor, the statutory presumption of the lessee's disqualification and of the lessor's knowledge of it, based only on the lease and possession, is purely arbitrary. Pp. 90–92.

(b) In the case of the lessee, the shifting of the burden of proof is likewise unjustifiable, first, because a lease of agricultural land conveys no hint of criminality; and secondly, because there is in general no practical necessity for relieving the prosecution of the necessity of proving Japanese race,—the appearance of the defendant, and expert testimony, will suffice; and because, in the exceptional case, where the appearance of Japanese blood is obscured by admixtures of white or African blood, the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused: one whose racial origins are so blended as not to be discoverable at sight will often be unaware of them. Pp. 93–96.

(2) *Morrison* v. *California*, 288 U.S. 591, *distinguished*,—a case involving a different section of the statute and in which the burden

of proving citizenship by birth lay upon the alien after the State had proved him to be of a race ineligible for naturalization. P. 87.

2. The burden of proof may be shifted in criminal cases where the State has proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or where, upon a balancing of convenience or of the opportunities for knowledge, the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. P. 88.

3. Where a charge of conspiracy is limited to two persons the guilty knowledge must have been shared by both to warrant conviction of either. P. 93.

218 Cal. 287; 22 P. (2d) 718, reversed.

APPEAL from a judgment sustaining a conviction of conspiracy. The case went to the court below from the California District Court of Appeal. 13 P. (2d) 803.

*Mr. J. Marion Wright* for appellants.

*Mr. James S. Howie,* Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The appellants have been convicted of a conspiracy to violate the Alien Land Law of the State of California.

The indictment charges that the two appellants, Morrison and Doi, feloniously conspired to place Doi in the possession and enjoyment of agricultural land within the state; that possession was obtained, and the land used and cultivated, in execution of the conspiracy; and that Doi was an alien Japanese, ineligible to citizenship, and not protected in his possession by any treaty between the Government of the United States and the Government of Japan. These acts, if committed with the guilty knowledge of each defendant, make out a criminal conspiracy under the statutes of the state.

On the trial the state proved that Doi had gone upon the land and used it under an agreement with Morrison, but did not attempt to prove that he was not a citizen of the United States or that he was ineligible for citizenship. The statutes of California provide that as to these elements of the crime the burden of disproving guilt shall rest on a defendant. By § 9a of the Alien Land Law as amended in 1927 (California Statutes, 1927, p. 880, c. 528), it is enacted that "in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact(s), and the complaint, indictment or information alleges the alienage or ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant." At the same session of the legislature, the Code of Civil Procedure of the state was amended by the addition of a new section (1983) which in substance and effect restates the same rule. California Statutes, 1927, p. 434, c. 244. Applying these statutes to this case, the trial judge held (a jury having been waived) that both the defendants, Morrison as well as Doi, were guilty of conspiracy. They were sentenced to be imprisoned for two years, but the sentences were suspended, and the defendants placed upon probation. There was an appeal to the District Court of Appeal for the Fourth District, where the judgment was affirmed. The court overruled the defendants' contention that by the application of § 9a of the Alien Land Law and § 1983 of the Code of Civil Procedure, there had been a denial of due process

of law under the Fourteenth Amendment of the Constitution of the United States. 13 P. (2d) 803. The cause was then transferred to the Supreme Court of California. There defendants' contention under the Fourteenth Amendment was again overruled, and the conviction was affirmed, three judges dissenting. 218 Cal. 287; 22 P. (2d) 718. An appeal to this court followed.

A person of the Japanese race is a citizen of the United States if he was born within the United States. *United States* v. *Wong Kim Ark,* 169 U.S. 649. He is a citizen, even though born abroad, if his father was a citizen, provided, however, that this privilege shall not exist unless the father was at some time a resident of the United States as well as a citizen, and provided also that such a child, who continues to reside abroad, shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate his intention to become a resident and remain a citizen of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining his majority. R.S. § 1993; 8 U.S.C. § 6; *Weedin* v. *Chin Bow,* 274 U.S. 657; see also R.S. § 2172; 8 U.S.C. § 7. But a person of the Japanese race, if not born a citizen, is ineligible to become a citizen, i.e., to be naturalized. The privilege of naturalization is confined to aliens who are " free white persons, and to aliens of African nativity and to persons of African descent." R.S. § 2169; 8 U.S.C. § 359. " White persons " within the meaning of the statute are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. *Ozawa* v. *United States,* 260 U.S. 178; *Yamashita* v. *United States,* 260 U.S. 199; *United States* v. *Thind,* 261 U.S. 204, 214; *Terrace* v. *Thompson,* 263 U.S. 197; *Porterfield* v. *Webb,* 263 U.S. 225; *Webb* v. *O'Brien,* 263 U.S. 313; *Cockrill* v. *California,* 268 U.S. 258. The term

excludes the Chinese (*United States* v. *Wong Kim Ark, supra;* 8 U.S.C. § 363), the Japanese (cases *supra*), the Hindus (*United States* v. *Thind, supra*), the American Indians (*Ozawa* v. *United States, supra*) and the Filipinos (*Toyota* v. *United States,* 268 U.S. 402), though Indians and Filipinos who have done military or naval service may be entitled to special privileges (8. U.S.C. §§ 3, 388). Nor is the range of the exclusion limited to persons of the full blood. The privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent); and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always (*United States* v. *Thind, supra*) being that of common understanding. *Dean* v. *Commonwealth,* 4 Gratt. (45 Va.) 541; *Gentry* v. *McMinnis,* 3 Dana (Ky.) 382; *In re Camille,* 6 Fed. 256; *In re Young,* 198 Fed. 715, 717; *In re Lampitoe,* 232 Fed. 382; *In re Alverto,* 198 Fed. 688; *In re Knight,* 171 Fed. 299; 2 Kent Comm. (12th ed.) 73, note. Cf. the decisions in the days of slavery: *Gentry* v. *McMinnis,* 3 Dana (Ky.) 382; *Morrison* v. *White,* 16 La. Ann. 100, 102; see *Scott* v. *Raub,* 88 Va. 721, 727–9; 14 S.E. 178.[1]

The California Land Law must be read in the light of these rulings as to the effect of birth and race. Section 1 of the Act (Cal. Stat. 1923, p. 1020, amending Cal. Stat. 1921, p. lxxxiii) provides that all aliens eligible for citizenship may acquire and occupy real property to the same extent as citizens. Section 2 provides that aliens not eligible for citizenship may use and occupy real property to the extent prescribed by any treaty between the Government of the United States and the nation or country of which such alien is a citizen or subject, " and not

[1] The opinions in *Jeffries* v. *Ankeny,* 11 Ohio 372, and *Gray* v. *State,* 4 *id.* 353, rest upon peculiar provisions of the Ohio Constitution.

otherwise." There is a treaty between the United States and Japan (37 Stat. 1504) by which the Japanese may own or lease houses, manufactories, warehouses, and shops, and may lease land for residential and commercial purposes. The treaty does not confer a privilege to own or use land for the purposes of agriculture. *Webb* v. *O'Brien, supra,* p. 323; *Frick* v. *Webb,* 263 U.S. 326. Section 3 of the Act prescribes the rule applicable to the acquisition of shares in corporations organized by aliens for the occupation or use of land; §§ 4 and 5 prescribe the rule for alien trustees and guardians; §§ 7, 8, and 9 provide for the escheat to the state of any interest in real property unlawfully acquired. Section 10 provides that "if two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both." This is the section under which the defendants have been convicted. There is nothing in the statute whereby unlawful occupation of land by an alien ineligible for citizenship is declared to be a crime unless the occupation has been acquired by force of a conspiracy.

This court in *Morrison* v. *California,* 288 U.S. 591,[2] passed upon a controversy as to the validity of § 9b of the California Land Law, which, though akin to § 9a, has important elements of difference. This section (9b) provides in substance that when it has been proved that the defendant has been in the use or occupation of real property and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have

[2] The appeal was dismissed for the want of a substantial federal question upon a statement as to jurisdiction, and without argument of counsel.

the burden of proving citizenship as a defense.[3] We sustained that enactment when challenged as invalid under the Fourteenth Amendment of the federal constitution. The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him.

The ruling was not novel. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what

[3] Sec. 9b. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant. Cal. Stats. 1927, c. 528, p. 881.

has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. Special reasons are at hand to make the change permissible when citizenship *vel non* is the issue to be determined. Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good. In accord with that view are decisions of this court in proceedings under the acts of Congress for the deportation of aliens. A Chinaman by race resisted deportation on the ground that, though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the Government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities. *Chin Bak Kan* v. *United States,* 186 U.S. 193, 200. "The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed." *Ibid.* See also: *Ah How* v. *United States,* 193 U.S. 65, 76; *Christy* v. *Leong Don,* 5 F. (2d) 135. Cf. *Ng Fung Ho* v. *White,* 259 U.S. 276, 283. We adhered to that principle in *Morrison* v. *California, supra.* Upon that basis, we approved the ruling of the Supreme Court of California (*People* v. *Osaki,* 209 Cal. 169; 286 Pac. 1025) that § 9b of the Alien Land Law casting upon a Japanese defendant the burden of proving citizenship after proof of his race had been given by the state was not an impairment of his immunities under the federal constitution. No point was made in the statement of jurisdiction or the supporting brief that

the crime was conspiracy and that one of the defendants belonged to the white race. The case was submitted as if both were Japanese.

The question is now as to § 9a. Obviously there is a wide difference between the scope of the two sections. Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation. *Yee Hem* v. *United States,* 268 U.S. 178, 183, 184; *Luria* v. *United States,* 231 U.S. 9, 25; *Casey* v. *United States,* 276 U.S. 413, 418; *Mobile, J. K. & C. R. Co.* v. *Turnipseed,* 219 U.S. 35, 42, 43; *Bailey* v. *Alabama,* 219 U.S. 219, 233, 238; *Manley* v. *Georgia,* 279 U.S. 1; *People* v. *Cannon,* 139 N.Y. 32. "The legislature may go a good way in raising [a presumption] or in changing the burden of proof, but there are limits." *McFarland* v. *American Sugar Co.,* 241 U.S. 79, 86. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Co., supra; Bailey* v. *Alabama, supra; Manley* v. *Georgia, supra.* There are, indeed, "presumptions that are not evidence in a proper sense but simply regulations of the burden of proof." *Casey* v. *United States, supra.* Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance (*Yee Hem* v. *United States, supra; Casey* v.

*United States, supra*), or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79.[4] The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.

We turn to this statute and endeavor to assign it to its class. In the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege that is general, and only the prohibition that is limited and special. Without preliminary

[4] Instances of the application of this principle can be cited in profusion. The cases that follow are typical examples: *King* v. *Turner*, 5 Mau. & Sel. 206, where a defendant having game in his possession in violation of a statute whereby possession was generally a crime, was held to have the burden of proving his special qualifications (cf. *Yee Hem* v. *United States, supra;* also *Spieres* v. *Parker*, 1 T.R. 144, per Lord Mansfield); *Fleming* v. *People*, 27 N.Y. 329, a prosecution for bigamy, where on proof that the defendant had contracted a second marriage during the lifetime of his first wife, the burden was laid upon him to prove exceptional circumstances that would have made the marriage lawful; and finally such cases as *Potter* v. *Deyo*, 19 Wend. 361, 363, and *United States* v. *Turner*, 266 Fed. 248 (typical of a host of others) where a defendant has been subjected to the burden of producing a license or a permit for a business or profession that would otherwise be illegal. Cf. *United States* v. *Hayward*, 26 Fed. Cas. 240; *Board of Comm'rs* v. *Merchant*, 103 N.Y. 143; 8 N.E. 484.

proof of race, occupation of the land is not even a suspicious circumstance. The inquiry must therefore be whether occupants so situated may be charged with the burden of proving themselves eligible and thus establishing their innocence.

*First.* The indictment is for conspiracy, and, indeed, the Alien Land Act creates no other crime. *In re Akado,* 188 Cal. 739, 742; 207 Pac. 245; *Mott* v. *Cline,* 200 Cal. 434, 448; 253 Pac. 718; *California Delta Farms* v. *Chinese American Farms,* 207 Cal. 298, 308; 278 Pac. 227. Morrison and Doi are charged to have conspired, but Doi alone is charged to be ineligible for citizenship. One might suppose from a reading of the statute that the burden of proof, even if shifted as to him, would be unaffected as to Morrison. The California courts, however, have cast the same burden upon both; and both have been convicted. None the less, in applying the presumption, we must keep before us steadily the quality of their crime. It is impossible in the nature of things for a man to conspire with himself. *Turinetti* v. *United States,* 2 F. (2d) 15, 17. In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each. *People* v. *Richards,* 67 Cal. 412; 7 Pac. 828; *People* v. *Kizer,* 22 Cal. App. 10, 14; 133 Pac. 516, 521; 134 *id.* 346; *People* v. *Entriken,* 106 Cal. App. 29, 32; 288 Pac. 788; *Sands* v. *Commonwealth,* 21 Gratt. (Va.) 871, 899; *Pettibone* v. *United States,* 148 U.S. 197, 203, 205.

Now, plainly as to Morrison, an imputation of knowledge is a wholly arbitrary presumption. He may never have seen Doi before the transfer of possession or afterwards. He may have made his agreement by an agent or over the telephone or by writings delivered through the mails. Even if lessor and lessee came together face to face, there is nothing to show whether Doi was a Japanese of the full blood, whose race would have been appar-

ent to any one looking at him. Moreover, if his race was apparent, he may still have been a citizen, for anything that was known to Morrison or others. The statute does not make it a crime to put a lessee into possession without knowledge or inquiry as to race and place of birth. The statute makes it a crime to put an ineligible lessee into possession as the result of a wilful conspiracy to violate the law. Nothing in the People's evidence gives support to the inference that Morrison had knowledge of the disqualifications of his tenant or could testify about them. What was known to him, so far as the evidence discloses, was known also to the People, and provable with equal ease. Only an arbitrary mandate could charge him with guilty knowledge as an inference of law if it were proved that Doi was not a citizen or eligible to become one. Still less can he be charged with such knowledge when Doi's disqualification is itself a mere presumption. In such circumstances the conviction of Morrison because he failed to assume the burden of disproving a conspiracy was a denial of due process that vitiates the judgment as to him. Nor is that the only consequence. Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. *Pettibone* v. *United States, supra; Gebardi* v. *United States,* 287 U.S. 112, 123. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. *In re Akado, supra.* The conviction failing as to the one defendant must fail as to the other. *Turinetti* v. *United States, supra; Williams* v. *United States,* 282 Fed. 481, 484; *Gebardi* v. *United States, supra.*

*Second.* The result will not be changed if we view the case on the assumption that possession by one ineligible, when it is the product of agreement, may be criminal as to the tenant who holds with guilty knowledge, though

innocent as to the landlord who believes that all is lawful.

We have pointed out before that a lease of agricultural land, unaccompanied by evidence of the race of the lessee, conveys no hint of criminality. For the moment we assume, without intending to decide, that strong considerations of convenience, if they existed, might cast upon the tenant the burden of proving his qualifications and thus disproving guilt. The question will then be whether the normal burden of proof will so thwart or hamper justice as to create a practical necessity, without preponderating hardship to the defendant, for a departure from the usual rule.

In the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him. There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the court room and will draw their own conclusions. If more than this is necessary, the People may call witnesses familiar with the characteristics of the race, who will state his racial origin. The only situation in which the shifting of the burden can be of any substantial profit to the state is where the defendant is of mixed blood, the white or the African so preponderating that there will be no external evidence of another. But in such circumstances the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused. One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime.

Reflection will satisfy that the chance of this injustice is not remote or shadowy. Let us assume a charge that

agricultural land has been occupied by Filipinos not born in the United States, and not entitled to the privileges growing out of service in the army or the navy. 8 U.S.C. § 388. They are then ineligible for citizenship, and subject to indictment under the laws of California if they have gone into possession in aid of a conspiracy. But Filipinos have intermarried with many other peoples. They have intermarried with whites and with Negroes and mulattoes. A laborer, born in Canada, his parents apparently mulattoes, but one of his grandparents a Filipino, according to the charge in an indictment, would be ignorant in many cases whether he was a Filipino or an African. The admixture of oriental blood might be too slight for his race to be apparent to the eye, and family traditions are not always well preserved, especially when the descendants are men and women of humble origin, remote from kith and kin. The same possibility of injustice would be present where the occupant of the land is a descendant of Mexicans and Indians,[5]

[5] Indians not born in the United States and not entitled to the special privileges growing out of service in the war (8 U.S.C. § 3) are ineligible for citizenship.

There is a strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America. Robert F. Foerster, The Racial Problems involved in Immigration from Latin America and the West Indies to the United States, Report to Secretary of Labor, 1925, pp. 7, 10, 15, 17, 18, 21, 22, 23, 24, 28, 29, 41.

Whether persons of such descent may be naturalized in the United States is still an unsettled question.

The subject was considered in *Matter of Rodriguez,* 81 Fed. 337, but not all that was there said is consistent with later decisions of this court. *Ozawa* v. *United States,* and *United States* v. *Thind, supra.* Cf. *In re Camille, supra.*

Mexicans have migrated into California in increasingly large numbers (T. F. Woofter, Jr., Status of Racial and Ethnic Groups in "Recent Social Trends," Vol. 1, pp. 553, 562, 572, 573); and there have developed racial problems which have been considered by official

or an Eurasian, his ancestors partly Europeans and partly Asiatics.[6]

The probability is thus apparent that the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance. The statute does not say that the defendant shall be acquitted if he does not know his racial origin and is unable to make proof of it. What the effect of such a law would be, we are not required to consider. To the contrary, the statute says in substance that unless he can and does prove it, he will have failed to discharge his burden, and will therefore be found guilty. Moreover, if he were to profess ignorance, and ignorance were an excuse, the trier of the facts might refuse to credit him. Holmes, J., in *Ah How* v. *United States, supra,* p. 76. There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People.

What has been written applies only to those provisions of the statute that prescribe the rule for criminal causes.

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bodies. California Departments of Industrial Relations, Agriculture and Social Welfare, "Mexicans in Californa," Report by Governor C. C. Young's Mexican Fact Finding Committee, San Francisco, Cal., 1930, pp. 41, *et seq.*

The treaty of Amity, Commerce, and Navigation of 1831 between the United States and Mexico gives to the nationals of either country the privilege of owning personal estate in the other (Art. XIII), but contains no provision in respect of the ownership of land. This treaty was revived after the Mexican War by Article XVII of the Treaty of Guadalupe Hidalgo (1848). It was terminated by Mexico in November, 1881. See Malloy, Treaties, Vol. 1, p. 1085.

[6] As to the appearance of children of marriages between Japanese and the white races, see: S. C. Gulick, The American Japanese Problem, p. 153; Iyenaga and Sato, Japan and the California Problem, p. 157.

Other considerations may or may not apply where the controversy is civil. We leave that question open.

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

*Reversed.*

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## SNYDER *v.* MASSACHUSETTS.

CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, MASSACHUSETTS.

No. 241. Argued November 7, 1933.—Decided January 8, 1934.

1. So far as the Fourteenth Amendment is concerned, the presence of the defendant in a prosecution for felony is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. P. 105.
2. In a state prosecution for murder, the accused was denied permission to attend a view, which was ordered by the court on motion of the prosecution, at the opening of the trial. The jurors, under a sworn bailiff, visited the scene of the crime, accompanied by the judge, the counsel for both parties and the court stenographer. The counsel, acting as showers by the permission of the judge, pointed out particular features of the scene and asked the jurors to observe them, but there was no statement of the evidence. A stenographic record was made of everything that was said or done. The defendant at the trial virtually admitted that the place visited was the right one; and if there had been failure to point out anything material, he had full opportunity to prove the fact and ask for another view. *Held*, that the viewing in the absence of the accused was not a denial of due process under the Fourteenth Amendment. P. 108.
3. Statements to the jury pointing out the specific objects to be noticed have been a traditional accompaniment of a view in England and in this country, and this procedure was not displaced by the Fourteenth Amendment. P. 110.
4. Designation of counsel for the parties as the showers is also an ancient practice and can not be prejudicial to the defendant. P. 113.
5. Assuming that the knowledge derived from a view is evidence, still a view is not a trial nor any part of a trial in the sense in which a trial was understood at common law. P. 113.

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6. To transfer to a view the constitutional privileges applicable to a trial would be forgetful of history. P. 114.
7. Irrespective of whether a view be labeled as part of the "trial," and the knowledge so derived as "evidence," the question whether exclusion of the defendant, not by a statutory mandate but by a discretionary ruling of the court, violates due process of law, is determined by conceptions of fairness and justice applied to the particular facts. P. 114.
8. A statement made by the judge during a view in the absence of the defendant, to the effect that one of the structures pointed out was not there at the homicide,—*held* improper, but harmless, both because it was not material and because it was confirmed by the accused and his counsel at the trial. P. 118.
9. A view constitutionally taken in the absence of the defendant, is not to be adjudged unconstitutional because the court told the jury it was evidence. P. 121.

282 Mass. 401; 185 N.E. 376, affirmed.

CERTIORARI, 290 U.S. 606, to review a judgment entered on the affirmance of a conviction of murder.

*Mr. A. C. Webber,* with whom *Messrs. Henry P. Fielding* and *L. H. Weinstein* were on the brief, for petitioner.

The proposition that the right of personal presence of the accused in a capital case only applies to testimony of witnesses, is contrary to reason and to all human instincts of justice.

The position that the encroachment on constitutional rights of the petitioner must occur within the limits of the trial court room is untenable, particularly in view of what actually took place at the trial of petitioner.

As to the practical effect of what the jury saw and heard at the view, no distinction was made between knowledge thus acquired and other evidence introduced in the course of the trial. Thus the jury were authorized to use such knowledge to bring in a conviction of first degree murder and it must be assumed that they did so.

The fundamental right and importance of personal presence of the accused at a criminal trial, particularly in

capital cases, has been stressed by judicial expression whenever occasion has arisen. *Lewis* v. *United States,* 146 U.S. 370; *Hopt* v. *Utah,* 110 U.S. 574; *Schwab* v. *Berggren,* 143 U.S. 444.

The principle has its roots in the early history of the common law. See *Rex* v. *Ladsingham,* Sir T. Raymond Reports, 193 (1862); 1 Cooley, Const. Lim., 8th ed., p. 667; 1 Bishop, New Crim. Pro., 2d ed., § 273; *French* v. *State,* 85 Wis. 400; *Maurer* v. *State,* 43 N.Y. 1; 1 Zoline, Federal Crim. Law & Pro., 254.

The protection of the Massachusetts Declaration of Rights, Art. 12, and General Laws of Massachusetts, c. 278, § 6, is but declaratory of the common law and is found generally in all state constitutions. *Commonwealth* v. *McCarthy,* 163 Mass. 458; *Commonwealth* v. *Cody,* 165 Mass. 133; *Hooker* v. *Commonwealth,* 13 Grat. 763.

Such rights do not relate to matters merely procedural, even though they may be the subject of waiver. Nor are the merits of the case involved when paramount substantial rights are invaded. *Commonwealth* v. *Harris,* 231 Mass. 584; *Lebowitch* v. *Commonwealth,* 235 Mass. 357; *Powell* v. *Alabama,* 287 U.S. 45. See Parker, C.J., in *Commonwealth* v. *Parker,* 2 Pick. 550. *Commonwealth* v. *Knapp,* 9 Pick. 496.

The right of personal presence comes within the pale of "an immutable principle of justice which is the inalienable possession of every citizen of a free government." *Twining* v. *New Jersey,* 211 U.S. 78; *Holden* v. *Hardy,* 169 U.S. 366.

All the fundamental safeguards of the criminal law against oppression and injustice rest upon broad grounds of fair play. They are not to be narrowed by technical interpretation, or to be sacrificed to mere expediency. *Moore* v. *Dempsey,* 261 U.S. 86; *Cooke* v. *United States,* 267 U.S. 517; *Tumey* v. *Ohio,* 273 U.S. 510; *Lebowitch* v.

*Commonwealth,* 235 Mass. 357; *Powell* v. *Alabama,* 287 U.S. 45.

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense. *Powell* v. *Alabama, supra.*

Such protection, to be more than meaningless, must assure an accused full opportunity, to see through his own eyes, hear through his own ears, and to act through his own powers of reasoning,—these are not infrequently his best means to establish his innocence. No one can be substituted to exercise these faculties for him.

Massachusetts statutes have never interfered with the fundamental right of a defendant in a criminal case to be present at a view. General Laws, c. 278, § 6, provides that "A person indicted for a felony shall not be tried unless he is personally present at the trial." And the only statute relating to view in a criminal case was passed in 1836, and in the simplest language thus: "The court may order a view by a jury impanelled to try a criminal case." Rev. Stats., 1836, c. 137, § 10.

No limitation upon the legislative power of Massachusetts is sought to be imposed in this case. It is not conceded, however, that such limitation upon state action does not exist under the Fourteenth Amendment. *Twining* v. *New Jersey,* 211 U.S. 78, 99.

The relief sought by the petitioner, therefore, does not conflict with the principles in *Hurtado* v. *California,* 110 U.S. 516, and *Maxwell* v. *Dow,* 176 U.S. 581, and *Holden* v. *Hardy,* 160 U.S. 366, and *Twining* v. *New Jersey,* 211 U.S. 78, and cases there collected.

Even in rate hearings, involving property rights and not life and liberty, the right to a full hearing is within the protection of the due process clause of the Fourteenth Amendment. "Manifestly there is no hearing when the party does not know what evidence is offered or considered." *Interstate Commerce Comm'n* v. *Louisville &*

*N. R. Co.,* 227 U.S. 88, 93. "Nothing can be treated as evidence, which is not introduced as such." *United States* v. *Abilene & So. Ry. Co.,* 265 U.S. 274, 288.

The earlier Massachusetts cases before the enactment of the statute permitting a view in criminal cases pointed out the apparent violation of "an important principle, that all the proceedings should be in the presence of the accused." Parker, C.J., in *Commonwealth* v. *Parker,* 2 Pick. 550, 551; See *Commonwealth* v. *Knapp,* 9 Pick. 496; 3 Wharton, Crim. Law, 9th ed., § 707, quoted in dissenting opinion in *Valdez* v. *United States,* 244 U.S. 432, 453.

The practice in numerous important Massachusetts capital cases, as shown by the manuscript records, does not bear out the statement in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 30, that the right of the accused to be present is left to the court.

A view is evidence, under Massachusetts decisions. See: *Commonwealth* v. *Chance,* 174 Mass. 245; *Commonwealth* v. *Dascalakis,* 246 Mass. 12; *Tully* v. *Fitchburg R. Co.,* 134 Mass. 499; *Hanks* v. *B. & O. R. Co.,* 147 Mass. 495; *Smith* v. *Morse,* 148 Mass. 407; *Commonwealth* v. *Mercier,* 257 Mass. 353; *Commonwealth* v. *Mara,* 257 Mass. 198; *Wall* v. *U.S. Mining Co.,* 232 Fed. 613; *Commonwealth* v. *Handren,* 261 Mass. 294. It is the most convincing evidence. *Foster* v. *State,* 70 Miss. 755. See 12 Harv.L.Rev. 212.

The proposition that the view is a part of the trial is forcibly supported by authority and reason.

Of the authorities that seem to hold to the contrary, all are cases where the point was raised for the first time after verdict and where the right was expressly or impliedly waived,—with the exception of the two recent instances of *Commonwealth* v. *Belenski,* 276 Mass. 36, and *Commonwealth* v. *Snyder,* 282 Mass. 401, the case here.

*Valdez* v. *United States,* 244 U.S. 432, was a trial before a single justice without jury, so that the fundamental principles connected with jury trial were not directly involved. *People* v. *Thorn,* 156 N.Y. 286, proceeded upon the theory of waiver, and the dictum often relied upon in support of the proposition that view is not part of a trial is not followed in the practical administration of the trials in murder cases in New York. See *People* v. *Lytton,* 257 N.Y. 310; *People* v. *Weiner,* 248 N.Y. 118, both capital cases.

Counsel for petitioner have been unable to discover a single instance in the judicial history of the entire country (other than the recent instances in *Commonwealth* v. *Belenski, supra,* and *Commonwealth* v. *Snyder, supra*) where the accused in a capital case was denied the right to be present at a view when the request was seasonably made and not waived.

There was a denial of equal protection, because the accused, charged with a capital offense and in custody without bail, had no control over his presence or absence.

*Mr. Joseph E. Warner,* Attorney General of Massachusetts, with whom *Mr. George B. Lourie,* Assistant Attorney General, and *Mr. Frank G. Volpe* were on the brief, for respondent.

Mr. Justice Cardozo delivered the opinion of the Court.

On April 9, 1931, James M. Kiley was shot to death at a gasoline station at Somerville, Massachusetts. Three men, Garrick, Donnellon and the petitioner Snyder, joined in the murder and in the attempted robbery that led to it. Garrick confessed to his part in the crime and became a witness for the state. Donnellon and Snyder were tried together and sentenced to be put to death. The jury found upon abundant evidence that the guilt of each had

been established beyond a reasonable doubt. At the trial and on appeal Snyder made the claim that through the refusal of the trial judge to permit him to be present at a view there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. The Supreme Judicial Court of Massachusetts affirmed the conviction. 282 Mass. 401; 185 N.E. 376. A writ of certiorari brings the case here.

At the opening of the trial there was a motion by the Commonwealth that the jury be directed to view the scene of the crime. This motion was granted. In granting it the court acted under a Massachusetts statute which provides "The court may order a view by a jury impanelled to try a criminal case." General Laws of Massachusetts, c. 234, § 35. The court appointed counsel for Donnellon and for Snyder to represent their respective clients at the place to be viewed. Counsel for Donnellon moved that he be permitted to go there with his client after the view, but did not ask that his client be present with the jury. The court stated that such an order would probably be made. Counsel for Snyder moved that his client be permitted to view the scene with the jury, invoking the protection of the federal constitution. This motion was denied. The jurors were then placed in charge of bailiffs duly sworn. Accompanied by these bailiffs and also by the judge, the court stenographer, the District Attorney and the counsel for the defendants, they went forth to make their view.

The first stopping place was at the filling station, 13 Somerville Avenue. Entering the station, the District Attorney pointed out to the jurors the particular parts of the building that he wished them to observe. He asked them to note the window at the rear, its position with reference to the entrance, the position of other windows to the right, the size of the room, the angle made by a partition, and the location of other objects. Counsel for

Snyder called attention to the view from within the building looking out, and to the condition of the floor. Leaving the station by the front door, the jury viewed the building from the other side of the street. The District Attorney asked that note be made of the driveway to the right and left of the station, the three pumps in front, and also the width of the street. Counsel for Snyder called attention to the nature of the travel, the setback of the station from the roadway, and in particular the possibility of observing from without what was taking place within. After the visit to the station the jurors were taken a short distance away where they were asked to make note of the lay-out of the streets. They then went back to the station, the District Attorney saying that he had omitted to direct their attention to the lights. The lights were then observed, the dimensions of a fence in front of them, and also, once more, the gasoline pumps. The District Attorney stated that the middle pump was not there at the time of the homicide. Counsel for the petitioner answered that he had no knowledge on the subject but would accept his adversary's statement. Thereupon the judge, who had guided the proceeding, stated the agreement to the jurors assembled on the walk. "It is agreed," he said, "that at the time of the offense, that is, on April 9, 1931, there were but two pumps in front of the gasoline station, the one on the extreme right that is painted green, and the one on the extreme left that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there."

After the completion of the view, the group returned to the court house and the trial went on. In charging the jury the judge said, "Now what have you before you on which to form your judgment and to render your finding and your verdict? The view, the testimony given by the witnesses and the exhibits comprise the evidence that is before you." The question in this court is whether a

view in the absence of a defendant who has made demand that he be present is a denial of due process under the Fourteenth Amendment.

The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U.S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U.S. 425, 434; *Maxwell* v. *Dow,* 176 U.S. 581, 604; *Hurtado* v. *California,* 110 U.S. 516; *Frank* v. *Mangum,* 237 U.S. 309, 326; *Powell* v. *Alabama,* 287 U.S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker* v. *Sauvinet,* 92 U.S. 90; *Maxwell* v. *Dow, supra; N. Y. Central R. Co.* v. *White,* 243 U.S. 188, 208; *Wagner Electric Co.* v. *Lyndon,* 262 U.S. 226, 232. Indictments by a grand jury may give way to informations by a public officer. *Hurtado* v. *California, supra; Gaines* v. *Washington,* 277 U.S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining* v. *New Jersey, supra.* What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining* v. *New Jersey, supra; Powell* v. *Alabama, supra,* pp. 68, 71; *Holmes* v. *Conway,* 241 U.S. 624. Cf. *Blackmer* v. *United States,* 284 U.S. 421, 440.

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend

against the charge. Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts (*Gaines* v. *Washington, supra,* at p. 85), and in prosecutions in the state courts is assured very often by the constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held. Cf. *Schwab* v. *Berggren,* 143 U.S. 442, 448, 450; *West* v. *Louisiana,* 194 U.S. 258; *Diaz* v. *United States,* 223 U. S. 442, 455; *Blackmer* v. *United States, supra. Hopt* v. *Utah,* 110 U.S. 574, has been distinguished and limited. *Frank* v. *Mangum, supra,* pp. 340, 341. Cf. *Patton* v. *United States,* 281 U.S. 276. Again, defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself. See *Lewis* v. *United States,* 146 U.S. 370, a prosecution in the federal courts. In such circumstances also we make a like assumption as to the scope of the privilege created by the federal constitution. *Diaz* v. *United States, supra.* No doubt the privilege may be lost by consent or at times even by misconduct. *Diaz* v. *United States, supra.* Cf. Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302. Our concern is with its extension when unmodified by waiver, either actual or imputed.

In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a

shadow. What has been said, if not decided, is distinctly to the contrary. *Howard* v. *Kentucky,* 200 U.S. 164, 175; *Valdez* v. *United States,* 244 U.S. 432, 445. Cf. *Frank* v. *Mangum, supra,* and particularly the dissenting opinion at p. 346. The underlying principle gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after. Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals. Cf. *Schwab* v. *Berggren, supra,* and *Lewis* v. *United States, supra.* Confusion of thought will result if we fail to mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source, either expressly or by implication, in the federal constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." *Dowdell* v. *United States,* 221 U.S. 325, 330. See also Wigmore, Evidence, vol. 3, §§ 1395, 1397, collating the decisions. Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. *Dowdell* v. *United States, supra.* Cf. *Robertson* v. *Baldwin,* 165 U.S. 275, 282; *Motes* v. *United States,* 178 U.S. 458, 472, 473. The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule. *Commonwealth* v. *Slavski,* 245 Mass. 405, 415; 140 N.E. 465; cf. *West* v. *Louisiana, supra.* So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due

process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States.

At the outset we consider a bare inspection and nothing more, a view where nothing is said by any one to direct the attention of the jury to one feature or another. The Fourteenth Amendment does not assure to a defendant the privilege to be present at such a time. There is nothing he could do if he were there, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene. If he felt any doubt about this, he could examine the bailiffs at the trial and learn what they had looked at. The risk that they would lie is no greater than the risk that attaches to testimony about anything. "Constitutional law like other mortal contrivances has to take some chances." *Blinn* v. *Nelson,* 222 U.S. 1, 7. Here the chance is so remote that it dwindles to the vanishing point. If the bailiffs were to bear false witness as to the place they had shown, the lie would be known to the jury. There is no immutable principle of justice that secures protection to a defendant against so shadowy a risk. The argument is made that conceivably the place might have been changed and in a way that would be material. In that event the fact could be brought out by appropriate inquiry. There could be inquiry of witnesses in court and of counsel out of court. Description would disclose the conditions at the view, and the defendant or his witnesses could prove what the conditions were before. He could do nothing more though he had been there with the jury. Indeed the record makes it clear that upon request he would have been allowed to go there afterwards in company with his

counsel. Opportunity was ample to learn whatever there was need to know.

If the risk of injustice to the prisoner is shadowy at its greatest, it ceases to be even a shadow when he admits that the jurors were brought to the right place and shown what it was right to see. That in substance is what happened here. On the trial, photographs and diagrams of the scene of the homicide were put in evidence by the Commonwealth and placed before the jury. There was no suggestion by the defendant or his counsel that these photographs and diagrams did not truly represent the place that had been seen upon the view. There was no suggestion of any change except the one that was conceded. The defendant took the stand and admitted that he was at the gasoline station at the time of the crime. He tried to reduce the grade of his wrongdoing by testifying that the shot had been fired by his codefendant Donnellon and that larceny, not robbery, was the aim of the conspiracy.* In the course of his testimony, he described his own and Donnellon's movements with the aid of the diagram in evidence. At the end of the trial he made a brief statement to the jury, supplementing the argument that had been made by his counsel. "I am sorry," he said, "that I had any part in the crime. I am sorry for the grief I have caused. But I did not fire the fatal shot. That is all." Nowhere is there a suggestion of any doubt as to the place. Like concessions are implicit in the summing up of counsel. His argument reminds the jurors of what they had seen upon

* Under the law of Massachusetts, homicide is murder in the first degree when committed "with deliberately premeditated malice aforethought" or in the commission or attempted commission of a crime that would be punishable, if there were no homicide, with imprisonment for life. Robbery by one armed with a dangerous weapon is a crime so punishable, but not larceny or attempted larceny. Mass. General Laws, c. 265, §§ 1 and 17.

the view, and of the dimensions of the building, which are shown also on the diagram. The place is undisputed.

If it be true that there is no denial of due process as the result of a bare inspection in the absence of a defendant, the question remains whether such a denial results where counsel are permitted, without any statement of the evidence, to point out particular features of the scene and to request the jury to observe them. The courts of Massachusetts hold that statements, thus restricted, are proper incidents of a view. "The essential features may be pointed out by the counsel. No witnesses are heard . . . There can be no comment or discussion." *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 29; 140 N.E. 470, 477; "One or two attorneys representing both the Commonwealth and the defendant go on the view, it being permissible to them, in the presence of each other and of the officers of the court, merely to point out to the jury 'marks, matters or things' but not otherwise to speak to the jury." *Ibid.* The rule in Massachusetts is that these acts are permissible though the defendant is not present (*ibid.*), and though he is kept away under protest. See *Commonwealth* v. *Belenski,* 276 Mass. 35; 176 N.E. 501, which was followed in the case at bar. *Commonwealth* v. *Snyder, supra.* We are to determine whether the Fourteenth Amendment prescribes anything to the contrary.

Obviously the difference between a view at which every one is silent and a view accompanied by a request to note this feature or another is one of degree, and nothing more. The mere bringing of a jury to a particular place, whether a building or a room or a wall with a bullet hole, is in effect a statement that this is the place which was the scene of the offense, and a request to examine it. When the tacit directions are made explicit, the defendant is not wronged unless the supplement of words so transforms the quality of the procedure that injustice will be done if the defendant is kept away. Statements to the jury

pointing out the specific objects to be noted have been a traditional accompaniment of a view for about two centuries, if not longer. The Fourteenth Amendment has not displaced the procedure of the ages. *Corn Exchange Bank* v. *Coler,* 280 U.S. 218; *Ownbey* v. *Morgan,* 256 U.S. 94; *Twining* v. *New Jersey, supra,* at pp. 100, 101.

As early as 1747 there is the record of a precedent that exhibits the remedy in action. The practice then was to place the jury in the charge of "showers," who were sworn to lead them to the view. The defendant in a civil action complained that the plaintiff's shower had misbehaved himself in his comments to the jury. "The court discharged the rule, being of opinion the showers may show marks, boundaries, etc., to enlighten the viewers, and may say to them, 'These are the places which on the trial we shall adapt our evidence to.'" *Goodtitle* v. *Clark,* Barnes, 457. At that time views were not taken in criminal cases without the consent of both the parties, the Crown as well as the defendant, except, it seems, upon indictments for maintaining a nuisance. *Rex* v. *Redman,* 1756, 1 Kenyon 384; s. c. Sayer's Rep. 303; *Commonwealth* v. *Handren,* 261 Mass. 294, 297; 158 N.E. 894; but see *Anonymous,* 1815, 2 Chitty 422. Cf. 1 Burr. Rep. 252. In 1825, however, a statute applicable to England and Wales supplied the defect of power, if defect there formerly had been. 6 George IV, c. 50, s. 23. Thereafter, in any case, "either civil or criminal," a view might be ordered in the discretion of the court. The form of oath administered to the showers appears in the reports. Thus, in *Regina* v. *Whalley,* 1847, 2 Cox Crim. Rep. 231, the oath administered was this: "You swear you will attend this jury and well and truly point out to them the place in which the offense for which the prisoner T. W. stands charged is alleged to have been committed; you shall not speak to them touching the supposed offence whereof the said T. W. is so charged, only so far as relates to describ-

ing the place aforesaid." See also *Queen* v. *Martin,* L.R., 1 Crown Cases Reserved 378; Tidd's Practice, vol. 2, pp. 797, 798; Gude's Crown Practice, London, 1828, vol. 2, pp. 655, 656; cf. Wigmore, Evidence, vol. 3, §§ 1802, 1803, and cases cited. So also in our own country, the power to order a view in criminal cases has been made certain by statutes enacted in nearly all the states (see the statutes collated in Wigmore on Evidence, vol. 2, § 1163), though there are instances in which the power has been treated as inherent. *State* v. *Perry,* 121 N.C. 533; 27 S.E. 997; *Commonwealth* v. *Knapp,* 9 Pick. 496, 515. The statutes, when enacted, conform very generally to the practice in the English courts, provision being made for the presence of the judge, or, in his discretion, for the appointment of showers sworn in the ancient form. Cf. the statutes and decisions in Wigmore, Evidence, vol. 3, §§ 1802, 1803, and vol. 2, § 1163; and see *Brooklyn* v. *Patchen,* 8 Wend. 47, 65; *State* v. *Perry, supra,* at p. 536.

When the scene is explained by showers who are not the counsel for the parties, a defendant gains nothing by being present at a view any more than he gains where there is only a bare inspection without an explanatory word. He has no privilege in such circumstances, and certainly no constitutional privilege, to speak to the showers and give suggestions or advice. "We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury." *People* v. *Bonney,* 19 Cal. 426, 446. If they fail to point out anything material, he may prove the fact upon the trial and ask for another view. He had the same privilege here, for there was a stenographic transcript of all that was said and done. Never, at any stage of the proceeding, has there been a suggestion by the de-

fendant or his counsel that there was need of something more.

The situation is not changed to his prejudice because the showers in this instance were the counsel for the parties. The choice of counsel for that purpose has its roots in ancient practice. Tidd's Practice, vol. 2, pp. 797, 798; Wigmore, Evidence, vol. 3, § 1803: cf. 1 Burr. 252. Far from being harmful, it supplies an additional assurance that nothing helpful to either side will be overlooked upon the view. True, indeed, it is that when counsel are the showers, the defendant may be able, if he is present, to give suggestion or advice, or so at least we may assume. Constitutional immunities and privileges do not depend upon these accidents. The Fourteenth Amendment does not say that showers are at liberty in the absence of the defendant to point out the things to be viewed if the showers are not counsel, but are not at liberty to do so if they happen to be counsel. The least a defendant must do, if he would annul the practice upon a view which the Commonwealth has approved by the judgment of its courts, is to show that in the particular case in which the practice is exposed to challenge, there is a reasonable possibility that injustice has been done. Cf. *Rutherford* v. *Commonwealth,* 78 Ky. 639; *Howard* v. *Kentucky, supra.* No one can read what was said at this view in the light of the uncontroverted facts established at the trial, and have even a passing thought that the presence of Snyder would have been an aid to his defense.

There is an approach to the subject from the viewpoint of history that clarifies the prospect. We may assume that the knowledge derived from an inspection of the scene may be characterized as evidence. Even if this be so, a view is not a " trial " nor any part of a trial in the sense in which a trial was understood at common law. This is seen from two circumstances. In the first place

the judge is not required to be present at a view, though he may go there if he will. In the second place, the practice for many years was to have a committee of the jurors, the usual number being six, attend at the view to represent the whole body. See the rules laid down by Lord Mansfield in 1 Burr. Rep. 252: also the provisions of the Act of 6 George IV, c. 50, §§ 23, 24 [1825], by which the practice was made uniform in criminal and civil cases: and compare Wigmore, Evidence, vol. 2, § 1165, and the cases cited. We have no thought to suggest that a view by a part of a jury is permissible today. That question is not before us. There is significance, none the less, in the fact that it was permissible in England, the home of the principle that a defendant charged with felony has the privilege of confronting his accusers and of being present at his trial. Certain it is that in the land where these maxims had their genesis and from which they were carried to our shores, the proceeding known as a trial was thought of as something very different from the proceeding known as a view. To transfer to a view the constitutional privileges applicable to a trial is to be forgetful of our history.

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence. A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel (*Powell* v. *Alabama, supra*), and cross-examine his accusers. *Dowdell* v. *United States, supra; Commonwealth* v. *Slavski, supra.* Cf. *Felts* v. *Murphy,* 201 U.S. 123. Let the words " evidence " and " trial " be extended

but a little, and the privilege will apply to stages of the cause at which the function of counsel is mechanical or formal and at which a scene and not a witness is to deliver up its message. In such circumstances the solution of the problem is not to be found in dictionary definitions of evidence or trials. It is not to be found in judgments of the courts that at other times or in other circumstances the presence of a defendant is a postulate of justice. There can be no sound solution without an answer to the question whether in the particular conditions exhibited by the record the enforced absence of the defendant is so flagrantly unjust that the Constitution of the United States steps in to forbid it. What we are subjecting to revision is not the action of a legislature excluding a defendant from a view at all times or in all conditions. What is here for revision is the action of the judicial department of a state excluding the defendant in a particular set of circumstances, and the justice or injustice of that exclusion must be determined in the light of the whole record. Cf. *Howard* v. *Kentucky, supra; Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 234, 235. Discretion has not been abdicated. To the contrary, the record makes it clear that discretion has been exercised. Much is made of a supposed analogy between a view and a photograph, but the analogy, whatever its superficial force, is partial and misleading. The photograph to be admissible should be verified by the oath of the photographer, who must be subject to cross-examination as to the manner of its taking. It is common knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality. Nor is there need for us to hold that conditions can never arise in which justice will be outraged if there is a view in the defendant's absence. Enough for present purposes that they have not arisen here. "A statute may be invalid as applied to one state of facts and yet valid as applied

to another." *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289; *DuPont* v. *Commissioner,* 289 U.S. 685, 688. If this is true of the action of the legislative department of the state laying down a general rule, it is even more plainly true of the action of judicial or administrative officers dealing only with the instance. Cf. *Nectow* v. *Cambridge,* 277 U.S. 183. We view the facts in their totality.

True, indeed, it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial. In saying this we put aside cases within the rule of *de minimis.* If the defendant in a federal court were to be denied the opportunity to be confronted with the " witnesses against him," the denial of the privilege would not be overlooked as immaterial because the evidence thus procured was persuasive of the defendant's guilt. In the same way, privileges, even though not explicit, may be so obviously fundamental as to bring us to the same result. A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the *ex parte* showing. But here, in the case at hand, the privilege, if it exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. " The due process clause does not impose upon

the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *Ownbey* v. *Morgan, supra,* p. 110. What is fair in one set of circumstances may be an act of tyranny in others. This court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment.* Cf. *Commonwealth* v. *Kelly,* 292 Pa. 418; 141 Atl. 246. But we do not need to dwell upon the measure of the privilege at such a time or in such conditions. Whatever it may be, not even an intimation will be found in our decisions that there is a denial of due process if the accused be excluded from a view, though present at every stage of the proceedings in the court. It is one thing to say that the prevailing practice is to permit the accused to accompany the jury, if he expresses such a wish. It is another thing to say that the practice may not be changed without a denial of his privileges under the Constitution of the United States. To hold this in the light of the historic concept of a view as something separate from a trial in court and in the light of the shadowy relation between the defendant's

* What was said in *Hopt* v. *Utah, supra,* and *Schwab* v. *Berggren, supra,* on the subject of the presence of a defendant was dictum, and no more. See this opinion, *ante,* p. 106. We may say the same of *Lewis* v. *United States, supra,* with the added observation that it deals with the rule at common law and not with constitutional restraints.

There are decisions in the state courts that a conviction will stand even though rulings have been made by the trial court in the absence of the defendant if it appears that they could not by any possibility have resulted to his hurt. *Whittaker* v. *State,* 173 Ark. 1172; 294 S.W. 397; *Lowman* v. *State,* 80 Fla. 18; 85 So. 166. The Supreme Court of Pennsylvania held in *Commonwealth* v. *Kelly, supra,* that the burden was on the defendant to show a probability of injury.

presence at such a time and his ability to defend, is to travel far away from the doctrine of *Hurtado* v. *California* and *Twining* v. *New Jersey*.

One episode at the view must have a word of criticism. The statement by the judge that one of the three pumps was not there at the homicide goes beyond the bounds of explanation appropriate for showers. No objection on this score was made by the defendant, though he had or could have had the minutes of the proceeding. The blunder did not harm him, for there is no hint in all the evidence that the presence or absence of the pump had any bearing on the verdict. The situation is much the same as in cases where there has been misconduct by the jury. The verdict is not upset for such a cause, if there was no substantial harm. *People* v. *Johnson*, 110 N.Y. 134, 144; 17 N.E. 684; *People* v. *Dunbar Contracting Co.*, 215 N.Y. 416, 426; 109 N.E. 554; *United States* v. *Davis*, 103 Fed. 457, 467. But there is another answer more convincing, if these are insufficient. After returning from the view, the District Attorney offered in evidence a diagram of the station, and said to the jury, " It is agreed that this third pump was not there at the time of the offense." To this, defendant and his counsel gave assent by acquiescence. In effect the agreement was thus renewed and confirmed as if then made for the first time. The defendant was not hurt because it had been made once before.

Whether a defendant must be present at a view has been considered in the state courts with varying conclusions. Nearly always the argument has been directed to the local constitutions, generally to a provision that the accused must be confronted with the witnesses against him, sometimes a specific mandate that he be present at the trial. Never, so far as our search of the books informs us, has the privilege been established in opposition to the

local practice as an essential condition of due process under the federal constitution. Some courts have put their decision on the ground that a view is part of the trial. *State* v. *McGinnis,* 12 Idaho 336; 85 Pac. 1089; *Freeman* v. *Commonwealth,* 226 Ky. 850; 10 S.W. (2d) 827; *Noell* v. *Commonwealth,* 135 Va. 600, 619; 115 S.E. 679; *Benton* v. *State,* 30 Ark. 328, 350. Others have held that it is not. *People* v. *Thorn,* 156 N.Y. 286; 50 N.E. 947; *State* v. *Rogers,* 145 Minn. 303; 177 N.W. 358; *Washington* v. *State,* 86 Fla. 533; 96 So. 605; *State* v. *Mortensen,* 26 Utah 312; 73 Pac. 562, 633; cf. *State* v. *Congdon,* 14 R.I. 458, 463; *State* v. *Hilsinger,* 167 Wash. 427, 437, 438; 9 P. (2d) 357. A trial, they remind us, is appointed to be held in a courthouse or a place designated by statute with a judge or magistrate presiding. *People* v. *Thorn,* at p. 297. A view may be had anywhere. Some courts, placing the emphasis on the privilege of confrontation, have thought that a view is equivalent to an examination of a witness, and that the privilege of attendance may not even be waived. *Noell* v. *Commonwealth, supra; State* v. *McCausland,* 82 W.Va. 525; 96 S.E. 938; *Benton* v. *State, supra; Foster* v. *State,* 70 Miss. 755; 12 So. 822; *State* v. *Stratton,* 103 Kan. 226; 173 Pac. 300. Other courts have held, and plainly with the better reason, that physical objects are not witnesses, even though they have the quality of evidence, and that the defendant is at liberty to waive the privilege to view them, if such a privilege exists. *People* v. *Thorn, supra; Elias* v. *Territory,* 9 Ariz. 1; 76 Pac. 605; *Blythe* v. *State,* 47 Ohio 234; 24 N.E. 268; *State* v. *Hartley,* 22 Nev. 342; 40 Pac. 372; *State* v. *Buzzell,* 59 N.H. 65. Cf. *Patton* v. *United States, supra.** Still others, though conceding the possibility of

* Cases relating to the procedure at a view are not to be confused with cases where the defendant was absent during the examination of witnesses or the charge of the judge. Examples of such cases are

waiver, uphold the privilege to be present if due demand is made. *People* v. *Bush,* 68 Cal. 623; 10 Pac. 169; *People* v. *Auerbach,* 176 Mich. 23; 141 N.W. 869; *Carroll* v. *State,* 5 Neb. 31; *State* v. *Hilsinger, supra; Sasse* v. *State,* 68 Wis. 530; 32 N.W. 849; *Chance* v. *State,* 156 Ga. 428; 119 S.E. 303; *People* v. *Palmer,* 43 Hun 397. Massachusetts takes the position that waiver is unnecessary and that the defendant may be excluded in the discretion of the judge. *Commonwealth* v. *Belenski, supra; Commonwealth* v. *Snyder, supra.* So also does Minnesota. *State* v. *Rogers, supra.* In none of the cases where the privilege was upheld did the defendant make the claim that there had been an infringement of his rights under the Fourteenth Amendment.

The decisions in the federal courts are, none of them, controlling. *Howard* v. *Kentucky, supra,* sustained a judgment of conviction against the claim of a denial of due process where the court in the absence of the defendant had discharged a juror for misconduct, and substituted another. There was evidence, however, leading to an

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*Slocovitch* v. *State,* 46 Ala. 227; *People* v. *Beck,* 305 Ill. 593; 137 N.E. 454; *State* v. *Hutchinson,* 163 La. 146; 111 So. 656; *Duffy* v. *State,* 151 Md. 456; 135 Atl. 189; *State* v. *Jackson,* 88 Mont. 420; 293 Pac. 309; *State* v. *Dixon,* 185 N.C. 727; 117 S.E. 170; *State* v. *Schasker,* 60 N.D. 462; 235 N.W. 345; *State* v. *Chandler,* 128 Ore. 204; 274 Pac. 303. In most, if not all, there was an express statutory or constitutional requirement of presence at the trial, a requirement so clear as to leave little room for construction. One court has gone so far as to require the presence of the defendant upon a motion for a new trial (*State* v. *Hoffman,* 78 Mo. 256), in opposition to the judgments of this court in *Schwab* v. *Berggren* and *Lewis* v. *United States, supra.*

As to the rule where the crime is of the grade of a misdemeanor only, see *United States* v. *Santos,* 27 Fed. Cas. 954; *United States* v. *Shelton,* 6 F. (2d) 897; *Gray* v. *State,* 158 Tenn. 370; 13 S.W. (2d) 793. Cf. *Hopt* v. *Utah, supra,* at p. 576.

inference of waiver by the defendant and his counsel. *Diaz* v. *United States,* 223 U.S. 442, had to do with the privilege of confrontation, and drew an inference of waiver where the defendant had wilfully absented himself after the trial had been begun. Cf. Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302; *Smellie's Case,* 14 Crim. App. Reports 128. *Frank* v. *Mangum, supra,* found a waiver of the privilege of presence at the rendition of the verdict. None of these cases was concerned with the procedure at a view. *Valdez* v. *United States, supra,* considered a provision of the Philippine Code which confers the privilege of confrontation, and held that consistently therewith the scene of the crime might be viewed by the judge with the consent of the defendant's counsel, though without the knowledge of the client. The court added that " apart from any question of waiver " it would be pressing the privilege of confrontation too far to apply it in such circumstances, and moreover that in the circumstances of the case, the absence of the defendant was plainly immaterial, it " being difficult to divine how the inspection . . . added to or took from the case as presented."

We find it of no moment that the judge in this case described the view as evidence. The Supreme Judicial Court of Massachusetts has said of a view that " its chief purpose is to enable the jury to understand better the testimony which has or may be introduced." *Commonwealth* v. *Dascalakis, supra.* Even so, its inevitable effect is that of evidence, no matter what label the judge may choose to give it. *Commonwealth* v. *Handren, supra.* Such is the holding of many well considered cases. Wigmore, vol. 2, § 1168, pp. 705 *et seq.,* vol. 3, §§ 1802, 1803, collating the decisions. To say that the defendant may be excluded from the scene if the court tells the jury that

the view has no other function than to give them understanding of the evidence, but that there is an impairment of the constitutional privileges of a defendant thus excluded if the court tells the jury that the view is part of the evidence,—to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them.

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker,* 187 U.S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

The judgment is

*Affirmed.*

MR. JUSTICE ROBERTS, dissenting.

The petitioner and two others were charged with murder committed in an attempt to rob a gasoline station. The petitioner and one of his co-defendants were tried together; the third testified for the Commonwealth.

There is no dispute that when the three embarked on their evil enterprise all were armed, and it is not denied that they approached the station with intent to commit either larceny or robbery; but the record exhibits grave contradictions as to which of them fired the fatal shot, and as to the petitioner's abandonment of the common plan before the shot was fired. The situation and size of the station, its arrangement, its contents, the location and size of doors and windows, and the position of surrounding objects, were vital factors in corroboration or contradiction of the varying accounts given in the testimony of the three participants.

After the jury had been empaneled and sworn the district attorney moved for a view of the scene of the murder. The request was granted. The district attorney then made a short statement to the jury, telling them they were to view the premises and that when they returned from the view he would make a fuller opening. In the course of a colloquy between counsel and the judge the latter announced that he would appoint the defendants' counsel to go on the view as representing their respective clients. Counsel for the petitioner moved that his client be permitted to accompany the jury on the view, asserting this was the defendant's right under the federal constitution. The motion was denied and an exception reserved to the ruling.

The judge, the official stenographer, the district attorney, and counsel for the defendants, accompanied the jury to the scene. The judge controlled the entire proceeding, and everything that was said or done was taken by the stenographer and made a part of the record of

the trial. The pointing out of features of the scene by the district attorney went beyond a mere showing, and what he said closely approached argument.[1] During the progress of the view the court formulated and placed of record a stipulation as to changes which had occurred since the shooting.[2] In his charge to the jury the judge said:

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[1] The following are outstanding instances:

"The Court: Now, Mr. Volpe, if you are ready.

"Mr. Volpe. Just first stand here, gentlemen, and take a look inside of the gasoline station. Now step in, please.

"(The following occurred inside the filling station:)

"Mr. Volpe: Now, gentlemen, I call your attention to this glass here (indicating), this window (indicating the back window of the filling station,) about the position of the glass, and I ask you to look at that, and the relative position of the entrance, especially to the right or to the left, coming in through the door. And then this oil tank here on the right of this window; the other two windows on the right of the building, and I want you to take note of the size of the room, and this telephone here, and these two doors, one on each side of the telephone. Take note, also, of the location of this other gas tank over here, back of the door; this desk on the left. Also look out the window at the back, and notice the gravel in the yard, and the fence there."

. . . . .

"Mr. Volpe: I want you to take a view of the other side of the sidewalk from this location, and note the driveway on the right of the gas station, and on the left, and these two pumps, or three pumps, noticing the distance from the pumps on the entrance of the gas station.

"Now, I would like to have you come over here and take a look at the gas station as it sits back there.

"(The jury were taken across the street to the opposite sidewalk.)

"Mr. Volpe: I want you to get a look at the whole layout, the righthand entrance and the lefthand entrance over there, where that car is standing. Take particular notice of the width of this street, and, as you stand here, notice the bridge going towards Union Square, with the right and left driveways."

[2] What occurred is shown by the notes as follows:

"Mr. Volpe: That middle pump wasn't there at the time.

"The Court: It is agreed that the only pumps that were there were the two outside pumps, and that the middle, or blue one, was not there.

"Now, what have you before you on which to form your judgment and to render your finding and verdict? The view, the testimony given by the witnesses, and the exhibits, comprise the evidence in this case, comprise the evidence that is before you." [3]

. . . . . .

"As I say, it is for the jury to say, from all the evidence before you, taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, and any appearances or any evidence that you may gather from the appearance of the locality itself, the testimony relative to the result of the shot, the course of it, and what was done. All that is a part of the surrounding evidence and the circumstances that you shall take into consideration. And then, having taken all the surrounding circumstances into consideration, it is for you to say from all the evidence before you, whether or not it was a withdrawal." [3]

In Massachusetts what the jury observes in the course of a view is evidence in the cause. In *Tully* v. *Fitchburg R. Co.*, 134 Mass. 499, 503, it was said:

"In many cases, and perhaps in most, except those for the assessment of damages, a view is allowed for the pur-

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"Mr. Volpe: Yes, your Honor.

"The Court: I can state that to them.

"(The jury left the bus and assembled on the sidewalk.)

"The Court: Now, it is agreed that at the time of the offense,—that is, on April 9, 1931,—there were but two pumps in front of the gasoline station, the one on the extreme right, that is painted green, and the one on the extreme left, that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there. It is also suggested that the jurors look at the street lights from that corner down there (indicating), and the situation of those lights and those down the street."

[3] During the trial, when certain plans were being put in evidence, the judge said: "What they [the jury] saw is to be taken equally with any evidence that is before them."

pose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case."

And in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 29–30; 140 N.E. 470, 478, a prosecution for homicide, the Supreme Judicial Court held:

"The things thus seen by the jurors could not well be banished from their minds. A view often dispenses with the necessity of detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. It is rightly described as such. Expressions to that effect are in numerous decisions."

In *Commonwealth* v. *Handren,* 261 Mass. 294, 297; 158 N.E. 894, 896, the court observed:

"And the knowledge which the jurors thus acquire is evidence in the case."

Of such weight is the knowledge thus obtained that it may tip the scales in favor of the sufficiency of the evidence to sustain a verdict. Thus in *Hanks* v. *Boston & A. R. Co.,* 147 Mass. 495, 499; 18 N.E. 218, 220, where the question was whether the case ought to have been submitted to the jury or a binding direction given, it was said:

"It is to be observed that the jury may have been materially aided by a view taken by them of the locality."

Compare *Smith* v. *Morse,* 148 Mass. 407, 410; 19 N.E. 393.

It necessarily follows that the court may instruct the jury to take into consideration what they saw. In *Commonwealth* v. *Mara,* 257 Mass. 198, 209; 153 N.E. 793, 795, the ruling was:

"There was no error in the part of the instructions which permitted the jury to consider in deciding this question what they observed on the view."

And in *Commonwealth* v. *Mercier,* 257 Mass. 353, 365; 153 N.E. 834, 836, this was said:

"The defendant also excepted to the statement by the trial judge to the jury that what they would see on the view would be competent evidence for them to consider. . . . There was no error in the statement of the judge as to the right of the jury to consider as evidence what was seen by them on the view."

In the light of these rulings, which were concretely applied in this case, the question is whether the denial of petitioner's request to be present at the view deprived him of the due process guaranteed by the Fourteenth Amendment. This court has never had occasion to pass upon the precise point; but many pronouncements regarding the requirements of due process seem to leave no doubt as to the proper resolution of the issue.

The concept of due process is not technical. Form is disregarded if substantial rights are preserved.[4] In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing.[5] Though the usual and customary forms of procedure be disregarded, the hearing may neverthe-

[4] *Hurtado* v. *California,* 110 U.S. 516, 524, 532; *Louisville & N. R. Co.* v. *Schmidt,* 177 U.S. 230, 236; *Simon* v. *Craft,* 182 U.S. 427, 436; *Holmes* v. *Conway,* 241 U.S. 624.

[5] *Hagar* v. *Reclamation District No. 108,* 111 U.S. 701, 708; *Hooker* v. *Los Angeles,* 188 U.S. 314, 318; *Twining* v. *New Jersey,* 211 U.S. 78, 111.

less be fair, if it safeguards the defendant's substantial rights.

The States need not adopt a particular form of accusation,[6] or prescribe any one method of trial,[7] or adhere to any set mode of selecting the triers of fact.[8] To conform to modern conditions, they may substitute a new form of procedure for one long practised and recognized.[9] But, whatever the form or method of procedure adopted, they remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing. Tested by this principle the trial of an issue beyond the claim asserted,[10] the participation of a judge affected with a personal interest in the result,[11] the forcing of a trial under pressure of mob domination,[12] or the deprivation of the right to present evidence bearing on the issue,[13] have been adjudged to deny due process. And this court has recently decided that in the trial of a capital offense due process includes the right of the accused to be represented by counsel.[14]

Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout

[6] *Hurtado* v. *California, supra; Caldwell* v. *Texas,* 137 U.S. 692; *Bolln* v. *Nebraska,* 176 U.S. 83; *Barrington* v. *Missouri,* 205 U.S. 483.

[7] *Walker* v. *Sauvinet,* 92 U.S. 90; *Maxwell* v. *Dow,* 176 U.S. 581; *Jordan* v. *Massachusetts,* 225 U.S. 167.

[8] *Brown* v. *New Jersey,* 175 U.S. 172; *Howard* v. *Kentucky,* 200 U.S. 164; *Rawlins* v. *Georgia,* 201 U.S. 638.

[9] *Hurtado* v. *California, supra,* 528, 529; *Twining* v. *New Jersey, supra,* 111.

[10] *Windsor* v. *McVeigh,* 93 U.S. 274, 282; *Standard Oil Co.* v. *Missouri,* 224 U.S. 270, 281–2.

[11] *Tumey* v. *Ohio,* 273 U.S. 510.

[12] *Moore* v. *Dempsey,* 261 U.S. 86.

[13] *Saunders* v. *Shaw,* 244 U.S. 317.

[14] *Powell* v. *Alabama,* 287 U.S. 45.

his trial is of the very essence of due process. The trial as respects the prisoner's right of presence in the constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits, or stages of the litigation after the rendition of the verdict,[15] but does comprehend the inquiry by the ordained trier of fact from beginning to end.[16]

Speaking generally of the administration of criminal justice throughout the nation, this court has said: [17] "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner; " and in enforcing the mandate of a territorial statute this language was used: [18]

" Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with

[15] *Schwab* v. *Berggren,* 143 U.S. 442; *Dowdell* v. *United States,* 221 U.S. 325, 331.

[16] *Hopt* v. *Utah,* 110 U.S. 574; *Lewis* v. *United States,* 146 U.S. 370; *Diaz* v. *United States,* 223 U.S. 442.

[17] *Lewis* v. *United States, supra,* p. 372.

[18] *Hopt* v. *Utah, supra,* p. 579.

the witnesses against him, and have the assistance of counsel for his defense. But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the Union.[19] Out of excess of caution the fundamental law of many of the States specifically safeguards the right of the accused, "to appear and defend in person."[20] But mere differences in phraseology have not obscured the fact that all these instruments were intended to secure the same great privilege—a fair hearing. Accordingly, the courts have uniformly and invariably held that the Sixth Amendment, as respects federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial. This court has so declared. In commenting upon the section of the Philippine Civil Government Act which extends to the accused in all criminal prosecutions "the right to be heard by himself and counsel," this was said:

"An identical or similar provision is found in the constitutions of the several States, and its substantial equiv-

[19] In two States (California and Nevada) the constitutions omit reference to the right of the accused to confront the witness against him; but the omission is supplied by statute: Cal. Stats. 1911, Ch. 187, p. 364, Penal Code, § 686; Nevada Compiled Laws, 1929, Vol. 5, § 10654.

[20] Arizona, Const. of 1910, Art. II, § 24; California, Const. of 1879, Art. I, § 13; Colorado, Const. of 1876, Art. II, § 16; Idaho, Const. of 1889, Art. I, § 13; Illinois, Const. of 1870, Art. 2, § 9; Kansas, Const. of 1859, Bill of Rights, § 10; Missouri, Const. of 1875, Art. II, § 22; Montana, Const. of 1889, Art. III, § 16; Nebraska, Const. of 1875, Art. I, § 11; Nevada, Const. of 1864, Art. I, § 8; New Mexico, Const. of 1911, Art. II, § 14 (as amended); New York, Const. of 1894, Art. I, § 6; North Dakota, Const. of 1889, Art. I, § 13; Ohio, Const. of 1851, (as amended Sept. 3, 1912), Art. I, § 10; South Dakota, Const. of 1889, Art. VI, § 7; Utah, Const. of 1895, Art. I, § 12; Washington, Const. of 1889, Art. I, § 22; Wyoming, Const. of 1889, Art. I, § 10.

alent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony our courts, with substantial accord, have regarded it [the right so granted] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself." [21]

And, as if to make assurance doubly sure, the legislatures of many of the States have adopted statutes redundant to the constitutional mandate explicitly declaring the right of the accused to be present at his trial.[22]

In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule.

It has been urged that the prisoner's privilege of presence is for no other purpose than to safeguard his opportunity to cross-examine the adverse witnesses. But the privilege goes deeper than the mere opportunity to cross-examine, and secures his right to be present at every stage of the trial. The cases cited in the margin,[23] while by no

[21] *Diaz* v. *United States, supra,* p. 454.

[22] La. Code Crim. Proc. (Dart 1932), Art. 365. Ann. Laws of Mass., Vol. 9, Ch. 278, § 6; Comp. Laws Michigan, 1929, Vol. 3, Ch. 287, § 17129; Revised Codes of Montana, 1921, Vol. 4, Part II, Ch. 1, § 11611; Nevada Comp. Laws, 1929, Vol. 5, § 10654, § 10921; New York Code of Crim. Pro., Cahill, § 8, par. 2; No. Dak. Comp. Laws, 1913, Vol. 2, § 10393; Code of Laws of South Carolina, 1932, § 996; Vermont General Laws 1917, § 2496; Virginia Code of 1930, § 4894; Pierce's Washington Code, § 1086–324; Wisconsin Statutes 1931, § 357.07; Wyoming Revised Statutes, 1931, § 33–903.

[23] *Slocovitch* v. *State,* 46 Ala. 227; *Whittaker* v. *State,* 173 Ark. 1172; 294 S.W. 397; *Lowman* v. *State,* 80 Fla. 18; 85 So. 166; *Chance* v. *State,* 156 Ga. 428; 119 S.E. 303; *People* v. *Beck,* 305 Ill. 593; 137 N.E. 454; *Batchelor* v. *State,* 189 Ind. 69; 125 N.E. 773; *State* v. *Reidel,* 26 Iowa 430; *Riddle* v. *Commonwealth,* 216 Ky. 220; 287 S.W. 704; *State* v. *Hutchinson,* 163 La. 146; 111 So. 656; *Duffy* v.

means exhausting the authorities, sufficiently illustrate and amply sustain the proposition that the right is fundamental and assures him who stands in jeopardy that he may in person, see, hear and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life. It would be tedious and unnecessary to quote the language used in vindication of the privilege. The books are full of discussions of the subject.

The accused cannot cross-examine his own witnesses. Will it be suggested that, for this reason, he may be excluded from the court room while they give their evidence? He cannot cross-examine documents or physical exhibits. But documents, plans, maps, photographs, the clothing worn by the victim and by the perpetrator of the alleged crime, the weapon used, and other material objects may be more potent than word of mouth, to carry conviction to the jury's mind; and, so of the physical appearance of the scene of the crime. No reason is apparent why, if the accused may be excluded from a view, he may not also be excluded from the court room while such documentary and physical evidence is proffered to and examined by the jury. The opportunity for cross-examination of witnesses is only one of many reasons for the defendant's presence throughout the trial. In no State save in the Commonwealth of Massachusetts, and in no

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*State,* 151 Md. 456; 135 Atl. 189; *Commonwealth* v. *Cody,* 165 Mass. 133; 42 N.E. 575; *State* v. *Dingman,* 177 Minn. 283; 225 N.W. 82; *Foster* v. *State,* 70 Miss. 755; 12 So. 822; *State* v. *Hoffman,* 78 Mo. 256; *State* v. *Jackson,* 88 Mont. 420; 293 Pac. 309; *Miller* v. *State,* 29 Neb. 437; 45 N.W. 451; *State* v. *Duvel,* 103 N.J.L. 715; 137 Atl. 718; *People* v. *Perkins,* 1 Wend. 91; *State* v. *Dixon,* 185 N.C. 727; 117 S.E. 170; *State* v. *Schasker,* 60 N.D. 462; 235 N.W. 345; *Cole* v. *State,* 35 Okla. Cr. Rep. 50; 248 Pac. 347; *State* v. *Chandler,* 128 Ore. 204; 274 Pac. 303; *Gray* v. *State,* 158 Tenn. 370; 13 S.W. (2d) 793; *Schafer* v. *State,* 118 Tex. Cr. Rep. 500; 40 S.W. (2d) 147; *State* v. *Mannion,* 19 Utah 505; 57 Pac. 542; *Palmer* v. *Commonwealth,* 143 Va. 592; 130 S.E. 398; *State* v. *Shutzler,* 82 Wash. 365; 144 Pac. 284; *State* v. *Howerton,* 100 W.Va. 501; 130 S.E. 655.

cases save in those there recently decided, has the privilege or the fundamental nature of the right it preserves been questioned or denied. As the cases show,[24] the right of presence exists at every step in the trial, whether it be during the giving of oral testimony, the submission of a document, the presentation of physical exhibits, the argument of counsel, the charge of the court, or the rendition of the verdict.

It cannot successfully be contended that as the Sixth Amendment has no application to trials in state courts, and the Fourteenth does not draw to itself and embody the provisions of state constitutions (*Patterson* v. *Colorado,* 205 U.S. 454), the due process secured by the Fourteenth Amendment does not embrace a right secured by those instruments. In *Powell* v. *Alabama, supra,* the argument that the conclusion would be difficult that the right to counsel specifically preserved by the Sixth Amendment was also within the intendment of the due process clause of the Fourteenth, was answered thus:

"In . . . *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U.S. 226, 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood* v. *Baker,* 172 U.S. 269, 277; *Smyth* v. *Ames,* 169 U.S. 466, 524; and *San Diego Land Co.* v. *National City,* 174 U.S. 739, 754.

"Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in spe-

[24] See the cases cited in notes 16 and 23.

cific terms from abridging the right. *Gitlow* v. *New York,* 268 U.S. 652, 666; *Stromberg* v. *California,* 283 U.S. 359, 368; *Near* v. *Minnesota,* 283 U.S. 697, 707.

". . . The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (*Hebert* v. *Louisiana,* 272 U.S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution." (pp. 66, 67.)

If, then, a view of the premises where crime is alleged to have been committed is a part of the process of submission of data to the triers of fact, upon which judgment is to be founded; if the knowledge thereby gained is to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner, it is a part of the trial. If this is true the Constitution secures the accused's presence. In this conclusion all the courts, save those of Massachusetts, agree. Such difference of view as the authorities exhibit as to the prisoner's right to be present at a view arises out of a disagreement on the question whether the view is a part of the trial, whether it is, in effect, the taking of evidence. The great weight of authority is that it forms a part of the trial, and for that reason a defendant who so desires is entitled to be present.[25] Many decisions hold that he may waive the

[25] *Benton* v. *State,* 30 Ark. 328; *People* v. *Bush,* 68 Cal. 623; 10 Pac. 169; 71 Cal. 602, 12 Pac. 781; *Washington* v. *State,* 86 Fla. 533; 98 So. 605; *Chance* v. *State,* 156 Ga. 428; 19 S.E. 303; *State* v. *McGinnis,* 12 Idaho 336; 85 Pac. 1089; *Freeman* v. *Commonwealth,*

privilege;[26] but an examination of the cases discloses none (with a single possible exception) where a denial of his request to accompany the jury on the view has not been held reversible error. And the statements that a view is not a part of the trial or that it is not the taking of evidence, and denying, on that ground, the defendant's right to be present, are invariably found in cases where the defendant requested the view and did not ask to accompany the jury, or waived either expressly or by conduct his right so to do. Such statements are dicta, since the accused waived whatever right he had. Moreover, in several of the opinions which deny the right it is said that the prisoner ought always to be allowed to accompany the jury if he so requests.[27]

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226 Ky. 850; 10 S.W. (2d) 827; *State* v. *Bertin,* 24 La. Ann. 46; *People* v. *Auerbach,* 176 Mich. 23, 45; 141 N.W. 869 (semble); *Bailey* v. *State,* 147 Miss. 428; 112 So. 594; *Carroll* v. *State,* 5 Neb. 31; *Colletti* v. *State,* 12 Oh. App. 104; *Watson* v. *State,* 166 Tenn. 400; 61 SW. (2d) 476; *State* v. *Mortensen,* 26 Utah 312; 73 Pac. 562, 633; *Noell* v. *Commonwealth,* 135 Va. 600; 115 S.E. 679; *State* v. *Hilsinger,* 167 Wash. 427; 9 P. (2d) 357; *State* v. *McCausland,* 82 W.Va. 525; 96 S.E. 938.

[26] *Whitley* v. *State,* 114 Ark. 243; 169 S.W. 952; *People* v. *Searle,* 33 Cal. App. 228; 164 Pac. 819; *Haynes* v. *State,* 71 Fla. 585; 72 So. 180; *State* v. *Stratton,* 103 Kan. 226; 173 Pac. 300; *State* v. *Hartley,* 22 Nev. 342; 40 Pac. 372; *Colletti* v. *State,* 12 Oh. App. 104; *Starr* v. *State,* 5 Okla. Cr. Rep. 440; 115 Pac. 356; *State* v. *Congdon,* 14 R.I. 458; *Jenkins* v. *State,* 22 Wyo. 34; 134 Pac. 260, 135 *id.* 749.

[27] *Elias* v. *Territory,* 9 Ariz. 1; 76 Pac. 605; *Shular* v. *State,* 105 Ind. 289; 4 N.E. 870; but see *Barber* v. *State,* 199 Ind. 146; 155 N.E. 819; *State* v. *Rogers,* 145 Minn. 303; 177 N.W. 358; *People* v. *Thorn,* 156 N.Y. 286; 50 N.E. 947; *State* v. *Sing,* 114 Ore. 267, 274; 229 Pac. 921; *Commonwealth* v. *Van Horn,* 188 Pa. 143; 41 Atl. 469; *State* v. *Collins,* 125 S.C. 267; 118 S.E. 423. The last mentioned case, while apparently a decision against the right, contains but a mere statement on the subject without reference to the occurrences at the trial, and is probably based upon a waiver. It cites as authority *State* v. *Suber,* 89 S.C. 100; 71 S.E. 466, which is a clear case of waiver. If this is not so the case apparently stands alone.

It is true there is disagreement as to the nature and function of a view. On the one hand, the assertion is that its purpose is merely to acquaint the jury with the scene and thus enable them better to understand the testimony, and hence it forms no part of the trial and is not the taking of evidence. On the other, the suggestion is that the jury are bound to carry in mind what they see, and form their judgment from the knowledge so obtained, and so the view amounts to the taking of evidence.[28] The distinction seems too fine for practical purposes; but however that may be, discussion of this abstract question is unimportant in a case like the present where the view was held to be evidence, and the jury were expressly so instructed.

The respondent urges that whatever may have been the petitioner's right, the record demonstrates he could have suffered no harm by reason of his absence. The argument is far from convincing in the light of the circumstances and the rule announced by the court as respects the use the jury were at liberty to make of the knowledge gained by their view of the premises. But if it were clear that the verdict was not affected by knowledge gained on the view or that the result would have been the same had the appellant been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is

[28] Compare with cases cited in note 25 the following: *Jenkins* v. *State,* 22 Wyo. 34; 134 Pac. 260, 135 *id.* 749; *State* v. *Hartley,* 22 Nev. 342; 40 Pac. 372; *People* v. *Thorn,* 156 N.Y. 286; 50 N.E. 947; *Starr* v. *State,* 5 Okla. Cr. Rep. 440; 115 Pac. 356; *State* v. *Lee Doon,* 7 Wash. 308; 34 Pac. 1103.

unfair to exclude him. As this court has recently said with respect to disregard of the mandate of the Sixth Amendment respecting trial by jury: [29]

"But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. . . . It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been."

A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, though the result is just, if the hearing was unfair.

In this case, the view was a part of the trial. The jury were not sent to the scene in the custody of bailiffs who had no knowledge of the place or the circumstances of the crime. They were not instructed to view the premises so as to better understand the testimony. They went forth with the judge presiding, the stenographer officiating, the District Attorney and the counsel of the defendants. As has been shown, more than a mere view of the

[29] *Patton* v. *United States*, 281 U.S. 276, 292.

premises was had. Matters were called to the jury's attention in detail so that they could form judgments of distance, relative position, the alinements of objects, all having a crucial bearing upon the truthfulness of the testimony subsequently given, and they were told they might take their own estimates of these matters in corroboration or contradiction of the other evidence. Little wonder, in these circumstances, that the court felt it right to appoint the defendants' counsel to accompany the jury on the view. If the prisoners were entitled to this protection, by the same token they were entitled themselves to be present.

I think that the petitioner was deprived of a constitutional right and that the judgment should be reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur in this opinion.

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## PIGEON RIVER IMPROVEMENT, SLIDE & BOOM CO. *v.* CHARLES W. COX, LTD.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 126. Argued December 6, 7, 1933.—Decided January 15, 1934.

1. The Webster-Ashburton Treaty of 1842 declares that "all water communications and all the usual portages along" the international boundary line, as established by the Treaty "from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the citizens and subjects of both countries." Pigeon River is one of the waters traversed by the line, and Grand Portage was one of several portages circuiting impassable falls and rapids in that river which were used in aid of transportation by canoe. *Held* that the clause does not preclude an improvement of the stream, by sluiceways, booms and dams, rendering it capable of transporting timber products—a use theretofore impossible be-

cause of the natural obstructions; nor does it prevent the exaction of a non-discriminatory charge for the use of such improvement. P. 157.

2. Ambiguity in a treaty may be resolved by practical construction. P. 158.

3. For the purpose of utilizing an international boundary stream (the Pigeon River) for transportation of lumber products, the State of Minnesota authorized a corporation to erect, and to collect tolls for the use of, sluiceways, booms and dams within her limits, complementing like structures on the other side of the international line made by another corporation under Canadian authority. *Held:*

(1) A State may make reasonable provision for local improvement of a navigable stream until its authority is superseded by dominant Federal action. P. 158.

(2) The fact that the stream forms part of an international boundary does not make this principle inapplicable. P. 158.

(3) The Act of March 3, 1901, by which Congress expressly authorized the Minnesota corporation to improve part of the river next to an Indian reservation, on condition that it be open to free passage of timber cut from the reservation and passage of all other timber for a reasonable charge, was, by necessary implication, an approval of the improvements at other places, without which the purpose of the Act could not have been accomplished. P. 159.

(4) This Act is not to be construed as abrogating or modifying the treaty provision (*supra*) but is a practical construction of it. P. 160.

(5) The action of the Province of Ontario in providing for complementary works on the Canadian side of the boundary and authorizing tolls for their use, is also a practical construction of the treaty provisions. P. 161.

(6) The structures and uses in question are among those recognized by the Treaty of January 11, 1909, with Great Britain, as "heretofore permitted." 36 Stat. 2448. P. 161.

63 F. (2d) 567, reversed.

Appeal from affirmance of a judgment dismissing a complaint, in an action brought by a Minnesota corporation against a Canadian corporation to recover tolls for the use of river improvements in the transportation of timber products.

*Mr. John D. Jenswold,* with whom *Mr. Bernard R. Goggins* was on the brief, for appellant.

The record and historical and geographical facts clearly indicate, if they do not show conclusively, that Pigeon River is non-navigable.

The territorial sovereignty of the State extends to the international boundary at midstream.

The maintenance of appellant's works and the collection of reasonable charges for their use is authorized by Act of Congress of March 3, 1901. Although this statute is not pleaded as a basis of appellant's rights, the Court must take judicial notice of it.

The Act should be construed with a view to making it effective for the purpose intended which was to so improve the river, throughout its entire length, as to make it possible to get out timber, not only from the Indian Reservation, but from all other points.

In the absence of regulation by Congress, the State may supply the needed regulation.

The improvement and regulation of navigable waterways was long left largely to the States. It was not until 1890 that Congress assumed any material control and then only to a limited extent. Act of September 19, 1890, c. 907, § 10, 26 Stat. 426.

Even under this statute obstructions to navigation authorized by the States might be constructed and continued without authority from Congress, the words "not affirmatively authorized by law" being construed as meaning authorization from either the state or federal government.

It was not until 1899 that the entire control of navigable waters of the United States was withdrawn from the States and taken over by Congress by the Rivers and Harbors Act of that year. Act of March 3, 1899, 30 Stat. 1151.

Since this enactment permission from the State as to navigable waters within its own territorial limits is still necessary in order to make the authority for the improvement complete and perfect. *Montgomery* v. *Portland,* 190 U.S. 89.

As late as 1905 private corporations were authorized by Congress to improve navigable waters of the United States and to collect tolls therefor. Act of March 3, 1905, c. 1482, 33 Stat. 1117.

Congress has, however, never assumed to regulate or control non-navigable waters. The power of the States over them remains as it always has been. Within their territorial limits they may either improve or authorize their improvement and may collect or authorize the collection of tolls therefor in the same manner as they formerly did in the case of navigable waters.

Undoubtedly, Congress might, under the commerce clause, regulate interstate or foreign commerce over non-navigable waters. The power has, however, never been exercised and, until it is, the power of the State is supreme and plenary.

The portions of Pigeon River in which appellant's improvements are located were not "water communications" within the meaning of the treaty; they had never been "actually used" as such; hence the treaty does not inhibit appellant's improvements and collection of tolls.

The words "as now actually used" refer back to and limit all that precedes; in other words, the treaty makes only such of the "water communications" and of the "usual portages" along the boundary line and the Grand Portage as were then "actually used," "free and open" to both countries.

When the treaty was made, the location and line of these portages and of the intervening water communications, was a matter of certain knowledge. Geographical

knowledge of the region was then practically limited to this land-water trail itself. These portages, as then used, and the intervening water courses, as then used, constituted the boundary line first proposed by Lord Ashburton to Daniel Webster in their negotiations,—a line which, as he says, "has the advantage of being known and attended with no doubt or uncertainty in running it."

This construction of the treaty is sustained not only by President Tyler's message submitting the treaty to the Senate, but also the diplomatic correspondence. Sen. Docs., 3d Sess., 27th Cong., Vol. 1.

The term "water-communications" of itself implies a meaning of waters used as a means of communication. If this is not so, why was the word "waters" not used instead?

The expression "free and open" does not imply freedom from charges for the use of special facilities provided, but means simply "common to the citizens and subjects of both countries,"—"thrown open to the use and enjoyment of the citizens of both countries on equal terms"; or in other words, "open without discrimination to the citizens of each, without direct tax, impost or duty."

Appellant is a public service corporation. It is bound by Minnesota statutes and the Act of Congress to collect only "reasonable charges." These fall on everyone alike regardless of citizenship. Appellant is forbidden to discriminate.

Distinguishing: *Rainy Lake Boom Corp.* v. *Rainy River Lumber Co.,* 27 Ont.L.Rep. 131; *Rainy Lake Boom Co.* v. *Rainy River Co.,* 162 Fed. 287. See *Arrow River Co.* v. *Pigeon Timber Co.,* 1932 Canadian Sup. Ct. Rep. 495.

The phrase "free and open" as applied to navigation and commerce is not new. Similar provisions are contained in various state constitutions, enabling acts and the ordinance creating the Northwest Territory. The phrase

has been construed as we contend it should be. *Huse* v. *Glover,* 119 U.S. 543; *Sands* v. *Manistee River Imp. Co.,* 123 U.S. 288; *Cardwell* v. *American River Bridge Co.,* 113 U.S. 210; *Hamilton* v. *Vicksburg,* 119 U.S. 280; *Willamette Iron Bridge Co.* v. *Hatch,* 125 U.S. 1, 9; *Duluth Lumber Co.* v. *St. Louis Boom & Imp. Co.,* 17 Fed. 419; *Osborne* v. *Knife Falls Boom Co.,* 32 Minn. 412; *In re Southern Wisconsin Power Co.,* 140 Wis. 245.

The words "free and open" not infrequently appear in treaties between this country and Great Britain. 8th Art., Treaty of Paris, 8 Stat. 80; Treaty of Washington, 1871, Art. XXVI, 17 Stat. 863; Treaty Consenting to Panama Canal, Art. III, 32 Stat. 1903. See also Webster-Ashburton Treaty, Art. VII; Message of President Tyler, Sen. Docs., 3d Sess., 27th Cong., Vol. 1; Art. III of same Treaty; Root-Bryce Treaty of 1909, Art. I, 36 Stat. 2448.

If the treaty forbids appellant's works and collection of tolls, it is superseded by the Act of Congress of 1901, *supra.*

The use of Pigeon River is now controlled by the Root-Bryce Treaty of 1909, which impliedly repeals the Webster-Ashburton Treaty in so far as it may apply to Pigeon River. This later treaty permits appellant's acts alleged in the complaint.

*Mr. Edward L. Boyle,* with whom *Messrs. H. B. Fryberger* and *H. C. Fulton* were on the brief, for appellee.

The movement of forest products from Canada into and along Pigeon River is foreign commerce. *Rainy River Boom Corp.* v. *Rainy River Lumber Co.,* 162 Fed. 287.

Only the Government of the United States is authorized to regulate foreign commerce.

The pulpwood in this case is cut from Canadian soil, handled by Canadian labor and put into the Arrow River,

which is an interior watercourse of the Dominion of Canada. The Arrow River flows into the Pigeon River on the Canadian side. The wood moves down the Arrow River into the Pigeon River and down the Pigeon River into Lake Superior, on its way to Canadian mills. It does not come within the territorial limits of the United States. *The Apollon,* 9 Wheat. 362; *The Pilot,* 50 Fed. 437; *The Fame,* Fed. Cas. No. 4634.

The Act of the Province of Ontario, under which the Arrow River and Tributaries Slide & Boom Co., Ltd., is organized, has the same standing with reference to the Pigeon River as an Act of Congress would have with reference to that international boundary. An Act of the Legislature of the State of Minnesota, on account of the constitutional provisions giving to Congress the exclusive power to regulate foreign commerce and making treaties the supreme law of the land, has no such standing. *Arrow River Co.* v. *Pigeon Timber Co.,* 1932 Canadian Sup. Ct. Rep. 495.

The treaty adopts the *Thalweg* theory of boundary until the line reaches the mouth of the Pigeon River; then the river itself is designated as the boundary. This made the entire river a boundary water.

It would seem that the Act authorizing the state government recognizes the fact that, although the Pigeon River borders on the State of Minnesota, it has already, by the terms of the treaty, been designated an international highway over which the State of Minnesota has no jurisdiction.

The imaginary boundary line running close to the middle of the Pigeon River was not established by the Webster-Ashburton Treaty but was fixed by a survey made under the direction of the international joint commission created by the Root-Bryce Treaty. This treaty does not authorize the collection of tolls by the appellant.

Pigeon River from its mouth to Fort Charlotte is a "water communication" within the meaning of the Webster-Ashburton Treaty. The diplomatic correspondence supports this view.

"Free and open" means that the citizens and subjects of both countries have a right to use the River without interference and without paying for so doing. Cf. Art. VII and Art. III of the Treaty. The diplomatic correspondence sustains this interpretation. So does President Tyler's message. Distinguishing: *Huse* v. *Glover,* 119 U.S. 543.

In considering the *Arrow River Case,* it is important to keep in mind that treaties in British countries are not "the supreme law of the land" unless sanctioned by legislation. An Act of the Legislature of Ontario regulating foreign commerce, has the same standing in that Province and in the Dominion of Canada as an Act of the Federal Government has in the United States.

"As now actually used" applies only to Grand Portage. "All water communications and all the usual portages along the line" are to be free and open. "Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used," is to be free and open. Liberal interpretation of the treaty demands this construction.

As for the words "free and open," in the Treaty of Paris and the Treaty of Washington,—neither the Mississippi referred to in the one, nor that part of the St. Lawrence referred to in the other, is a boundary water. The Panama Canal Treaty is entirely different. It provides that the canal shall be free and open, "on terms of entire equality" so that there shall be "no discrimination" against any such nation in respect of "the conditions or charges of traffic."

President Tyler's message does not support a claim that "free and open" and "common" are synonymous.

Navigability is not a controlling factor in this litigation.

The words "all water communications and all the usual portages" shall be "free and open to the use of the citizens and subjects of both countries" were not intended to refer to navigable waters. The expression is more comprehensive than the provisions relating to some of the other waters along the line. The treaty made the Pigeon River a border stream free and open to the citizens and subjects of both countries, for whatever purpose this stream might be useful. The modern rules of navigability had not been established when the Webster-Ashburton Treaty was written; and the rule in this Court then depended upon the ebb and flow of the tide. If a border water is in fact navigable it is by the law of nations and without a treaty provision "free and open to the citizens and subjects" of the countries on either side of the river. *The Fame,* Fed. Cas. No. 4634.

If the Pigeon River is not a navigable stream, the State of Minnesota could not grant to the defendant the right to improve it or collect tolls thereon without condemning the rights of the riparian owners. The defendant is not a riparian proprietor and is not exercising the usual rights of a riparian owner. And, even in its exercise of the power of eminent domain, the State could not authorize the taking of property beyond the international boundary nor could it exercise any control over the water in the stream, because this would belong to the owners on both sides of the international line. The control of the water in the river on one side results in the taking of property on the other side. The usual powers of the State respecting navigable waters within its borders do not extend to non-navigable streams. *Stillman* v. *White Rock Mfg. Co.,* Fed. Cas. No: 13446.

The Act of 1901 merely gives to appellant the right "to enter upon Grand Portage Indian Reservation and improve Pigeon River" at one point. Rules and regu-

lations and conditions and limitations to be prescribed by the Secretary of the Interior, were conditions precedent. An intention to alter and *pro tanto* abrogate a treaty is not to be lightly attributed to Congress. *United States* v. *Payne,* 264 U.S. 446. The Act was considered necessary only because of the existence of the reservation adjacent to a portion of the river. It was so presented to Congress. Cong. Rec., 56th Cong., 2d Sess., p. 3462.

The Act of March 3, 1899, 30 Stat. 1151, is the governing statute.

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

Pigeon River Improvement, Slide & Boom Company, a Minnesota corporation, brought this action against Charles W. Cox, Limited, a Canadian corporation, to recover tolls for the use of improvements which the Minnesota corporation had made in the Pigeon River. These improvements embraced sluiceways, booms and dams, which were used by the defendant in driving, sluicing and floating timber products. The case was removed to the federal court, a demurrer to the amended complaint was sustained without leave further to amend, and the judgment of dismissal was affirmed by the Circuit Court of Appeals. 63 F. (2d) 567. The case comes here on appeal.

Pigeon River is a boundary stream between the State of Minnesota and the Province of Ontario, Dominion of Canada, at the northeast corner of Minnesota. The river is a small stream which has its source in lakes on the international boundary and flows in a southeasterly direction along that boundary for about forty miles, discharging at Pigeon Bay into Lake Superior. The boundary is approximately midstream. The defense against the charge of tolls is based upon Article II of the Treaty of

1842—the Webster-Ashburton Treaty—which, after defining the international boundary, provides as follows: [1]

"It being understod that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

When this treaty was concluded, the lower portion of the Pigeon River was impassable because of falls and rapids. On July 25, 1842, Mr. Ferguson, who had been surveyor to the commissioners under the seventh article of the Treaty of Ghent,[2] thus described this part of the river in response to an inquiry by Mr. Webster:[3] "At the mouth of the Pigeon River, there is probably about three hundred yards in length of alluvial formation; but the river above that, as far as to near Fort Charlotte, runs between steep cut rocks of basaltic or primitive formation, and is a succession of falls and rapids for nearly its whole length—the last cataract, which is within about a mile of its mouth, being almost one hundred feet in height." Below Fort Charlotte, on the Pigeon River, communication with Lake Superior was by means of a trail about nine miles long running south of the river, and some distance from it, which was known as the Grand Portage and was so described in the treaty.[4] In Mr. Webster's com-

[1] 8 Stat. 574; Malloy, Treaties, vol. 1, pp. 652, 653.

[2] 8 Stat. 221, 222; Malloy, Treaties, *loc. cit.*, pp. 617, 624.

[3] Sen. Doc., vol. 1, No. 1, 27th Cong., 3d sess., pp. 104, 105. See also "The Topography and Geology of the Grand Portage," George M. Schwartz, Minnesota Historical Bulletin, vol. 9, p. 27.

[4] "The Pigeon River, which now forms the international boundary at Lake Superior, was, in the days of water transportation, the best natural highway between the Great Lakes or the St. Lawrence system, and the great northwestern section of the continent, with its thousands of lakes and streams draining into Hudson Bay or the Arctic

munication to Lord Ashburton of July 27, 1842, summarizing the understanding which had been reached as to the boundary and setting forth the proposed stipulation as to water communications and portages which was incorporated in the treaty as above quoted, he said: "The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway where necessary for the use of the subjects and citizens of both Governments." [5] At the time of the conclusion of the treaty, this was the highway of commerce, used principally by fur traders, between the Great Lakes and the country to the north and northwest.[6] But the Pigeon River itself, prior to the improvements here in question, as alleged in the complaint and admitted by the demurrer, "was at all times incapable of use for the driving, handling and floating of logs, pulp-wood and timber."

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Ocean. But the Pigeon River, through the last twenty miles of its course before it flows into Lake Superior, is so obstructed by falls and by cascades in rocky canyons as to be impossible of navigation. On the Canadian side the land is too mountainous and the distance too great for portaging to be practicable; but on the American side the line of the lake shore is roughly parallel to the river, and about seven or eight miles from the mouth of the river a little bay forms a natural harbor from which a portage of about nine miles over not too difficult country can be made to the Pigeon River above the cascades." "The Story of the Grand Portage," Solon J. Buck, Minnesota History Bulletin, vol. 5, p. 14.

[5] Sen. Doc., vol. 1, No. 1, 27th Cong., 3rd sess., p. 61.

[6] For a description of the traffic carried on by means of the Grand Portage, see "The Story of the Grand Portage," Minnesota History Bulletin, vol. 5, pp. 15–26; "Voyages from Montreal through the Continent of North America," Sir Alexander Mackenzie, vol. 1, pp. lxxi, lxxvii–lxxxii; Henry-Thompson Journals, Elliott Coues, vol. 1, pp. 6, 7; Wisconsin Historical Collections, vol. xi, pp. 123–125, note.

Pigeon River Improvement, Slide & Boom Company, which for convenience we may call the Pigeon River Company, was incorporated in 1898 under the General Laws of Minnesota.[7] These laws purported to empower the Pigeon River Company to improve streams by erecting sluiceways, booms, dams and other works; to acquire structures already erected together with necessary rights of way, shore rights, land and lands under water; to operate its works so as to render the driving of logs practicable; and to collect "reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated" on the streams so improved. The Company was also authorized, in the case of a boundary stream, to purchase stock in a corporation created in an adjoining State or country for similar purposes upon the same stream, or to unite with such a corporation, upon conditions stated. Acting under this authority, the Pigeon River Company took possession of the portion of Pigeon River within the State of Minnesota and improved it by erecting sluiceways, booms and dams on the Minnesota side of the international boundary.

At the same time, the complaint alleges, the Arrow River & Tributaries, Boom & Slide Company, was organized under the laws of the Dominion of Canada and Province of Ontario, with powers and purposes similar to those of the Pigeon River Company, but limited to the portion of the Pigeon River and its tributaries within the Dominion of Canada. This Canadian corporation, under an agreement with the Pigeon River Company, similarly improved the portion of the Pigeon River on the Dominion side of the boundary, so that the improvements made by each company "constituted complements the one of the other, and the whole of said improvements

[7] General Laws of Minnesota, 1878, Chap. 34; 1889, Chap. 221; 1905, Chap. 89; Mason's Minnesota Statutes, 1927, §§ 7550–7552.

rendered the driving of logs thereon reasonably practicable and certain." These improvements, which have since been maintained, were all located below Fort Charlotte on the Pigeon River, with the sole exception of a reservoir dam at the south end of South Fowl Lake.

Adjacent to the lower part of the Pigeon River on the Minnesota side, lies the Grand Portage Indian Reservation, extending for a considerable distance along the stream.[8] By the Act of Congress of March 3, 1901,[9] the Pigeon River Company was authorized, under such regulations and conditions as the Secretary of the Interior might prescribe, to " improve the Pigeon River at what is known as the cascades of said river, for the purpose of making said river at said point navigable for floating logs." For that purpose the Company was empowered to enter upon unallotted lands and, with the consent of the allottees, upon allotted lands, adjacent to the cascades, of the Grand Portage Indian Reservation and to construct such dams, bulkheads and other works as should be necessary. It was further provided that the river " after being so improved shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor." [10] It does not appear that the Secretary of the Interior prescribed any regulations or conditions in relation to the improvements made by the Pigeon River Company.

Recovery is now sought for the use by the defendant, a Canadian corporation, of these improvements in the years 1928, 1929, and 1930, in driving, sluicing and floating upon the Pigeon River its pulp wood and railway ties.

[8] 10 Stat. 1110; see, also, H.R. 51st Cong., 1st sess., Ex. Doc. No. 247, p. 59.

[9] C. 878, 31 Stat. 1455.

[10] See Cong. Rec., 56th Cong., 2d sess., vol. 34, pt. 4, p. 3462.

This timber, the defendant says in its argument, was cut from Canadian lands and put into the Arrow River, a tributary in Canada of the Pigeon River, and was floated into the Pigeon River on its way to Lake Superior and Canadian mills. The tolls charged the defendant are alleged in the complaint, and thus admitted, to be the "reasonable and uniform tolls" which the Pigeon River Company had established. No question is raised as to reasonableness or discrimination, the only question being whether, in the light of the provision of the treaty, any tolls whatever could be charged. The contentions of the defendant are that the Pigeon River is a boundary stream and, as one of the "water communications" described in the treaty, must be kept "free and open" to the use of the citizens and subjects of both countries; that the imposition of tolls is inconsistent with this stipulated immunity and is not justified by the legislation which the Pigeon River Company invokes.

The Circuit Court of Appeals in the instant case followed its earlier decision in *Clark* v. *Pigeon River Improvement, Slide & Boom Co.*, 52 F. (2d) 550, where the court reached the conclusion that the charge of tolls was forbidden by the treaty. The court disagreed with the view advanced by the Pigeon River Company that the words of the treaty "as now actually used" limited the provision as to "free and open" use, expressing the opinion that these qualifying words referred only to the Grand Portage. *Id.*, pp. 555, 556. In support of its conclusion, the Circuit Court of Appeals cited the decision of the Appellate Division of the Supreme Court of Ontario in the case of *Arrow River & Tributaries, Slide & Boom Co.*, 66 Ont.L.R. 577; where the court held that the Canadian Company did not have "the right to build upon the bed of the Pigeon River anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States." After the Circuit Court of Ap-

peals had decided the *Clark* case, the judgment in the case of the *Arrow River Company* was reversed by the Supreme Court of Canada. 1932 Canadian Supreme Court Reports, 495. The latter decision was brought to the attention of the Circuit Court of Appeals in the instant case, but the court adhered to its former opinion. 63 F. (2d) 568, 569.

The litigation in Canada presented the question whether the statutes of the Province of Ontario authorized the Canadian Company to construct and maintain works upon the Pigeon River on the Ontario side of the international boundary and to charge tolls upon timber passing through those works. It appeared that the Arrow River & Tributaries, Slide & Boom Company, Ltd., had been incorporated in 1922 under the Ontario Companies Act,[11] for the purpose of acquiring or constructing dams, booms and other works to facilitate the transmission of timber down the Arrow River, and its tributaries, and that part of the Pigeon River which is within the Province of Ontario; and that the Company had acquired title to, and had extended, works which had been erected by a former corporation formed in 1899 with the same shareholders and directors and with similar objects. The Company applied to the District Judge for approval of tolls to be charged for the use of these works, and the respondent in that case, the Pigeon River Timber Company, Ltd., sought an injunction restraining the District Judge from acting upon the application. The Webster-Ashburton Treaty was invoked and it was contended that the provision of the Ontario statute, so far as it purported to authorize the Company to charge tolls for the use of its improvements on that river, was "*ultra vires* of the Ontario Legislature." The District Judge

[11] R.S.O. 1914, c. 178; R.S.O. 1927, c. 218; Lakes and Rivers Improvement Act, R.S.O. 1927, c. 43, §§ 32, 52.

refused the injunction, for the reason that "treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation." On appeal, the Appellate Division of the Supreme Court of Ontario agreed with that principle but had a different opinion as to the effect of the legislation of Ontario. That Court decided that the statute in question applied to lakes and rivers that were wholly within the Province and did not apply to the Pigeon River which was a boundary stream. The reason given for this construction was that the court should not impute to the legislature an intent to authorize a violation of the terms of the treaty, if the statutory provision was capable of another construction. The Supreme Court of Canada reversed this decision of the Appellate Division of the Supreme Court of Ontario, holding that the statute did authorize the construction of the works on the Pigeon River and also the charge of tolls for the use of the improvements, and, as thus construed, was within the competency of the provincial legislature.

In the Supreme Court of Canada three opinions were delivered. Three of the five judges held that the legislation was not in conflict with the terms of the treaty. Of this majority, Judges Rinfret and Smith, in an opinion delivered by the latter, took the view that the right preserved by the provision of the treaty "was the right to continue to use the water communication and portages then in use." They expressly disagreed with the opinion of the Circuit Court of Appeals in the *Clark* case, *supra,* that the words "as now actually used" applied only to Grand Portage. These judges could not see any reason "for preserving a right to use Grand Portage that would not apply to other portages," and they thought that the language of the provision appeared "to apply to all, and to the water communications, and should be so construed." They added: "What was being dealt with, and

what was in the contemplation of the parties, was travel and transportation over the water communications and portages as then used, and there was . . . no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by the portages."

Chief Justice Anglin wrote a separate opinion agreeing in the result "largely for the reasons" stated by Judges Rinfret and Smith. He said, however, that he should have "preferred it had the majority of the court seen its way clear to base its decision upon a holding" that the stipulation of the treaty "was merely meant to ensure to the citizens of both countries equality of rights in regard to the water communications, portages, etc., and that it never was intended thereby to provide that in no event should either party to the treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon"; that "where either party to the treaty saw fit to impose tolls upon its own citizens, in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made."

Two judges—Judges Lamont and Cannon—delivered an opinion to the effect that "although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the clause in question places no limit on the purposes for which they might be used"; that "they are to be 'free and open' to the people of both countries for whatever purpose they may desire to use them as a water communication," and therefore if "they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger," there was "nothing in the clause, or in any other

part of the treaty, which would compel the use of the portage in order to have a free passage." These judges thought that to hold otherwise would be "to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty." They expressed the opinion that the Pigeon River "from its mouth along both sides of the boundary line, forms part of the 'water communications' which were to be free and open," and that this provision is not consistent with the imposition of tolls for the use of improvements erected in the river. While thus construing the treaty, Judges Lamont and Cannon nevertheless reached the final conclusion that the legislation authorizing the imposition of tolls was applicable and valid. This was in the view that "the legislative competence of a provincial legislature is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed, and could bestow"; that the existence of the treaty does not of itself impose a limitation upon the provincial legislative power; that "the treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power." Hence, it was said, the rights and privileges given by a treaty are, under Canadian law, enforceable by the courts only where the treaty "has been implemented or sanctioned by legislation rendering it binding upon the subject," and the statute giving authority to impose tolls for the use of the improvements "must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation." While the judges of the Supreme Court of Canada thus differed in the grounds of their judgments, they agreed in the result.

Under this decision in Canada and that of the Circuit Court of Appeals, we have the extraordinary situation that as to these improvements at the same place on the

boundary stream—improvements necessarily complementary to each other—the Ontario Company may impose charges upon citizens of the United States for the use of its works on the Canadian side of the line while the Minnesota Company may not charge citizens of Canada for the use of its corresponding works on the Minnesota side.

In deciding the instant case, we think that there are controlling considerations which make it unnecessary to pass broadly upon the significance of the words " free and open " in provisions in treaties relating to the use of navigable streams,—a phrase which with different contexts has been repeatedly used in international engagements.[12] The question here is simply as to the application of these words of the Webster-Ashburton Treaty to this particular boundary stream, the Pigeon River, at points where the river was impassable and hence not used as a means of communication at the time the treaty was made, the travel and transportation of that period, and of earlier times, necessarily seeking the portage by means of which alone it was practicable to secure the desired communication. The words of the clause in question " as now actually used," undoubtedly refer to the Grand Portage, but we think there is force in the reasoning of the opinion of Judges Rinfret and Smith in the Supreme Court of Canada that these words were not limited to that portage, and we are not convinced that it was the intention either to

[12] See Treaty of September 3, 1783, between the United States and Great Britain, Art. VIII, Malloy, p. 589; Webster-Ashburton Treaty, 1842, Art. III, Malloy, p. 653; Treaty of Washington, 1871, Arts. XXVI, XXVIII, compare Art. XXVII, Malloy, p. 711; Convention concerning the Boundary Waters between the United States and Canada, 1909, Art. I, U.S. Treaties, vol. 3, p. 2608; Treaty of Guadalupe Hidalgo, 1848, Arts. VI, VII, Gadsden Treaty, 1853, Art. IV, Malloy, pp. 1111, 1123; Moore, International Law Digest, vol. 1, pp. 625, *et seq.;* Hyde, International Law, vol. 1, §§ 160, *et seq.;* Oppenheim, International Law, 4th ed., §§ 178, *et seq.*

preclude an improvement which would make a stream along the boundary available for use theretofore impossible, or to prevent a reasonable and non-discriminatory charge for the use of such an improvement. In the terms of the treaty we find no compelling clarity of prohibition. At best, the clause is ambiguous, and it is appropriate that we should look to the practical construction which has been placed upon it.

With respect to the portion of the stream within the territorial jurisdiction of the State of Minnesota, the legislature of that State authorized the erection of these improvements and the charging of reasonable tolls. In contemplation of improvements of this sort in a stream forming part of the international boundary, the state legislation expressly provided for the uniting of such an enterprise with a similar and complementary project appropriately authorized with respect to the Canadian portion of the stream. In the absence of a violation of treaty, or of conflict with an act of the Congress, there can be no doubt as to the power of the State to establish such an aid to commerce. An undertaking of this character by the State falls within the familiar category of cases in which a State may make reasonable provision for local improvements until its authority is superseded by dominant federal action.[13] The fact that the stream forms part of the international boundary does not make this principle inapplicable. Where, under § 9 of the

[13] *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U.S. 459; *Mobile County* v. *Kimball*, 102 U.S. 691; *Cardwell* v. *American Bridge Co.*, 113 U.S. 205; *Huse* v. *Glover*, 119 U.S. 543; *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288; *Lindsay & Phelps Co.* v. *Mullen*, 176 U.S. 126; *Minnesota Rate Cases*, 230 U.S. 352, 403–405; *International Bridge Co.* v. *New York*, 254 U.S. 126; *Economy Light & Power Co.* v. *United States*, 256 U.S. 113; *Newark* v. *Central R. Co.*, 267 U.S. 377.

Act of March 3, 1899,[14] the consent of Congress is required for the erection of structures in or over navigable waters not lying wholly within a State, "The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State"; it merely subjects the exercise of the right "to the further condition of getting from Congress consent to action upon the grant." *International Bridge Co.* v. *New York,* 254 U.S. 126, 133.

It is not necessary to decide whether, in view of the impassable condition of the portion of the Pigeon River under consideration, the improvements came under the provisions of either § 9 or § 10 of the Act of March 3, 1899,[15] as we are of the opinion that the improvements were made with the consent of Congress. By the Act of March 3, 1901[16] (which apparently was not brought to the attention of the Circuit Court of Appeals), the Congress expressly authorized the Pigeon River Company to improve the river in order that it might be rendered navigable for floating logs, to erect dams and other works necessary for that purpose, and to impose a reasonable charge for the passage of all timber save that which was cut from the adjoining Grand Portage Indian Reservation. The fact that this authority directly applied to that part of the Pigeon River known as "the cascades" does not, in our judgment, detract from the significance of the Act as showing the acquiescence of the Congress in the improvements here in question. The authority was given because of the governmental interest in the Indian Reservation adjacent to the Pigeon River, and

[14] 30 Stat. 1151.

[15] See *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 707, 708; *Leovy* v. *United States,* 177 U.S. 621, 628; *Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 123, 124; *Wisconsin* v. *Illinois,* 278 U.S. 367, 412, 413.

[16] See Note 9.

it is obvious that the works at the cascades would have been futile if the related portions of the river required for the contemplated flotation of timber were not appropriately improved. The consent of the Congress, running expressly to the Pigeon River Company as a corporation organized under the applicable laws of Minnesota, for the erection of the structures at the cascades where the interests of the Indian Reservation were involved, necessarily implied acquiescence in the action by the State in authorizing the improvements which would accomplish the purpose which the Congress had in view. Nor does it affect the question that the congressional authorization was stated to be subject to such regulations and conditions as the Secretary of the Interior might prescribe. It is not shown that the Secretary has imposed restrictions and the Act did not require him to impose them.

We find no reason for regarding this action as intended to abrogate or modify the provision of the Webster-Ashburton Treaty. So far as the Act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected. *The Cherokee Tobacco,* 11 Wall. 616, 621; *Head Money Cases,* 112 U.S. 580, 597; *Cook* v. *United States,* 288 U.S. 102, 120. But the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Chew Heong* v. *United States,* 112 U.S. 536, 549; *United States* v. *Payne,* 264 U.S. 446, 449; *Cook* v. *United States, supra.* We think that it is proper to infer that the Congress, in view of the condition of the stream and the purpose of the improvements, did not consider the authority to make them and to impose a reasonable charge for their use, as being inconsistent with the treaty

stipulation. We regard the action of the Congress, following that of the State, as a practical construction of the treaty as permitting these works and justifying the charge.

The same may be said of the action of the Province of Ontario in providing for the complementary works on the Canadian side of the boundary and authorizing tolls for their use. While this action was taken in the plenitude of the power of the provincial legislature as defined by the Supreme Court of Canada, we perceive no reason for ascribing to that legislature an intention to override the provision of the treaty, but rather see in that action an assumption on the part of the legislature that its course was not repugnant to the treaty, an inference which finds abundant support in the conclusion of the majority of the judges of the Supreme Court of Canada. Nor does it appear that either of the Parties to the treaty has made to the other any representations as to a breach of obligation by reason of the making of the improvements or the imposition of tolls. We find no ground for rejecting the practical construction which the treaty has thus received.

Further, in 1909, for the purpose of settling all questions pending between the United States and the Dominion of Canada, " involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier," the United States and Great Britain entered into a treaty concerning the boundary waters.[17] By Article I of this treaty the Parties formulated their agreement " that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to ships, vessels and boats of both countries

[17] 36 Stat. 2448, U.S. Treaties, vol. 3, p. 2607.

equally." [18] The treaty expressly refers to uses and obstructions of boundary waters which had theretofore been permitted, and sets up an International Joint Commission with jurisdiction to deal with future uses and obstructions, as stated. Article III of the treaty thus provides: "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission to be known as the International Joint Commission."

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[18] Article I of the Treaty of 1909 is as follows:

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof."

We think it may fairly be said that the improvements here in question on the Pigeon River constituted structures and uses which had been permitted by the Parties prior to the treaty of 1909 and were recognized by that treaty. It does not appear that any action has been taken by either Government or by the International Joint Commission inconsistent with this view.

We conclude that it was error to sustain the demurrer to the amended complaint. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

*Reversed.*

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## HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CANFIELD.*

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

No. 158. Argued December 13, 1933.—Decided January 15, 1934.

The Revenue Act of 1921, § 201 (a) (b), provides that any distribution made by a corporation to its shareholders out of profits accumulated since February 28, 1913, is taxable; and, for the purposes of the Act, every distribution is regarded as made from the most recently accumulated profits to the extent that they have accumulated since that date; but profits accumulated prior to March 1, 1913 may be distributed exempt from tax after profits accumulated since February 28, 1913, have been distributed. A corporation with a surplus on March 1, 1913, made a distribution after ensuing years in the earlier of which it suffered losses and in the later of which it made profits. *Held* that, to determine the amount exempt under the statute, the losses should be deducted from the surplus of March 1, 1913, not be charged against the subsequent profits. P. 166.

62 F. (2d) 751, reversed.

65 F. (2d) 234, affirmed.

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* Together with No. 212, *Thorsen* v. *Helvering, Commissioner of Internal Revenue,* certiorari to the Circuit Court of Appeals for the Ninth Circuit.

CERTIORARI, 290 U.S. 611, to review two judgments rendered upon appeals taken by two stockholders of the same corporation, in different circuits, from a decision of the Board of Tax Appeals, 24 B.T.A. 480.

*Mr. H. Brian Holland,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *Andrew D. Sharpe* were on the brief, for the Commissioner of Internal Revenue.

*Mr. Edwin H. Cassels,* with whom *Messrs. Barry Gilbert* and *Adolphus E. Graupner* were on the brief, for Canfield and Thorsen.

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

These cases present the question of the construction of the following provisions of § 201 of the Revenue Act of 1921, 42 Stat. 228:

"Sec. 201. (a) That the term 'dividend' when used in this title . . . means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913, . . .

"(b) For the purposes of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; but any earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, may be distributed exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed. . . ."

The respondent in No. 158 and the petitioner in No. 212 are stockholders of the West Side Lumber Company, a California corporation. The question is as to the amount

properly taxable against them as their respective shares of a dividend of $5,100,000 paid by that company on April 14, 1923.

The findings of fact state that in addition to its original capital of $1,500,000, the company had a surplus on March 1, 1913, of $4,332,684.78. Its profits and losses in the following years—ending on February 28 in each year—were as follows: 1914, a profit of $4,594.62; 1915, a loss of $193,139.67; 1916, a loss of $211,707.32; 1917 to 1923, inclusive, and from February 28, 1923 to April 14, 1923, profits aggregating $2,450,688.30. Prior to the dividend here involved, and for the years 1918 to 1923, the company had paid dividends amounting to $1,290,000.

The question is as to the proper treatment of the losses of 1915 and 1916. If these losses, over the profits of 1914, are not treated as reducing the surplus of March 1, 1913, but are charged against the subsequent profits, the entire amount of that surplus, or $4,332,684.78 was distributable exempt from the tax after the profits subsequent to February 28, 1913, had been distributed. On this basis, for which the taxpayers contend, the profits accumulated after February 28, 1913, would be deemed to amount to $2,050,435.93, leaving subject to the tax, after deducting prior dividends, the sum of $760,435.93.

If the losses of 1915 and 1916, over the profits of 1914, are treated as reducing the surplus of March 1, 1913, there remained of that surplus, on February 28, 1916, the sum of $3,932,432.41, which was distributable exempt from the tax after the subsequent profits had been distributed. With this application of the losses of 1915 and 1916, the subsequent profits subject to tax, after deducting prior dividends, amounted to $1,160,688.30.

The Board of Tax Appeals adopted the latter view and directed the determination of deficiencies accordingly. 24

B.T.A. 480. That decision was overruled by the Circuit Court of Appeals for the Seventh Circuit as to the respondent Canfield in No. 158, 62 F. (2d) 751, and was sustained by the Circuit Court of Appeals for the Ninth Circuit as to the petitioner Thorsen in No. 212, 65 F. (2d) 234. The cases come here on certiorari.

In deciding between these conflicting views, the outstanding, and we think the controlling, fact is that on February 28, 1916, the surplus of March 1, 1913, had actually been diminished by losses. The company continued in business after March 1, 1913, and exposed its accumulated profits to the hazard of that business. On February 28, 1914, the company still had those profits and an additional profit of $4,594.62. But in the next two years the company lost $404,846.99, so that the surplus of March 1, 1913, was invaded. It is inaccurate to say that this was merely a matter of bookkeeping. Under the findings of fact the losses must be deemed to have been actual losses, not mere bookkeeping entries. Hence, the decrease of the preëxisting surplus was actual—as real as the preëxisting surplus itself, as real as the subsequent profits. The surplus of March 1, 1913, was the amount of net assets over liabilities including capital stock.[1] When the losses of 1915 and 1916 were suffered, the net assets of March 1, 1913, shrunk accordingly.

In the presence of that inescapable fact, the question is not whether the company could distribute, as being surplus of March 1, 1913, what no longer remained of that surplus—a manifest impossibility—but whether the statute entitled the company to treat subsequent profits as restoring what had been lost of the surplus of March 1, 1913, so that, to the extent of that replacement, the subsequent profits could be distributed to stockholders free

[1] *Edwards* v. *Douglas*, 269 U.S. 204, 214; *Willcuts* v. *Milton Dairy Co.*, 275 U.S. 215, 218.

of tax. That the question is one of such a replacement would be strikingly evident if the whole of the surplus of March 1, 1913, had been lost and an attempt had been made to treat later profits as restoring it. The fact that only a part of the surplus was lost does not alter the question as related to that part.

The argument that the surplus of March 1, 1913, constituted capital is unavailing. We are not here concerned with capital in the sense of fixed or paid-in capital, which is not to be impaired, or with the restoration of such capital where there has been impairment.[2] No case of impairment of capital is presented. We are dealing with a distribution of accumulated profits. Nor is it important that the accumulated profits, as they stood on March 1, 1913, constituted capital of the company as distinguished from the gains or income which the company subsequently realized.[3] When a corporation continued in business after March 1, 1913, the dividends it later declared and paid to its stockholders, whether out of current earnings or from profits accumulated prior to that date, constituted income to the stockholders, and not capital, and were taxable as income if the Congress saw fit to impose the tax. *Lynch* v. *Hornby,* 247 U.S. 339. The provision of the Act of Congress under consideration was a "concession to the equity of stockholders" with respect to receipts as to which they had no constitutional immunity. There is no question here of the receipt of "capital."

The fundamental contention of the taxpayers is that the statute created two distinct periods for tax purposes; that the accumulations for each period constituted "a

[2] Compare *Hadden* v. *Commissioner,* 49 F. (2d) 709.

[3] *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330; *Gulf Oil Corp.* v. *Lewellyn,* 248 U.S. 71; *Lucas* v. *Alexander,* 279 U.S. 573; *Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552.

fixed and static amount, not to be changed by happenings after the end of the period." That the statute does relate to two periods, the dividing line being March 1, 1913, and that the periods are distinct, is obvious. But it does not follow because there are two distinct periods that the accumulations for each period constitute " a fixed and static amount " and are to remain unaffected despite the vicissitudes of business. To attribute to the accumulated profits or surplus of March 1, 1913, embarked in a continued business, such a static condition is to ignore the course of business and to impute to the Congress an intention to consider, for tax purposes, the existence of that surplus as still continued notwithstanding its actual diminution or exhaustion. Such an intention to disregard realities so as to afford immunity from a tax is not lightly to be ascribed to the taxing authority. The " equity of stockholders," which we said in *Lynch* v. *Hornby, supra,* the Congress probably had in view, might reasonably require freedom from taxation on receiving a distribution of the accumulated profits of March 1, 1913, where those profits remained intact, but that equity is not apparent when those profits had been lost in whole or in part and immunity is sought from the taxation of an equivalent amount of profits subsequently earned.

Paragraphs (a) and (b) of § 201 disclose a single purpose and are to be construed in harmony with each other. They show that the Congress was careful to arrange its plan so that the right to receive, free of tax, a distribution of surplus accumulated prior to March 1, 1913, should not be exercised in such a fashion as to permit profits accumulated after that date to escape taxation. To that end the Congress provided that " every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913." Then follows the exemption which is strictly limited to a

distribution of profits accumulated prior to March 1, 1913. Nothing is said as to a restoration of those profits out of subsequent earnings if the former have been lost.

The argument for the stockholders stresses the word "accumulated." We think that the expression is made to carry too heavy a burden. The argument is substantially the same as that which is based on what seems to us to be an artificial conception of the two periods. What had been "accumulated" prior to March 1, 1913, was obviously not immune from the risk of loss. It is urged that the same rule should be applied whether the losses in the subsequent years preceded or succeeded the making of profits. But the actual course of events is not to be ignored. If there had been profits immediately after March 1, 1913, sufficient in amount to absorb later losses incurred before the time of distribution, it is manifest that the profits accumulated prior to March 1, 1913, would have remained intact. The case is different where, in the absence of such profits, losses necessarily diminish the prior accumulations. Thus, in the instant case there were no profits accumulated after March 1, 1913, and prior to February 28, 1916, except the small amount in 1914 which was wiped out by the losses of the two succeeding years. The profits from February 28, 1916, to February 28, 1919, amounted to $327,134.45. If there had been a distribution of these profits on February 28, 1919, it could not have been maintained that they constituted part of the surplus existing on March 1, 1913, or that they should escape taxation on the theory that they made good prior losses which had actually reduced that surplus. And the same is true of the profits subsequently made. Administrative practice appears to have been in accord with this view. See A.R.M. 82, 3 Cumulative Bulletin 36 (1920).

Our conclusion is that the judgment of the Circuit Court of Appeals for the Seventh Circuit in No. 158

should be reversed and that of the Circuit Court of Appeals for the Ninth Circuit in No. 212 should be affirmed.

*No. 158, reversed.*

*No. 212, affirmed.*

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## WILLIAMS *v.* UNION CENTRAL LIFE INSURANCE CO.

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

No. 208. Argued December 14, 1933.—Decided January 15, 1934.

1. A paid-up addition to a policy of life insurance is an amount added to the face of the policy, paid for by a single premium, for which there must be a legal reserve. P. 173.
2. This is the meaning of the term "dividend additions," as used in Art. 7432, Par. 7, Rev. Civ. Stats. of Texas, 1925. P. 181.
3. A paid-up addition is distinct from extended insurance. P. 173.
4. The policy provided: "In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash." *Held* applicable where the policy lapsed and the insured died after the days of grace. P. 174.
5. A level premium participating policy provided that upon lapse for non-payment of premium, if the insured failed to exercise specified options, the dividend due him for the current year should be paid him in cash, and the surrender value of the policy (defined as equal to the reserve at the end of the policy year, less surrender charges), together with the value of any paid-up additions, and accumulations of dividends at interest, should be applied to the extension of the policy as term insurance from the date to which premiums had been paid, first deducting any indebtedness or advances on the policy. *Held:*

   (1) That a current dividend as to which the insured had exercised no option, was inapplicable to increase the extension of insurance but was payable in cash. P. 176.

   (2) A dividend is no part of the surrender value. P. 176.

   (3) The provisions as to paid-up additions and accumulations of dividends at interest have no relation to such current dividend or to earlier dividends applied in reduction of premiums. P. 178.

6. Advances against surrender value do not create a personal liability or debt of the insured, but are merely deductions from the sum that the company ultimately must pay. P. 179.
7. The company has no right, without agreement with the insured, to apply a dividend payable in cash under the policy to the reduction of an advance against the policy. P. 180.
8. While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important, to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations. P. 180.

65 F. (2d) 240, affirmed.

CERTIORARI, 290 U.S. 613, to review a judgment reversing a recovery obtained by the present petitioner in an action on a policy of life insurance. The case was removed to the District Court from a court of Texas, on the ground of diversity of citizenship.

*Mr. Harris O. Williams,* with whom *Messrs. Charles O. Harris, Charles Gibbs,* and *H. T. McGown* were on the brief, for petitioner.

*Mr. Eugene P. Locke,* with whom *Mr. Stanley K. Henshaw* was on the brief, for respondent.

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

This action was brought by petitioner as beneficiary of a policy of insurance for $10,000 issued July 26, 1927, upon the life of her husband, who died on October 15, 1931. Application for the policy was made and the policy was delivered in the State of Texas. A level premium of $449.10 was payable annually on June 10th, and was paid to and including June 10, 1930. The premium payable on June 10, 1931, was not paid either at that time or within the thirty-one days of grace allowed by the policy.

The "loan value" or "cash value" of the policy, as shown by the table which the policy set forth, was then $910. Loans against the policy, with interest, amounted to $898.88. The policy was a participating one, and a dividend of $74.80 was declared in favor of the insured on June 10, 1931. If that dividend had been applied in reduction of the amount advanced against the policy or to the purchase of extended insurance, the result would have been to extend the insurance beyond the date of the death of the insured. Petitioner contends that the dividend should have been so applied. Respondent insists that such application would have been contrary to the terms of the policy and that, on the expiration of the period of grace without payment of the premium due, the policy lapsed and the dividend was payable in cash and not otherwise.

Respondent's request for the direction of a verdict was denied and the verdict and judgment went for petitioner. The judgment was reversed by the Circuit Court of Appeals. 65 F. (2d) 240. This Court granted certiorari.

The policy gave the following options as to the disposition of dividends:

"11. Dividend Options. Dividends may be withdrawn in cash; or applied to the payment of premiums; or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of application therefor."

There is no ambiguity in the terms of these options. They are clear and definite in the terminology of insurance

and each is to be applied with its distinctive significance. No one of these options provides for the use of a dividend to procure extended insurance; that is, to procure an extension of the term of the insurance from the date to which premiums have been paid, without any further payment. Dividends may be withdrawn in cash or applied to the payment of premiums or left to accumulate with interest subject to withdrawal at any time. The further option to have dividends "applied to the purchase of paid-up participating additions to the policy" is quite distinct from an option to procure extended insurance. A "paid-up addition" to the policy, by the application of a dividend, is the amount added to the face of the policy and purchased by the use of the dividend as a single premium. For such paid-up additions, there must be a legal reserve.

The insured did not exercise any one of the options given by article 11. It appears that he had several other policies issued by the same company, and in addition to the amount advanced by the company he had borrowed certain amounts from the company's agents in Dallas, Texas. These agents, on September 18, 1931, obtained an order on the company, signed by the insured, which directed payment to them of the dividend on the policy in suit together with dividends on other policies. On this order, the dividend here in question was paid to the agents. Petitioner contested the order as having been signed at a time when the insured did not have sufficient mental capacity to understand the transaction. This issue of fact was decided by the jury in favor of petitioner and the Circuit Court of Appeals did not pass upon the sufficiency of the evidence in that relation. Nor do we deal with that question. The only other indication of the intention of the insured is sought to be drawn from a statement in a letter addressed to the company by its

agents on September 14, 1931, referring to a conversation with the insured about September 1st. The agents said that the insured had rejected their proposal for the use of dividends on his policies in partial payment of his note held by the agents, saying that "he was going to have every nickel applied towards paying these policies as far as it would carry them." We agree with the view of the Circuit Court of Appeals that this statement was too indefinite to serve as a direction to the company to apply the dividend in question in any particular way and, unless the insurance had been extended under the provisions of the policy, it had already lapsed and could be reinstated only in accordance with the requirements of the policy, that is, upon payment of premium arrears with interest and satisfactory evidence of insurability. We are unable to find any basis for the conclusion that the insured either had, or attempted to exercise, any option to use the dividend to obtain extended insurance, and our decision must turn upon the construction of the provisions of the policy applicable to such a case.

Article 12 provides for the "automatic disposition" of dividends as follows:

"12. Automatic Disposition. On payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid-up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."

The first sentence of article 12 is inapplicable as it provides for the disposition of the dividend "on payment

of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected." The present case is not one where the premium was paid or where on the " policy anniversary " no further premium was payable. The first part of the second sentence is also inapplicable, as the insured did not die during the days of grace. It is also clear that the third and last sentence does not apply. But the case does fall directly within the alternative of the second sentence, " *or if the policy shall lapse, the dividend then due shall be paid in cash.*" That is precisely this case. And this provision of the policy is in plain opposition to the contention that the dividend should be applied to an extension of the insurance. The provision presupposes a dividend due and the lapse of the policy for non-payment of premium, and the dividend is then to be paid in cash.

Petitioner seeks to escape this definite stipulation by invoking the provisions of the policy as to the use of the " policy value " or " surrender value " in obtaining extended insurance. After stating that the reserve of the policy " is computed on the American Experience Table of Mortality with interest 3½%," the policy provides:

" 15. Surrender Value. After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years, it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively.

" 16. Policy Values. The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no

option is exercised, such value shall be applied as provided in Option 1.

"17. Option 1.—Extended Insurance. Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1.) The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of extension. Dividends on extended insurance shall be paid in cash and only for completed policy years.

. . . . .

"22. Deduction of Indebtedness. If there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide."

Petitioner argues that an earlier provision of the policy (article 8) that "after two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article 16," conflicts with the provision of article 12 that the dividend in case of lapse shall be paid in cash. There is no conflict, however, as article 16 refers to the use of the "surrender value" as defined in article 15. Instead of there being inconsistency, article 8 expressly provides for lapse on non-payment of premium, the event on which, by article 12, the dividend is to be paid in cash. The dividend is not a part of the "surrender value." That value is equal to the "reserve" at the end of the policy year, less the "surrender charges" stated. Where level premiums are paid, the amount of the annual premium is necessarily greater than the mor-

tality cost during the early years of the insurance and less than the mortality cost in later years. With the mortality table and an assumed rate of interest on the investment of premiums received, the amount of the accumulated savings on this basis, at any date, can be mathematically computed. This amount constitutes the "reserve" against the policy or its net value. The insurer must have on hand the aggregate amount of these reserves against its outstanding policies. And in case of lapse, after a policy has been in force for a specified time, its net value or "surrender value," less surrender charges, is made available to the policyholder.

"Dividends" are in a different category. In fixing the annual level premium, there is added to the sum required on the basis of the mortality table, and assumed rate of interest, an amount to cover anticipated expenses and contingencies. If the rate of mortality exactly coincided with the expected rate, and the income, expenses and contingencies were precisely in accordance with the allowance made therefor, there would be no surplus and hence no dividends. But in the actual course of business there may be, and probably will be, gains from the fact that the mortality turns out to be less than that expected, or that the income is larger or the outlays are less than those estimated, and these gains are distributable to policyholders by means of "dividends" in accordance with the provisions of policies. The "surrender value" is calculated on the basis of the reserve and without reference to such possible dividends.

In this instance, according to the tables set forth in the policy to which article 16 refers, the surrender value at the time in question was $91 for each $1000 of insurance, and thus amounted to $910. According to article 22, this "cash value" was to be reduced by the amount advanced on the policy. It is not questioned that the

amount which had been advanced, with interest, was $898.88. There was thus left, of the surrender value, the sum of $11.12 which the insured was entitled to have applied as provided in article 16. The insured, on the failure to pay the premium due, did not exercise any of the options for the use of the surrender value of the policy under article 16, and hence "such value" was to be applied "as provided in Option 1," set forth in article 17. The amount to be so applied was clearly the surrender value of $11.12, as above stated. And under "Option 1," it was this amount that was to be used to obtain "extended insurance."

Article 17 provided that this amount should be "applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1)." According to that table, the sum of $910, the total surrender value without deducting advances, would have sufficed to purchase $10,000 of participating term insurance for "four years, 330 days," that is, at between 50 and 51 cents a day. The amount remaining of the surrender value, after deducting advances, or $11.12, would thus purchase extended insurance for only twenty-two days, a period inadequate to keep the policy alive until the date of the death of the insured.

The petitioner is not aided by the other provisions of Article 17. It provides that "the value of any paid-up additions will be used to increase the term of extension." But there were no "paid-up additions." Prior dividends had been used in reduction of the annual premiums paid. No option had been exercised for the use of the dividend in question in the purchase of a paid-up addition as provided in article 11, and that dividend, on the lapse of the policy, became payable in cash by the terms of article 12.

Article 17 also provided that " accumulations of dividends at interest may be applied to increase the term of extension." This provision manifestly refers to the option in article 11 that dividends may be " left to accumulate with interest at three per cent." That option had not been exercised and no dividends had been left to accumulate. The provision has no application to a current dividend as to which no option had been exercised and which on the lapse of the policy is expressly made payable in cash. If, after the lapse and during the life of the insured, the company had attempted to apply that dividend to extended insurance, its action would not have been binding upon the insured and he would have been entitled to demand the cash payment explicitly promised him.[1]

It is the contention of the petitioner that, on the lapse of the policy, the dividend of $74.80 should have been applied in reduction of the amount advanced against the surrender value of the policy, thus raising what remained of that value from $11.12 to $85.92, a sum sufficient to extend the insurance until after the death. But the policy gave no warrant for an application of the dividend to the reduction of advances against the policy. As this Court pointed out in *Board of Assessors* v. *New York Life Ins. Co.,* 216 U.S. 517, 522, such advances being against the surrender value do not create a " personal liability " or a " debt " of the insured, but are merely a deduction from the sum that the company " ultimately must pay." While the advance is called a " loan " and interest is computed in settling the account, " the item never could be sued for " and in substance " is a payment, not a loan."

[1] See *Hutchinson* v. *National Life Ins. Co.,* 196 Mo. App. 510; 195 S.W. 66; *Atlantic Life Ins. Co.* v. *Bender,* 146 Va. 312; 131 S.E. 806; *Gardner* v. *National Life Ins. Co.,* 201 N.C. 716; 161 S.E. 308; *Toncich* v. *Home Life Ins. Co.,* 309 Pa. 336; 163 Atl. 673.

*Id.* The company had no right, without agreement with the insured, to apply a dividend, payable in cash, to the reduction of the advance against the policy.[2]

In the endeavor to support her contention, petitioner refers to a statement and a " cash surrender voucher " sent by the company to the insured under date of July 15, 1931. These papers were submitted for the signature of the insured but were not signed or approved by him. In them, the cash value of the dividend, or $74.80, was added to the cash value of the policy, and the amount of the advances against the policy with interest, together with a " balance on loan " ($81.10) on another policy, were deducted, leaving a " net cash surrender value available " of $4.82. The endeavor to treat this statement and proposed voucher as making the dividend a part of the surrender value is unsuccessful. Not only is this effort opposed to the clear terms of the policy but the papers themselves show that the " cash value " of the dividend was regarded as a separate item. These papers, so far as the present question is concerned, evidence neither an admission nor an agreement.

As there is no ambiguity in the provisions under consideration, there is no occasion for resort to the familiar principle that equivocal words should be construed against the insurer. While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important, to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations.

[2] See *Wagner* v. *Thieriot*, 203 App. Div. 757, 197 N.Y.S. 560; 236 N.Y. 588, 142 N.E.295.

The remaining question is whether a different conclusion as to the interpretation of the policy is required in view of the provision of Article 4732, Revised Civil Statutes of Texas, 1925, quoted in the margin.[3] Petitioner insists that the phrase "dividend additions," as used in the statute, means "dividends." The Circuit Court of Appeals disagreed with this view, holding that "dividend additions" are "paid-up insurance in addition to the face of the policy and purchased with dividends." We think that this construction is correct. It is in accord with the uncontradicted testimony which was given by actuaries upon the trial as to the general understanding of the phrase. It will be observed that the statutory provision refers to the reserve at the date of default on the policy "and on any dividend additions thereto." It thus refers

[3] The provisions of Article 4732 invoked by the petitioner are as follows:

"No policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company organized under the laws of this State, unless the same shall contain provisions substantially as follows: . . .

"7. A provision which, in event of default in premium payments, after premiums shall have been paid for three full years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy, and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one-half per cent of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid, and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances."

to "dividend additions" upon which there would be a reserve, that is, it would seem plainly, to paid-up insurance purchased by dividends, which would require a reserve. We also agree with the Circuit Court of Appeals that the case of *First Texas State Ins. Co.* v. *Smalley,* 111 Tex. 68; 228 S.W. 550, is not to be regarded as a construction of the phrase, as the present question was not before the court. The same is true of the case of *Occidental Life Ins. Co.* v. *Jamora,* 44 S.W. (2d) 808. In *Great Southern Life Ins. Co.* v. *Jones,* 35 F. (2d) 122, relating to a similar statute of Oklahoma, the policy provided for guaranteed "premium reduction coupons" which were fixed liabilities requiring a reserve, and were not dividends in the proper sense as in the instant case. The ruling of the Court of Appeals of Kentucky in *United States Life Ins. Co.* v. *Spinks,* 126 Ky. 405; 96 S.W. 889, 103 *id.* 335, is met by the later decision of the same court in *Jefferson* v. *New York Life Ins. Co.,* 151 Ky. 609, 616, 617; 152 S.W. 780, where the Court held that the words "dividend additions" in the statute of Kentucky "has reference solely to paid-up insurance." See, also, *Mutual Benefit Life Ins. Co.* v. *O'Brien,* 116 S.W. 750. We see no reason for attributing, under the statute of Texas, any other meaning to the terms of the policy in suit than that which would otherwise be regarded as their clear import.

The petition for certiorari in this case directed attention to what was deemed to be a conflict between the decision below and the decisions of other Circuit Courts of Appeals in *Harvey* v. *Union Central Life Ins. Co.,* 45 F. (2d) 78, and *Atlantic Life Ins. Co.* v. *Pharr,* 59 F. (2d) 1024. In the case of *Harvey,* the decision could, and did, rest on the fact that the period of extended insurance, to which the surrender value was applicable according to the provisions of the policy, ran from the effective date of the policy and, as thus calculated, the insurance extended be

yond the date of death. So far as what was said by the court in that case may be regarded as bearing upon the question presented in the instant case, it was, and was stated to be, unnecessary to the decision. In the case of *Pharr,* there were provisions in the policy, quite different from those before us, which were of doubtful meaning. The views expressed by the court may be taken as limited to the facts of the particular case.

The judgment of the Circuit Court of Appeals is

*Affirmed.*

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## HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FALK ET AL., EXECUTORS.

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

No. 225. Argued December 11, 1933.—Decided January 15, 1934.

1. An iron ore mine, the estimated life of which was nine years, while subject to a fourteen year lease providing for royalties, was conveyed to trustees to hold during two lives and twenty-one years, with power to manage, sell, lease, mortgage or otherwise dispose thereof. The deed, without setting up a reserve for depletion, directed that all proceeds (less expenses) be distributed to the beneficiaries. Large sums were collected by the trustees as royalties under the lease and distributed to the beneficiaries. *Held,* the beneficiaries were the owners of the entire economic interest in the mine, and, under the Revenue Acts of 1921, 1924 and 1926 were entitled to an allowance of a deduction for depletion, each in his proportionate share. Distinguishing *Anderson* v. *Wilson,* 289 U.S. 20. Pp. 187, 189.
2. The plain purpose of the Revenue Act of 1921 (and corresponding provisions of the 1924 and 1926 Acts), in respect to income from mining properties, was to tax only that portion of the proceeds remaining after proper allowance for depletion; and the act must be so applied in practice as to carry out that purpose. P. 187.
3. The immunity from taxation granted by the Revenue Acts (since 1913) to the proceeds of mining property to the extent that they represent actual depletion, enures to the beneficial owners of the economic interest. P. 187.

4. Section 219 (b) of the Revenue Act of 1921 (and corresponding sections of the 1924 and 1926 Acts) which directs that where income is to be distributed to the beneficiaries periodically, " the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary," was not intended to impose a tax upon that part of the proceeds which represents the return of capital assets, whenever this has been paid over to the beneficiary. Pp. 188–189.

64 F. (2d) 171, affirmed.

CERTIORARI, 290 U.S. 616, to review a judgment reversing orders of the Board of Tax Appeals, 24 B.T.A. 299, which sustained deficiencies determined by the Commissioner.

*Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs, Mr. Sewall Key,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

*Mr. Charles F. Fawsett,* with whom *Mr. Richard S. Doyle* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Bristol iron ore mine in Michigan, while subject to a fourteen year lease providing for royalties of nineteen cents per ton, was conveyed to three trustees to hold during two lives and twenty-one years with power to manage, sell, lease, mortgage or otherwise dispose thereof. After providing for payment of taxes, expenses, etc., the deed directed:

" Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the Trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the Trustees shall belong to and be

the property of the beneficiaries hereunder to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as the same shall from time to time appear as hereinafter provided."

Respondents are the beneficiaries under the deed and owners of the entire economic interest in the mine. Its life was estimated as nine years. Proper depletion allowance would be 13.255 cents per ton of ore extracted.

During the years 1922 to 1926 the trustees collected large sums as royalties. After deducting expenses they distributed what remained among the beneficiaries. Claims for depletion made by the trustees in their tax returns were disallowed.

Each beneficiary claimed the right to deduct from the total received his proportionate share of the depletion. This, he maintained, was not subject to taxation under the statute. The Commissioner demanded payment reckoned upon the whole amount; and the Board of Tax Appeals accepted his view. The court below thought otherwise and sustained the taxpayers.

There is no substantial dispute concerning the facts. Our decision must turn upon construction of the statute.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 239, 242, 246, 247, imposes a tax upon the net income of property held in trust, §§ 210, 211, 219, and directs that in order to determine this there shall be deducted from gross "in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case." § 214 (a) (10).

Also it requires the fiduciary to make return of the income of the trust, § 219 (b), and provides that whenever income must be distributed to beneficiaries periodically the amounts paid out shall be allowed as an addi-

tional deduction in computing the net income of the trust. In the latter event there shall be included in computing the net income of each beneficiary so much of the income of the trust as he has received. § 219 (e).*

The relevant provisions of the Revenue Acts of 1924 (c. 234, 43 Stat. 253, 269, 272, 275) and 1926 (c. 27, 44 Stat. 9, 26, 28, 32) are substantially the same as those in the Act of 1921.

The argument for the Commissioner is this—The entire proceeds from the working of a mine constitute income within the constitutional provision and may be subjected to taxation without regard to depletion. Here the beneficiary claims deduction for an item subject to taxation as gross income; but no provision in the statute allows him to subtract anything because of depletion.

Moreover, § 219 expressly requires every beneficiary to include in his return the portion of the income of a trust distributed to him. Thus in terms he is subjected to taxation upon the whole of this.

Whatever may be said concerning the power of Congress to treat the entire proceeds of a mine as income, ob-

* Revenue Act, 1921, c. 136, 42 Stat. 227, 247.

Sec. 219 (e). In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

viously this statute has not undertaken so to do. The plain purpose, we think, was to tax only that portion of the proceeds remaining after proper allowance for depletion. This allowance represents property consumed, is treated as if capital assets, and no tax is laid upon it. The statute must be so applied in practice as to carry out this purpose. The intention was that owners of beneficial interests should not be unduly burdened.

Since 1913 all Revenue Acts have left untaxed the proceeds of a mine so far as these represent actual depletion. And this court has often recognized that this immunity enures to the beneficial owners of the economic interest.

*Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370. "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition 'of the product thereof which has been mined and sold during the year for which the return and computation are made.'"

*United States* v. *Ludey*, 274 U.S. 295, 302. "The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment, As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed."

*Murphy Oil Co.* v. *Burnet*, 287 U.S. 299, 302. "We think it no longer open to doubt that when the execution of an oil and gas lease is followed by production of oil, the bonus and royalties paid to the lessor both involve at

least some return of his capital investment in oil in the ground, for which a depletion allowance must be made."

*Palmer* v. *Bender,* 287 U.S. 551, 557. "That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this Court in *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364. . . . But this Court held that regardless of the technical ownership of the ore before severance, the taxpayer, by his lease, had acquired legal control of a valuable economic interest in the ore capable of realization as gross income by the exercise of his mining rights under the lease. Depletion was, therefore, allowed. Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if, by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production."

*Freuler* v. *Helvering, ante,* p. 35, construed § 219. We there said—"Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. . . . But as the tax on the entire net income of the trust is to be paid by the fiduciary or the beneficiaries or partly by each, the beneficiary's share of the income is considered his property from the moment of its receipt by the estate. . . . For the purpose of imposing the tax the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession."

True it is that § 219 (b) directs that in cases of "income which is to be distributed to the beneficiaries periodically,"

. . . " the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary." But we cannot accept the view that this was intended to impose a tax upon that part of the proceeds which represents the return of capital assets, whenever this has been paid over to the beneficiary. In cases like the one before us so to hold would in practice result in taxing allowances for depletion, contrary to what we regard as the plain intent of the statute.

The petitioner relies upon *Anderson* v. *Wilson,* 289 U.S. 20, 26. The conclusion there rests upon the construction of the will. Under it the beneficiaries became entitled to no income until the executors in their discretion should sell the corpus. " What was given to them was the money forthcoming from a sale. . . . Their interest in the corpus was that and nothing more. . . . A shrinkage of values between the creation of the power of sale and its discretionary exercise is a loss to the trust, which may be allowable as a deduction upon a return by the trustees. It is not a loss to a legatee who has received his legacy in full."

Here the governing instrument directed payment to the beneficiaries of the entire proceeds, less expenditures, etc., and the trustees must be regarded as a mere conduit for passing them to the beneficial owners. Part only of the proceeds was subjected to taxation. The other part was left untaxed and remained so in the hands of the beneficiaries.

*Affirmed.*

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

By a trust created by the lessor of a mine, the trustees were authorized to collect the stipulated cash royalties

of 19¢ per ton on ore mined, and to distribute them to the beneficiaries, who are the taxpayers here, without setting up any reserve for depletion of the lessor's capital investment in the mine. The beneficiaries were given no other interest in the trust property or its income. It is not denied that the entire amount thus received by them is income which may be taxed. See *Burnet* v. *Harmel,* 287 U.S. 103, 107, 108; *Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U.S. 308, 310; *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103, 114; cf. *Lynch* v. *Hornby,* 247 U.S. 339. And the tax is imposed on the entire amount received, subject only to such deductions as the statute permits. The sole question to be decided is whether they are entitled to the benefit of the statute authorizing the taxpayer, in computing the tax, to deduct from income " a reasonable allowance for depletion and for depreciation of improvements according to the peculiar conditions in each case."

As the statute permits the deduction only because the allowance represents a return to the taxpayer, in the form of income, for some part of his capital worn away or exhausted in the process of producing the income, see *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299; *Bankers Pocahontas Coal Co.* v. *Burnet, supra; United States* v. *Dakota-Montana Oil Co.,* 288 U.S. 459, it would seem plain that there is no occasion for a depletion allowance, and that the statute authorizes none where as here the taxpayer, a donee of the income, has made no capital investment in the property which has produced it. This was not doubted where the deduction claimed, but denied, was for depreciation, *Weiss* v. *Wiener,* 279 U.S. 333, and it was only because the court concluded that the taxpayer had made a capital investment, represented by the minerals in place, that he was permitted to deduct an allowance for depletion from royalties received from the production of an oil well in *Palmer* v. *Bender,* 287 U.S.

551, and of a mine in *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364. The function of the allowance for depletion as a means of securing to the taxpayer a credit against gross income for so much of his capital investment as is restored from the income does not differ from that for depreciation or obsolescence when allowed as a deduction. See *United States* v. *Ludey*, 274 U.S. 295; *Gambrinus Brewery Co.* v. *Anderson*, 282 U.S. 638; *United States* v. *Dakota-Montana Oil Co., supra.* Legally and economically the statutory allowances for depletion and depreciation stand on the same footing. Both are means of restoring capital invested, the one, in ore, the other, in structures and improvements. Both are allowed by the same language in a single statute. Neither has any function to perform if the taxpayer has made no investment to be restored from income received. The incongruity of allowing the deduction for depletion where the taxpayer has made no capital investment but denying it for depreciation is apparent.

The income here, derived from mining royalties, cannot be said to be a return of the taxpayer's capital because if paid to the lessor it would have restored to him some part of his capital investment. The lessor, by directing that the royalties be distributed to the beneficiaries, cut himself off from the enjoyment of the privilege which the statute gives to restore his capital investment from royalties, and he has denied that privilege to the trustees. The taxpayer may not claim the benefit of a deduction which the statute grants to another, *Dalton* v. *Bowers*, 287 U.S. 404; *Burnet* v. *Clark*, 287 U.S. 410; *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, and the petitioners are in no better position to claim the privilege because the lessor, to whom it was given, has relinquished it.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur in this opinion.

# REYNOLDS, COLLECTOR OF INTERNAL REVENUE, *v.* RICHARD F. COOPER.*

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

No. 227. Argued December 11, 1933.—Decided January 15, 1934.

Decided upon the authority of *Helvering* v. *Falk, ante,* p. 183. 64 F. (2d) 644, affirmed.

WRITS of certiorari, 290 U.S. 616, to review judgments affirming recoveries by taxpayers in three suits against the collector, which were tried together in the District Court and on appeal.

*Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs, Mr. Sewall Key,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

*Mr. N. E. Corthell,* with whom *Mr. A. W. McCollough* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In each of these causes a beneficiary received from trustees royalties arising from a lease of oil and gas lands in Wyoming. Taxes were exacted upon the full amounts so received. Separate suits were brought to recover proper allowances for depletion. The respondents prevailed in both of the courts below. Here the causes were heard together.

* Together with No. 228, *Reynolds, Collector of Internal Revenue,* v. *Barbara V. Cooper,* and No. 229, *Reynolds, Collector of Internal Revenue,* v. *Richard F. Cooper et al.,* certiorari to the Circuit Court of Appeals for the Tenth Circuit.

The Solicitor General says—" The question is identical with that raised in *Helvering* v. *Falk,* No. 225, October Term, 1933, and the argument made in the Government's brief in that case is likewise applicable here. . . . There is therefore substantially no difference between the position of the beneficiaries in this case and the *Falk* case."

The judgments below are affirmed upon authority of *Helvering* v. *Falk,* decided this day, *ante,* p. 183.

*Affirmed.*

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO think that these cases are to be distinguished from No. 225, *Helvering* v. *Falk,* just decided, because of the nature of the duties imposed upon the trustees, and of the remainder interest granted to the beneficiaries by the trust instrument presently involved, and accordingly concur in the result.

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## BROWN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

No. 187. Argued December 13, 14, 1933.—Decided January 15, 1934.

A general agent of fire insurance companies received " overriding commissions " on the business written each year, subject however to the contingent liability that when any of the policies was canceled before its term had run, a part of the commission thereon, proportionate to the premium money repaid the policyholder, must be charged against the agent in favor of the company. In his accounts and income tax returns involved in this case, he deducted from the accrued commissions of each year a sum entered in a reserve account to represent that part of them which, according to the experience of earlier years, would be returnable because of cancellations. *Held:*

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1. That the deductions were not "expenses paid or incurred" in the taxable years. Section 214, Revenue Acts of 1921, 1924, and 1926. P. 198.

2. Although a liability accrued may be treated as an expense incurred, a contingent liability is not an accrued liability unless so designated specifically by statute. P. 200.

3. The reserve set up is not akin to the reserves required of insurance companies, nor is it to be classed with the reserves voluntarily established as a matter of conservative accounting which are specifically authorized by the Revenue Acts. P. 201.

4. Under § 212 (b), it was within the discretion of the Commissioner to require the taxpayer to adhere to a method of accounting previously used in the business—deduction of the return commissions accrued during the tax year from the "overriding commissions" accrued during that year,—if in the Commissioner's opinion the older method would more clearly reflect the net income. P. 202.

5. It was likewise within the province of the Commissioner to reject an alternative method proposed by the taxpayer, viz, a prorating of the overriding commissions over the lives of the policies and deduction of return commissions as they accrued. P. 203.

63 F. (2d) 66, affirmed.

CERTIORARI, 290 U.S. 607, to review the affirmance, on appeal, of an order of the Board of Tax Appeals (22 B.T.A. 678), sustaining three deficiency assessments of income taxes.

*Mr. Arthur B. Dunne,* with whom *Mr. Lloyd M. Robbins* was on the brief, for petitioner.

*Solicitor General Biggs,* with whom *Messrs. Sewall Key, J. P. Jackson,* and *H. Brian Holland* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

An unincorporated concern known as Edward Brown & Sons, of San Francisco, has since 1896 acted as Pacific

Coast General Agent for fire insurance companies.[1] In 1923, Arthur M. Brown conducted the concern alone. In 1925 and 1926, he and his son Arthur M. Brown, Jr. conducted it as partners. The general agent receives as compensation from its principals, among other things, a so-called " overriding commission " on the net premiums derived from business written through the local agents. The question for decision is, how the income of the petitioner, Arthur M. Brown, derived from overriding commissions during the years 1923, 1925 and 1926 should be calculated for purposes of the federal income tax. The Commissioner of Internal Revenue held that in determining income, the gross overriding commissions on business written during the year should not be subjected to any deduction on account of cancellations expected to occur in later years. The taxpayer contends that either the gross overriding commissions should be subjected to such a deduction or that parts of the gross overriding commissions should be allocated as earnings of future years.

[1] The duties required of and performed by the general agent are described by the Board of Tax Appeals as follows [22 B.T.A. 681]: " The firm appointed and removed local agents; accepted service of process; adjusted losses under policies; received and acknowledged service of proof of loss; issued, countersigned and canceled policies; received and receipted for premiums, surveyed all risks offered and accepted or rejected the same; represented its principals on the Pacific Board of Fire Underwriters; computed and paid commissions due local agents; ceded or reinsured certain lines of business with treaty or other companies; computed and paid return premiums on canceled policies; secured return of premium on canceled reinsurance; rendered all reports required of its principals by the authorities of political subdivisions in the territory in which it operated; attended to the payment of all license fees and taxes; furnished all necessary printed matter, except policy blanks, to local agents; transferred insurance by endorsement, determined whether its principals should participate in special pools; and generally attended to all the affairs of its principals in the territory in which it operated."

The term net premium as used in providing for overriding commissions, means the gross premium on the business written less the return premium and the net cost of any reinsurance. Fire insurance policies are written for periods of one, three or five years, with the right of cancellation by either party at stipulated rates of premium return. Premiums being payable in advance (subject to the 60 day grace period), a return premium is paid to the policyholder in case of cancellation; and the general agent who receives the premium pays the return premium. The company writing a policy frequently reinsures in another company a part of its contingent liability; and the general agent, who makes the payments for reinsurance, receives, in case of cancellation, a return of a proportionate part of the cost of the cancelled reinsurance. The general agent makes to each principal remittances on monthly balances, crediting itself among other things, with the overriding commissions on premiums receivable, with the return premiums paid and with the net amount paid for reinsurance; and charging itself, among other things, with a proportionate part of any overriding commissions previously credited in respect of any business which has been cancelled during the month. Thus, whenever there is a cancellation and a return or credit of a portion of the premium and of the cost of any reinsurance, the general agent returns to the company or charges itself with a corresponding portion of the overriding commission.

Prior to 1923, overriding commissions on new business were accounted income of the year in which the business was written; and refunds of overriding commission on account of cancellations were accounted expenses of the year of cancellation. The books of the general agent have at all times been kept on the accrual basis. Although no change was made in the method of accounting between the general agent and its principals, there was

set up on the books of the concern at the close of 1923, for the first time, a liability account entitled "Return Commission." In it was recorded an estimate of the liability expected to arise out of the general agent's obligations to refund to the companies a proportionate part of the overriding commission received because of cancellations which it was expected would occur in future years. The estimate was based on the experience of the preceding five years. Thus, on the books, the year's income from overriding commissions was reduced by the amount of refunds which, it was estimated, would have to be made in future years. This changed method of accounting has been followed ever since; and the difference in the method of calculating the general agent's income has been reflected in the returns made by Brown of his taxable income.

The ratio of cancellations to premiums receivable having been 22.38 per cent. for the five years ending in 1923, the gross income from overriding commissions on business written in 1923, amounting to $236,693.31, was subjected on the books to a deduction of $52,971.96; and this amount was credited to the "Return Commission" account. Similarly, at the close of each of the years 1924, 1925 and 1926 the credit balance in the "Return Commission" account was adjusted so that it bore the same relation to the overriding commissions on business written during the year as the total fire insurance premiums cancelled in the preceding five-year period bore to the gross premiums on business written during those years. The ratio of cancellations for the five years ending in 1925 having been 21.55 per cent., and the total overriding commissions $244,597.88, a deduction of $3,292.98 was made, representing the net addition to the "Return Commission" account in 1925. The ratio of cancellations to premiums for the five-year period ending in 1926 having been 21.13 per cent., and the total overriding com-

missions $258,677.57, a deduction was made of $1,947.77 representing the net addition to the "Return Commission" account in 1926.[2]

In making his federal income tax return for the year 1923, 1925 and 1926, Brown claimed as deductions the benefit of the credits so made to the "Return Commission" account. The Commissioner of Internal Revenue disallowed these deductions; and accordingly assessed to Brown for 1923 a deficiency of $17,923.03; for 1925 a deficiency of $1,520.19; and for 1926 a deficiency of $944.30.[3] The Commissioner's determinations were sustained by the Board of Tax Appeals, 22 B.T.A. 678; and its order was affirmed by the Circuit Court of Appeals. 63 F. (2d) 66. Certiorari was granted by this Court because of alleged conflict with the decision of Circuit Court of Appeals for the Fourth Circuit in *Virginia-Lincoln Furniture Corp.* v. *Commissioner of Internal Revenue,* 56 F. (2d) 1028, and other cases.

*First.* The Commissioner properly disallowed the deductions on account of the credits to the "Return Com-

[2] For the year 1923, the deduction of $52,971.96, the entire amount set up as a reserve, is in dispute. Similar figures were set up for the years 1924, 1925, and 1926; but actual cancellations for each of these later years were charged not against overriding commissions, but against the return commission account as set up and carried over from the preceding year. Thus the amount in dispute for each of the years 1925 and 1926 is not the entire deduction from overriding commissions as made by the general agent, but the difference between that figure and the amounts charged to the "Return Commission" account; or, in other words, the net adjustment or addition to the account. (There was no addition for 1924.)

Judge Wilbur concurred specially below taking the ground, among others, that the result of this method was a claim in 1923 for deductions both of the entire reserve and of actual cancellations during the year.

[3] The amount of the deficiency for each year was affected by an additional claim as a deduction of $3,000 which was disallowed. It is not here in question.

mission" account. Under the Revenue Acts taxable income is computed for annual periods. If the accounts are kept on the accrual basis the income is to be accounted for in the year in which it is realized even if not then actually received; and the deductions are to be taken in the year in which the deductible items are incurred. What is taxable as income is provided by the Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 239.[4] Section 212 (a) declares "That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214." Section 214 (a) declares "That in computing net income 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." The only relevant deductions allowable by law are those provided for in § 214; and the burden rests upon the taxpayer to show that he was entitled to the deduction claimed. *Reinecke* v. *Spalding,* 280 U.S. 227, 232.

The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income. Compare *American National Co.* v. *United States,* 274 U.S. 99. When received, the general agent's right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment. Compare *North American Oil Consolidated* v. *Burnet,* 286 U.S.

[4] Sections 212, 213 and 214 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 267–270, and the corresponding sections of the Revenue Act of 1926, c. 27, 44 Stat. 9, 23–27, contain provisions identical with those quoted above, except that § 206 of those acts is also referred to as defining deductions.

417, 424.[5] The refunds during the tax year of those portions of the overriding commissions which represented cancellations during the tax year had, prior to the tax return for 1923, always been claimed as deductions; and they were apparently allowed as "necessary expenses paid or incurred during the taxable year." The right to such deductions is not now questioned. Those which the taxpayer claims now are of a very different character. They are obviously not "expenses paid during the taxable year." They are bookkeeping charges representing credits to a reserve account.

These charges on account of credits to the "Return Commission" reserve account are claimed as deductions on the ground that they are expenses "incurred," "during the taxable year." It is true that where a liability has "accrued during the taxable year" it may be treated as an expense incurred; and hence as the basis for a deduction, although payment is not presently due, *United States* v. *Anderson,* 269 U.S. 422, 440, 441; *American National Co.* v. *United States,* 274 U.S. 99; *Aluminum Castings Co.* v. *Routzahn,* 282 U.S. 92; and although the amount of the liability has not been definitely ascertained. *United States* v. *Anderson, supra.*[6] Compare *Continental Tie & Lumber Co.* v. *United States,* 286 U.S. 290, 296. But no liability accrues during the taxable year on account of cancellations which it is expected may occur in future years, since the events necessary to create the liability do not occur during the taxable year. Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent. *Weiss* v. *Wiener,* 279 U.S. 333, 335; *Lucas* v. *American Code Co.,* 280 U.S. 445, 450, 452; compare *New York Life Ins. Co.*

[5] See also *Vang* v. *Lewellyn,* 35 F. (2d) 283.

[6] See also *Uncasville Mfg. Co.* v. *Commissioner,* 55 F. (2d) 893, 895; *Ocean Accident & Guarantee Corp.* v. *Commissioner,* 47 F. (2d) 582. Compare *Commissioner* v. *Old Dominion S.S. Co.,* 47 F. (2d) 148.

v. *Edwards,* 271 U.S. 109, 116; *Ewing Thomas Co.* v. *McCaughn,* 43 F. (2d) 503; *Highland Milk Condensing Co.* v. *Phillips,* 34 F. (2d) 777.

The liability of Edward Brown & Sons arising from expected future concellations was not deductible from gross income because it was not fixed and absolute. In respect to no particular policy written within the year could it be known that it would be cancelled in a future year. Nor could it be known that a definite percentage of all the policies will be cancelled in the future years. Experience taught that there is a strong probability that many of the policies written during the taxable year will be so cancelled. But experience taught also that we are not dealing here with certainties. This is shown by the variations in the percentages in the several five-year periods of the aggregate of refunds to the aggregate of overriding commissions.[7]

Brown argues that since insurance companies are allowed to deduct reserves for unearned premiums which may have to be refunded, he should be allowed to make the deductions claimed as being similar in character. The simple answer is that the general agent is not an insurance company; and that the deductions allowed for additions to the reserves of insurance companies are technical in character and are specifically provided for in the Revenue Acts. These technical reserves are required to be made by the insurance laws of the several States. See *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 350; *United States* v. *Boston Ins. Co.,* 269 U.S. 197; *New York Life Ins. Co.* v. *Edwards,* 271 U.S. 109. The "Return Commission" reserve here in question was voluntarily established. Only a few reserves voluntarily established

[7] The taxpayer testified: From my experience in the insurance business, I would say that approximately the general ratio of cancellations to business written, depending on the year, runs between 20% and 25%.

as a matter of conservative accounting are authorized by the Revenue Acts. Section 214 mentions only the reserve for bad debts (in the discretion of the Commissioner), provided for in paragraph 7; those for depreciation and depletion, provided for in paragraphs 8 and 10; and the special provision concerning future expenses in connection with casual sales of real property, provided for in paragraph 11 of § 214 as amended by the Revenue Act of 1926. 26 U.S.C. § 955. Many reserves set up by prudent business men are not allowable as deductions. See *Lucas* v. *American Code Co.*, 280 U.S. 445, 452.[8]

Brown argues also that the Revenue Acts required him to make his return "in accordance with the method of accounting regularly employed in keeping the books";[9] and that in making the deductions based on the credits to "Return Commission" account, he complied with this requirement. The Commissioner's oft-quoted[10] instruction of January 8, 1917 (No. 2433, 19 Treas. Dec. Int. Rev. 5) is relied upon:

"In cases wherein, pursuant to the consistent practice of accounting of the corporation . . . corporations set up and maintain reserves to meet liabilities, the amount of which and the date of payment or maturity of which is not definitely determined or determinable at the time the liability is incurred, it will be permissible for the corpora-

[8] Compare *Barde Steel Products Corp.* v. *Commissioner*, 40 F. (2d) 412, 416; *Spring Canyon Coal Co.* v. *Commissioner*, 43 F. (2d) 78.

[9] Section 212 (b). The net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if . . . the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commission does clearly reflect the income.

[10] *United States* v. *Anderson*, 269 U.S. 422; *American National Co.* v. *United States*, 274 U.S. 99, 101; *Niles Bement Pond Co.* v. *United States*, 281 U.S. 357, 359; *Aluminum Castings Co.* v. *Routzahn*, 282 U.S. 92, 98.

tions to deduct from their gross income the amounts credited to such reserves each year, provided that the amounts deductible on account of the reserve shall approximate as nearly as can be determined the actual amounts which experience has demonstrated would be necessary to discharge the liabilities incurred during the year and for the payment of which additions to the reserves were made."

The accrual method of accounting had been regularly employed by Edward Brown & Sons before 1923, but no "Return Commission" account had been set up. Moreover, the method employed by the taxpayer is never conclusive. If in the opinion of the Commissioner it does not clearly reflect the income, "the computation shall be made upon such basis and in such manner," as will, in his opinion, do so. *United States* v. *Anderson,* 269 U.S. 422, 439; *Lucas* v. *American Code Co.,* 280 U.S. 445, 449; *Lucas* v. *Ox Fibre Brush Co.,* 281 U.S. 115, 120; compare *Williamsport Wire Rope Co.* v. *United States,* 277 U.S. 551; *Lucas* v. *Structural Steel Co.,* 281 U.S. 264.[11] In assessing the deficiencies, the Commissioner required in effect that the taxpayer continue to follow the method of accounting which had been in use prior to the change made in 1923. To so require was within his administrative discretion; compare *Bent* v. *Commissioner,* 56 F. (2d) 99.

*Second.* The Board of Tax Appeals did not err in refusing to allocate to future years part of the overriding commissions on business written during the taxable year. Brown urges that the overriding commission is compensation for services rendered throughout the life of the policy; that the compensation to be rendered in later years cannot be considered as earned until the required services have been performed; and that the Revenue Acts con-

[11] See also *Industrial Lumber Co.* v. *Commissioner,* 58 F. (2d) 123; *Jennings* v. *Commissioner,* 59 F. (2d) 32.

template that where books are kept on the accrual basis, the income shall be accounted for as it is earned. He suggests, therefore, as an alternative method of ascertaining the income, that the commissions on each year's writing be prorated over the life of the policies.

Under this alternative proposal, the practice of making deductions prevailing prior to 1923 would remain unchanged; but the method of ascertaining the gross income of the taxable year would be subjected to a far-reaching change. The proposal is that all policies be deemed to have been written on July 1; that of the overriding commission on one-year policies, one-half should be returned as income of the year in which the policy was written, the other half as income of the next year; that of the commissions on three-year policies, one-sixth should be returned as income of the year in which the policy was written, one-third as the income of each of the next two years and one-sixth as income of the fourth year; and that the commission on five-year policies, one-tenth should be returned as income of the first year, one-fifth as income of each of the next four years, and one-tenth as income of the sixth year.

This proposed alternative method of computing the income from overriding commissions was not employed by Edward Brown & Sons either before or after 1923. Moreover, the Board concluded that there "is no proof that the overriding commissions contain any element of compensation for services to be rendered in future years." The whole of the overriding commissions has at all times been treated as income of the year in which the policy was written. The Commissioner was of opinion that the method of accounting consistently applied prior to 1923 accurately reflected the income. He was vested with a wide discretion in deciding whether to permit or to forbid a change. Compare *Bent* v. *Commissioner,* 56 F. (2d) 99. It is not the province of the court to weigh and determine

the relative merits of systems of accounting. *Lucas* v. *American Code Co.,* 280 U.S. 445, 449.

The deductions here claimed, not being authorized specifically either by the Revenue Acts, or by any regulation applying them, were properly disallowed. So far as the decision in *Virginia-Lincoln Furniture Corp.* v. *Commissioner,* 56 F. (2d) 1028, may be inconsistent with this opinion, it is disapproved.

*Affirmed.*

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## MOORE *v.* CHESAPEAKE & OHIO RAILWAY CO.

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

No. 173. Argued January 10, 11, 1934.—Decided February 5, 1934.

1. The jurisdiction of the District Court is to be determined by the allegations of the complaint. P. 210.
2. The Federal Employers' Liability Act, in providing that the employee shall not be held guilty of contributory negligence, nor to have assumed the risk, in any case under it where violation by the carrier of "any statute enacted for the safety of employees" contributed to the injury or death, embraces the Federal Safety Appliance Acts. P. 210.
3. The Federal Employers' Liability Act and Safety Appliance Acts are *in pari materia;* and an action under the former in connection with the latter may be brought in the federal court of a district in which the carrier is doing business. P. 211.
4. A state statute prescribing the liability of common carriers for negligence causing injuries to employees while engaged in intrastate commerce provided that no employee should be held guilty of contributory negligence, or to have assumed the risk, in any case where violation by the carrier "of any statute, state or federal, enacted for the safety of employees" contributed to the injury. *Held:*

   (1) That the provisions of the Federal Safety Appliance Acts for the safety of employees are in effect read into the state law. P. 212.

(2) An action under the state statute against an interstate railroad for personal injuries suffered by an employee while engaged in intrastate commerce and caused by a violation of the Federal Safety Appliance Acts, is not an action arising under the laws of the United States, and, diversity of citizenship being present, may be brought in the federal court in the district of the plaintiff's residence. Jud. Code, § 51; 28 U.S.C., § 112. P. 211.

5. The Federal Safety Appliance Acts embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce, and the duty to protect employees by the appliances prescribed exists even where the vehicle and employee are engaged, at the time of his injury, in intrastate commerce. P. 213.
6. Questions relating to the scope or construction of the Federal Safety Appliance Acts arising in actions in state courts for injuries sustained by employees in intrastate commerce, are federal questions reviewable by this Court. P. 214.
7. Where the Circuit Court of Appeals has erroneously reversed a judgment upon the ground that jurisdiction was wanting, the case will be remanded to it for consideration of the other questions presented. P. 217.

64 F. (2d) 472, reversed.

CERTIORARI, 290 U.S. 613, to review the reversal of a judgment for damages in an action for personal injuries.

*Mr. Edward Davidson,* with whom *Mr. John P. Bramhall* was on the brief, for petitioner.

*Mr. Albert H. Cole* for respondent.

The Safety Appliance Acts give to an employee, injured as a result of their violation, a right of action for the injuries sustained. *San Antonio R. Co.* v. *Wagner,* 241 U.S. 475, 484; *Texas & Pac. Ry. Co.* v. *Rigsby,* 241 U.S. 33, 39; *Central Vermont Ry. Co.* v. *Perry,* 10 F. (2d) 132, 133; *Director General* v. *Ronald,* 265 Fed. 128, 147.

The right of action necessarily arises out of those Acts, and jurisdiction to hear and determine it is conferred upon the federal district courts by 28 U.S.C., § 41 (Jud. Code, § 24), which provides that they shall have original

jurisdiction of suits arising under the laws of the United States.

The second paragraph of complaint, by expressly alleging that the action was brought under the Act of Congress commonly known as the Safety Appliance Acts and by seeking a recovery on no grounds other than an alleged violation of those Acts, clearly invoked the jurisdiction of the federal court on the ground that the action was a suit of a civil nature arising under a law of the United States.

Where an action is within the general jurisdiction of the federal courts, both upon the ground of diversity of citizenship and because founded on a law of the United States, it can be brought only in the district of which the defendant is an inhabitant.

The allegation that the action is under the Employers' Liability Act of Kentucky, as well as under the Federal Safety Appliance Acts, does not bear upon the jurisdictional question. In order that federal jurisdiction may attach to a suit arising under a law of the United States it is in nowise essential that it shall be based solely on federal law unaffected by the common or the statutory law of the State. *Union Pacific R. Co.* v. *Myers,* 115 U.S. 1; *Osborn* v. *United States Bank,* 9 Wheat. 738; *Nashville* v. *Cooper,* 6 Wall. 247. See also *New Orleans, N. & T. R. Co.* v. *Mississippi,* 102 U.S. 135; *Cohens* v. *Virginia,* 6 Wheat. 264; *Tennessee* v. *Davis,* 100 U.S. 257.

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

Petitioner brought this action in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover for injuries which he sustained on November 29, 1930, in the course of his employment by respondent, an interstate carrier, in its yard

at Russell, Kentucky. In his complaint he set forth two "paragraphs" or counts, both being for the same injuries. In the first paragraph, petitioner alleged that at the time of the injuries he was employed in interstate commerce and that he brought the action under the Acts of Congress known as the Federal Employers' Liability Act [1] and the Safety Appliance Acts,[2] and the rules and orders which the Interstate Commerce Commission had promulgated under the latter.[3] In the second paragraph, he alleged that at the time of the injuries he was employed in intrastate commerce and he invoked the Safety Appliance Acts enacted by the Congress, and the rules and orders of the Interstate Commerce Commission thereunder, and the Employers' Liability Act of Kentucky. The provisions of the laws of Kentucky which were alleged to govern the rights of the parties at the time and place in question were set forth.[4] In each count petitioner stated that the injuries were received while he was engaged as a switchman in attempting to uncouple certain freight cars and were due to a defective uncoupling lever.

Objections to the jurisdiction of the District Court as to each count were raised by plea in abatement. They were overruled and petitioner had a general verdict. The judgment, entered accordingly, was reversed by the Circuit Court of Appeals upon the ground that the District Court was without jurisdiction to entertain the case upon

[1] Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U.S.C. §§ 51 *et seq.*; Act of April 5, 1910, c. 143, 36 Stat. 291, 45 U.S.C. § 56.

[2] Acts of March 2, 1893, c. 196, 27 Stat. 531, 45 U.S.C. §§ 1 *et seq.*; April 1, 1896, c. 87, 29 Stat. 85, 45 U.S.C. § 6; March 2, 1903, c. 976, 32 Stat. 943, 45 U.S.C. §§ 8, 9, 10; April 14, 1910, c. 160, 36 Stat. 298, 45 U.S.C. §§ 11 *et seq.*

[3] Order of March 13, 1911; Roberts' Federal Liabilities of Carriers, Vol. 2, pp. 2010, 2016.

[4] Ky. Acts, 1918, c. 52, §§ 1–3, p. 153; Carroll's Ky. Statutes, §§ 820 b–1, 820 b–2, 820 b–3.

either count. 64 F. (2d) 472. This Court granted certiorari.

Distinct questions are presented with respect to each count and they will be considered separately.

*First.* By the first paragraph, the jurisdiction of the Federal court was rested upon the sole ground that the injury had been sustained during petitioner's employment in interstate commerce and that the cause of action arose under the pertinent Federal legislation. To support the jurisdiction of the District Court for the Northern District of Indiana, the complaint alleged that respondent was engaged in business in that district at the time of the commencement of the action. Respondent's challenge to the jurisdiction was upon the grounds (1) that at the time of the injuries petitioner was not employed in interstate commerce and hence the action would not lie under the Federal Employers' Liability Act, and (2) that respondent was a corporation organized under the laws of Virginia and an inhabitant of the Eastern District of Virginia, and hence, so far as the action rested upon the Safety Appliance Acts of Congress, and the rules and orders of the Interstate Commerce Commission, it could not be brought in a Federal court in any district other than the Eastern District of Virginia. Jud. Code, § 51; 28 U.S.C. § 112.

Petitioner's demurrer to the plea in abatement as to the first cause of action was sustained by the trial court. That court pointed out that the plea did not deny that respondent was doing business within the Northern District of Indiana and that the pleading, in substance, went to the merits. The Circuit Court of Appeals took a different view, holding that so far as petitioner relied upon a violation of the Safety Appliance Acts, the action must be brought in the district of respondent's residence. In reversing the judgment, the Circuit Court of Appeals re-

manded the cause with instructions to grant permission to petitioner to amend his first paragraph to conform exclusively to the theory of a violation of the Federal Employers' Liability Act.

This ruling of the appellate court cannot be sustained. The jurisdiction of the District Court is to be determined by the allegations of the complaint. *Mosher* v. *Phoenix,* 287 U.S. 29, 30; *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105. These allegations clearly set forth, in the first paragraph, a cause of action under the Federal Employers' Liability Act. Every essential ingredient of such a cause of action was appropriately alleged. The Federal Employers' Liability Act expressly recognized that in an action brought under its provisions the question of a violation of the Safety Appliance Acts might be presented and determined. This is the unmistakable effect of the provisions that, in such an action, the employee shall not be held " to have been guilty of contributory negligence," or " to have assumed the risks of his employment " in any case " where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Act of April 22, 1908, §§ 3, 4, 45 U.S.C. §§ 53, 54. By the phrase " any statute enacted for the safety of employees " the Congress evidently intended to embrace its Safety Appliance Acts. *Seaboard Air Line Ry.* v. *Horton,* 233 U.S. 492, 503. This Court has said that the statutes are *in pari materia* and that " where the Employers' Liability Act refers to ' any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as ' negligence '—what is sometimes called negligence *per se.*" *San Antonio & Aransas Pass Ry. Co.* v. *Wagner,* 241 U.S. 476, 484. Where an employee of an interstate carrier sustains injuries while employed in the interstate commerce of the carrier, his action

may thus be brought under the Federal Employers' Liability Act in connection with the Safety Appliance Acts.[5]

Under the Federal Employers' Liability Act an action may be brought " in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. It follows that, upon the allegations of the complaint, the action on the claim set forth in the first paragraph was properly brought in the District Court for the Northern District of Indiana where respondent was doing business when the action was begun.

*Second.* In the second paragraph of the complaint, which treated the injuries as received in intrastate commerce, diversity of citizenship was alleged; that petitioner was a citizen of Indiana, and a resident of the city of Fort Wayne in that State, and that respondent was a citizen of Virginia doing business in Indiana. The plea in abatement, admitting respondent's citizenship in Virginia, denied that petitioner was a resident of Fort Wayne or of the Northern District of Indiana, or was a citizen of that State, and alleged that as the cause of action set forth in the second paragraph arose under the Federal Safety Appliance Acts, the action could not be brought

[5] See *Southern Ry. Co.* v. *Crockett,* 234 U.S. 725, 727; *St. Louis & San Francisco R. Co.* v. *Conarty,* 238 U.S. 243, 248; *Great Northern Ry. Co.* v. *Otos,* 239 U.S. 349, 350; *San Antonio & Aransas Pass Ry. Co.* v. *Wagner,* 241 U.S. 476, 484; *Spokane & I. E. R. Co.* v. *Campbell,* 241 U.S. 497, 498; *Atlantic City R. Co.* v. *Parker,* 242 U.S. 56, 58; *St. Joseph & G. I. Ry. Co.* v. *Moore,* 243 U.S. 311, 312; *Minneapolis & St. Louis R. Co.* v. *Gotschall,* 244 U.S. 66; *Great Northern Ry. Co.* v. *Donaldson,* 246 U.S. 121, 124; *Davis* v. *Wolfe,* 263 U.S. 239, 240; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U.S. 521, 528; *Chicago Great Western R. Co.* v. *Schendel,* 267 U.S. 287, 289; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Goneau,* 269 U.S. 406, 407.

in any district other than the Eastern District of Virginia. The District Court took evidence on the issue of fact, found that the petitioner was a citizen of Indiana and a resident of Fort Wayne, and overruled the plea. The Circuit Court of Appeals held that the District Court of the Northern District of Indiana was without jurisdiction, in the view that the second count attempted to set forth a cause of action " under the Federal Safety Appliance Act as well as under the statutes of Kentucky " and hence that jurisdiction did not rest solely on diversity of citizenship. Jud. Code, § 51, 28 U.S.C. § 112. In remanding the cause, the Circuit Court of Appeals directed that petitioner be allowed to amend the second paragraph of his complaint so as to conform exclusively to the theory of a violation of the Kentucky statute.

While invoking, in the second count, the Safety Appliance Acts, petitioner fully set forth and relied upon the laws of the State of Kentucky where the cause of action arose. In relation to injuries received in that State in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. *Slater* v. *Mexican National R. Co.*, 194 U.S. 120, 126; *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 478; *Young* v. *Masci*, 289 U.S. 253, 258; *Ormsby* v. *Chase*, 290 U.S. 387. The statute of Kentucky, in prescribing the liability of common carriers for negligence causing injuries to employees while engaged in intrastate commerce, reproduced in substance, and with almost literal exactness, the corresponding provisions of the Federal Employers' Liability Act as to injuries received in interstate commerce. Ky. Acts, 1918, c. 52, §§ 1–3, p. 153; Carroll's Ky. Statutes, 1930, §§ 820 b–1, 820 b–2, 820 b–3. The Kentucky Act provided that no employee should be held " to have been guilty of contributory negligence " or " to have assumed the risk of his employment " in any case " where the violation by

such common carrier of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee." *Id.* The Kentucky legislature read into its statute the provisions of statutes both state and federal which were enacted for the safety of employees, and the Federal Safety Appliance Acts were manifestly embraced in this description. *Louisville & Nashville R. Co.* v. *Layton,* 243 U.S. 617, 619. Thus, the second count of the complaint, in invoking the Federal Safety Appliance Acts, while declaring on the Kentucky Employers' Liability Act, cannot be regarded as setting up a claim which lay outside the purview of the state statute. As in the analogous case under the Federal Employers' Liability Act, a violation of the acts for the safety of employees was to constitute negligence *per se* in applying the state statute and was to furnish the ground for precluding the defense of contributory negligence as well as that of assumption of risk.

The Circuit Court of Appeals took the view that if it were assumed that the second count was based exclusively upon the Kentucky statute, that statute and the federal requirements could not be considered as being *in pari materia* because the latter applied only to interstate commerce, and that, if the petitioner were permitted to establish the negligence required by the state statute by showing the violation of the federal requirements the court would thereby be placed " in the anomalous position of extending the benefits of the Safety Appliance Act to intrastate commerce."

This is an erroneous view. The original Safety Appliance Act of March 2, 1893, 27 Stat. 531, did not embrace all cars on the lines of interstate carriers but only those engaged in interstate commerce. *Brinkmeier* v. *Missouri Pacific Ry. Co.,* 224 U.S. 268. By the amending Act of March 2, 1903, 32 Stat. 943, the scope of the statute was enlarged so as to include all cars " used on any railroad

engaged in interstate commerce." The statute as amended was intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce. *Southern Ry. Co.* v. *United States,* 222 U.S. 20. With respect to such vehicles, the duty to protect employees by the prescribed safety appliances exists even though the vehicles and the employee injured through the failure to provide such protection are at the time engaged in intrastate commerce. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33; *Louisville & Nashville R. Co.* v. *Layton, supra.* The Federal Act in its application to such a case is thus *in pari materia* with the statute of Kentucky which prescribes the liability of carriers for injuries to employees while employed in intrastate commerce and which, in effect, reads into the provisions of the statute the requirements of the Federal Act for the safety of employees. There apears to be no anomaly in enforcing the state law with this defined content.

The Federal Safety Appliance Acts prescribed duties, and injured employees are entitled to recover for injuries sustained through the breach of these duties. *Johnson* v. *Southern Pacific Co.,* 196 U.S. 1; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281; *Texas & Pacific Ry. Co.* v. *Rigsby, supra.* Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor, supra; Louisville & Nashville R. Co. v. Layton, supra.* But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the

federal court in the absence of diversity of citizenship. The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original Act of 1893 made no provision for suits, except for penalties. That Act did impliedly recognize the employee's right of action by providing in § 8 that he should not be deemed to have assumed the risk of injury occasioned by the breach of duty. But the Act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 220 U.S. 590; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar*, 237 U.S. 369, 371, 372. In these respects the amended Act of 1903 made no change, notwithstanding the enlargement of the scope of the statutory requirements. The Act of 1910, by a proviso in § 4 relating to penalties (36 Stat. 299), provided that nothing in that section should "be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee" caused by the use of the prohibited equipment.

The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (*Texas & Pacific R. Co.* v. *Rigsby, supra,* at pp. 39, 40[6]) and was left to be enforced accordingly, or, in case of the death of

[6] In *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, the action was brought in the state court and was removed to the federal court upon the ground that the defendant was a federal corporation.

the injured employee, according to the applicable statute.[7] *St. Louis, I. M. & S. Ry. Co.* v. *Taylor, supra,* at p. 285; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar, supra.* When the Federal Employers' Liability Act was enacted, it drew to itself the right of action for injuries or death of the employees within its purview who were engaged in interstate commerce, including those cases in which injuries were due to a violation of the Safety Appliance Acts. Such an action must be brought as prescribed in the Federal Employers' Liability Act, and if brought in the state court, it cannot be removed to the federal court, although violation of the Safety Appliance Acts is involved. See *St. Joseph & G. I. Ry. Co.* v. *Moore,* 243 U.S. 311. With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts precluded the State from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this Court said in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar, supra,* as to an action for injuries sustained in intrastate commerce: "The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the

[7] In *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 285, the Court said: "The accident by which the plaintiff's intestate lost his life occurred in the Indian Territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the Territory, and was enforced in the courts of Arkansas." The question whether the action was triable in those courts was held not to present a federal question, but the question as to the interpretation of the Safety Appliance Act of 1893 did present the federal question which was reviewed by this Court.

plaintiff to recover was left to be determined by the law of the State."

We are of the opinion that the second paragraph of the complaint set forth a cause of action under the Kentucky statute and, as to this cause of action, the suit is not to be regarded as one arising under the laws of the United States. In view of the diversity of citizenship and the residence of petitioner, the District Court of the Northern District of Indiana had jurisdiction.

As the Circuit Court of Appeals did not consider any questions save those relating to the jurisdiction of the District Court, the judgment of the Circuit Court of Appeals will be reversed and the cause remanded to that court with directions to consider such other questions as may be presented by the appeal.

*Reversed.*

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## UNITED STATES v. CHAMBERS ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

No. 659. Argued January 16, 17, 1934.—Decided February 5, 1934.

1. The Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution, which repealed the Eighteenth Amendment, was consummated on December 5, 1933. P. 222.
2. Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment became inoperative, and neither the Congress nor the courts could give it continued validity. P. 222.
3. The National Prohibition Act, to the extent that its provisions rested upon the grant of authority to Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support. P. 222.
4. Prosecutions for violations of the National Prohibition Act in a State, pending when the Eighteenth Amendment was repealed, can not be continued. P. 222.

5. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept it alive for that purpose. P. 223.
6. Section 13 of the Revised Statutes, providing that penalties and liabilities incurred under a statute are not to be extinguished by its repeal unless the repealing act shall so expressly provide, etc., is inapplicable where the statute imposing the penalties is rendered inoperative by the power of the people exercised through a constitutional amendment. P. 223.
7. Instances in which Congress has provided for the transfer of cases pending in territorial courts as an incident to the exercise of its power to admit new States into the Union, present no analogy to a case in which the power of Congress over the subject-matter has been withdrawn by a constitutional amendment. P. 225.
8. Prosecution for crimes is but an application or enforcement of the law, and if the prosecution is to continue the law must continue to vivify it. P. 226.
9. It is a continuing and vital principle that the people are free to withdraw authority which they have conferred and, when withdrawn, neither Congress nor the courts can assume the right to continue to exercise it. P. 226.

5 F.Supp. 153, affirmed.

APPEAL under the Criminal Appeals Act from a judgment quashing an indictment for conspiracy to violate the National Prohibition Act, and for possessing and transporting intoxicating liquor in violation of that Act.

*Solicitor General Biggs,* with whom *Mr. Robert P. Reeder* was on the brief, for the United States.

The common law rule, if applicable, would seem to cover all pending cases, in trial and appellate courts. As was said in *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U.S. 503, 506, the rule even "requires the reversal of a judgment which was right when rendered." *Green* v. *United States,* 67 F. (2d) 84, was an instance of dismissal by an appellate court. In the court below, conspiracies punishable under § 37 of the Criminal Code were affected by the rule. Indeed, this rule would effect an "automatic amnesty for crimes." *Pickett* v. *United States,* 216 U.S.

456, 459. Since it is merely a rule of construction, it should yield to another, if legal principles permit.

Decisions interpreting the Eleventh Amendment are not applicable, *Hollingsworth* v. *Virginia,* 3 Dall. 378, due to the marked precision with which the Eleventh Amendment was framed.

In transferring power from the United States to the States, the Twenty-first Amendment brought about a situation comparable to that which arose when Territories which had been subject to federal control entered the Union as States. For that reason, *United States* v. *Baum,* 74 Fed. 43, is much like the case at bar. *Pickett* v. *United States,* 216 U.S. 456, 459. Distinguishing: *Moore* v. *United States,* 85 Fed. 465; *Sonora* v. *Curtin,* 137 Cal. 583, 589.

The court below should not have applied the common law rule to the Twenty-first Amendment, as such rule is opposed to present public policy, but it should have applied the principles of the statutory rule. The Constitution must be "interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *United States* v. *Wong Kim Ark,* 169 U.S. 649, 654. Since the first ten Amendments embody guarantees and immunities inherited from our English ancestors, they are to be interpreted in a like manner. Cf. *Robertson* v. *Baldwin,* 165 U.S. 275, 281. Clearly, this Court has always sought and applied those principles of law which were familiar and controlling at the time when the constitutional provision, or Amendment, in question was adopted.

What principle of law governing the effect of repeals was most familiar and most controlling throughout the United States in 1933 when the Twenty-first Amendment was adopted?

After *United States* v. *Tynen,* 11 Wall. 88, Congress had promptly passed "An Act prescribing the form of the

enacting and resolving clauses of Acts and Resolutions of Congress, and rules for the construction thereof," (February 25, 1871, c. 71, 16 Stat. 431) which is now § 13 of the Revised Statutes, changing the common law rule of construction.

It was a salutary change, *United States* v. *Barr,* 4 Sawyer 254, and has stood for sixty-two years as the rule of federal jurisprudence and policy.

Why should the courts be powerless to punish for crimes committed under a valid criminal law, merely because for satisfactory reasons the statute has been repealed?

There is no difference in principle between repeal by statute and by a constitutional amendment. The one is passed by Congress while the other is proposed by Congress and adopted by three-fourths of the States. The intent of the framers is in both cases the same. If the courts have power to punish for offenses committed before the repeal when the repeal is by statutory enactment, the courts have equal power to punish for like offenses when the repeal is by constitutional provision.

It is only necessary that the old statute be repealed in order to make effective § 13, Rev. Stats., unless otherwise provided in the repealing Act. The repeal may be express by statute, or it may be by implication by the enactment of a statute inconsistent with the old one; or it may be a repeal by implication by a constitutional amendment inconsistent with the old statute, or by withdrawing from the legislative arm of the Government the power to enact the old statute, as in this case; or it may be by an enactment creating a new State whereby the authority of Congress to make acts criminal in the jurisdiction of the new State is taken away.

See *Great Northern Ry. Co.* v. *United States,* 208 U.S. 452, 465.

The rule of construction contained in R.S. § 13 has become firmly entrenched. *Hertz* v. *Woodman,* 218 U.S.

205. Had Congress intended to reverse this long-established policy, it would have framed the Amendment accordingly.

Canada and England and many of the States have provisions similar to § 13 R.S. In the year 1933, when the Twenty-first Amendment was proposed and adopted, the almost universal rule throughout the United States was that the repeal of a criminal law did not debar prosecution for crimes committed before its adoption.

This Court, in *Funk* v. *United States,* 290 U.S. 371, rejected an aged rule of the common law on the competency of witnesses, even though it had not been changed by Congress. The reasoning is pertinent here.

If the old rule of construction should be applied in this case, then the spectacle would be presented of some joint offenders escaping punishment while the others are serving terms or have paid fines for the same offense.

See Levitt, "Repeal of Penal Statutes and Effect on Pending Prosecutions," Am. Bar. Assn. Jour., Nov., 1923, pp. 715–721.

*Messrs. Z. I. Walser* and *William M. Hendren,* with whom *Messrs. Don A. Walser* and *Leland Stanford* were on the brief, for appellees.

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

Claude Chambers and Byrum Gibson were indicted in the District Court for the Middle District of North Carolina for conspiring to violate the National Prohibition Act, and for possessing and transporting intoxicating liquor contrary to that Act, in Rockingham County in that State. The indictment was filed on June 5, 1933. Chambers pleaded guilty but prayer for judgment was continued until the December term. On December 6, 1933, the case was called for trial as to Gibson. Cham-

bers then filed a plea in abatement and Gibson filed a demurrer to the indictment, each upon the ground that the repeal of the Eighteenth Amendment of the Federal Constitution deprived the court of jurisdiction to entertain further proceedings under the indictment. The District Judge sustained the contention and dismissed the indictment. The Government appeals. 18 U.S.C. § 682.

This Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment [1] of the Constitution of the United States, which repealed the Eighteenth Amendment, was consummated on December 5, 1933. *Dillon* v. *Gloss,* 256 U.S. 368. Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality. The National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support. The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory

[1] Article XXI of the Amendments of the Constitution provides as follows:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose.

The decisions of this Court afford abundant illustration of this principle. In *Yeaton* v. *United States,* 5 Cranch 281, 283, where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal, the Court held that the cause was to be considered as if no sentence had been pronounced. Chief Justice Marshall said that " it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." Chief Justice Taney observed in *Maryland* v. *Baltimore & Ohio R. Co.,* 3 How. 534, 552: " The repeal of the law imposing the penalty, is of itself a remission." In *United States* v. *Tynen,* 11 Wall. 88, 95, the Court thus stated the principle applicable to criminal proceedings: " There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the Act repealed." See, also, *Norris* v. *Crocker,* 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U.S. 503, 506.

The Government endeavors to avoid the application of this established principle by invoking the general saving provision enacted by the Congress in relation to the

repeal of statutes. That provision is to the effect that penalties and liabilities theretofore incurred are not to be extinguished by the repeal of a statute "unless the repealing act shall so expressly provide," and to support prosecutions in such cases the statute is to be treated as remaining in force. R.S., § 13; 1 U.S.C. § 29.[2] But this provision applies, and could only apply, to the repeal of statutes by the Congress and to the exercise by the Congress of its undoubted authority to qualify its repeal and thus to keep in force its own enactments. It is a provision enacted in recognition of the principle that, unless the statute is so continued in force by competent authority, its repeal precludes further enforcement. The Congress, however, is powerless to expand or extend its constitutional authority. The Congress, while it could propose, could not adopt the constitutional Amendment or vary the terms or effect of the Amendment when adopted. The Twenty-first Amendment contained no saving clause as to prosecutions for offenses theretofore committed. The Congress might have proposed the Amendment with such a saving clause, but it did not. The National Prohibition Act was not repealed by Act of Congress but was rendered inoperative, so far as authority to enact its provisions was derived from the Eighteenth Amendment, by the repeal, not by the Congress but by the people, of that Amendment. The Twenty-first Amendment gave to the Congress no power to extend the operation of those provisions. We are of the opinion that in such a case the statutory provision relating to the repeal of statutes by the Congress has no application.

[2] The text of the provision is as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The Government cites decisions involving changes from territorial to state governments and recognizing the authority of the Congress to provide for the transfer of pending cases from territorial courts to the courts established within the new States. *Pickett* v. *United States,* 216 U.S. 456; *United States* v. *Baum,* 74 Fed. 43; compare, *Moore* v. *United States,* 85 Fed. 465. These decisions present no analogy to the instant case. As the function and jurisdiction of territorial courts would naturally terminate when a territory becomes a State, some provision for the transfer of pending business is necessary and the Congress has adequate authority to that end. The Constitution authorizes the Congress to admit new States into the Union (Art. IV, § 3, par. 1), and, also, to provide in the case of crimes, not committed within any State, for trial at such place as the Congress may direct (Art. III, § 2, par. 3). The Congress, in admitting a new State, may thus transfer "jurisdiction in respect of local matters to state courts and of civil and criminal business and jurisdiction arising under the laws of the United States to courts of the United States when they should come into existence." *Pickett* v. *United States, supra,* at p. 459; *Forsyth* v. *United States,* 9 How. 571, 576, 577. In such cases, jurisdiction for the trial of pending criminal actions depends upon the provisions of the enabling Act. *Id.* Provision in the enabling Act for the vote of the people of the territory, as a condition precedent to the establishment of the new State and the adoption of its constitution, does not alter the fact that the State is admitted to the Union by the Congress under its constitutional authority. In the instant case, constitutional authority is lacking. Over the matter here in controversy, power has not been granted but has been taken away. The creator of the Congress has denied to it the authority it formerly possessed and this denial, being unqualified, necessarily defeats any legislative attempt to extend that authority.

Finally, the argument is pressed that the rule which is invoked is a common law rule and is opposed to present public policy. We are told that the rule of construction, evidenced by the saving provision adopted by the Congress in relation to the repeal of statutes, is firmly entrenched and attention is directed to corresponding statutory provisions in most of the States. But these state statutes themselves recognize the principle which would obtain in their absence. The question is not one of public policy which the courts may be considered free to declare, but of the continued efficacy of legislation in the face of controlling action of the people, the source of the power to enact and maintain it. It is not a question of the developing common law. It is a familiar maxim of the common law that when the reason of a rule ceases the rule also ceases. See *Funk* v. *United States,* 290 U.S. 371. But, in the instant case, the reason for the rule has not ceased. Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it. The law, here sought to be applied, was deprived of force by the people themselves as the inescapable effect of their repeal of the Eighteenth Amendment. The principle involved is thus not archaic but rather is continuing and vital,—that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it.

What we have said is applicable to prosecutions, including proceedings on appeal, continued or begun after the ratification of the Twenty-first Amendment. We are not dealing with a case where final judgment was rendered prior to that ratification. Such a case would present a distinct question which is not before us.

The judgment dismissing the indictment is

*Affirmed.*

# CLARK'S FERRY BRIDGE CO. *v.* PUBLIC SERVICE COMMISSION OF PENNSYLVANIA.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA.

No. 274. Argued January 18, 1934.—Decided February 5, 1934.

In sustaining an order limiting the charges of a toll-bridge company, against an attack based on the due process clause of the Fourteenth Amendment, *held:*

1. That a claim that a valuation of the property in an earlier proceeding was treated as *res judicata* in the proceeding in question is not substantiated by the record. P. 233.

2. The reasonable cost of constructing the bridge is good evidence of its value at time of construction. P. 234.

3. The fact that, in constructing it, a contractor who obtained the contract under competitive bidding and performed it expeditiously, spent more than the contract price, does not prove that the value of the bridge, when constructed, was greater than that price, in the presence of evidence attributing the loss to unusual water conditions, with no evidence to show that it could not have been prevented by reasonable precautions. P. 234.

4. It was reasonable to conclude that cost of reconstruction at a later time would not be materially greater, the trend of construction prices having been downward during the interim. P. 236.

5. A corporation owning and operating a toll-bridge under franchise from a State in a location formerly occupied by a bridge constructed by the State and forming a link in a state system of highway communication previously established, is entitled to have its real estate appraised for rate-making purposes at its fair market value for all of its available uses and purposes, including particular uses to which it may be specially adapted, but not to have that value increased by virtue of the public use. *Minnesota Rate Case,* 230 U.S. 352, 451. P. 237.

6. Opinion evidence that the cost of building the bridge at other locations would be greater, because of variation in the width of the river and conditions in its bed, did not warrant an increase of fair market value. P. 238.

7. While it is recognized that accrued depreciation, as it may be observed and estimated at a given time, and an appropriate

allowance of depreciation according to good accounting practice, need not be the same, there is no rule which requires an allowance to be made or continued which in the light of experience is shown to be extravagant. *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 158. P. 239.

8. The amount that shall be allowed for annual depreciation in fixing the charges of a public utility, is a question of fact. In reviewing the findings of a state court, this Court is not required to prescribe an invariable method of computation, and can not overrule the state court's determination unless the results are seen to be unconstitutional. P. 240.

9. In the present case, involving a single structure which deteriorates continuously from the moment of completion, annual allowances, during the life of the structure, which, with reasonable interest, will provide a sum for its replacement, are not shown to be inadequate. P. 238.

10. A rate of return of 7% of the fair value of the property, is not shown to be confiscatory. P. 241.

11. Where an order fixes an adequate gross revenue for a toll-bridge and tentative rates that may be modified at any time on application to the rate-making body to conform to the results of experience, the uncertainty whether, with the rates as initially prescribed, the future traffic will bring in the prescribed revenue, is not a ground for constitutional objection. P. 241.

108 Pa. Super. Ct. 49, affirmed.

APPEAL from a judgment affirming (with a modification) an order of the Public Service Commission prescribing the tolls to be charged by the appellant bridge company. The Supreme Court of Pennsylvania had declined to review the case.

*Mr. George Ross Hull* for appellant.

It was error to apply the earlier valuation as *res judicata.*

The earlier finding of fair value was based solely on original cost of the bridge. The original cost to the company was less than the fair value at that time, and in 1930.

There is an element of value in the location of the real estate and improvements,—the special value which the

real estate has because of its special adaptability to bridge purposes, not franchise value. This special value should have been included in the rate base.

Although the measure of fair value for rate-making purposes may not in all cases correspond to the measure of just compensation where private property is condemned, we think it is clear that where there is a special value inherent in private property which can not be taken by eminent domain without just compensation, the use of that property value can not be taken by the public without just compensation by a refusal to allow a return upon it when it is devoted to public use. *Spring Valley Water Works* v. *San Francisco,* 124 Fed. 574, 594.

The claim of appellant for addition of this special value to the rate base is supported by the numerous decisions in condemnation cases, in which it is held that the owner must be compensated for such value. Citing: *Boom Co.* v. *Patterson,* 98 U.S. 403; *Mitchell* v. *United States,* 267 U.S. 341, 344; and *North Shore R. Co.* v. *Pennsylvania Co.,* 251 Pa. 445, among other cases.

The proper method of determining the amount of accrued depreciation is by estimate of the actual depreciation observed by inspection, and not by the application of mathematical computations based upon the age and life of the property. *McCardle* v. *Indianapolis Water Co.,* 272 U.S. 400, 416.

The court below assumed that the public was entitled to the interest accruing from year to year on the depreciation reserve, and concluded that the allowance of $7,678 was sufficient because, when the interest was added, the accumulated total in the depreciation reserve at the end of fifty years would equal the fair value of the property. Whether the public or the appellant is entitled to interest on the money paid annually into the depreciation reserve, is a question of law; and if it has been

erroneously decided and results in confiscation of appellant's property, this Court should correct it.

It is not inconsistent to base accrued depreciation upon actual depreciation, and at the same time to base annual depreciation upon theoretical depreciation where depreciation proceeds much more slowly during the early, than during the late, years of the life of the property.

The purpose of an appraisal of the reproduction cost new, less accrued depreciation, of a utility property, is to arrive at the fair present value of the property. The appraisal is intended to reflect the actual, not the theoretical value, at the time of the appraisal. When we turn to the matter of annual depreciation, the question then is, what is the just and equitable method of collecting from the consumers during the life of the property a sum sufficient to replace the property at the end of its useful life, or to return to the owners their capital at that time. The consumers throughout the life of the property receive service from it, and it is assumed that they all receive the same service and that it is equally valuable and satisfactory. It is fair, therefore, to spread this depreciation charge equally over the life of the property so that the consumers in each year will bear the same proportion of this burden. It is merely an accounting device designed to produce an equitable distribution of depreciation charges over the life of the property, and it has no necessary or direct relation to the depreciated value of the property in any particular year. *United Railways* v. *West,* 280 U.S. 234, 264.

The disparity between the accrued depreciation and the total of the annual depreciation allowances in the early years of the property is marked because in those years actual depreciation lags.

The rate of return should be greater than seven per cent. *Bluefield Co.* v. *Public Service Comm'n,* 262 U.S. 679, 692; *United Railways* v. *West,* 280 U.S. 234, 251–

252; *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 160–161; *Wabash Valley Elec. Co.* v. *Young*, 287 U.S. 488, 501; *Los Angeles Gas Co.* v. *Railroad Comm'n*, 289 U.S. 287, 319.

The order makes the line of confiscation the maximum which the company may receive. It is impossible for the company to design a tariff which will produce " an annual gross revenue of not more than $85,455," unless it estimates a margin so far below the line of confiscation that no reasonable fluctuation of traffic will carry its revenue into the forbidden territory. Such a tariff must necessarily result in confiscation.

The Attorney General of the State is even now suing the company to recover penalties of $50 for every day the company had in effect its former tariff producing more than the allowed gross annual revenue.

Under the practical construction placed upon the commission's order by the Commission and the Attorney General, the company must, at its peril, devise a schedule of rates which will not produce more than $85,455.

*Mr. E. Everett Mather, Jr.*, with whom *Mr. John Fox Weiss* was on the brief, for appellee.

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

The Superior Court of Pennsylvania affirmed (as modified) an order of the Public Service Commission of that State prescribing a tariff of tolls to be charged on the bridge of the Clark's Ferry Bridge Company over the Susquehanna River, 108 Pa. Superior Ct. 49; 165 Atl. 261. The Company brings this appeal.

In its review of the facts the Superior Court states that the bridge is comparatively new, having been completed in May, 1925. The bridge replaced and was con-

structed near the site of a wooden bridge which had been acquired by the incorporators of the present Company. In August, 1925, a complaint was filed with the Public Service Commission alleging that the rates in effect were unreasonable. By its order of June 8, 1926, the Commission found the fair value of appellant's property to be $767,800 and that appellant was entitled to receive a gross annual revenue of $85,905, on the basis of a return of 7 per cent. on that fair value, after allowing operating expenses, taxes, an annual depreciation allowance, and amortization of bond discount. An appeal from the Commission's order was taken to the Superior Court, but was withdrawn, and in February, 1927, the Company filed a new tariff. The rates thus fixed were continued in effect until July, 1929, when the Company made a voluntary reduction. In January, 1930, the Commission began the present proceeding on its own motion and, after hearings, determined that the fair value of the appellants' property, as of February 2, 1932, was still $767,800, and that the annual gross revenue which should be allowed was $84,124 on the basis of a return of 7 per cent. on that fair value, after allowing expenses and annual depreciation. 11 Pa. P.S.C. 222.[1] In this calculation, an item of $1,331 for annual bond amortization was omitted. The Superior Court held that it should be included and modified the Commission's order accordingly, that is, so as to provide that the allowable gross revenue should be $85,455.

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[1] The order of the Public Service Commission, of February 2, 1932, is as follows:

"That Clark's Ferry Bridge Company file, post and publish, effective thirty (30) days from date hereof, upon not less than one (1) day's notice to the public and this Commission, a new tariff calculated to produce an annual gross revenue of not more than $84,125.

"It is further ordered: That said tariff contain as tentative rates intended to produce said gross annual revenue of $84,125, and effective

*First.* Appellant contends that the Commission and the Court treated the valuation in the Commission's decision of 1926 as *res judicata* in the present proceeding. We do not so construe the Commission's report or the Court's opinion. The Commission received evidence as to alleged changes in value and estimates of the cost of reproducing the property. The Commission determined that "cost conditions" had not "changed materially" since 1926, and "upon a complete examination of the entire record in both proceedings" the Commission found that the fair value of the property was $767,800 as of February, 1932. 11 Pa.P.S.C. at p. 231. The Superior Court, in construing the action of the Commission, said: "When the subsequent complaints were filed, the Commission evidently did not consider its previous findings as barring appellant from raising the question of the fair value of its property in 1930 and the proper allowances to be made for operating expenses and depreciation, but instituted an investigation, and, as already stated, admitted in evidence appellant's reproduction cost estimate and its supporting testimony, and put in evidence the reproduction cost esti-

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until further action by this Commission or the Company in conformity with said determination of allowable gross revenue the following charges:

"(1) A rate of 8 cents cash toll for all ordinary passenger automobiles and wagons now paying 10 cents.

"(2) A ticket without time limit salable at the rate of two for 15 cents for all such automobiles and wagons.

"(3) A 20-trip ticket non-transferable as between vehicles good any time within thirty (30) days from date of issue and salable for one dollar ($1) for all such automobiles and wagons.

"(4) Rates for all other types of vehicles as are now provided in tariff P. S. C. Pa. No. 5.

"It is further ordered: That said Company file with this Commission monthly statements of income and operating expenses, showing the number of vehicles passing over its bridge in each class of traffic as contained in its tariff."

mate of one of its engineering staff, and the report of the result of an examination of appellant's books and records." The Court acted upon what it stated to be " the legislative mandate of the amendment of June 12, 1931, P.L. 530, that in an appeal of this character, we shall consider the record and 'on [our] own independent judgment . . . determine whether or not the findings made and the valuation and rates fixed by the Commission are reasonable and proper.'" It was in this view that the Court examined the " main controversies " between the parties. 108 Pa. Superior Ct. at p. 63.

Appellant attacks the finding of fair value upon the grounds that it was based solely on the original cost of the bridge property and that the amount paid by the appellant for the bridge was less than its fair value at that time and less than its fair value in 1930. It is not open to question that the reasonable cost of the bridge is good evidence of its value at the time of construction. And we have said that " such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices." *McCardle* v. *Indianapolis Water Co.*, 272 U.S. 400, 411; *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U.S. 287, 306. In this instance, as the state court observed, the utility is not " a complicated system which has taken years to construct and enlarge, like a waterworks, or gas works, or electric light plant, or street railway system," but is " one structure, a reënforced concrete bridge, built as it now is, without additions or improvements." It appears that the bridge was built under a contract awarded in June, 1924, after competitive bidding, and was open to traffic in May, 1925. It is manifest that when the Commission made its first decision in June, 1926, the reasonable cost of the structure furnished a proper basis for determining its fair value. Of

the amount of the total valuation, at that time, of $767,800, the sum of $592,253 was taken as the construction cost on the basis of the actual outlay which included $566,301 paid to the contractor for the bridge and approaches. Appellant then insisted, and still insists, and it was shown, that the contractor sustained a loss. This was said to amount to about $143,000, that is, on labor and material, with overhead and depreciation of plant, as distinguished from a loss of profits. The evidence as to this was given by the contractor's auditor, who attributed the loss to an unusual flood. He said: "We would have made money probably if things would have gone along smoothly without any high water." The Court accepted this explanation—the only one given—stating that "A sudden rise in the Susquehanna River during the course of the work was responsible for the loss; without it there would have been a fair profit." The Court estimated that $20,000 additional, "spent on the coffer-dam construction," would probably have obviated the loss, adding—"We have increased the coffer-dam expense to cover this amount." Appellant complains that this statement was based on speculation and has no support in the record. But appellant's case is no stronger. The evidence gives no adequate ground for a conclusion that with reasonable care the loss could not have been prevented. The outstanding fact is that the contract was let in the usual way to the lowest bidder and the contractor received a substantial bonus ($22,050) for finishing the work before the stipulated date. To sustain the contention that the actual cost of the structure was less than a reasonable cost at the time, it was necessary for the appellant to give convincing proof. But such proof is lacking. We find no satisfactory basis for holding that the fair value of the property in June, 1926, was greater than $767,800 as it was then determined to be.

The question is whether the proof shows that the value was greater in 1932. Appellant relies upon the estimate of engineers as to the cost of reproduction new of the physical property, as of September 1, 1929, together with "all additional expenditures required over and above the bare cost of the physical property, to put the bridge in operation as an income-producing property." This estimate gave a total cost of reproduction new less depreciation (the estimate being exclusive of two other elements of alleged intangible value described as "attached business value" and "location value") of $875,644.30. The Commission's engineer made a similar estimate based upon prices prevailing during the last three months of 1930, which gave the cost of reproduction new, less depreciation, as $741,871. There were also charts showing the price trends for labor and materials for 1924 to 1930, inclusive. As summarized by the Court, the evidence shows "that in 1924, when the contract for the construction of the bridge was awarded, construction prices were reported as being 215% of the 1913 level; that in September, 1929, when appellant's reproduction cost estimate was made, they were 208% of the 1913 level; and that during the last three months of 1930 they fell to about 198%." It would serve no useful purpose to review the details of the estimates of reproduction cost. The Court carefully considered them and properly concluded that the trend in prices from 1924–5, when the bridge was built, to 1931–2, when the Commission determined its present fair value, was "downward rather than upward," and that "in the absence of proof that the prices paid for the construction of the bridge were abnormally low there is no reason why in the short period of six years after its completion, with a tendency of prices for both material and labor being downward, there should be a radical increase in the fair value of the bridge for rate-making purposes." We agree with this conclusion.

It does not appear that the Court made any deduction from the amount of the fair value as determined in 1926 by reason of the depreciation accrued during the succeeding years. There was controversy as to the extent of that depreciation. Appellant's engineers allowed for the four and one-half years which had elapsed to the time of their survey the sum of $16,282. The Commission's engineer estimated the accrued depreciation for six years at $41,403. The Court thought that the latter figure was "nearer the actual accrued depreciation than the estimate of the Company," but the Court apparently treated such accrued depreciation as largely off-set by the "extra allowance, over the contractor's bid, for concrete and coffer-dams." The Court decided that no harm was done the appellant by leaving the fair value at $767,800.

A distinct question is raised by a claim for what is called "the special value of location," in addition to the value of the bridge property thus far considered. This "special value" was put at $100,000. It was based, according to appellant's engineers, upon the advantage that the location of the bridge has over any other point for miles in either direction because the river is narrower and the conditions of the river bed are more favorable. The engineers made their estimate upon what they thought one would be willing to pay for the present site, in preference to other sites in the vicinity, because of the additional cost of building a bridge elsewhere. It appears that the bridge is located in a rural area. It was originally constructed as a part of an extensive transportation system built by the Commonwealth in the first half of the last century. As the Court pointed out, the right to operate a toll bridge across the river at this point or elsewhere "is fundamentally the gift of the Commonwealth, contained in appellant's franchise, and to attach a value

to it would be to capitalize the franchise contrary to the provisions of the statute and the frequent decisions of the courts." In building its new bridge, appellant took advantage of the traffic customs which had already been established. In the determination of the value of its property appellant was entitled to be allowed the fair market value of its real estate for all its available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over this fair market value by virtue of the public use. *Minnesota Rate Cases,* 230 U.S. 352, 451, *et seq.* The evidence, so far as it was properly addressed to the question of the fair market value of appellant's real estate, tended to support the amount allowed in the estimate of fair value reached by the Commission and the Court, and afforded no basis for a higher valuation. There is no warrant for an increase of fair market value by reason of opinions as to what it would cost to build a bridge elsewhere.

We conclude that appellant has failed to show confiscation because of the amount used as a rate base.

*Second.* Appellant complains that the amount prescribed for gross revenue is inadequate. Appellant contests the annual allowance for depreciation and the rate at which the fair return is calculated.

The Commission fixed the annual depreciation allowance at $7,678 and the Court approved it. This amount equals one per cent. of the fair value. Appellant contends that the allowance should be 2½ per cent. of the value of the depreciable property on the straight line basis. The difference—on appellant's calculation of the fair value—amounts to $13,434. The Court approved the ruling of the Commission.

There is no question as to the fact of depreciation. It was established, as respondent admits, that concrete

bridges deteriorate from the moment of their completion; that there are chemical changes in their structure, absorptions of moisture and oxidation, both within the concrete and in the reënforcing iron covered by it, which cannot be stopped in their process or their effects removed. With this understanding, the question is as to the amount which should annually be allowed which will serve adequately to protect the investment from impairment due to age and use. Testimony was given by one of appellant's engineers that the average life of a concrete bridge was from 30 to 50 years; by another, that the period for which this bridge might be expected to remain useful was "from 40 to 80 years,"—he "would not figure on over 40." Another testified that physically the bridge "might have a life of 50 to 100 years." The Commission's engineer estimated its life at from 40 to 50 years; for his computation he took an expectancy of 45 years. Respondent urges that the annual allowance asked by appellant was plainly too large and contrasts it with appellant's claim for accrued depreciation; that is, as the Court stated, appellant's engineers "allow an accrued depreciation for the four and a half years elapsing to the time of their survey of $16,282, but claim a *yearly* depreciation allowance thereafter of $21,210." While it is recognized that accrued depreciation, as it may be observed and estimated at a given time, and an appropriate allowance of depreciation according to good accounting practice, need not be the same, there is no rule which requires an allowance to be made or continued which in the light of experience is shown to be extravagant. *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 158. After reviewing the testimony, and the methods of calculation which the parties respectively advocated, the Court thus stated its conclusion: "It [the Commission] allowed $7,678 annually. This sum set aside each year, with 4% *simple* interest will

in fifty years produce approximately $767,800, sufficient to rebuild the bridge as now valued. The straight line method advocated by the Company will in fifty years with 4% simple interest produce a fund twice as great as that necessary to replace the bridge. The straight line method is often used for short-lived structures, or plants of a character that they can be restored from time to time to the original condition of efficiency. . . . It is not so fair or equitable when applied to a long-lived structure or one that is disintegrating gradually and continuously and not capable of being restored to its original condition. The company may not be required to apply the income received from the depreciation fund to make up any deficit of operation (*Board of Public Utility Comm'rs* v. *New York Telephone Co.*, 271 U.S. 23), but it is not entitled to an allowance, which exclusive of interest earned on the fund, will be sufficient to rebuild the bridge, when its life is done, but only to such an allowance as will with reasonable interest added make a fund sufficient to replace the bridge when it requires replacement." In this view, the Court thought the amount allowed by the Commission to be "fair and reasonable in the circumstances." The Court added that the Commission had included in its allowance for operating expenses an item of $1,800 for "maintenance."

The question of the amount which should be allowed annually for depreciation is a question of fact. *Georgia Railway & Power Co.* v. *Railroad Commission*, 262 U.S. 625, 633. In reviewing the findings of the state court we are not required to enter a debatable field of fact and to choose and prescribe an invariable method of computation. To justify the overruling of the determination of the state court we must be able to see that what has been done will produce the result which the Constitution forbids. Considering the nature of the property, and upon facts shown by the evidence, the state court has allowed

appellant to reserve annually, and use for its own purposes, an amount which according to common experience may be expected to produce a sum adequate to replace the property on the expiration of its life. We find it impossible to say, from a constitutional standpoint, that another method should have been employed or a greater amount allowed.

Appellant also insists that it is entitled to a rate of return of nine per cent. upon the fair value of its property. The Commission and the court decided that seven per cent. was sufficient. We perceive no constitutional ground for complaint on that score. *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, 502; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U.S. 287, 319, 320.

*Third.* The final attack is on the form of the Commission's order. The Commission fixed the amount of the annual gross revenue and then prescribed a tentative schedule of rates.[2] Appellant says that it is obvious that no one can tell in advance how many vehicles of different tariff classifications will pass over the bridge in a year and what annual gross revenue will be produced by a given schedule of rates. But, as the prescribed rates are expressly stated to be tentative, there is no ground for assuming that the Commission will reject an application to make such changes in the schedule as experience may show to be necessary in order to produce the stipulated revenue. There is nothing in the order which requires that the test period should be a year or any definite time. From the statements at the bar it appears that appellant has not put the tentative schedule in effect and has made no application to the Commission for a change in the schedule. If the allowance of gross revenue is adequate, as it has been found to be, there is no basis for complaint

[2] See Note 1.

because of a schedule of rates which on application may be appropriately modified.

The judgment of the Superior Court of Pennsylvania is *Affirmed.*

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## STANDARD OIL COMPANY OF CALIFORNIA *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 347. Argued January 12, 1934.—Decided February 5, 1934.

A State is without power to levy a license tax in respect of the selling and delivery of goods on a military reservation included within the exterior limits of the State but over which the full legislative authority has been ceded to the United States by an Act of the State Legislature. P. 244.

218 Cal. 123; 22 P. (2d) 2, reversed.

APPEAL from the reversal of a judgment in favor of the Oil Company in an action brought by the State to collect an excise tax together with a penalty. The judgment of reversal directed the trial court to enter judgment for the State as prayed.

*Mr. Vincent K. Butler, Jr.,* with whom *Messrs. Oscar Sutro* and *Felix T. Smith* were on the brief, for appellant.

*Mr. H. H. Linney,* Deputy Attorney General of California, and *Mr. U. S. Webb,* Attorney General, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By Ch. 267, Statutes 1923, as amended (Chs. 716 and 795, Statutes 1927), the State of California undertook to lay a license tax upon every distributor for each gallon of motor vehicle fuel "sold and delivered by him in this State" with certain exceptions not here important.

At its own expense and risk, appellant, a Delaware corporation, qualified to do business in California, sold and delivered to the Post Exchange, within the Presidio of San Francisco, 420 gallons of gasoline. It carried this to the Exchange's place of business in barrels or by tank trucks. Both sale and delivery were within the area long held and occupied by the United States for military purposes.

The State demanded of appellant three cents per gallon upon the gasoline so sold and delivered. Payment being refused, this suit followed. In the trial court the Company prevailed. The Supreme Court held to the contrary and, among other things, said—

"We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States, made to the army post exchange therein, are to be excluded in fixing the license fees to be paid by the distributor under said act of the legislature. . . . It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises sole legislative authority. . . . It is contended that, by reason of this concession, a sale consummated on it is a sale outside the state, as tho consummated in Nevada or Oregon. It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state, and for this purpose said military reservation was to be included like all other territory." [218 Cal. 123, 126]

The Presidio of San Francisco, a tract of more than fourteen hundred acres, lies between that city and the Golden Gate, and is within the exterior limits of California. Established as a military post under Spanish dominion about 1776, it continued to be so used by the Republic of Mexico until ceded to the United States in 1848 by the treaty of Guadalupe Hidalgo. An executive

order of November 6, 1850, dedicated it to public purposes; since then it has been occupied as a military reservation. By Act of March 2, 1897, California ceded to the United States exclusive jurisdiction over this area with a proviso—"That this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands." See *United States* v. *Watkins,* 22 F. (2d) 437. The State reserved to herself no power whatever in respect of taxation.

Appellant challenges the validity of the taxing act as construed by the Supreme Court. The argument is that since the State granted to the United States exclusive legislative jurisdiction over the Presidio, she is now without power to impose taxes in respect of sales and deliveries made therein. This claim, we think, is well-founded; and the judgment below must be reversed.

In three recent cases—*Arlington Hotel Co.* v. *Fant,* 278 U.S. 439, *United States* v. *Unzeuta,* 281 U.S. 138, and *Surplus Trading Co.* v. *Cook,* 281 U.S. 647—we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein.

*Arlington Hotel Co.* v. *Fant,* 278 U.S. 439, denied the power of Arkansas by legislation to modify the liability of innkeepers within a reservation ceded by her to the United States.

*United States* v. *Unzeuta,* 281 U.S. 138, affirmed the exclusive jurisdiction of the United States over crimes committed within a reservation lying within Nebraska. Jurisdiction had been ceded by the State.

*Surplus Trading Co.* v. *Cook,* 281 U.S. 647, ruled that land within Arkansas purchased by the United States for military purposes with the State's consent was under their exclusive jurisdiction. Private personal property therein was declared not subject to taxation by the State.

The principle approved in those cases applies here. A State can not legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.

The judgment of the Supreme Court must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

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## TEXAS & PACIFIC RAILWAY CO. *v.* POTTORFF, RECEIVER.

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

No. 128. Argued December 7, 1933.—Decided February 5, 1934.

1. A national bank has no power to pledge its assets to secure a private deposit. P. 253.
2. Such pledges are neither customary nor necessary in the business of such banks, and are inconsistent with provisions of the National Banking Act designed to secure uniform treatment of depositors and ratable distribution of assets in case of disaster. Pp. 254–255.
3. The Acts of Congress authorizing national banks to give security for deposits of specified public funds, do not impart or imply power to pledge assets to secure private deposits. P. 257.
4. The contention that since the relation of bank to depositor is that of debtor and creditor, and since a national bank may borrow

money upon a pledge of assets, it may likewise pledge assets to secure a private deposit,—is untenable. The difference between deposits and loans is fundamental and far-reaching. P. 259.

5. A national bank is not estopped to deny the legality of an *ultra vires* pledge of assets by which it obtained deposits; still less is its receiver when the bank has become insolvent. P. 260.
6. The fact that a general deposit was obtained by the bank on the faith of an *ultra vires* pledge of its assets does not create a constructive trust or confer upon the depositor a preference over other creditors in the event of the bank's insolvency. P. 261.

63 F. (2d) 1, affirmed.

CERTIORARI, 290 U.S. 609, to review the affirmance of a decree dismissing a bill brought by the Railway against the receiver of a national bank, and granting relief to the receiver on a cross bill.

*Mr. M. E. Clinton,* with whom *Messrs. Del W. Harrington* and *T. D. Gresham* were on the brief, for petitioner.

The relationship between a bank and its depositors often has been stated by this Court. *N.Y. County Nat. Bank* v. *Massey,* 192 U.S. 145; *Auten* v. *U.S. Nat. Bank,* 174 U.S. 141, 142; *Marine Bank* v. *Fulton County Bank,* 2 Wall. 256.

While recognizing that the power to borrow money is not expressly given, this Court nevertheless has upheld pledges to secure such loans because a national bank has the implied power "to incur liabilities in the regular course of its business," *Aldrich* v. *Chemical Nat. Bank,* 176 U.S. 626, and because "it is not in terms prohibited by the National Banking Act," *Wyman* v. *Wallace,* 201 U.S. 243. Since a deposit is a loan and a loan may be secured by a pledge of assets, it follows that deposits may be so secured. Morse, Banks and Banking, 6th ed., Vol. 1, § 63, p. 182; Paton's Digest of Banking Law, 1926, Vol. 1, § 641.

Such implied power is clearly conferred by § 24 of the Act. *First Nat. Bank* v. *National Exchange Bank,* 92

U.S. 127. In that section, the word "necessary" does not mean "indispensable." Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 412, 413.

It should be presumed that Congress used the word "necessary" in its liberal sense and intended it to convey the meaning ascribed to it in *McCulloch* v. *Maryland, supra.* Employing this definition and applying it to the opinion in *First Nat. Bank* v. *National Exchange Bank,* 92 U.S. 122, we find that the power conferred upon national banks was two-fold: (1) "To transact such a business as is specified," i.e., the business of "receiving deposits"; and (2) "all such incidental powers necessary," i.e., convenient, useful, or essential, "to carry it on," i.e., the business of procuring deposits, and securing them. It should be observed that the implied power thus granted, to use other language of Chief Justice Marshall, "is placed among the powers . . ., not among the limitations on those powers. Its terms purport to enlarge, not to diminish the powers. It purports to be an additional power, not a restriction on those already granted." 4 Wheat. 419, 420.

"Subject to law" means "subject to whatever law" the legislative body might think fit to pass. *Head* v. *University,* 19 Wall. 530. But we find nothing in the Act prohibiting national banks, while solvent, from pledging a part of their assets to procure or retain deposits. The plain implication of § 52 is to the contrary.

If a bank be solvent, there can be no valid objection to its giving in good faith a dollar security for a dollar gained by deposit, for the bank at any time can fully discharge all of its obligations. Cf. *Scott* v. *Armstrong,* 146 U.S. 510; 30 Op. Atty. Gen. 341; *Burrowes* v. *Nimocks,* 35 F. (2d) 152.

There is no valid distinction between the giving of security for a public and a private deposit. *Schumaker* v. *Eastern Bank & T. Co.,* 52 F. (2d) 925.

The pledging of a bank's securities as protection for a deposit for the purpose of saving bond premiums is a reasonable exercise of the authority of a bank's vice president to procure such deposit and within the principle announced by this Court in *First Nat. Bank* v. *National Exchange Bank,* 92 U.S. 122

What the bank did in the case at bar amounted to a compromise. By it the bank would be able to keep the railway company's account, which carried an average daily deposit balance of approximately $50,000, and at the same time save the bond premiums. This the bank clearly had authority to do. It was "a reasonable incident to the business of receiving deposits."

The National Bank Act does not require every act of a national bank to "accord with national banking practices and customs" before such act is legal. Those banks are authorized to exercise all incidental powers which are convenient or useful (if not prohibited) in carrying on the business of banking, which includes the business of receiving deposits. A transaction, therefore, which comes within this implied power is valid even when performed for the first time by a national bank. And it is manifestly improper for the courts, as was done in this case, to place a burden of proof upon the railway company greater than the Act itself required. The facts raised a presumption in favor of the validity of the pledge under the rule that corporations are presumed to contract within their powers, and, in the absence of proof to the contrary, their contracts are presumed to be valid when not foreign to the purposes for which the corporation is created. *Ohio & M. R. Co.* v. *McCarthy,* 96 U.S. 258; *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.,* 163 U.S. 564. Moreover, the pledge agreement being on its face valid, the receiver, who asserts that it was *ultra vires,* had the burden of proving its invalidity. *Clews* v. *Jamieson,* 182 U.S. 490.

The power to receive deposits is indispensable to the

conduct of banking, and the practice of giving security for deposits is a practice followed by many banks. *Grigsby* v. *Peoples Bank,* 158 Tenn. 193. Properly, therefore, it should be held that the means by which deposits are to be secured, not being limited or restricted by statute, should be left to the discretion of the bank's officers and directors who know best what is convenient. Whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires. Jacksonville, M. P. R. & N. Co.* v. *Hooper,* 160 U.S. 514.

The receiver's powers are enumerated in §§ 191 and 192 of the National Bank Act, and are not broad enough to authorize the receiver to challenge the validity of the pledge agreement. Even in the case of *ultra vires* contracts, no one but the sovereign or some one authorized by statute is permitted to assert that a corporation's contract is *ultra vires. Jones* v. *N.Y. Guaranty & I. Co.,* 101 U.S. 622; *Sioux City Terminal Co.* v. *Trust Co.,* 173 U.S. 110; *Thompson* v. *St. Nicholas Nat. Bank,* 146 U.S. 251; *Blair* v. *Chicago,* 201 U.S. 451. The receiver "does not in any sense represent the Government." *Case* v. *Terrell,* 11 Wall. 199.

If the receiver, as a representative of the bank, can question the validity of the pledge agreement, he must first return or tender to the railway company its deposits made in reliance upon that agreement, as the bank would be required to do.

The creditors now represented by the receiver are those whose deposits no doubt were made since the bonds were pledged. Under these circumstances it is difficult to understand how those creditors or their representative, the receiver, acquired any special property interest in the pledged bonds superior to that of the bank itself, and especially so since the railway company thereafter de-

posited a total of $148,765.75 relying on the pledge agreement, of which sum more than $54,000 on deposit when the bank failed would be distributed by the receiver to those creditors upon delivery of the pledged bonds to the railway company. But the receiver acquired no greater right in the pledged bonds than the bank had. *Scott* v. *Armstrong,* 146 U.S. 507; *Fourth Street Nat. Bank* v. *Yardley,* 165 U.S. 653

The bank could not have disaffirmed the agreement without returning the bonds. *California Nat. Bank* v. *Kennedy,* 167 U.S. 362; *Union Pacific Ry.* v. *Chicago,* 163 U.S. 564; *Central Transportation Co.* v. *Pullman Car Co.,* 139 U.S. 60; *National Bank* v. *Whitney,* 103 U.S. 99; *Union Nat. Bank* v. *Matthews,* 96 U.S. 621; *Ohio & M. R. Co.* v. *McCarthy,* 96 U.S. 258; *Chicago, R. I. & P. R. Co. v. Howard,* 7 Wall. 392.

The pledge was known to the national bank examiners and was therefore sanctioned by the Comptroller. See *Brown* v. *Schleier,* 118 Fed. 981, aff'd, 194 U.S. 18.

When a solvent national bank induces a depositor to cancel or surrender corporate surety bonds protecting its deposits and to accept in lieu thereof other security which the bank is without authority to furnish, moneys thereafter deposited in reliance upon that security are received by the bank as special deposits which it holds in trust for the use and benefit of the depositor.

The courts will enforce an implied agreement on the part of the bank to return the moneys deposited with it in reliance upon the invalid security, and those deposits never become general assets of the bank which its subsequently appointed receiver may distribute ratably among the bank's unsecured creditors. *Scott* v. *Armstrong,* 146 U.S. 499; *Central Transportation Co.* v. *Pullman Car Co.,* 139 U.S. 24; *Aldrich* v. *Chemical Nat. Bank,* 176 U.S. 618; *Citizens Nat. Bank* v. *Appleton,* 216 U.S. 196.

*Messrs. Henry E. Hackney* and *Thornton Hardie,* with whom *Messrs. Ben R. Howell, F. G. Awalt,* and *George P. Barse* were on the brief, for respondent.

By leave of Court, *Messrs. Charles N. Burch* and *Edward W. Smith* filed a brief on behalf of the Illinois Central Railroad Co., as *amicus curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The main question for decision is whether a national bank has power to pledge a part of its assets to secure a private deposit.

The First National Bank of El Paso, Texas, failed on September 4, 1931, and S. O. Pottorff was appointed receiver. The Texas & Pacific Railway Company was then, and long had been, a depositor. To secure it as such the bank had, in January, 1931, pledged $50,000 Liberty Bonds and held them for the Railway in the Trust Department of the bank. The balance in the Railway's regular checking account at the time of the failure was $54,646.94. Of this claim it made proof as a secured creditor. The receiver approved the amount of the claim, but denied the validity of the pledge; and he tendered a dividend check only for the amount to which the Railway would have been entitled as an unsecured creditor. Thereupon, the Railway brought, in the federal court for western Texas, this suit against the receiver, praying, in the alternative, that the bonds be delivered to it; or that they be sold for its benefit; or that the claim be paid in full with interest. The receiver filed a cross-bill praying that the bank's title to the bonds be quieted.

The case was first heard upon motions to dismiss the bill and the cross-bill. The decision on the motions was postponed until after hearing the case upon the evidence. Thereupon the court dismissed the bill and en-

tered a decree for the receiver upon the cross-bill, holding that the pledge was void and that the Liberty Bonds constituted assets to be administered for the benefit of the general creditors of the bank. The Circuit Court of Appeals affirmed the decree. 63 F. (2d) 1. This Court granted certiorari. The Railway contends that the bank had power to make the pledge; that even if the bank did not have such power, the receiver is not in a position to question the validity of the pledge; and that even if he is not estopped from doing so, he may not disaffirm it without returning the consideration therefor received by the bank. We are of opinion that none of these contentions is sound.

The District Court found the following additional facts. The relation between the Railway and the bank began in 1922 when the Railway was in receivership. Then, an order was entered appointing the bank a depositary upon condition that it should furnish a bond with solvent sureties. An acceptable bond was then given in the sum of $25,000. When, in 1924, the receivership terminated, the Railway continued its deposit account; and a bond in like amount was given with the National Surety Company as surety. When, in 1927, the average deposits had increased to about $50,000, an additional bond of $25,000 was given with the Maryland Casualty Company as surety. While these bonds were in full force and effect and the bank was solvent, it requested the Railway to accept, in substitution for the surety bonds, the pledge of the $50,000 Liberty Bonds, giving as its reason for the request that the premiums payable on the surety bonds were a burden from which it wished to be relieved. The Railway expressed willingness to assent to the substitution, but only on condition that thereby it would be as fully protected as by the surety bonds. The bank and its attorney gave this assurance; and thereupon the pledge was substituted

for the surety bonds and these were cancelled. Without that assurance, the Railway would not have consented to the cancellation of the surety bonds; or if they had been cancelled without its consent, would have immediately withdrawn all of its deposits. In reliance upon the assurances and the pledge, the Railway continued until the failure to make deposits; and in fact increased its deposits.

National bank examiners commenced on August 6, 1931, an examination of the bank. Within a few days, they learned from the bank's books that the pledge had been made; but neither the examiners nor the Comptroller of the Currency advised the bank's officers that the pledge was beyond the powers of the bank or that it was irregular or otherwise objectionable. The bank had frequently secured private deposits by surety bonds; but never before by a pledge of assets. The examiners concluded their investigation on August 20, 1931. The failure occurred on September 4, 1931.

*First.* National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied.[1] For the Act[2] under which national banks are organized constitutes a complete system for their government, *Cook County National Bank* v. *United States,* 107 U.S. 445, 448; *California Bank* v. *Kennedy,*

[1] *First National Bank* v. *National Exchange Bank,* 92 U.S. 122, 128; *Logan County National Bank* v. *Townsend,* 139 U.S. 67, 73; *California Bank* v. *Kennedy,* 167 U.S. 362; *Concord First National Bank* v. *Hawkins,* 174 U.S. 364; *First National Bank* v. *Converse,* 200 U.S. 425, 439. Compare *McCormick* v. *Market Bank,* 165 U.S. 538, 549; *Merchants National Bank* v. *Wehrmann,* 202 U.S. 295.

*United States* v. *Robertson,* 5 Pet. 641, and *Planters' Bank* v. *Sharp,* 6 How. 300, have no application to the National Banking Act.

[2] Act of June 3, 1864, c. 106, § 8, 13 Stat. 101; R.S. 5136; 12 U.S.C. § 24, Seventh.

167 U.S. 362, 366; *First National Bank* v. *Missouri,* 263 U.S. 640. Confessedly the power to pledge assets to secure a private deposit was not granted in specific terms. The contention is that this power is incidental to the general grant of powers "necessary to carry on the business of banking . . . by receiving deposits"; and, hence, is implied.[3]

There is no basis for the claim that the power to pledge assets is necessary to deposit banking. The record is barren of evidence that the practice of so pledging assets has ever prevailed among national banks. And facts of which we take judicial notice indicate that among national banks such action must have been deemed contrary to good banking practice.[4] From the establishment of the system in 1864 to March 1, 1933, 2159 national banks failed[5] and there has been much litigation arising from their insolvency; but only two other reported cases have been found involving a pledge of assets to secure a private deposit, and in those cases, very recent ones, the existence of the power was denied.[6] *Smith* v. *Baltimore & O. R.*

[3] Compare *Jacob Ruppert* v. *Caffey,* 251 U.S. 264, 301.

[4] No mention of securing a private deposit in a national bank by a pledge of assets or otherwise has been found in any published report of the Comptroller (compare note 6); or in any of the 52 available treatises or textbooks on banks and banking practice published since 1900; in any of the annual proceedings of the American Bankers Association or in any issue of the American Banker's Journal; or in any issue of The Commercial and Financial Chronicle since 1900; or in the New York Times Index since 1913. Compare "Contemporary Banking," by Willis, Chapman & Robey (1933), p. 336.

[5] Annual Report of Comptroller of the Currency (1932) 148. Federal Reserve Bulletin (1933) 144. (Figures from these two sources have been combined.)

[6] In that case the parties stipulated, and the District Court found (p. 864) that "during, before, and after the said period of February 23, 1928, to July 31, 1930, when the said Comptroller was requested by national banks or others for an opinion upon the power of national banks to pledge securities to secure a private depositor, in every in-

*Co.*, 48 F. (2d) 861; 56 F. (2d) 799; *Illinois Central R. Co.* v. *Rawlings*, 66 F. (2d) 146. In the case at bar, there is a specific finding that the transaction challenged was the only instance in which this bank had ever pledged assets to secure a private deposit. Surely action cannot be deemed a necessary incident of a business when only a single instance has been found in which it was taken. Moreover, even a practice commonly pursued may not be a necessary one.[7]

To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. Compare *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 290. This policy of equal treatment was held to preclude, in case of a national bank, even the preference under § 3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U.S. 445. The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection. Thereby the legitimate expectations of a great body of the depositors are defeated and confidence in the fairness of the national banking laws and administration is impaired. It is no answer to say that the other depositors are benefited by the increased resources which the pledge brings to the bank, or at least are not harmed, since the new funds take the place of the securities pledged and are available to meet

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stance the Comptroller disapproved of such pledges by stating that in his opinion national banks had no such power."

[7] Compare *Federal Reserve Bank* v. *Malloy*, 264 U.S. 160, 167. A practice is not within the incidental powers of a corporation merely because it is convenient in the performance of an express power. *Merrill* v. *Monticello*, 138 U.S. 673, 692; compare *Beaty* v. *Knowler's Lessee*, 4 Pet. 152, 168–171.

liabilities.[8] The immediate safety of unsecured creditors depends on the bank remaining open and solvent; the pledge reduces the fund of quick assets available to meet unusual demands without any assurance that the deposit will be used to replenish this fund.

The fact that this bank had frequently secured private deposits by surety bonds lends no support to the contention that the power to pledge assets is necessary to carrying on the business of deposit banking. Such a practice would likewise be a departure from the policy of equal treatment of depositors; but the loss to other depositors resulting from such action would be far less serious. A pledge withdraws capital assets, while the giving of a surety bond merely increases the bank's expenses. There is, however, no finding that among national banks

[8] These arguments seem to ignore the realities of the banking business. The primary interest of a depositor is that the bank shall be able to pay as and when he demands payment. The ability to do so depends not on the bulk of the assets but on their liquidity. The law applicable to national banks requires them to maintain as reserves in the form of cash or of cash balances with a federal reserve bank, fixed percentages of their demand deposits in order to assure ability to meet probable demands as they arise; but such reserve is commonly deemed insufficient to meet possible emergencies. Because of this, soundly managed banks maintain so-called "secondary reserves," usually in the form of government obligations which can be liquidated quickly with little or no loss. The effect of pledging quick assets for particular deposits is to reduce the fund available for meeting current demands of an unexpected nature. The funds received from the deposit are not necessarily an equivalent for the securities withdrawn from available resources. In the first place the deposit, in the process of clearing and collection, may serve merely to cancel liabilities against the bank. This may mean that there will be fewer competing claims in case of insolvency, but it will still be true that the reserves have been depleted considerably beyond what would be justified by reason of the cancellation of the liability. In the second place, to the extent that the deposit represents free funds, it is not probable that the deposit will be used to buy other low yield quick assets to take the place of those which have been pledged.

there exists the practice of securing by surety bonds some private deposits. If there has been such a practice, it must have been a secret one; for reference to it has not been found in either official reports, or the books on banking or other publications dealing with financial affairs.[9] Whether a national bank could legally engage in such a practice we have no occasion to decide.[10]

The Railway insists that Congress in providing that the Secretary of the Treasury might deposit public money in national banks upon receiving satisfactory security by "the deposit of United States bonds or otherwise," Act of June 3, 1864, c. 106, § 45, 13 Stat. 113,[11] assumed a gen-

[9] See note 4. However, compare Lunt, Surety Bonds (1930), 206.

[10] *Nebraska* v. *First National Bank of Orleans,* 88 Fed. 947, and *Interstate National Bank* v. *Ferguson,* 48 Kan. 732; 30 Pac. 237, held in the case of a deposit of public funds that the practice was legal. Two Attorneys General have expressed the opinion that national banks lacked the power to pay for guaranteeing all depositors. 27 Op. Atty. Gen. 37, 40; 272, 279. But see 30 Op. Atty. Gen. 341, *contra.*

[11] The original national bank act of 1863 had provided merely that the Secretary of the Treasury might deposit public moneys in national banks. By legislation subsequent to 1864 national banks have been made depositaries of moneys of bankrupt estates, Act of July 1, 1898, c. 541, § 61, 30 Stat. 562; of Indian moneys, March 3, 1911, c. 210, § 17, 36 Stat. 1070; May 25, 1918, c. 86, § 28, 40 Stat. 591; of funds in the hands of the receivers of insolvent national banks, May 15, 1916, c. 121, 39 Stat. 121; of postal funds, May 18, 1916, c. 126, § 2, 39 Stat. 159; of proceeds from the sale of bonds, Sept. 24, 1917, c. 56, § 8, 40 Stat. 291; April 4, 1918, c. 44, § 5, 40 Stat. 504; July 9, 1918, c. 142, § 4, 40 Stat. 845; and of a number of other public funds. In all of these statutes the depositor is required to take security; but therein likewise nothing is said as to the power of the bank to pledge the required securities. Two of these statutes, those relating to deposits of the funds of insolvent banks and of bankrupt estates, have reference to the deposit of private funds. In some of the legislation, not only national, but state, banks also are made depositaries. It is true that Congress cannot make valid a pledge by a state bank, but that does not make it any the less likely that Congress intended to make valid every pledge by a national bank that would be called for

eral power in national banks to pledge their assets to secure deposits; and that the assumption indicates that it intended this power to be among the "incidental" powers granted by § 8. But without such assumption, the duty of the Secretary to demand a pledge authorizes a national bank to make it.[12] We may not import into § 8 a meaning not derivable from the words of that section and inconsistent with other provisions of the Act. Moreover, if the Railway's argument were sound it would have been unnecessary to amend § 45 as was done by the Act of June 25, 1930, c. 604, 46 Stat. 809, which provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

This amendment indicates that Congress believed that the original Act had not granted general power to pledge assets to secure deposits.[13] The fact that the amendment was made to § 45 indicates that the power to pledge was granted only as an incident of the public officer's duty to demand a pledge. If, as is sug-

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under the statute. It would be the duty of a public officer depositing in a state bank to make sure that it had the power to give the security required by Congress.

[12] Where a statute specifically forbids a preferential pledge, it has been held that a public officer's duty to demand a pledge impliedly gives power to pledge in that specific case. *Maryland Casualty Co.* v. *Board of Comm'rs,* 128 Okla. 58; 260 Pac. 1112; 31 Op. Atty. Gen. (U.S.) 41.

[13] Senator Thomas, in introducing the bill, stated in the Senate: "It is a bill simply to confer on a national bank the same opportunity for the giving of security for the safe-keeping and prompt payment of state and county moneys, as is authorized with reference to state banking institutions." 72 Cong.R. 6243.

gested, the 1930 amendment was passed merely in order to settle doubts as to the power of a national bank to pledge its assets to secure deposits, the amendment would naturally have been made not to § 45, but to § 8 which contains the grant of "incidental" powers.

The Railway urges also that since the relation of the bank to its depositors is that of debtor to creditor, and since a national bank may borrow money, *Aldrich* v. *Chemical National Bank,* 176 U.S. 618; *Auten* v. *U.S. National Bank,* 174 U.S. 125, and pledge its assets therefor, *Wyman* v. *Wallace,* 201 U.S. 230, it may likewise pledge assets to secure a private deposit. The fallacy of this contention has been many times exposed.[14] The difference between deposits and loans is fundamental and far-reaching. The amount of the deposits is commonly accepted as a measure of the bank's success; an increase of deposits as evidence of increased prosperity. The depositor does not think of himself as lending money to the bank. The modern deposit grew out of the older form of deposit in which the fund was held separate and intact, and the sole purpose of the deposit was safe-keeping. Safe-keeping is still a very important function of deposit banking; and from the point of view of most depositors the chief one.[15] Borrowing by a bank (as distinguished from a re-discount) is commonly regarded as evidence of weak-

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[14] *Farmers & Merchants Bank* v. *Consolidated School District,* 174 Minn. 286, 291; 219 N.W. 163; *State Bank of Commerce* v. *Stone,* 261 N.Y. 175; 184 N.E. 750; *Divide County* v. *Baird,* 55 N.D. 45, 52; 212 N.W. 236; *Commercial Banking & Trust Co.* v. *Citizens Trust & Guaranty Co.,* 153 Ky. 566, 574; 156 S.W. 160; 27 Col. L. Rev. 88; 79 U. of Penn. L. Rev. 608, 614.

[15] Though large deposits frequently represent loans by the bank to the depositor, this is less likely to be true of small accounts. Out of 30,556,105 accounts reported by 5,500 licensed member banks of the Federal Reserve System, 29,482,384 were under $2,500 and the average size of these accounts was $189. Federal Reserve Bulletin, July 1933, p. 454. [See order, *post,* p. 649.]

ness.[16] Often the loan is made in the hope of averting insolvency. Loans made by one bank to another commonly involve a pledge of assets, since only upon such a condition is the transaction possible. *Wyman* v. *Wallace, supra.*

*Second.* The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defence of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy,* 167 U.S. 362; *McCormick* v. *Market Bank,* 165 U.S. 538; *Central Transportation Co.* v. *Pullman Co.,* 139 U.S. 24.[17] But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unau-

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[16] The Comptroller of the Currency has insisted on the distinction between deposits and borrowings and has stated that to list borrowings as deposits—e.g., as certificates of deposit—is a grave misrepresentation of the condition of the bank. Annual Report 1890, p. 13; 1892, p. 39.

"The fact that more than one-half of the national banks reporting were not borrowing from any source is additional evidence of the stability of the national banking system." Annual Report of Comptroller of the Currency (1922), p. 26.

[17] See also *Pearce* v. *Madison & I. R. Co.,* 21 How. 441; *Thomas* v. *Railroad Co.,* 101 U.S. 71; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.,* 118 U.S. 290; *Oregon Ry. & N. Co.* v. *Oregonian Ry.*

thorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.[18]

*Third.* The receiver may assert the invalidity of the pledge without making restitution by paying the pledgee's claim in full. The Railway's argument to the contrary is that when as a result of an *ultra vires* contract one of the parties is enriched at the expense of the other, the law creates an obligation to repay *ex aequo et bono* to the extent of the enrichment. The argument if applicable would not help the Railway. Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* [19] and a constructive trust based on special circum-

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*Co.*, 130 U.S. 1; *Concord First Nat. Bank* v. *Hawkins*, 174 U.S. 364; *De La Vergne Co.* v. *German Savings Inst.*, 175 U.S. 40.

And on the matter of estoppel in pledge cases, see authorities cited in note 14. Also *Smith* v. *Baltimore & Ohio R. Co.*, 48 F. (2d) 861, 869; affirmed 56 F. (2d) 799; *contra: State Bank of Commerce* v. *Stone*, 261 N.Y. 175; 184 N.E. 750. Also compare *West Penn Chemical & Mfg. Co.* v. *Prentice*, 236 Fed. 891.

[18] *King* v. *Pomeroy*, 121 Fed. 287; *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. 392, 399; *In re O'Gara & Maguire, Inc.*, 259 Fed. 935, 936; *In re K-T Sandwich Shoppe*, 34 F. (2d) 962, 963; *Shooter's Island Shipyard Co.* v. *Standard Shipbuilding Corp.*, 293 Fed. 706.

[19] The claimant has the burden of identifying the property in its original or altered form. *Schuyler* v. *Littlefield*, 232 U.S. 707. It is not enough to show that at the time of receipt the general assets of the insolvent were increased or that debts were discharged. *Wuerpel* v. *Commercial Germania Bank*, 238 Fed. 269, 272–3; *Knauth* v. *Knight*, 255 Fed. 677; *State Bank of Winfield* v. *Alva Security Bank*, 232 Fed. 847; *In re See*, 209 Fed. 172; *In re Dorr*, 196 Fed. 292; *City*

stances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor.[20] Its right thereto is conceded.

*Affirmed.*

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## CITY OF MARION *v.* SNEEDEN, RECEIVER, ET AL.

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

No. 400. Argued December 7, 8, 1933.—Decided February 5, 1934.

1. Under the national banking laws, a national bank has no power to pledge its assets to secure a deposit of public money of a State, or of a subdivision of a State, unless it is located in a State in which state banks are so authorized. Act of June 25, 1930. P. 268.
2. The State of Illinois has not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the State. P. 269.
3. Where a national bank, before becoming insolvent, made an *ultra vires* pledge of bonds to secure a deposit, its receiver was entitled to recover them unconditionally, for the benefit of the general creditors of the bank. *Texas & Pacific Ry. Co.* v. *Pottorff, ante,* p. 245. P. 272 .

64 F. (2d) 721, affirmed.

CERTIORARI, 290 U.S. 617, to review a decree which reversed a decree of the District Court, 58 F. (2d) 341, dismissing a bill brought by the receiver of an insolvent national bank to obtain possession of bonds which the bank had pledged as collateral security for a deposit of public moneys by a city.

*Messrs. Richard Mayer* and *Henry F. Driemeyer,* with whom *Messrs. Carl Meyer, David F. Rosenthal, C. E.*

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*Bank* v. *Blackmore,* 75 Fed. 771; compare *St. Louis & S. F. R. Co.* v. *Spiller,* 274 U.S. 304, 311; *Cunningham* v. *Brown,* 265 U.S. 1.

[20] Compare *Blakey* v. *Brinson,* 286 U.S. 254; *Handelsman* v. *Chicago Fuel Co.,* 6 F. (2d) 163.

*Pope,* and *R. T. Cook* were on the brief, for petitioner. *Mr. William Cattron Rigby* also participated in the oral argument in behalf of petitioner.

Solvent national banks have always had the power to pledge assets as security for deposits of public funds. Act of June 3, 1864, c. 106, 13 Stat. 99, 101; Rev. Stats., § 5136; 12 U.S.C., § 24; *Smith* v. *Lansing,* 22 N.Y. 520; *United States* v. *Robertson,* 5 Pet. 641; *Planters Bank* v. *Sharp,* 6 How. 300; § 45, Act of June 3, 1864, *supra;* Rev. Stats., § 5153; *National Bank* v. *Graham,* 100 U.S. 699.

The power is likewise necessarily implied from the provision in the National Bank Act forbidding transfers of assets by an insolvent bank with a view to a preference of one creditor to another. § 52.

Congress further recognized the power, as incidental to the right to receive deposits, in statutes requiring custodians of public funds to obtain collateral security from the state or national banks in which such funds are deposited. See Rev. Stats., § 5234, as amended by 12 U.S.C., § 192; Federal Reserve Act, § 9, as amended by 45 Stat. 492; 12 U.S.C., § 332; 39 U.S.C., § 759; 25 U.S.C., §§ 156, 162; 31 U.S.C., § 771. In each of these Congress has assumed that not only national banks, but state banks as well, have general power to pledge their assets as security for deposits of public money and that the exercise of such power is merely an ordinary incident of the business of banks of deposit. See opinion by Sparks, J., in the court below in this case.

The Comptroller of the Currency has consistently taken the position that national banks have the right to secure deposits of public money. *Pottorff* v. *Road District,* 62 F. (2d) 498; *Smith* v. *Baltimore & Ohio R. Co.,* 48 F. (2d) 861, aff'd, 56 F. (2d) 799.

The question of the power of banks to secure deposits has arisen in the following cases: *Mothersead* v. *U.S.*

*F. & G. Co.*, 22 F. (2d) 644, cert. den., 276 U.S. 637; *Parks* v. *Knapp*, 29 F. (2d) 547, cert. den., 278 U.S. 660; *Burrowes* v. *Nimocks*, 35 F. (2d) 152; *Baltimore & Ohio R. Co.* v. *Smith*, 56 F. (2d) 799; *Texas & Pacific Ry. Co.* v. *Pottorff*, 63 F. (2d) 1; *Illinois Central R. Co.* v. *Rawlings*, 66 F. (2d) 146; *Feather* v. *School District*, June 7, 1933, Dist. Ct., Western Dist. of Penna.; *Friend* v. *School District*, October 19, 1933, Dist. Ct., Western Dist. of Penna.; *Evans* v. *New Haven Bank*, September 21, 1933, Dist. Ct., Dist. of Conn.; *Pottorff* v. *Road District*, 62 F. (2d) 498; *Fidelity & Deposit Co.* v. *Kokrda*, 66 F. (2d) 641; *Mays* v. *Board of Comm'rs*, 164 Okla. 231; *Interstate Nat. Bank* v. *Ferguson*, 48 Kan. 732.

The amendment of June 25, 1930, to § 5153, Rev. Stats., clarified and enlarged, but did not limit the powers previously possessed by national banks to pledge assets as security for the deposit of public moneys of States or political subdivisions thereof. Sen. Rep. No. 67, 71st Cong., 3d Sess.; H.Rep. No. 1657, 71 Cong., 2d Sess. See *Pottorff* v. *Road District*, 62 F. (2d) 498; dissenting opinion in case at bar. Also 58 F. (2d) 341, 347; *Fidelity & Deposit Co.* v. *Kokrda*, 66 F. (2d) 641.

State banks in Illinois have this general power. There is no constitutional or statutory prohibition of any kind. *Ward* v. *Johnson*, 95 Ill. 215, upholds the power. This decision has never been questioned, but long been relied upon. No subsequent legislation has been inconsistent with it.

The inherent power of banks to pledge assets as security for deposits of public funds is generally recognized. *McFerson* v. *National Surety Co.*, 75 Colo. 482; *First American Bank & T. Co.* v. *Palm Beach*, 96 Fla. 247; *Schornick* v. *Butler*, 185 N.E. 111; *Richards* v. *Osceola Bank*, 79 Iowa 707; *Interstate Nat. Bank* v. *Ferguson*, 48 Kan. 732; *U.S. Fidelity & G. Co.* v. *Bassfield*, 148 Miss. 109; *French* v.

*School District,* 223 Mo. App. 53; *Consolidated School District* v. *Citizens Savings Bank,* 223 Mo. App. 940; *Ainsworth* v. *Kruger,* 89 Mont. 468; *Melaven* v. *Hunker,* 35 N.M. 408; *Smith* v. *Lansing,* 22 N.Y. 520; *Application of Broderick,* 140 Misc. Rep. 861; *In re Bank of Spencerport,* 143 Misc. Rep. 196; *State Bank* v. *Stone,* 261 N.Y. 175; *Page Trust Co.* v. *Rose,* 192 N.C. 673; *Snider* v. *Fulton,* 44 Ohio App. 238; *Mays* v. *Board of Comm'rs,* 164 Okla. 231; *Maryland Casualty Co.* v. *Board of Comm'rs,* 128 Okla. 58; *Mothersead* v. *U.S. F. & G. Co.,* 22 F. (2d) 664; *Cameron* v. *Christy,* 286 Pa. 405; *Ahl* v. *Rhoads,* 84 Pa. 319; *Grigsby* v. *Peoples Bank,* 158 Tenn. 182; *Pixton* v. *Perry,* 72 Utah 129; *Millard County School District* v. *State Bank,* 80 Utah 170. Cf. *Williams* v. *Hall,* 30 Ariz. 581; *Williams* v. *Earhart,* 34 Ariz. 565; *Bliss* v. *Mason,* 121 Neb. 484; *Bliss* v. *Pathfinder Irrigation Dist.,* 122 Neb. 203.

The courts in the following States, denying this power, represent the minority view. *Arkansas-Louisiana Highway Imp. Dist.* v. *Taylor,* 177 Ark. 440; *Arkansas County Road Imp. Dist.* v. *Taylor,* 185 Ark. 293; *Wood* v. *Imperial Irrigation Dist.,* 216 Cal. 748; *Commercial Bank & T. Co.* v. *Citizens T. & G. Co.,* 154 Ky. 566; *Farmers & Merchants State Bank* v. *Consolidated School Dist.,* 174 Minn. 278; *Divide County* v. *Baird,* 55 N.D. 45; *Foster* v. *Longview,* 26 S.W. (2d) 1059; *Austin* v. *Lamar County,* 26 S.W. (2d) 1062. Cf. op. of Alschuler, J., in this case, 64 F. (2d) 731; and *Grigsby* v. *Peoples Bank,* 158 Tenn. 182; *First American Bank & T. Co.* v. *Palm Beach,* 96 Fla. 247.

State statutes, generally, recognize that the public welfare demands that public funds deposited in banks be adequately protected, and have utilized the power of banks to pledge their assets as security for public funds.

In any event, the Receiver of the Bank can not, after the pledge has been fully executed and deposits made in reliance thereon, come into a court of equity and disaffirm the transaction consummated in good faith while the Bank was solvent.

*Messrs. Hosea V. Ferrell* and *John Hay,* with whom *Mr. Charles C. Murrah* was on the brief, for respondents.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. William Cattron Rigby, Fred W. Llewellyn, Serafin P. Hilado,* and *Kyle Rucker,* on behalf of the Philippine Islands; *Messrs. William H. Sexton* and *Leon Hornstein,* on behalf of the City of Chicago; and *Mr. Leland K. Neeves.*

Mr. Justice Brandeis delivered the opinion of the Court.

The Act of June 25, 1930, c. 604, 46 Stat. 809, amends § 45 of the National Bank Act of 1864 [1] by adding thereto the following:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The controlling question is whether Illinois has conferred upon banks organized under its laws power to pledge assets as security for deposits of public moneys of political subdivisions of the State.

In 1931, the city of Marion, Illinois, was operating under the "Commission Form of Government." Cahill's 1931 Rev. Stat., Chap. 24. Pars. 323–384. That statute

[1] Act of June 3, 1864, c. 106, § 8, 13 Stat. 101; R.S. 5336; 12 U.S.C. § 24, Seventh.

required the treasurer of a city to give a bond; and to "make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever, to his credit, as treasurer of said city . . . in one or more banks to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city . . . or any two of them, and any such bank before any such deposit is made therein . . . shall also execute a good and sufficient bond with sureties to be approved by the president of said council and conditioned that such bank will safely keep and account for and pay over said money . . ." (Par. 374.)

Carroll having been appointed treasurer of Marion, applied to the Fidelity and Casualty Company of New York to become surety on his official bond. Although Marion has a population of 9,000, it was then without a bank. The Fidelity Company agreed to become surety on Carroll's bond provided he would get elsewhere a bank which would give satisfactory collateral security for the repayment of his deposits of the public moneys. The City National Bank of Herrin agreed to do this. Thereafter, it delivered to the Continental Illinois National Bank and Trust Company of Chicago, as escrow agent, negotiable bonds of the par value of $23,000, under an agreement so to secure the City's deposit; the Fidelity Company executed Carroll's official bond; and he made his initial deposit in the Herrin bank of the City's moneys. That bank was then solvent. On October 31, 1931, it failed and a receiver was appointed. At the time of the failure the City's deposit was $16,430.00.

Ben Sneeden, the receiver, brought, in the federal court for eastern Illinois, this suit against the City, its treasurer, the surety and the escrow agent. Setting forth the above facts, he prayed that the pledge be declared *ultra vires* and void; that the bonds be delivered to him as receiver; and that, meanwhile, the defendants be enjoined from dis-

posing of them. The District Court dismissed the bill. 58 F. (2d) 341. Its decree was reversed by the Circuit Court of Appeals, one judge dissenting. 64 F. (2d) 721. This Court granted certiorari.

The petitioners contend that the pledge is valid because the Act of 1864, as originally enacted, conferred upon national banks, as a necessary incident of the business of deposit banking, the power to pledge assets to secure deposits; and that the amendment of June 25, 1930, did not limit the power so originally conferred. They contend further that even if the 1930 amendment be construed as denying to a national bank power to make such a pledge unless it is located in a State which grants the power to its state banks, the pledge here challenged is valid, because in Illinois, state banks have the power to pledge assets as security for deposits of public moneys of any political subdivision of the state. The petitioners contend also that even if the pledge was without authority in law, the bill was properly dismissed by the District Court, because the bank could not have required return of the bonds without repaying the deposit and that it would be inequitable to permit the receiver to do so. We think these contentions are unsound.

*First.* For the reasons stated in *Texas & Pacific Ry. Co.* v. *Pottorff*, decided this day, *ante*, p. 245, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under § 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds.[2] A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it

[2] See *Texas & Pacific Ry.* v. *Pottorff*, *ante*, p. 245, note 11.

can do so legally only if it is located in a State in which state banks are so authorized. In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained.

*Second.* Banks organized under the laws of Illinois do not appear to possess the power of pledging assets to secure the deposit of public moneys of a political subdivision of the State. Illinois corporations have only such powers as are conferred by statute either expressly or by implication; and only those powers are conferred by implication which are reasonably necessary to carry out the powers expressly granted, *People* v. *Chicago Gas Trust Co.,* 130 Ill. 268; 22 N.E. 798; *Calumet Dock Co.* v. *Conkling,* 273 Ill. 318; 112 N.E. 982. No Illinois statute confers in express terms upon banks organized under its laws either the general power to pledge assets to secure a deposit; or the general power to pledge assets to secure public deposits. A statute confers in terms the power to pledge assets to secure deposits of the State but there is none which so confers the power to pledge assets to secure public deposits of a political subdivision of the State.[3] No

[3] In the Banking Act of 1919, Cahill's 1931 Ill. Rev. Stats., c. 16a, Par. 1, which, reënacting the law of 1887, provides for the organization of banks "for the purpose of . . . deposit" there is complete silence on this subject. The only references in any Illinois statute concerning the pledge of assets to secure a deposit are the following:

(a) Section 10 of the State Depositary Act of 1919 (Cahill's 1931 Ill. Rev. Stat., c. 130, Par. 29) provides: "No moneys in the State Treasury shall be deposited in any bank approved as a depositary

reported decision rendered by any Illinois court since the enactment of the General Banking Law of 1887 holds that the alleged power exists as one incidental to the business of deposit banking. Nor is there any evidence that in Illinois such power is necessary in the conduct of the business of deposit banking.

*Ward* v. *Johnson,* 95 Ill. 215, 217, decided in 1880, is relied upon as authority for the proposition that Illinois banks have power to pledge assets to secure deposits. That case arose under the charter of "The Merchants, Farmers and Mechanics Savings Bank," which was granted long before the General Banking Act of 1887. The pledge involved therein was given to secure a transaction which appears to have been a loan as distinguished from a deposit. The transaction dealt with private funds. The statement was there made that banks have authority to pledge assets to secure deposits. If that statement expresses the law of the State, Illinois banks have had for more than half a century power to pledge their assets to secure private deposits as well as deposits of public moneys of its political subdivisions. But the case has never been referred to since on this point in any reported opinion of any Illinois court.[4] During that period, many state

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under the terms of this Act until such bank shall have deposited security with the State Treasurer equal in market value to the amount of moneys deposited.

(b) Section 11 of the Banking Act as amended in 1929 (Cahill's 1931 Ill. Rev. Stat., c. 16a, par. 11) provides that a receiver of a closed bank:

"Shall deposit daily all moneys collected by him in any state or national bank selected by the auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safe keeping and prompt payment of the money so deposited."

[4] Courts of other States have referred to it as authority for the proposition that banks have the power to pledge assets to secure deposits. See *Williams* v. *Earhart,* 34 Ariz. 565; 273 Pac. 728; *First*

banks have failed;[5] and there must have been much litigation arising therefrom; but no exertion of the alleged power on the part of any state bank has been shown.

An authoritative determination of the question whether Illinois banks have power to pledge assets to secure the deposit of public moneys of a political subdivision of the State can be given only by its highest court. The District Court discussed, but did not decide, that question. Its decision dismissing the bill was rested on the ground that the National Bank Act as enacted in 1864 had conferred the general power to pledge assets to secure deposits; and that the power so granted had not been lessened by the later legislation. The majority of the Circuit Court of Appeals being of opinion that national banks lacked the power to pledge assets to secure deposits (except so far as conferred by the 1930 amendment) necessarily passed upon the applicable Illinois law. After careful consideration, it reached the conclusion that Illinois had not conferred upon its banks the power to pledge assets to secure deposits of political subdivisions of the State. Its reasons are set forth fully and persuasively; and the decisions of the courts of other States

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*Amer. Bank & T. Co.* v. *Palm Beach,* 96 Fla. 247; 117 So. 900; *U.S. Fidelity Co.* v. *Bassfield,* 148 Miss. 109; 114 So. 26; *Melaven* v. *Hunker,* 35 N.M. 408; 299 Pac. 1075; *Page Trust Co.* v. *Rose,* 192 N.C. 673; 135 S.E. 795; *Cameron* v. *Christy,* 286 Pa. St. 405; 133 Atl. 551; *Grigsby* v. *People's Bank,* 158 Tenn. 182; 11 S.W. (2d) 673; *Pixton* v. *Perry,* 72 Utah 129; 269 Pac. 144.

[5] The Auditor of Public Accounts in his annual statement on the condition of state banks (p. 42) gives (Dec. 31, 1932) 1,866 as the aggregate number of the banks existing on Dec. 6, 1888 and organized since. Of these 26 had charters granted prior to Dec. 6, 1888; and 1,840 were organized thereafter under the general law. The number of banks in operation Dec. 31, 1932 was 742. The number then in receivership was 444. Between Dec. 31, 1932 and March 1, 1933, 32 more state banks failed. Federal Reserve Bulletin, 1933, pp. 105, 201.

involving similar questions are fully reviewed. We cannot say that the Circuit Court erred in the conclusion reached.

*Third.* Since the Herrin bank was without power to make the pledge of bonds here in question, its receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank. See *Texas & Pacific Ry. Co.* v. *Pottorff, ante,* p. 245.

*Affirmed.*

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## UNITED STATES *v.* PROVIDENT TRUST CO., ADMINISTRATOR.

CERTIORARI TO THE COURT OF CLAIMS.

No. 224. Argued January 11, 12, 1934.—Decided February 5, 1934.

1. In determining the value of a devise to charities of a remainder contingent upon the death without issue of a female life tenant in order that such value may be deducted from gross income in computing the federal estate tax, it is permissible to prove that before the death of the testator the life tenant became incapable of having issue, as the result of a surgical operation by which her procreative organs were removed. P. 281.
2. The ancient rule that a woman is conclusively presumed to be capable of bearing children as long as she lives, was, like other irrebuttable presumptions, a rule of expediency or policy, based upon the belief that to permit proof of the facts would result in injuries of greater consequence than the predominance of truth over error in the cases to which it applied. P. 281.
3. Applicability of this presumption remains a proper subject of judicial inquiry in the light of modern knowledge and experience. Pp. 282, 285.
4. Application of a conclusive presumption of possibility of issue in the present case would be subversive of the policy of the estate tax statute to encourage bequests to charitable organizations. P. 286.

77 Ct. Cls. 37; 2 F.Supp. 472, affirmed.

CERTIORARI, 290 U.S. 614, to review a judgment allowing a claim for overpayment of federal estate tax.

*Solicitor General Biggs,* with whom *Assistant Attorney General Wideman* and *Mr. Paul A. Sweeney* were on the brief, for the United States.

The amount subject to tax is to be ascertained as of the date of the decedent's death. *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. No deduction will be allowed for a charitable bequest dependent upon a condition unfulfilled at that date. *Humes* v. *United States,* 276 U.S. 487; Regulations 37, Art. 56.

By the overwhelming weight of authority in the United States, evidence is not admissible to show that a woman, after reaching adult age, is incapable of bearing children. Whether the courts use the words "conclusive presumption of law," "presumption of law," or some other expression, the result is the same, the rule being one of substantive law rather than one governing the burden of proof or the duty of going forward with evidence.

The following cases involved the rule against perpetuities, holding that remoteness could not be avoided by allegation, agreement or proof that a woman was, by reason of age, incapable of bearing children: *White* v. *Allen,* 76 Conn. 185; *Taylor* v. *Crosson,* 11 Del. Ch. 145; *Reasoner* v. *Herman,* 191 Ind. 642; *Beall* v. *Wilson,* 146 Ky. 646; *Brown* v. *Columbia Finance & Trust Co.,* 123 Ky. 775; *Tyler* v. *Fidelity & Columbia Trust Co.,* 158 Ky. 280; *U. S. Fidelity & G. Co.* v. *Douglas' Trustee,* 134 Ky. 374; *Lovering* v. *Lovering,* 129 Mass. 97; *Gettins* v. *Grand Rapids Trust Co.,* 249 Mich. 238; *Rozell* v. *Rozell,* 217 Mich. 324; *Loud* v. *St. Louis Union Trust Co.,* 298 Mo. 148; *Graves* v. *Graves,* 94 N.J.Eq. 268; *Stout* v. *Stout,* 44 N.J.Eq. 479.

The following involved determination of title and the right to distribution or partition under wills and deeds. Presumption in favor of child-bearing capacity held conclusive: *Bowen* v. *Frank,* 179 Ark. 1004; *Williams* v. *Frierson,* 150 Ga. 797; *Dustin* v. *Brown,* 297 Ill.

499; *Hill* v. *Sangamon Loan & Trust Co.,* 295 Ill. 619; *Hill* v. *Spencer,* 196 Ill. 65; *Burrell* v. *Jean,* 196 Ind. 187; *Futrell* v. *Futrell's Executor,* 224 Ky. 814; *Rand* v. *Smith,* 153 Ky. 516; *Williams* v. *Armiger & Bro.,* 129 Md. 222; *Riley* v. *Riley,* 92 N.J.Eq. 465; *Gowen's Appeal,* 106 Pa. 288; *In re Sterrett's Estate,* 300 Pa. 116; *Bigley* v. *Watson,* 98 Tenn. 353; *Frank* v. *Frank,* 153 Tenn. 215; *Jordan* v. *Jordan,* 145 Tenn. 378.

The presumption was regarded as conclusive, except as otherwise noted, in the following cases involving the termination of trusts: *Fletcher* v. *Los Angeles T. & S. Bank,* 182 Cal. 177; *DuPont* v. *DuPont,* 159 Atl. 841; *Byers* v. *Beddow,* 106 Fla. 166; *In re Dougan,* 139 Ga. 351; *Allen* v. *Allen's Trustee,* 141 Ky. 689; *Bailey's Trustee* v. *Bailey,* 30 Ky.L.Rep. 127; *May* v. *Hardinsburg Bank & T. Co.,* 150 Ky. 136; *Quigley's Trustee* v. *Quigley,* 161 Ky. 85; *In re Ricard's Estate,* 97 Md. 608; *Towle* v. *Delano,* 144 Mass. 95; *Application of Smith,* 94 N.J.Eq. 1; *Bowlin* v. *R.I. Hospital Trust Co.,* 31 R.I. 289; *Bearden* v. *White,* 42 S.W. 476; *Garner* v. *Dowling,* 58 Tenn. 48; *Read* v. *Fite,* 8 Humph. 328; *Reeves* v. *Simpson,* 182 S.W. 68; *Carney* v. *Kain,* 40 W.Va. 758.

In the following cases it has been held that the presumption in favor of issue made it impossible for a vendor to convey clear title, and specific performance was denied: *Weberpals* v. *Jenny,* 300 Ill. 145; *Aulick* v. *Summers,* 186 Ky. 810; *Azarch* v. *Smith,* 222 Ky. 566; *Brown* v. *Owsley,* 198 Ky. 344; *Rozier* v. *Graham,* 146 Mo. 352; *Shuford* v. *Brady,* 169 N.C. 224; *List* v. *Rodney,* 83 Pa. 483.

The following involved suits under Acts providing for sale of land under special circumstances: *In re Apgar,* 37 N.J.Eq. 501, reversed on other grounds, *sub nom. Apgar* v. *Apgar,* 38 N.J.Eq. 549; *In re Clement,* 57 Atl. 724; *Westhafer* v. *Koons,* 144 Pa. 26.

In the following cases the presumption was discussed in connection with the determination of the intent of a testator: *Ansonia Nat. Bank* v. *Kunkel,* 105 Conn. 744; *Oleson* v. *Somogyi,* 93 N.J.Eq. 506; *Flora* v. *Anderson,* 67 Fed. 182.

The presumption was also discussed in *Sims* v. *Birden,* 197 Ala. 690; *State* v. *Lash,* 16 N.J.Eq. 380.

See also 48 L.R.A. (N.S.) 865; 67 A.L.R. 538; 23 Col.L. Rev. 50.

In England the same rule has been strictly enforced in cases involving the rule against perpetuities (*Jee* v. *Audley,* 1 Cox Ch. Cas. 324; *Griffiths* v. *Deloitte,* [1926] Ch. 56), but in distributing estates the courts have been more liberal when the proof of incapacity seemed persuasive and distribution would deprive no living person of a possible interest. *In re White,* [1901] 1 Ch. 570; *Carr* v. *Carr,* 106 L.T.Rep. 753. Cf. *Perkin* v. *Bland,* 122 L.T.Rep. 181.

With relatively few exceptions, the courts have regarded the principle as so firmly established that departures from precedent should be prohibited, if only for the sake of certainty and uniformity. See *In re Dougan,* 139 Ga. 351, 355.

The cases holding that evidence can be admitted to show that a woman is in fact incapable of having issue are few. *Johnson* v. *Beauchamp,* 5 Dana 70, has not been followed in Kentucky. See *May* v. *Bank of Hardinsburg,* 150 Ky. 136. *Male* v. *Williams,* 48 N.J.Eq. 33; *Riley* v. *Riley,* 92 N.J.Eq. 465; *Gowen's Appeal,* 106 Pa. 288; *List* v. *Rodney,* 83 Pa. 483; *Sterrett's Estate,* 300 Pa. 116; *Miller* v. *Macomb,* 26 Wend. 229; *Bacot* v. *Fessenden,* 130 App. Div. 819; and *Whitney* v. *Groo,* 40 App.D.C. 496, were cases involving specific performance of contracts for the sale of real estate. It can be inferred in all of them that the courts concluded that the possibil-

ity of issue being born to a woman long past the age for child-bearing was too remote to render unmarketable the title offered by the vendor.

There are two cases in which the capacity of a woman to bear children has arisen in connection with tax matters—*Farrington* v. *Commissioner,* 30 F. (2d) 915, cert. den., 279 U.S. 873; and *Guaranty Trust Co.* v. *Commissioner,* 27 B.T.A. 550, now pending on appeal to the Circuit Court of Appeals for the Second Circuit. Both involved the federal estate tax, and in both the presumption of capacity was held to be conclusive and irrebuttable. See also *Pennsylvania Co.* v. *Brown,* E.D.Penna., decided July 18, 1933, reported in Prentice-Hall Federal Tax Service, 1933, Vol. 1A, par. 1761.

The reasons usually given for excluding evidence of the incapacity of a woman to bear children are: (1) that the age at which ability to procreate ceases can not be ascertained with any degree of certainty; (2) that the subject is one of such delicacy that it should not be investigated in judicial proceedings; (3) that consideration of such evidence might encourage the performance of surgical operations to prevent birth of issue; and (4) that the prevailing rule tends to eliminate confusion in titles to property. See *Hill* v. *Sangamon Loan & Trust Co.,* 295 Ill. 619, 621–622.

It happens that the great majority of the cases wherein the presumption has been held conclusive involved only old age or the physiological changes incident thereto, but the rule makes no distinction between incapacity due to age and incapacity due to artificial causes. In two cases testimony has been offered to show that the capacity to bear children had been terminated by medical treatment. Both involved the same surgical operation as was proved here (hysterectomy), and in both the evidence was held inadmissible. *Byers* v. *Beddow,* 106 Fla. 166; *Guaranty Trust Co.* v. *Commissioner,* 27 B.T.A. 550.

Courts may well be reluctant to permit inquiry into matters so steeped in uncertainty as the efficacy of the various methods used to destroy child-bearing capacity.

The rule which has survived for many years should not be discarded upon a showing of hardship in individual cases.

*Mr. Joseph Carson,* with whom *Mr. George M. Morris* was on the brief, for respondent.

Modern medical knowledge and scientific certainty have made the rule contended for by the United States obsolete and inapplicable in this case.

No legal writer before Littleton refers to the rule. Littleton's Tenures (1592 ed.), fol. 8; Coke on Littleton, 28; 2 Blackstone's Commentaries, 125. The comments of these writers are made in connection with estates tail for the purpose of showing that a fee tail general can not become a fee tail with possibility of issue extinct and that a fee tail special arises only upon the death of one of the spouses. They appear to be the product of logicians in tenure and have an extremely remote, if any, connection with a federal estate tax dispute arising under modern American statutes. Cf. *United States* v. *Provident Trust Co.,* 281 U.S. 497.

In the then state of medicine and surgery, it was impossible to determine as a fact that either the male or female was incapable of procreation,—hence the rule.

The modernity of medical knowledge is emphasized by the fact that of all the cases cited involving incapacity of a woman to bear children, it appears that only three involved surgical operations. *Byers* v. *Beddow,* 106 Fla. 166; Guaranty Trust Co. *v.* Commissioner, 27 B.T.A. 550; and the present case. The absence of such cases makes it evident that the chief practical difficulty in the cases which have heretofore come before the courts has been the inconclusiveness of the evidence offered.

That the rule has rested on ignorance and uncertainty and not on knowledge, will best be demonstrated by reading the cases cited by petitioner. In every case the character of the evidence tending to show incapacity appears to have been considered, and the judgments of the courts will be seen in large measure to have been formed from the facts appearing in the evidence offered. Uncertain as to the impossibility of issue from the evidence presented, the courts have fallen back on the ancient formula as a safer guide. See *Hill* v. *Sangamon Loan & Trust Co.,* 295 Ill. 619; *Bowlin* v. *R.I. Hospital Trust Co.,* 31 R.I. 289.

Nevertheless courts in the United States have frequently recognized incapacity to bear children where the evidence was less conclusive than here. *Whitney* v. *Groo,* 40 App.D.C. 496; *Johnson* v. *Beauchamp,* 5 Dana 70; *Male* v. *Williams,* 48 N.J.Eq. 33; *Gowen's Appeal,* 106 Pa. 288; *Bacot* v. *Fessenden,* 130 App. Div. 819; *Ansonia National Bank* v. *Kunkel,* 105 Conn. 744. See also *Apgar* v. *Apgar,* 38 N.J.Eq. 549; *In re Staheli,* 78 N.J.Eq. 74, 77. And the British courts have, except where the property interests of living persons would be adversely affected, regularly admitted such evidence. *Mackenzie* v. *King,* 17 L.J. Ch. N.S. 488 (1848); *In re White,* 1 Ch. 570 (1901); *Leng* v. *Hodges,* Jac. 585 (1822); *Edwards* v. *Tuck,* 3 De G. M. & G. 39 (1853); *Brown* v. *Pringle,* 4 Hare 124 (1845); *Haynes* v. *Haynes,* 35 L.J. Ch. 303 (1866). Moreover, in the field of law pertaining to damages for personal injury, it appears to be the universal rule that evidence will be received to show that the injury destroyed the power to have issue. This Court has in fact so held. *Denver & R. G. Ry.* v. *Harris,* 122 U.S. 597. See also *Normile* v. *Wheeling T. Co.,* 57 W.Va. 132; Sedgwick on Damages, 9th ed., vol. 1, § 41a; *Partridge* v. *Boston & M. R. Co.,* 184 Fed. 211; *Alabama G. S. R. Co.* v. *Hill,* 93 Ala. 514.

Petitioner relies upon a presumption, the product of the artificial reasoning necessary to round out an intricate medieval concept. With the appearance of modern abdominal surgery the ancient presumption has become a demonstrable fiction—a bar to the truth—to be continued only if overwhelmingly desirable in the public interest. No such desirability exists here.

None of the reasons underlying the frequent refusal of the courts to hold that a woman is incapable of bearing children are applicable here.

Without the evidence as to incapacity the true value of the estate for tax purposes can not be computed.

The wisdom, as a matter of public policy, of admitting evidence concerning the impossibility of issue, is not involved where the question to which the evidence goes is one of valuation by a party (the Government) not directly concerned with anything more than the size of the testator's estate under the statute. It was the province of the court to pass upon the weight of all evidence pertinent to value.

It is the purpose of the statute to encourage charitable bequests (*Edwards* v. *Slocum,* 264 U.S. 61), and to require no more certainty in the evidence of value than is generally found in "human affairs" (*Ithaca Trust Co.* v. *United States,* 279 U.S. 151).

Mr. Justice Sutherland delivered the opinion of the Court.

The Provident Trust Company is the administrator, with will annexed, of the estate of the deceased, who died in 1921, leaving a will thereafter duly admitted to probate. Subsequent to the filing of the federal estate tax return, the Commissioner of Internal Revenue imposed an additional estate tax, amounting with interest to something over $21,000. The trust company paid the amount and filed a claim for refund of $18,404.05, on the ground

that under the provisions of the will the value of the residuary estate, less the value of the life estate of the daughter of deceased, should have been but was not allowed as a deduction from the gross estate. The commissioner rejected the claim and this action was brought.

The will, after making certain bequests, devised the remainder of the estate to the trust company, in trust to pay the income thereof to deceased's daughter during her natural life, and upon her death to her lawful issue; and further provided that upon the death of the daughter without issue, the testator's residuary estate should be distributed among designated charitable institutions and societies—all belonging to that class of organizations, bequests to which are deductible from the gross estate under the provisions of § 403 (a) (3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098. At the time of deceased's death, the daughter was fifty years of age. She had been in poor health and under a physician's care; and on February 9, 1914, upon medical advice, an operation was performed removing her uterus, Fallopian tubes, and both ovaries. The court below specifically found—"The operation and removal of the organs were necessary to prevent further impairment of her health. After the operation she could not have become pregnant nor could she have given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child." Following her death, a state orphans' court awarded the residue of the estate, subject to payment of transfer or inheritance taxes which might be due, to the charitable organizations named in the will.

Upon the foregoing facts, the court below held that respondent was entitled to recover, and accordingly awarded judgment in the sum of $17,204.66. 77 Ct. Cls. 37; 2 F.Supp. 472.

Section 403 (a) (3), *supra,* so far as it is pertinent here, provides that for the purpose of determining the value of the net estate to be taxed there shall be deducted from the value of the gross estate—" (3) The amount of all bequests, . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . ." Article 53, Treasury Regulations 37, declares that the amount of the deduction in such case is the value at the date of decedent's death of the remainder interest in the money or property which is devised or bequeathed to charity. Compare *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. It follows that in making a deduction for that interest, the value thereof must be determined from data available at the time of the death of decedent. Compare *Humes* v. *United States,* 276 U.S. 487, 494.

The government contended in the court below, as it contends here, that, in view of the restriction in respect of issue contained in the will, the value could not be thus determined, since the law, without regard to the fact, conclusively presumes that a woman is capable of bearing children as long as she lives; and that this presumption controls where the organs of reproduction have been completely removed and inability to bear children admits of no valid dispute, no less than where the question turns upon the circumstance of age alone, or upon conflicting evidence or medical opinions. The lower court held otherwise for the reason that the facts established, as of the date of decedent's death, forbade any other conclusion than that the daughter was incapable of bearing children, and a presumption to the contrary could not be indulged.

The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental re-

quirement of our system of law that questions of fact must be resolved according to the proof. Mr. Best, writing more than ninety years ago when the force of the rule was more strictly regarded than it has come to be since, said that modern courts of justice (that is to say, the courts of that day) were slow to recognize presumptions as irrebuttable, and were disposed to restrict rather than extend the number.

"Many presumptions," he says, "which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *praesumptiones juris tantùm*, or considered as presumptions of fact, to be made at the discretion of a jury. . . . By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice." Best, Presumptions of Law and Fact (London, 1844), § 18.

Certainly the world has gained in experience since that was written; and the binding effect, in respect of particular situations, of the ancient rule precluding proof of facts to the end of avoiding supposed injurious results thought to be of greater consequence than the predominance of truth over error, still remains a proper subject of judicial inquiry to be made and resolved in the light of such further experience and knowledge. Compare *Funk* v. *United States*, 290 U.S. 371.

The foregoing observations are peculiarly apposite to the phase of the subject now under review; for, as suggested by counsel for respondent, the presumption here

involved had its origin at a time when medical knowledge was meager, and many centuries before the discovery of anaesthetics and, consequently, before surgical operations of the kind here involved became practicable. It was not until a comparatively recent period, therefore, that the effect of such an operation was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children.

The government argues that the rule is one of substantive law and evidence to overcome it is inadmissible. Whether in particular instances so-called irrebuttable presumptions are, in a more accurate sense, rules of substantive law rather than true presumptions, is a matter in respect of which a good deal has been said by modern commentators on the law of evidence. 2 Chamberlayne on Evidence, §§ 1086, 1087, 1159, *et seq.;* 5 Wigmore on Evidence, 2d ed., § 2492. Compare *Heiner* v. *Donnan,* 285 U.S. 312, 328–329; 2 Thayer, Evidence, 351–352, 540–541, 545–546. But it is unnecessary to consider that interesting distinction, since, as will appear, the presumption in question in this instance must be dealt with as open to rebuttal and, therefore, in any aspect of the matter, as a true presumption.

The presumption generally has been held to be conclusive when the element of age alone is involved, albeit Lord Coke's view that the law seeth no impossibility of issue, even though both husband and wife be an hundred years old (Coke on Littleton, 551; 2 Blackstone Commentaries 125), if now asserted for the first time, might well be put aside as a rhetorical extravagance. But the presumption, even where age alone is involved, has not been universally upheld as conclusive or applied under all circumstances. It has been followed to a greater extent in this country than in England, though even here

exceptional cases are to be found; [1] and in England such cases are very numerous.[2] It does not seem necessary to review the decisions in either jurisdiction. It is enough to say that the English courts have treated the rule as possessing a considerable degree of flexibility and have refused to give it a conclusive effect in a large number of cases; while the American courts, adhering to a more rigid view, have applied the rule more generally. See extended note, 67 A.L.R. 538, *et seq.*, where the decisions are classified and digested. Few cases have arisen where elements other than, or in addition to, that of age were present, and the conclusive character of the rule in such cases is by no means established. Thus in *Hill* v. *Spencer,* 196 Ill. 65, 70; 63 N.E. 614, the Supreme Court of Illinois held meaningless an allegation that a woman was past the age of childbearing, but was careful to add, " unless more than a mere matter of age is stated in the bill." See *Denver & R. G. Ry.* v. *Harris, supra,* note 1. And speaking generally this court has said, *Lincoln* v. *French,* 105 U.S. 614, 616–617—" But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown."

The basis for the interposition of an irrebuttable presumption is embodied in the general statement of Mr.

[1] *Male* v. *Williams,* 48 N.J.Eq. 33, 36; 21 Atl. 854; *Ansonia National Bank* v. *Kunkel,* 105 Conn. 744, 753; 136 Atl. 588; *Moore's Executor* v. *Beauchamp,* 5 Dana (Ky.) 70, 72; *Bacot's Case,* MS. (N.J.), cited in note to *Apgar's Case,* 37 N.J.Eq. 502; *Apgar* v. *Apgar,* 38 N.J.Eq. 549, 552; *Carney* v. *Kain,* 40 W.Va. 758, 811; 23 S.E. 650. And in *Denver & R. G. Ry.* v. *Harris,* 122 U.S. 597, 608, a personal injury case, this court sustained without question the admission of evidence that the injured person had been rendered impotent as a result of the physical injury.

[2] See note to *Apgar's Case, supra,* note 1.

Wigmore, quoted by the court below, that evidence of certain kinds of facts is excluded "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth." 1 Wigmore on Evidence, 2d ed., § 11. Relating this obviously correct view to the presumption here invoked, not only do we perceive no grounds of expediency or policy that call for its hard and fast application to a particular physical condition, when ignorance has been supplanted by knowledge so as to put beyond the range of doubt the destructive effect of that condition upon the capacity for childbearing, but we conclude affirmatively that the policy of the statute under review as applied to the case in hand is quite to the contrary.

The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof. Moreover, the case does not involve the rule against perpetuities, the devolution of property, the rights or title of living persons in or to property, or any other situation such as constituted the background of practically all the decisions which have sustained the conclusiveness of the presumption. We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests. *Edwards* v. *Slocum,* 264 U.S. 61, 63. And, in that view, we well may assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not to *sustain* another or different policy, would deny the

truth and *subvert* the policy of this particular legislation. Compare *Humes* v. *United States, supra,* at p. 494.

The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. See *Ithaca Trust Co.* v. *United States, supra.* Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason.

The judgment of the court below is

*Affirmed.*

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## ALABAMA *v.* ARIZONA ET AL.

No. —, original. Argued January 9, 1934.—Decided February 5, 1934.

1. A bill by a State seeking to enjoin five other States from enforcing their statutes against open market sale of products of prison labor, upon the ground that such statutes, and an Act of Congress purporting to divest such products of their interstate character, operate unconstitutionally to deprive the complainant of its interstate markets for goods produced in its prison farms and factories,—*held* multifarious. *Bitterman* v. *Louisville & N. R. Co.,* 207 U.S. 205. P. 290.
2. This Court may not be called on to give advisory opinions or to pronounce declaratory judgments. P. 291.
3. Application by a State for leave to file a bill to enjoin other States from enforcing their laws will not be granted unless the facts alleged

are clearly sufficient to call for a decree in its favor and the threatened injury is clearly shown to be serious and imminent. P. 291.

4. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. P. 292.
5. In a suit by a State to prevent other States from enforcing their statutes, the burden upon the plaintiff to establish fully and clearly all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. P. 292.

Leave to file denied.

APPLICATION by the State of Alabama for leave to file a bill for an injunction against five other States.

*Mr. Wm. Logan Martin,* with whom *Mr. Thomas E. Knight,* Attorney General of Alabama, and *Mr. Perry W. Turner* were on the brief, for plaintiff.

*Mr. Wm. A. Schnader,* Attorney General of Pennsylvania, and *Mr. Raymond T. Nagle,* Attorney General of Montana, argued the cause for the defendant States, and briefs were filed as follows: by *Mr. Arthur T. LaPrade,* for Arizona; *Messrs. U. S. Webb* and *W. R. Augustine,* for California; *Messrs. Paul P. Prosser, Norris C. Bakke,* and *Allen Moore,* for Colorado; *Mr. Bert H. Miller,* for Idaho; *Messrs. Philip Lutz, Jr.,* and *Joseph W. Hutchinson,* for Indiana; *Messrs. Edward L. O'Connor, Walter F. Maley,* and *J. M. Parsons,* for Iowa; *Messrs. Bailey P. Wootton* and *S. H. Brown,* for Kentucky; *Mr. Harry H. Peterson,* for Minnesota; *Messrs. Raymond T. Nagle* and *Jeremiah J. Lynch,* for Montana; *Messrs. William A. Stevens* and *Duane E. Minard,* for New Jersey; *Messrs. John J. Bennett, Jr.,* and *Henry Epstein,* for New York; *Messrs. Dennis G. Brummitt* and *A. A. F. Seawell,* for North Carolina; *Messrs. John W. Bricker, W. Dale Dunifon,* and *Perry L. Graham,* for Ohio; *Mr. I. H. Van Winkle,* for Oregon; *Mr. Wm. A. Schnader,* for Pennsylvania;

*Messrs. G. W. Hamilton, John W. Hanna,* and *E. P. Donnelly,* for Washington; and *Messrs. James E. Finnegan* and *J. E. Messerschmidt,* for Wisconsin.

Mr. Justice Butler delivered the opinion of the Court.

For the purpose of invoking original jurisdiction as "to Controversies between two or more States" (Const., Art. III, § 2) Alabama lodged with the clerk and applied for leave to file a complaint against 19 States praying that the court adjudge invalid, because in violation of the commerce clause of the Federal Constitution, statutes by them respectively enacted to regulate or prohibit sales of articles produced by convict labor and an Act of Congress approved January 19, 1929, 45 Stat. 1084, effective January 19, 1934, to divest in certain cases such products of their interstate character. Responding to our orders to show cause why leave should not be granted, 17 of the States submitted returns suggesting that the complaint is multifarious and fails to allege facts sufficient to entitle Alabama to any relief. At the hearing upon the questions so raised, counsel for Alabama obtained leave to, and on a later day did, submit an amendment eliminating 14 States including those that merely regulate and some that prohibit sales of convict-made goods, leaving only Arizona, Idaho, Montana, New York and Pennsylvania.

Each of the assailed state statutes, while not in all respects the same as the others, forbids the sale upon the open market of any goods produced wholly or in part by convicts of other States and prescribes penalties for violation. The Act of Congress declares that, with exceptions which need not be specified here, goods produced by convict labor and transported into any State shall be subject to the laws of that State to the same extent and in the same manner as if there produced.

The substance of the complaint follows. Alabama's prison population averages about 5,500 and in connection with its prisons it has agricultural lands, cotton mills and a shirt factory. About 1,050 inmates do farm work for the production of cotton and potatoes, and about 1,250 operate spindles and make shirts. In 1927 the State entered into a contract with a manufacturing company pursuant to which it sold the latter cotton goods made in its mills and, for hire at the rate of 75 cents per dozen shirts made, furnished convict labor to be employed in the prison factory. The contract expired March 31, 1933, and, the company having declined to renew or extend it, the parties agreed that during the ensuing quarter the State would sell the company prison-made goods for 5 cents a yard and furnish the convict labor for 54 cents per dozen shirts.

While the contract was in force the company sold some of the convict-made products in each of the 19 States originally named as defendants. In round figures, sales amounted annually to $347,000, of which it received for the goods sold in Arizona $1,000, Idaho $10,000, Montana $10,000, New York $30,000, Pennsylvania $25,000. For the material and labor furnished by it Alabama received the equivalent of 30 per cent. of the amounts for which the company sold the goods. Because of the Act of Congress and state statutes in question Alabama is unable to make any "firm agreement" for the sale of its prison-made cotton goods or for the employment of its convicts. In the second quarter of 1933 it received for labor $11,500 less than was paid it in the preceding quarter. The lower rate of compensation will continue during the rest of 1933. And enforcement of the statutes in question will prevent Alabama from selling in defendant States potatoes produced by the labor of its convicts.

Alabama's investment in the cotton mills and shirt factory exceeds $300,000 and will be valueless as a result of

its inability to find an employer for its convict labor and a market for its prison-made goods. The cost of maintaining unemployed convicts will be about $550,000 annually. Without employment convicts cannot be treated appropriately for their rehabilitation and the promotion of the good order and welfare of the State. The very existence of the assailed enactments is sufficient to bring about the unemployment which will continue unless their enforcement is enjoined.

If Alabama is compelled to provide other employment, it will have to expend about $1,000,000 for the construction of plants for the manufacture of things to be used by the inmates of its eleemosynary institutions and in and about other state activities. As presently employed its prisoners are divided into night and day shifts so as to avoid overcrowding of the prisons. And, if the State does not provide other industrial activities it will have to expend about $100,000 for additional space to house its convicts.

1. There is no test or rule of general application by which to determine whether a complaint in equity is multifarious. That question is to be decided by the court in the exercise of sound discretion having regard to the facts alleged, circumstances disclosed and the character of the relief sought. *Oliver* v. *Piatt,* 3 How. 333, 411. *Nelson* v. *Hill,* 5 How. 127, 132. *Shields* v. *Thomas,* 18 How. 253, 259. *Fitch* v. *Creighton,* 24 How. 159, 163–164. *Brown* v. *Guarantee Trust Co.,* 128 U.S. 403, 410. Unless necessary for the prompt, convenient and effective administration of justice, a suit by one State against several States to set aside a statute of each is properly to be regarded as multifarious. There has been suggested no reason to sustain Alabama's complaint, as it stood before amendment, against the objection of misjoinder of parties defendant and of causes of action. Cf. *Hale* v. *Allinson,* 188 U.S. 56, 74.

The amendment of the bill serves merely to obviate objections that are based on dissimilarity of the state enactments. It is not shown that the joinder of five States is necessary to avoid a multiplicity of suits or that it will substantially serve the convenience of Alabama or of the court. Alabama does not claim concert of action on the part of the defendants or that they are jointly liable in respect of any matter referred to in the bill. The enforcement of the statutes attacked would prohibit the sale of Alabama's prison products in the five States named. If one is repugnant to the commerce clause, all transgress. Alabama cities *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U.S. 205. Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of such joinders have no bearing in a case such as this. If, in a suit brought by Alabama against one of these States, this court should hold the assailed statute invalid and enjoin its enforcement, the decision would be authoritative and controlling as a precedent in all courts, state and federal. Presumably no other State would attempt on similar facts to enforce a like measure, and Alabama would have no occasion to invoke our jurisdiction further. The amended bill is multifarious.

2. This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States,* 219 U.S. 346. *Willing* v. *Chicago Auditorium Assn.,* 277 U.S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 261–262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas,* 176 U.S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor.

Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois*, 200 U.S. 496, 520–521. *New York* v. *New Jersey*, 256 U.S. 296, 309. *North Dakota* v. *Minnesota*, 263 U.S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois, supra*, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U.S. 444, 458. The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669.

Plainly the amended bill does not meet the requirements that reasonably should be imposed upon the applicant. It fails to show that Alabama has any agreement with any defendant or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. Cf. *Louisiana* v. *Texas, supra*, 18, 22. There is no allegation that an adequate market for the goods in question may not be found outside the five States named. The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida* v. *Mellon*, 273 U.S. 12.

*Leave denied.*

Mr. Justice Stone concurs in the result.

# LOCAL 167, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 6. Argued January 17, 18, 1934.—Decided February 5, 1934.

1. Failure to comply with 28 U.S.C., § 862, and Rule 9 in respect of assignment of errors may be taken as sufficient ground for dismissal. P. 296.
2. Control of the handling, sales and prices of commodities at the place of origin before their interstate journey begins, or in the State of destination where the interstate movement ends, may operate directly to restrain and monopolize interstate commerce. P. 297.
3. The Sherman Act denounces every conspiracy in restraint of interstate trade, including those that are to be carried on by acts constituting intrastate transactions. P. 297.
4. In the presence of evidence of a highly organized scheme and conspiracy, maintained by the levy, collection and expenditure of enormous sums, for the purpose of dominating a great and permanent business, the defense of abandonment requires definite proof—abandonment can not be presumed. P. 297.
5. The silence of defendants whom the evidence tends to implicate and who were present at the taking of the testimony, is evidence of the persistence of the conspiracy and of their participation in it. P. 298.
6. In a suit under the Sherman Act to enjoin a conspiracy, parties who have been convicted in a criminal prosecution for the same conspiracy are estopped to deny their connection with it before the indictment. P. 298.
7. A decree of injunction under the Sherman Law should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy; it should be broad enough to prevent evasion, and doubts as to the scope of its prohibitions should be resolved in favor of the Government and against the conspirators. P. 299.
8. Intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the statute. P. 299.

Affirmed.

APPEAL from a decree of injunction under the Sherman Antitrust Act. For opinions of the District Court in connection with some of the interlocutory rulings, see 44 F. (2d) 393 and 53 F. (2d) 518.

*Mr. Samuel H. Kaufman,* with whom *Mr. Nathan D. Perlman* was on the brief, for appellants.

*Assistant Attorney General Stephens,* with whom *Solicitor General Biggs* and *Messrs. Charles H. Weston* and *Walter L. Rice* were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The decree appealed from is an injunction against a conspiracy commenced in May, 1927, by the appellants and others to restrain and monopolize interstate commerce in live and freshly dressed poultry in violation of §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C., §§ 1, 2. Most of the issues were litigated before the same court in a criminal prosecution commenced August 28, 1928. Sixty-five of the defendants in this case were there convicted November 21, 1929. The Circuit Court of Appeals affirmed.*

This suit was commenced February 7, 1930. The defendants are the Greater New York Live Poultry Chamber of Commerce, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Jobbers and Stablemen of America, the Official Orthodox Poultry Slaughterers of America, Inc., called the shochtim union, and 100 individuals, 75 of whom are wholesalers, hereafter called marketmen. The Chamber is an association of marketmen. The members of Local 167 haul live poultry. Shochtim are the only persons qualified to slaughter poultry in accordance with Jewish dietary laws; they are employed by the marketmen.

* 47 F. (2d) 156. Certiorari denied, 283 U.S. 837.

Live poultry for sale and consumption in the New York metropolitan area continuously moves in great volume from points in distant States to commission men, called receivers, at railroad terminals in Manhattan and Jersey City. The receivers sell to marketmen. The larger part of the poultry is delivered directly from the cars; the remainder from stands maintained by the receivers. The purchasers have the coops loaded on trucks and hauled to their places of business where, without avoidable delay, they sell, slaughter and deliver to retailers. Marketmen organized the Chamber of Commerce and allocated retailers among themselves and agreed to and did increase prices. The Chamber, through a levy of a cent a pound upon poultry sold by the marketmen, raised money—more than $1,000,000 in the first year—to pay for enforcement activities. To accomplish various purposes of the conspiracy, the conspirators hired men to obstruct the business of dealers who resisted. They spied on wholesalers and retailers and by violence and other forms of intimidation prevented them from freely purchasing live poultry. And, for like purpose and to extort money for themselves and their associates, members of Local 167 refused to handle poultry for recalcitrant marketmen, and members of the shochtim union refused to slaughter.

The petition contains allegations identical with those of the indictment as to the conspiracy and the means used to carry it into effect. The convicted defendants denied all the material allegations. On the Government's motion the court struck out as sham their denials of the conspiracy prior to the commencement of the criminal prosecution but let stand their denials of its continuance after that date. Decree was entered against 52 defendants by consent. Among the 49 resisting were the Chamber of Commerce, Local 167, the shochtim union and 29 individuals who had been convicted. At the conclusion of the evidence the trial judge in an oral opinion stated that, except as to two individual defendants, every mate-

rial allegation had been proved. In accordance with that ruling the court later made findings of fact, stated its conclusions of law and entered a comprehensive decree. Only Local 167, the shochtim union and 14 individuals, members of the one or the other union, have appealed.

In their brief and oral argument appellants contend: (1) there is no proof that they intended to restrain or did interfere with interstate commerce; (2) if ever concerned in the conspiracy, they voluntarily abandoned it before this suit was commenced, and there is no probability of resumption; (3) there is no credible evidence against Weiner, Rosenman and Markman; (4) the court erred in striking out as sham the denials of convicted defendants; (5) the decree should be modified by eliminating a paragraph that enjoins them in respect of both interstate and intrastate commerce and by limiting the injunction to interstate commerce.

The assignment of errors includes more than 250 specifications and occupies more than 35 pages of the record. While it is possible to find among them bases for the five points indicated, they contain so much that is irrelevant that they tend to confuse rather than to define the issues to be presented. They do not appropriately serve the convenience of the appellee or of the court. *Phillips & Colby Const. Co.* v. *Seymour,* 91 U.S. 646, 648. *Central Vermont Ry.* v. *White,* 238 U.S. 507, 508. *Chesapeake & Del. Canal Co.* v. *United States,* 250 U.S. 123, 124. *Seaboard Air Line Ry.* v. *Watson,* 287 U.S. 86, 91. In view of the omission of appellee to object and the lack of precedent definitely in point we refrain from dismissing the appeal for failure substantially to comply with the statute and our rule in respect of the assignment of errors. 28 U.S.C., § 862. Rule 9. But what is here said is to be understood as an announcement that in the future a failure of that sort may be taken as sufficient ground for dismissal.

Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.

The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. *Public Utilities Comm'n* v. *Landon,* 249 U.S. 236, 245. *Missouri* v. *Kansas Gas Co.,* 265 U.S. 298, 309. *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U.S. 465, 470–471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. *United States* v. *Brims,* 272 U.S. 549. *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295, 310. *United States* v. *Swift & Co.,* 122 Fed. 529, 532–533. Cf. *Swift & Co.* v. *United States,* 196 U.S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. *Bedford Co.* v. *Stone Cutters Assn.,* 274 U.S. 37, 46. *Loewe* v. *Lawlor,* 208 U.S. 274, 301. The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce.

Appellants' contention that the proof shows that they abandoned the conspiracy before the commencement of this suit cannot be sustained.

The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was

highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, abandonment will not be presumed. *Hyde* v. *United States,* 225 U.S. 347, 369. *Nyquist* v. *United States,* 2 F. (2d) 504, 505. The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants' participation continued until the filing of the amended complaint. They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them. *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 52. *Bilokumsky* v. *Tod,* 263 U.S. 149, 154.

There was evidence tending to show that Weiner, Rosenman and Markman were connected with the conspiracy. All were present but none testified. As on cross-examination full disclosure would have been called for, failure to take the witness stand strongly suggests that they could not give an account of their conduct that would be consistent with the denial interposed by answer or tend to repel what had been shown against them. The district court rightly held them to be parties to the conspiracy.

The judgment in the criminal case conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. And, to the extent that the answers attempted to deny participation of convicted defendants in the conspiracy of which they had been found guilty,

they are false and sham and the district court rightly so treated them. *Oklahoma* v. *Texas,* 256 U.S. 70, 85. Cf. *Coffey* v. *United States,* 116 U.S. 436, 442. *Stone* v. *United States,* 167 U.S. 178, 184.

Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shochtim union "for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof." The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.,* 265 U.S. 526, 532. The evidence shows that delegates of the unions coerced marketmen to use coops of a company that had or sought to secure a monopoly of such facilities and charged excessive rentals for them. The lack of specific evidence that coercion has been practiced or is threatened in respect of every detail or commodity is no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like. When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant.

And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be en-

joined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act. *Bedford Co.* v. *Stone Cutters Assn., ubi supra. Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 438. In this case the evidence fully sustains the decree.

*Affirmed.*

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## PACIFIC TELEPHONE & TELEGRAPH CO. *v.* SEATTLE ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 364. Argued January 15, 1934.—Decided February 5, 1934.

1. A city ordinance imposing a license tax on a telephone company measured on the gross income from its business in the city, and providing penalties for delay in payment, can not be held violative of due process upon the ground of being too vague and indefinite to enable the taxpayer to compute the amount of its tax, where the ordinance does not purport to give the final definition of the taxpayer's obligation but leaves that to be done by an administrative official through regulations and forms for tax returns, which are not shown to have been prepared, and where the duty to make return and pay any part of the tax can not arise under the ordinance until such forms are available. P. 303.
2. The Fourteenth Amendment does not require that legal duties shall be defined by any particular agency of the state government. P. 303.
3. The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply. P. 304.

172 Wash. 649; 21 P. (2d) 721, affirmed.

APPEAL from a judgment affirming the dismissal of a suit to restrain the collection of a tax.

*Mr. Otto B. Rupp,* with whom *Mr. Alfred Sutro* was on the brief, for appellant.

*Mr. Walter L. Baumgartner,* with whom *Mr. A. C. Van Soelen* was on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of the State of Washington, 172 Wash. 649; 21 P. (2d) 721, sustaining a state license or excise tax assailed by appellant upon numerous state and federal grounds. The only one urged here is that the statutory measure of the tax as applied to appellant is so vague and indefinite as to infringe the due process clause of the Fourteenth Amendment.

An ordinance of the Seattle city council, of May 23, 1932, imposes annual license taxes on the privilege of carrying on various classes of business. One such is the telephone business upon which the tax is 4% of the "gross income" of the business "in the city" during the preceding fiscal year. The definition of gross income by § 2 is printed in the margin.[1] By § 10, the taxpayer is required annually to make application to the city comptroller for an "occupation license" for the ensuing year "upon blanks or forms to be prepared by him requiring such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax." By § 20 the comptroller is required to make rules and regulations having the force of law for carrying the ordinance into effect. Payment of the full tax or a monthly or quarterly installment of it is required on filing the return.

[1] Section 2. Definitions: . . .

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

The cause was heard and decided on demurrer to appellant's bill of complaint asking an injunction to restrain the collection of the tax. The bill was filed shortly after the enactment of the ordinance. It alleges that the appellant, a California corporation, derives its receipts and earnings from the conduct of a telephone business, both interstate and intrastate, carried on within and without the City of Seattle, by the use of its telephone exchanges, wires, poles, conduits and other property located in Seattle and also outside of Seattle, both within and without the state. It charges that the ordinance is vague and indefinite, in that it fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business or so much of its intrastate business as is conducted within the City of Seattle, and that the definition of gross income set out in § 2 is so vague and uncertain as to make it impossible for appellant to compute with reasonable certainty the amount of the tax.

The bill of complaint does not show whether appellant had applied for its occupation license or had received from the comptroller the prescribed form of return specifying the information which would be required by him for the computation of the tax or whether the comptroller had prepared such a form at the time when the bill was filed. It fails to show whether the comptroller had promulgated rules or regulations for carrying the ordinance into effect or whether appellant had requested of him any ruling, interpreting the ordinance, which would aid in preparing the return required for the computation of the tax. On the argument before us appellant admitted that the present suit was brought without waiting for the preparation of forms and regulations and that it had made no effort to secure an administrative interpretation of the ordinance.

The state court, in disposing of the attack upon the uncertainty of the statute, contented itself with saying that "gross income" is a proper basis for determining the amount of a tax; that the objections raised by the appellant are "more fanciful than real"; and that "in practical application under present day systems of accounting appellant will have no serious difficulty in ascertaining the amount of the tax it is required to pay."

Despite this conclusion of the state court that the taxing act can be given a practical construction we are asked to say that the statute is unconstitutional because of its vagueness. It may be conceded that the definition by the ordinance of taxable "gross income" is not free from ambiguities or difficulties of construction. But in the present posture of the case we are called upon neither to resolve them nor to say whether they can be resolved.

The ordinance allows wide latitude for administrative construction, both by the provision which requires the comptroller to make interpretative rules and regulations, and that which commands him to prepare the form for the return on the basis of which the tax is to be computed. Until the form is prepared the most that can be required of taxpayers is that they apply for the license and for the form on which to make their tax returns. Without the return there can be no tax and no penalty can be imposed for its nonpayment. Thus the ordinance does not purport finally to define the duty of taxpayers. Instead it directs that an administrative officer shall mark the scope of the obligation, and only then does the state compel obedience to its mandate.

In this we see no invasion of constitutional immunity. Compare *In re Kollock*, 165 U.S. 526; *St. Louis, I. M. & S. Ry.* v. *Taylor*, 210 U.S. 281; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.*, 224 U.S. 194. The Fourteenth Amendment does not require that legal duties

shall be defined by any particular agency of the state government. *Dreyer* v. *Illinois*, 187 U.S. 71, 83; *Soliah* v. *Heskin*, 222 U.S. 522, 524; *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428, 443; *O'Donoghue* v. *United States*, 289 U.S. 516, 545; cf. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118. The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. Before the duties of the administrative officer are performed we cannot say that the ordinance falls short of that requirement. At this stage appellant can show no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution can not allay that fear. Compare *Edelman* v. *Boeing Air Transport*, 289 U.S. 249, 253.

The decision of the state court must be affirmed, not because the appellant has failed to exhaust its administrative remedies, which would concern us only if the suit had been brought in a federal court of equity, but because without administrative action, which has not occurred, there can be no infringement of the immunity invoked.

*Affirmed.*

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## FEDERAL TRADE COMMISSION *v.* R. F. KEPPEL & BRO., INC.

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

No. 194. Argued January 11, 1934.—Decided February 5, 1934.

1. The Federal Trade Commission, proceeding under § 5 of the Act, ordered respondent, one of numerous candy manufacturers similarly engaged, to desist from selling and distributing in interstate commerce candy in a certain type of package, in assortments, so arranged and offered for sale as to avail of the element of chance as an inducement to the retail purchaser. Each package contained

display material, attractive to children and explaining the plan by which either the price or the amount of the candy received by the purchaser was affected by chance. The Commission found that the candy in this type of package was inferior in size or quality to that in other classes of packaged candy marketed without the aid of the chance feature, and that the competition between the two classes resulted in substantial diversion of trade from others to the manufacturers and distributors of the former; that this type of package was sold extensively in the retail trade to school children, among whom it encouraged gambling; and that many manufacturers refrained on moral grounds from making it, and as a result were placed in a disadvantageous competitive position. *Held:*

(1) The practice complained of is a method of competition in interstate commerce. P. 308.

(2) The proceeding is "to the interest of the public," if otherwise within the purview of the Act. P. 308.

(3) The Commission correctly concluded that the practice was an unfair method of competition within the meaning of the Act. P. 314.

2. The fact that a practice does not involve any fraud or deception and that competitors may maintain their competitive position by adopting it, does not necessarily put it beyond the jurisdiction of the Commission. P. 309.
3. The types of practices held in earlier litigation in this Court to be subject to the Commission's prohibition do not mark the limits of the Commission's jurisdiction. P. 309.
4. The Act is not restricted in its operation to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act. P. 310.
5. The phrase "unfair methods of competition," as used in the Act, does not admit of precise definition, but its meaning and application must be arrived at by a gradual process of judicial inclusion and exclusion. P. 312.
6. A method used by a competitor is not necessarily fair because others may adopt it without restricting competition between them. P. 312.
7. The normal meaning of the words used is the first criterion of statutory construction. P. 313.
8. A practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and which

a large share of the industry regards as unscrupulous, would seem clearly to come within the meaning of the word "unfair." P. 313.

9. While it is for the courts finally to determine what are unfair methods of competition under the Act, yet the conclusions of the Commission on this question are of weight, and should be sustained when based upon clear, specific and comprehensive findings supported by evidence. P. 314.

10. It is unnecessary, even if it were possible, to define in advance what unfair methods are forbidden by the Act; new or different practices must be considered as they arise in the light of the circumstances in which they are employed. P. 314.

63 F. (2d) 81, reversed.

CERTIORARI, 290 U.S. 613, to review a judgment reversing an order of the Federal Trade Commission.

*Assistant Attorney General Stephens,* with whom *Solicitor General Biggs* and *Messrs. Hammond E. Chaffetz, Robert E. Healy,* and *James W. Nichol* were on the brief, for petitioner.

*Mr. George E. Elliott,* with whom *Mr. Harris C. Arnold* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to review a decree of the Court of Appeals for the Third Circuit, which set aside an order of the Federal Trade Commission forbidding certain trade practices of respondent as an unfair method of competition. 63 F. (2d) 81; § 5, Federal Trade Commission Act, 38 Stat. 717, 719.

The Commission found that respondent, one of numerous candy manufacturers similarly engaged, manufactures, sells and distributes, in interstate commerce, package assortments of candies known to the trade as "break and take" packages, in competition with manufacturers of assortments known as "straight goods" packages. Both types are assortments of candies in packages in convenient arrangement for sale by the piece at a small price

in retail stores in what is known as the penny candy trade. The break and take assortments are so arranged and offered for sale to consumers as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, penholder and ruler. Each assortment is accompanied by a display card, attractive to children, prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior quality. Much of the candy assembled in the break and take packages is sold by retailers, located in the vicinity of schools, to school children.

The Commission found that the use of the break and take package in the retail trade involves the sale or dis-

tribution of the candy by lot or chance; that it is a lottery or gambling device which encourages gambling among children; that children, enticed by the element of chance, purchase candy so sold in preference to straight goods candy; and that the competition between the two types of package results in a substantial diversion of trade from the manufacturers of the straight goods package to those distributing the break and take type. It found further that in some states lotteries and gaming devices are penal offenses; that the sale or distribution of candy by lot or chance is against public policy; that many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children; and that such manufacturers are placed at a disadvantage in competition. The evidence shows that others have reluctantly yielded to the practice in order to avoid loss of trade to their competitors.

The court below held, as the respondent argues here, that respondent's practice does not hinder competition or injure its competitors, since they are free to resort to the same sales method; that the practice does not tend to create a monopoly or involve any deception to consumers or the public, and hence is not an unfair method of competition within the meaning of the statute.

Upon the record it is not open to question that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it. If the practice is unfair within the meaning of the Act, it is equally clear that the present proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, "to the interest of the public." The practice is carried on by forty or more manufacturers. The disposition of a large number of complaints pending before the Commission,

similar to that in the present case, awaits the outcome of this suit. Sales of the break and take package by respondent aggregate about $234,000 per year. The proceeding involves more than a mere private controversy. A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy industry. A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute. *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U.S. 212, 216. Compare *Federal Trade Comm'n* v. *Klesner*, 280 U.S. 19, 28. Hence we pass without further discussion to the decisive question whether the practice itself is one over which the Commission is given jurisdiction because it is unfair.

Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Comm'n* v. *Gratz*, 253 U.S. 421, 427; *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453; *Federal Trade Comm'n* v. *Raladam Co.*, 283 U.S. 643, 652; *Federal Trade Comm'n* v. *Royal Milling Co., supra*, at 217. But we cannot say that the Com-

mission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court.

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See *Federal Trade Comm'n* v. *Raladam Co., supra,* 649, 650. But as this Court has pointed out it also had a broader purpose, *Federal Trade Comm'n* v. *Winsted Hosiery Co.,* 258 U.S. 483, 493; *Federal Trade Comm'n* v. *Raladam Co., supra,* 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition" to be unlawful.[1] But

[1] The Senate Committee on Interstate Commerce, in recommending the bill in its original form, seems to have adopted the phrase "unfair competition" with the deliberate purpose of giving to the Commission some latitude for dealing with new and varied forms of unfair trade practices. The Committee said in its report of June 13, 1914, Senate Report No. 597, 63d Cong., Second Session, page 13:

it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase " unfair methods of com-

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" The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

. . . . . .

" It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

Senator Newlands, in introducing the bill for the Committee, emphasized this feature. In answering the criticism that the phrase " unfair competition " lacked definition he said, 51 Cong. Rec. 11084:

" Our answer to this is that it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be. Germany does not hesitate by law to condemn practices in business that are *contra bonos mores*. It leaves their tribunals to determine what practices are against good morals.

. . . . . .

" It is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow. If we should attempt to define all the trade practices that can be devised, that would create dishonest advantage in competition, we would undertake a hopeless task."

petition" was substituted.[2] Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" *Federal Trade Comm'n* v. *Raladam Co., supra,* 648; compare *Davidson* v. *New Orleans,* 96 U.S. 97, 104.[3]

The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in *Federal Trade Comm'n* v. *Winsted Hosiery Co., supra;* compare *Federal Trade Comm'n* v. *Algoma Lumber Co., ante,* p. 67. There it was specifically held that a

[2] The phrase "unfair methods of competition" was substituted for "unfair competition" in the Conference Committee. This change seems first to have been suggested by Senator Hollis in debate on the floor of the Senate in response to the suggestion that the words "unfair competition" might be construed as restricted to those forms of unfair competition condemned by the common law. 51 Cong. Rec. 12145. The House Managers of the conference committee, in reporting this change, said, House Report No. 1142, 63d Congress, 2d Sess., September 4, 1914, at page 19:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

[3] References showing the details of the legislative history of the Act may be found in Handler, The Jurisdiction of the Federal Trade Commission over False Advertising, 31 Col.L.Rev. 527; Montague, Unfair Methods of Competition, 25 Yale L.J. 20; Henderson, The Federal Trade Commission, c. I.

trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods "Natural Wool," as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair." See *Federal Trade Comm'n* v. *Royal Milling Co., supra,* at 217; *Federal Trade Comm'n* v. *Algoma Lumber Co., supra,* at 81.

While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, *Federal Trade Comm'n* v. *Gratz, supra,* in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9, 11. See *Federal Trade Comm'n* v. *Beech-Nut Packing Co., supra,* at 453; compare *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U.S. 441, 454. If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.

We hold that the Commission correctly concluded that the practice was an unfair method of competition within the meaning of the statute. It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed.

*Reversed.*

Counsel for Parties.

## MURRAY *v.* JOE GERRICK & CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 308. Argued January 19, 1934.—Decided February 5, 1934.

1. Where a tract within a State has been acquired by the United States for a Navy Yard, with the consent of the state legislature, and the legislature has ceded to the United States the State's jurisdiction over it saving only the right to serve process, a state law subsequently passed to regulate rights and remedies for death by negligence can have no operation over the tract save as it may be adopted by Congress. P. 318.
2. The Act of February 1, 1928, provides that in case of death of one person by neglect or wrongful act of another within a place subject to the exclusive jurisdiction of the United States within the exterior boundaries of a State, "such right of action shall exist as though the place were under the jurisdiction of the State"; and that "in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." *Held:*

   (1) That the Act does not adopt a state Workmen's Compensation Law by which claims are settled without recourse to actions and paid from a state insurance fund collected from employers; nor does it adopt, separately, a provision of such a law allowing actions to be brought against employers who fail to contribute to such fund. P. 318.

   (2) By force of the federal Act, a death statute of the State of Washington confining the right of action to the personal representative, became applicable in the Puget Sound Navy Yard, superseding an early state statute, in force when that reservation was established, by which either heir or personal representative might sue. P. 319.

172 Wash. 365; 20 P. (2d) 591, affirmed.

CERTIORARI, 290 U.S. 615, to review the affirmance of a judgment sustaining a demurrer to a declaration in an action for death by wrongful act.

*Mr. M. M. Doyle* argued the cause, and *Mr. Wm. Martin* filed a brief, for petitioner.

*Messrs. Roszel C. Thomsen* and *Walter L. Clark* argued the cause, and *Messrs. Stephen V. Carey, J. Speed Smith,* and *Henry Elliott, Jr.,* filed a brief, for respondents.

Mr. Justice Roberts delivered the opinion of the Court.

Louis H. Murray, a steel erector, died as the result of a fall from a crane which was being erected by his employers, the respondents, in the Puget Sound Navy Yard at Bremerton, Washington. The petitioner, his widow, brought action, on her own and her minor child's behalf, alleging the decedent's death was caused by the respondents' negligence. The trial court sustained a demurrer to the declaration, holding the action was not maintainable by the widow and daughter as beneficiaries under the Washington Workmen's Compensation Act, since that act was not in force in the Navy Yard; and if it were considered a suit for death by wrongful act, the applicable state statute required that it be instituted by the personal representative of the decedent. The petitioner, although she was also administratrix, refused to amend and claim in virtue of her status as such, and stood upon the declaration. A judgment in favor of respondents was affirmed by the Supreme Court.[1]

In the petition for certiorari it is asserted that the state courts misconstrued the Act of Congress of February 1, 1928. This court consequently has jurisdiction. The question of the bearing of the federal Act upon the right to maintain the action requires the statement of additional facts.

By a statute passed in 1891 [2] the State consented to the acquisition of a tract of land by the United States for a navy yard or other specified uses, and ceded jurisdiction

[1] 172 Wash. 365; 20 P. (2d) 591.

[2] Laws of 1891, p. 31; Remington's Revised Statutes, § 8108.

over the same to the federal government, retaining only concurrent jurisdiction for the service of civil and criminal process issued under the authority of the State. Pursuant to this consent, the United States acquired what is now known as Puget Sound Navy Yard. At that time a state statute was in force permitting the heirs or personal representatives of one dying as a result of negligence to maintain suit against the wrongdoer.[3]

In 1911 Washington adopted an industrial insurance law or workmen's compensation act which required every employer engaged in extrahazardous occupation to report the work undertaken by him and to pay to a state insurance fund certain sums measured by the payroll for the work. The act abolished all actions by employees against employers for injury in extrahazardous occupations, and, in lieu thereof, conferred upon the injured workman the right to be paid from the fund; gave a similar right to named beneficiaries in case of an employee's death, and further provided that if an employer should fail to report or to pay to the state fund, the employee, or his beneficiaries in case of death, might sue the employer for negligence.[4]

In 1917 the prior statute relating to suits for death by wrongful act was superseded by an act vesting the right to sue in the personal representative of the decedent.[5]

February 1, 1928, an Act of Congress [6] became effective entitled "An Act Concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States." It enacts: "That in the case of the death of any person by the neglect or wrongful act of another within a national park or other place

[3] § 8, Code of 1881; Remington & Ballinger's Ann. Code, § 183.

[4] Remington's Revised Statutes, §§ 7673, 7674, 7676, 7679.

[5] Remington's Revised Statutes, §§ 183, 183–1.

[6] Act of February 1, 1928, c. 15, 45 Stat. 54; U.S. Code Title 16, § 457.

subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State . . .; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

The petitioner, believing this Act of Congress made the state compensation law applicable to the Navy Yard, sued on behalf of her child and herself as beneficiaries, alleging the respondents had failed to report the work and make the payments required by the compensation act.

The state Supreme Court held that the compensation act does not apply to territory beyond the authority of the state legislature. But it also held that act could not have any force in the Navy Yard, since it was adopted many years after the cession of jurisdiction by the State and the consequent acquisition of the tract by the United States. In this the court was clearly right. After the effective date of the State's cession the jurisdiction of the federal government was exclusive (*Fort Leavenworth R. Co.* v. *Lowe*, 114 U.S. 525, 537; *United States* v. *Unzeuta*, 281 U.S. 138), and laws subsequently enacted by the state were ineffective in the Navy Yard. *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439. Congress may, however, adopt such later state legislation as respects territory under its jurisdiction, and the petitioner claims it did so adopt the compensation act by the Act of February 1, 1928. This argument overlooks the fact that the federal statute referred only to actions at law, whereas the state act abolished all actions at law for negligence and substituted a system by which employers contribute to a fund to which injured workmen must look for compensation. The right of action given upon default of the employer in respect of his obligation to contribute to the fund is conferred as

a part of the scheme of state insurance and not otherwise. The Act of Congress vested in Murray no right to sue the respondents, had he survived his injury. Nor did it authorize the State of Washington to collect assessments for its state fund from an employer conducting work in the Navy Yard. If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the incongruous situation that this law is in part effective and in part ineffective within the area under the jurisdiction of the federal government. Congress did not intend such a result. On the contrary, the purpose was only to authorize suits under a state statute abolishing the common law rule that the death of the injured person abates the action for negligence.

The petitioner urges that if the Act of Congress failed to extend the workmen's compensation law to the Navy Yard, she is, nevertheless, entitled to maintain her action in behalf of herself and her child as heirs of the decedent, because the Code of 1881 ( *supra*) was in effect at the date of cession and remained applicable until Congress altered it. She relies upon the principle that when political jurisdiction and legislative power over territory are transferred from one sovereign to another, the municipal law of the place continues in force until abrogated by the new sovereign. *Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn,* 114 U.S. 542; *Vilas* v. *Manila,* 220 U.S. 345, 357. But the weakness of her position is that by the Act of February 1, 1928, Congress did abrogate the Code provision as respects the Navy Yard by enacting that " such right of action shall exist as though the place were under the jurisdiction of the State," and " in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." This plainly means the existing law, as declared from time to time by the state; and Washington,

by the Act of 1917, has substituted for the action, given in the alternative to heirs or personal representatives by the Code of 1881, one vested exclusively in the personal representative. It results that the petitioner could sue only under the Act of 1917.

The judgment is

*Affirmed.*

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## MANHATTAN PROPERTIES, INC. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.*

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

No. 505. Argued January 10, 1934.—Decided February 5, 1934.

1. The claim of a landlord for future rents based on a covenant to pay rent in a lease terminated by reëntry on the bankruptcy of the tenant, is not a provable debt under § 63 (a) of the Bankruptcy Act. P. 332.

   So *held* in view of the great weight of judicial authority construing that section and similar provisions of earlier Acts, and in view of the legislative history of the subject.
2. The fact that a provision of a statute which has received a settled construction from federal courts has remained unaltered notwithstanding that Congress has repeatedly amended the statute in other respects, is persuasive that the construction accords with the legislative intention. P. 336.
3. Sections 73–76, added to the Bankruptcy Act by the Act of March 3, 1933, were enacted to permit extensions and compositions not theretofore possible, for individuals only; and the clause of § 74 (a) providing that "A claim for future rent shall constitute a provable debt and shall be liquidated under § 63 (b) of this Act," is to be related to this novel procedure and not taken as an amendment of § 63 (a) or as declaratory of its meaning. P. 336.
4. A covenant by a tenant to indemnify the landlord for loss of rent he may suffer during the residue of the term after reëntry by the

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* Together with No. 506, *Brown et al.* v. *Irving Trust Co., Trustee in Bankruptcy*, certiorari to the Circuit Court of Appeals for the Second Circuit.

landlord upon the bankruptcy of the tenant, and which can come into operation only after the bankruptcy, and only if the landlord sees fit to reënter on that ground, is not a basis for a debt provable in the bankruptcy proceedings. P. 338.

5. Such a covenant is not the equivalent of an agreement that bankruptcy shall be a breach of the lease and that the consequent damages to the lessor shall be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. P. 338.

66 F. (2d) 470, 473, affirmed.

REVIEW by certiorari, 290 U.S. 619, of orders sustaining the rejection of claims for loss of future rents, in two bankruptcy cases.

*Mr. William D. Mitchell,* with whom *Messrs. C. Dickerman Williams, Rollin Browne, Ralph Montgomery Arkush,* and *Amos J. Peaslee* were on the brief, for petitioners.

The lower courts have become involved in a maze of technicalities and distinctions based on ancient maxims of the law of landlord and tenant and developed by indemnity clauses, reëntry clauses, *ipso facto* clauses, acceleration clauses, liquidated damage clauses, and a variety of other covenants contained in modern leases. They have to a large extent lost sight of fundamentals and of the purposes of the Bankruptcy Act, and of the fact that Congress may have intended that such claims should be allowed, the tenant discharged from liability for future rents, and the landlord allowed to share with other creditors in the distribution of assets.

The correct rule is to be found in the Bankruptcy Act and in the decisions of this Court. *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 549; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581; *Wm. Filene's Sons Co.* v. *Weed,* 245 U.S. 597; *Gardiner* v. *Wm. S. Butler & Co.,* 245 U.S. 603; *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224; *Maynard* v. *Elliott,* 283 U.S. 273.

To deny provability of such claims defeats the purposes of the Act. It leaves the bankrupt liable indefinitely, while denying the landlord the right to participate with other contract creditors.

If the tenant be a corporation, it rarely is rehabilitated after bankruptcy; and if the claim be not allowed in bankruptcy, the landlord is left to pursue the empty husk of a corporation without assets. For all practical purposes his claim is discharged. It is true he may resume possession, but the value of what he resumes is depreciated below the rent contracted, otherwise he would have no claim. The persons interested in the corporation may organize a new one to take over the assets at bankruptcy sale at a price which will satisfy other creditors or pay them in full, and then continue the business and leave the landlord to pursue a defunct corporation, with only the possibility of mitigating his loss by renting the property for less than the original lease provided. How this system works is well stated in an article on "Rent Claims in Bankruptcy," 33 Col.L.Rev. 213. See 7 Univ.Cin.L. Rev. 162.

Claims have been allowed on instalment contracts to buy ice (*In re Stern,* 116 Fed. 604); contracts to buy cotton bagging (*Lesser* v. *Gray,* 236 U.S. 70); instalment contracts to sell rubber (*In re Portage Rubber Co.,* 296 Fed. 289); contracts to buy stock (*In re Pettingill & Co.,* 137 Fed. 143); employment contracts (*Re Schultz & Guthrie,* 235 Fed. 907); annuities (*Cobb* v. *Overman,* 109 Fed. 65); and on contracts to make monthly payments similar to rents for the privilege of handling baggage at a hotel (*Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581).

There should be no distinction between leases having special indemnity or *ipso facto* covenants and those which have not.

The special covenants have been relied on to remove the element of contingency, to endeavor to make claims absolute at the time of the filing of the petition, and also to avoid the objection that a covenant to pay rent is extinguished by the landlord's resumption of possession. On the latter theory, these special covenants have been said to substitute for the covenant to pay rent a personal covenant of indemnity, the liability to perform which is not extinguished as is the rent obligation by reëntry. There is support for this theory in *Gardiner* v. *Butler,* 245 U.S. 603, and in other decisions.

The resumption of possession is not the voluntary act of the landlord; it is forced upon him by the bankruptcy. For the purposes of the Bankruptcy Act the argument that the obligation to pay rent no longer forms a basis for awarding damage because the consideration for rent is the possession of the land, is no more forcible than the argument that the obligation of the bankrupt to pay for goods on future delivery is extinguished because the goods will not be delivered to an insolvent purchaser.

The argument that reëntry cancels the covenant to pay rent, the only covenant on which a claim could be based, unless there is a special indemnity covenant, ignores the fundamental purpose of the Bankruptcy Act as announced in *Williams* v. *U.S. Fidelity & G. Co.,* and *Maynard* v. *Elliott, supra.* Cf. *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581.

On the narrower view as to the operation of the Bankruptcy Act, the claims involved in these cases are provable because of the special indemnity covenants. In both leases the parties expressly contracted for personal liability of the tenant to indemnify the landlord for loss of rent consequent upon default or bankruptcy leading to reëntry and stipulated that resumption of possession of the leased premises by the landlord would not discharge that liability.

The lease in No. 506 contains an indemnity clause in substantially the form involved in the *Filene* case, except that in the latter case the lease contained a liquidated damage clause adopting the formula which is the ordinary rule for computing the damage, and which is the rule which may be adopted even where some other rule has been contracted for. *Central Trust Co.* v. *Chicago Auditorium Assn., supra; Sweatman's Appeal,* 150 Pa. St. 369.

The lease in No. 505 contains an indemnity clause in which the tenant agreed to reimburse the landlord from month to month. In so far as such a covenant contemplates a continued liability of the tenant after discharge in bankruptcy, it could not be operative, but nevertheless the covenants of that lease sufficiently reserve a claim against the tenant notwithstanding reëntry.

Although the covenants in both leases provide the same formula in case of bankruptcy as is provided in case of default without bankruptcy, if the provision for future liability of the tenant after bankruptcy is discarded, there still remains the covenant for indemnity in case of default, which satisfies the rule in the *Filene* case. The result is that in both cases the covenant for indemnity may form the basis of the claim as a substitute for the covenant for rent, and the objection that has sometimes been offered to the provability of such claims, that a rent covenant is extinguished by reëntry, disappears from the case.

The agreement of the tenant to indemnify his landlord is itself an existing contractual obligation susceptible of present valuation. *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 540; *In re Buzzini,* 183 Fed. 827, cited with approval by this Court in *Maynard* v. *Elliott,* 283 U.S. 273.

The provability of the indemnity covenant may be based theoretically on the doctrine of anticipatory breach

(cf. *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 244 Fed. 485, aff'd, 250 Fed. 327, cert. den., 246 U.S. 672; *In re Mullings Clothing Co.*, 238 Fed. 58, cert. den., 243 U.S. 635; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U.S. 581; *Re Fitz George*, [1905] 1 K.B. 462); or on the broad ground that any contractual obligation susceptible of present liquidation, matured or unmatured, absolute or conditional, may be proved in bankruptcy. *Maynard* v. *Elliott, supra;* Restatement, Contracts, § 324. The present value is the discounted difference between rental value and rent reserved. *Sweatman's Appeal*, 150 Pa. St. 369, cited with approval in *Wm. Filene's Sons Co.* v. *Weed, supra.*

The question has never been at rest in any circuit. There is no rule of property involved.

Under the English system, landlords' claims for damages for loss of future rent where tenants become bankrupt have long been provable, without regard to the presence of special covenants. *Mayor* v. *Steward*, 4 Burr. 2439 (K.B. 1769); 32 and 33 Vict., c. 71, § 23 (1869); *Ex parte Llynvi Coal Co.*, L.R. 7 Ch. App. 28 (1871); *Ex parte Blake*, 11 Ch. Div. 572 (1879); Bankruptcy Act of 1883, 46 and 47 Vict., c. 57. See *In re Panther Lead Co.* (1896), 1 Ch. Div. 978; Act of 1914, 4 and 5 Geo. V, c. 59, §§ 30, 54. See also *Ex parte Leather Sellers Co.*, 3 Morrell 126 (Q.B.D., 1886); *Ex parte Verdi*, 3 Morrell 218 (Q.B.D., 1886); *Hardy* v. *Fothergill*, L.R. 13 App. Cas. 358 (H.L., 1888); *In re Carruthers*, 15 Reports 317, 2 Mansons 172 (1895).

The amendment to the Bankruptcy Act enacted March 3, 1933, to the effect that "a claim for future rents shall constitute a provable debt and shall be liquidated under Section 63 (b) of this Act" is declaratory and intended to remove doubt as to the construction of the prior law, and confirms our position.

*Mr. Frederick H. Wood,* with whom *Messrs. Harold L. Fierman* and *William D. Whitney* were on the brief, for respondent.

The legislative and judicial history of the Bankruptcy Act is persuasive, if not conclusive, that Congress did not intend that claims for damages for loss of future rent should be provable in bankruptcy.

Moreover, only compelling language in the Act itself—which is wanting therefrom—would warrant the rejection of the construction placed upon the Act by the courts below, which is a construction accepted and followed with substantial unanimity by bench and bar practically ever since the enactment of the statute.

The amendment of March 3, 1933, was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

The long accepted interpretation of the Act upon which the decisions below are based, is consistent with the decisions of this Court and is supported by well established and long recognized principles of law.

With regard to the law of England, it is pertinent to observe that it took an Act of Parliament to abolish the distinction based upon what petitioners concede to be "the technical law of landlord and tenant" and the law governing contracts relating to personalty or to the performance of personal services.

The "technical law of landlord and tenant" is to be found in the rule that, while breaches of executory contracts relating to personalty and to the performance of personal services give rise to claims for damages, the landlord by reëntry terminates all liability of the tenant to pay rent, and that upon such reëntry and termination no cause of action in favor of the landlord for the recovery of damages for the consequent loss of future rent arises. *Gardiner* v. *Butler,* 245 U.S. 603; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581. Breach of a

covenant to pay rent, followed by reëntry and termination by the landlord, would give rise to no cause of action in favor of the landlord were the tenant solvent. Consequently, it gives rise to no claim where the breach of such covenant is the result of bankruptcy. This being so, the claim asserted is not even a contingent claim, since all liability of the tenant, whatever the occasion for the default, is extinguished by reëntry and termination of the lease on the part of the landlord.

Distinguishing: *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 549; *Maynard* v. *Elliott,* 283 U.S. 273; *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224. *Wm. Filene's Sons Co.* v. *Weed,* 245 U.S. 597, was in equity. The opinion intimates that the claim would not have been allowable in bankruptcy. Cf. *Gardiner* v. *Butler, supra.*

The specific claims presented in these cases, arising out of the particular covenants contained in the leases before the Court, are in no event provable in bankruptcy.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. W. Randolph Montgomery, Edwin M. Otterbourg,* and *Charles A. Houston,* on behalf of the National Association of Credit Men; *Messrs. Joseph F. Mann, Harry J. Gerrity,* and *Donald Adams Powell,* on behalf of the National Association of Building Owners and Managers; *Messrs. Rollin Browne* and *Ralph Montgomery Arkush,* on behalf of numerous owners of real property; *Mr. Reese D. Alsop,* on behalf of the Cotton Textile Merchants Association of New York; *Messrs. Arthur A. Ballantine* and *Henry J. Friendly,* on behalf of the Trustees in Bankruptcy of Paramount Publix Corp.; *Mr. Godfrey Goldmark,* on behalf of the Trustee in Bankruptcy of McCrory Stores Corp.; *Messrs. Charles Tuttle* and *Robert P. Levis,* on behalf of the Creditors Advisory Committee of McCrory Stores Corp. and McLellan Stores Co.; and *Messrs. Alanson W. Willcox* and *Bertram F. Willcox,* on behalf of certain landlords.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases present the question whether a landlord may prove in bankruptcy for loss of rents payable in the future, where the claim is founded upon the bankrupt's covenant to pay rent, and, in the alternative, upon his breach of a covenant that in event of bankruptcy, the landlord may reënter, and if he does, the tenant will indemnify him against loss of rents for the remainder of the term.

In No. 505 it appears that Oliver A. Olson Co., Inc., was the lessee of premises for a term of nine years and eight months beginning February 1, 1928, and expiring October 1, 1937. Defaults in payment of rent due February and March, 1932, were followed by an involuntary proceeding in which the company was, on March 18, 1932, adjudicated a bankrupt. The total rent reserved for the portion of the term subsequent to bankruptcy was $58,000, and, as the claimant asserted, the present rental value of the leased premises for the remainder of the term was $33,000. The lessor filed its claim, one item being damages for loss of future rentals, which it asked to have liquidated at $25,000, the difference between the rent reserved and the present rental value.

The lease contained a covenant that if the tenant should default in the payment of rent, or abandon the premises, or if they should become vacant, the tenant become insolvent, or make an assignment for the benefit of creditors, or if bankruptcy proceedings should be instituted by or against the tenant, the landlord might without notice reënter the premises; and after obtaining possession, relet as agent for the tenant, for the whole or any part of the term, and from time to time, and:

"The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the

amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The referee expunged so much of the claim as sought damages for loss of future rents, holding that it did not constitute a provable debt. The District Court and the Circuit Court of Appeals were of the same opinion.[1]

In No. 506 premises owned by the petitioners were held by the bankrupt under a lease dated June 14, 1920, for a term to expire June 30, 1945. There was a covenant that on default by the lessee, or if it should be adjudicated a bankrupt, the lessor might enter and repossess the premises,

". . . and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

A voluntary petition was filed and an adjudication entered August 29, 1932. November 23, 1932, the trustee disaffirmed the lease, and three days later the lessors took possession and proceeded to collect rents from the occupants of the demised premises; and January 13, 1933,

[1] 66 F. (2d) 470.

they filed a proof of claim which as amended included an item of $4,404.40, representing the difference between the rent accrued to the date of reëntry and the collections from occupants during that period, and an item of $143,-615.80, representing the difference between the alleged rental value for the remainder of the term after reëntry and the rent reserved in the lease. Petitioners made application for liquidation of their claim under § 63 (b) of the Bankruptcy Act. The trustee moved to have the claim expunged and disallowed. The referee disallowed both items, and his action was affirmed by the District Court and the Circuit Court of Appeals.[2]

The controversy hinges upon the interpretation of the following sections of the Bankruptcy Act:

"Sec. 63. *Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [3]

"Section 1 (11). 'Debt' shall include any debt, demand, or claim provable in bankruptcy." [4]

"Section 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . ." [5]

[2] 66 F. (2d) 473.

[3] U.S.C. Title 11, § 103.

[4] U.S.C. Title 11, § 1.

[5] U.S.C. Title 11, § 35.

A majority of the Circuit Court of Appeals felt bound to follow its earlier decision in *Re Roth & Appel,* 181 Fed. 667, which denied a landlord's right to prove a claim for future rents arising under a similar lease. The view there expressed was that the occupation of the land is the consideration for the rent, and if the right to occupy terminates, the obligation to pay ceases; and the covenant to pay rent creates no debt until the time stipulated for payment arrives. Since many events may occur which will absolve the tenant from further obligation for rent, the claim is said to be too contingent, both because of the uncertainty at the date of adjudication that the lessor will reënter, and the doubt as to his suffering loss of rent if he should reënter.

In the present case one of the judges of the Court of Appeals held that *Maynard* v. *Elliott,* 283 U.S. 273, has settled the provability of claims contingent in the sense that no sum is presently payable, thus destroying the principal ground of decision in *Re Roth & Appel,* and that the estimation of the present worth of payments to be made in the future is no obstacle to the proof of a claim based upon an anticipatory breach. *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581.

The petitioners say the provability of claims for future rent is a subject on which the lower federal courts have been in disagreement. They argue that a claim for rent is founded upon a lease which is an express contract within the words of § 63 (a) (4). They rely upon the purpose of the bankruptcy law to bring in all contract creditors and to discharge all debts of the bankrupt, so that he may start afresh unembarrassed by old indebtedness, and point to the hardship to an individual bankrupt of not discharging claims for rent which might well prevent his financial rehabilitation, and the unfairness to the landlord of a corporate bankrupt who, under the decision below, cannot prove upon his lease along with other cred-

itors, but must look solely for redress for loss of future rents to a corporate debtor whom bankruptcy has stripped of all assets.

The respondent asserts a substantial difference between rent and other kinds of indebtedness, and presents equitable considerations thought to weigh in its favor, but especially stresses the legislative history of the bankruptcy laws passed by Congress, and insists that the preponderant construction of them by the courts excludes claims for future rents from the class of provable debts.

The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act. The construction for which the petitioners contend is, as a matter of logic, an admissible one. But that construction is contrary to the great weight of authority as to the effect of similar provisions in earlier Acts, and § 63 of the present Act.

In England such claims were not provable under the Act of 7 Geo. I, c. 31; *Mayor* v. *Steward*, 4 Burr. 2439; and a discharge could not be pleaded in defense of an action for rent accruing subsequent to bankruptcy. *Boot* v. *Wilson*, 8 East 311. The landlord's claim for loss of future rent was made provable by the Act of 32 and 33 Vict., c. 71, § 23 (1869), and more explicit provisions to the same effect were embodied in that of 46 and 47 Vict., c. 52, §§ 37 and 55 (1883).

The Act of Congress, approved April 4, 1800,[6] permitted proof of a limited class of contingent claims, but did not mention rents. Apparently the latter were not considered provable debts under that statute. *Hendricks* v.

[6] 2 Stat. 19, Sec. 39. ". . . the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities, as if such money had been due and payable before the time of his or her becoming bankrupt . . ."

*Judah*, 2 Caines (N.Y.) 25; *Lansing* v. *Prendergast*, 9 Johns. (N.Y.) 127.

The Act of August 19, 1841, § 5, 5 Stat. 440, 444, expressly allowed proof of contingent claims,[7] specifying certain classes and adding a general description of contingent debts but said nothing about rent. The courts held that the latter was not a provable debt within this section, because neither a present debt nor a contingent claim susceptible of liquidation. *Bosler* v. *Kuhn*, 8 Watts & S. (Pa.) 183; *Stinemets* v. *Ainslie*, 4 Denio (N.Y.) 573; *Savory* v. *Stocking*, 4 Cush. (Mass.) 607.

The Act of March 2, 1867, § 19, 14 Stat. 517, 525, authorized the proof and liquidation of contingent claims, and also proof of a claim for a proportionate part of any rent up to the date of bankruptcy.[8] The courts uniformly

[7] ". . . all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti . . ."

[8] ". . . In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

. . . . . .

"Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

held that claims for future rent or for damages for breach of covenant to pay rent were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rents thereafter falling due. *Ex parte Houghton,* Fed. Cas. 6725; *Ex parte Lake,* Fed. Cas. 7991; *In re Croney,* Fed. Cas. 3411; *In re Commercial Bulletin Co.,* Fed. Cas. 3060; *In re May,* Fed. Cas. 9325; *In re Hufnagel,* Fed. Cas. 6837; *Bailey* v. *Loeb,* Fed. Cas. 739.

In the year 1880 Circuit Judge John Lowell, of Massachusetts, at the suggestion of several mercantile associations, drafted a proposed bankruptcy law, which, after revision, was introduced in Congress, but failed of passage. It contained a section (60) which allowed proof of damages suffered by a landlord by reason of the trustee's rejection of a lease, and another (61) permitting any creditor to compel the trustee to elect to accept or decline any lease, and upon declination the landlord was to have " any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy." [9]

After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors,* 251 U.S. 239, 250), Congress adopted the Act now in force, that of July 1, 1898.[10] The committee reports do not disclose the origin of the phraseology of § 63, nor discuss the classes of claims intended to be included. But it is clear that Congress was familiar with analogous sections of the earlier Acts and the court decisions interpreting them, and with the text of the

[9] The bill in full appears in the Congressional Record, Vol. 14, pp. 43–48.

[10] 30 Stat. 544, c. 541.

Lowell Bill and the English act then in force. In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra,* pp. 250, 251.

Soon after the passage of the Act several federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under § 63. *In re Ells,* 98 Fed. 967; *In re Mahler,* 105 Fed. 428; *Atkins* v. *Wilcox,* 105 Fed. 595. Since 1900 the Circuit Courts of Appeals in six circuits, and the District Courts in another, have agreed with these early adjudications. *Slocum* v. *Soliday,* 183 Fed. 410; *McDonnell* v. *Woods,* 298 Fed. 434 (C.C.A. 1); *In re Roth & Appel, supra; In re Mullings Clothing Co.,* 238 Fed. 58; *In re Metropolitan Chain Stores,* 66 F. (2d) 482 (C.C.A. 2); *Trust Co. of Georgia* v. *Whitehall Holding Co.,* 53 F. (2d) 635; *Orr* v. *Neilly,* 67 F. (2d) 423 (C.C.A. 5); *Wells* v. *Twenty-first Street Realty Co.,* 12 F. (2d) 237 (C.C.A. 6); *Britton* v. *Western Iowa Co.,* 9 F. (2d) 488 (C.C.A. 8); *Colman Co.* v. *Withoft,* 195 Fed. 250 (C.C.A. 9); *Bray* v. *Cobb,* 100 Fed. 270; *In re Hook,* 25 F. (2d) 498. The decisions in the Third Circuit turn upon a special form of lease drawn to take advantage of a local statutory provision, and while establishing a rule differing from that elsewhere recognized, are not inconsistent with it. See *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742; *South Side Trust Co.* v. *Watson,* 200 Fed. 50; *In re H. M. Lasker Co.,* 251 Fed. 53; *Rosenblum* v. *Uber,* 256 Fed. 584. The Court of Appeals of the Seventh Circuit has not discussed the question at length, but at least one of its decisions supports the view that a claim for loss of future rentals may be proved. *In re Chakos,* 24 F. (2d)

482; compare *In re Desnoyers Shoe Co.*, 227 Fed. 401; *In re National Credit Clothing Co.*, 66 F. (2d) 371.

This court has never had occasion to pass upon the precise point. It has not, however, expressed disapproval of the rulings of the great majority of the lower federal courts, and has cited many of their decisions with apparent approbation. See *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U.S. 581, 589–590; *Wm. Filene's Sons Co.* v. *Weed*, 245 U.S. 597; *Gardiner* v. *Butler & Co.*, 245 U.S. 603, 605; *Maynard* v. *Elliott*, 283 U.S. 273, 278.

In accord with the well-nigh unanimous view of the federal courts reiterated for over thirty years are statements of leading text writers. Collier, Bankruptcy, Vol. 2, p. 1422; Remington, Bankruptcy, Vol. 2, §§ 789, 793; Loveland, Bankruptcy, Vol. 1, § 313.

What of the activities of the Congress while this body of decisions interpreting § 63a was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times [11] without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh*, 149 U.S. 368, 372.

In this situation " only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted." *Maynard* v. *Elliott*, *supra*, 277. If the rule is to be changed Congress should so declare.

The petitioners call attention to the last clause of § 74 (a), which is one of the sections added to the Act in 1933: [12] "A claim for future rent shall constitute a

[11] Acts of February 5, 1903, c. 487, 32 Stat. 797; June 15, 1906, c. 3333, 34 Stat. 267; June 25, 1910, c. 412, 36 Stat. 838; March 2, 1917, c. 153, 39 Stat. 999; January 7, 1922, c. 22, 42 Stat. 354; May 27, 1926, c. 406, 44 Stat. 662; February 11, 1932, c. 38, 47 Stat. 47.

[12] Act of March 3, 1933, 47 Stat. 1467.

provable debt and shall be liquidated under section 63 (b) of this Act." Sections 73 to 76 inclusive were enacted to permit extensions and compositions not theretofore possible. They apply only to individuals. It is highly unlikely that if the quoted sentence had been intended as an amendment of § 63 (a) it would have been placed in context dealing only with the novel procedure authorized by the new sections. Moreover, the discussion on the floor of the Senate relative to the insertion of the sentence, indicates that it was not intended to alter § 63 (a) as it then stood.[13] The petitioners insist the clause is declaratory of the law, as understood by the Congress; but there is no evidence to support this view, and it is inconsistent with the long standing contrary judicial construction.

It remains to consider the effect of the indemnity covenants in the leases. These do not provide for liquidation of damages (compare *Wm. Filene's Sons Co.* v. *Weed, supra*), nor indeed for any right to damages for breach of the covenant to pay rent.

In No. 505 the agreement is, in the event of reëntry and reletting by the landlord, to pay each month the deficit accruing from the difference between the amount to be paid as rent under the lease and the amount received by the landlord from the premises throughout the residue of the original term; and further, that the overplus, if any, at the expiration of the term, shall be paid to the tenant, unless the landlord, within six months from reëntry, release the tenant from all liability under the covenant, which the landlord is authorized to do, thus terminating all rights and liabilities under the agreement of lease.

In No. 506 the stipulation is that upon bankruptcy the landlord may reënter and thereby terminate the lease, and

[13] Cong. Rec., Senate, Feb. 24, 1933, pp. 5058–9; Feb. 27, 1933, p. 5278.

the lessee covenants that, in such case, " it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term . . ."

In both cases the lessor has the choice whether he will terminate the lease. Neither the bankrupt nor the trustee has any such option, except as the trustee may be entitled by law to disclaim. And upon the exercise of the option by the landlord, a new contract, distinct from that involved in the original letting, becomes operative. While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. For here, the landlord does not rely upon the destruction of his contract by the bankruptcy; he initiates a new contract of indemnity by the affirmative step of reëntry. And this new contract comes into being not by virtue of the bankruptcy proceeding, but by force of the act of reentry, which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term. There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term. Compare *In re Ells, supra; Slocum* v. *Soliday, supra; In re Roth & Appel, supra.* Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder

of the term and the total rent to fall due in the future. The covenants appearing in the leases in question cannot be made the basis of a proof of debt against the estate.

The judgments are

*Affirmed.*

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## BOOTH *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 656. Argued January 17, 1934.—Decided February 5, 1934.

1. A district or circuit judge of the United States who retires pursuant to § 260 of the Judicial Code, as amended, continues in office within the meaning of § 1 of Art. III of the Constitution, and his compensation may not be diminished. P. 348.
2. In the light of the evident purpose of the Act that a retiring judge shall continue to hold office and perform official duties, its provision for the appointment of a "successor" can not be construed as vacating the office. P. 351.
3. A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the meaning of § 1 of Art. III. P. 352.

CERTIFICATES from the Court of Claims in two cases involving the validity of an Act reducing the pay of retired federal judges.

*Messrs. William D. Mitchell* and *John S. Flannery,* with whom *Mr. Carl Taylor* was on the brief, for petitioners.

To resign an office is to give it up. To retire from active service is something less. To retire from regular active service is still further removed from resignation. By retiring, a federal judge does not retire from office or wholly from active service, but in the words of the statute, only "from regular active service." The service he does per-

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* Together with No. 657, *Amidon* v. *United States,* certificate from the Court of Claims.

form is active, though it may not be regular. He is not disqualified to perform the same service as before retirement. Cf. *United States* v. *Tyler,* 105 U.S. 244; *Kahn* v. *Anderson,* 255 U.S. 1, 6.

If a retired judge ceases to hold office, he may not constitutionally serve as a judge. This statute has now been in effect fourteen years, and during that time retired federal judges have performed a vast amount of judicial labor. It is too late to say that by retirement they ceased to hold office and that this judicial service has been without authority of law.

The Act was intended to allow retired judges to continue in office. It merely grants them a surcease of that amount of judicial labor too exacting for men of their age and long service. It reduces their labors but not their powers. When they sit as judges, they are clothed with all the powers of judicial office. It provides two judges for the work previously done by one. It prescribes the rule of seniority between active and retired judges, and thus treats both as judges, holding the same office. Retirement makes little legal difference between the functions of active and retired judges. The provision for designating retired judges for certain service finds a counterpart in the law relating to active judges (§ 13, Jud. Code, 36 Stat. 1089). Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands. Retired judges do not receive new commissions. They continue to act under their original commissions. Retired district judges, without any designation from the senior circuit judge, may continue to function in their own districts. *Maxwell* v. *United States,* 3 F. (2d) 906, aff'd, 271 U.S. 647. See *McDonough* v. *United States,* 1 F. (2d) 147.

Some words in § 260 of the Judicial Code, relating to retirement, are not carefully chosen. It speaks of the

appointment of a "successor" to a retired judge, and in the last paragraph, of "vacancies" caused by retirement. These words mean "successor" as regular active judge, and "vacancies" in the regular active list.

Concerning the intent of the Act, see Cong. Rec., 65th Cong., 3d Sess., Vol. 57, Pt. 1, pp. 368–369, 428; Ruling of the Comptroller General of July 13, 1932 (unpublished).

A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the letter and spirit of § 1, Art. III, of the Constitution. *Evans* v. *Gore,* 253 U.S. 245, 253; The Federalist (No. 79); *O'Donoghue* v. *United States,* 289 U.S. 516; Protest by Chief Justice Taney, 157 U.S. 701; *James* v. *United States,* 202 U.S. 401; *Miles* v. *Graham,* 268 U.S. 501; *Long* v. *Watts,* 183 N.C. 99; *New Orleans* v. *Lea,* 14 La. Ann. Rep. 197; *Commonwealth ex rel. Hepburn* v. *Mann,* 5 W. & S. 403.

*Solicitor General Biggs,* with whom *Assistant Attorney General Wideman* and *Messrs. H. Brian Holland* and *Paul A. Sweeney* were on the brief, for the United States.

A judge "retiring" under Jud. Code, § 260, is under no obligation to perform any judicial duties whatever. Whether or not he renders any service, he receives his former salary, not as compensation for services rendered, but as a pension for past services.

The words of the Constitution are to be taken in their ordinary, natural sense. The word "office" (*Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514; *United States* v. *Hartwell,* 6 Wall. 385, 520; *United States* v. *Maurice,* Fed. Cas. No. 15747; *Clark* v. *Stanley,* 66 N.C. 59, 63; *Bradford* v. *Justices,* 33 Ga. 332, 336; *Throop* v. *Langdon,* 40 Mich. 673, 682; *Reed* v. *Schon,* 2 Cal. App. 55; *State* v. *Griswold,* 73 Conn. 95, 97; *United States* v. *Trice,* 30 Fed. 490, 494; *State Prison* v. *Day,* 124 N.C. 362, 368) implies an obligation to render services—to perform the duties incident to

the position. Indeed, it is difficult to conceive of an office to which no duties are attached. See *Commonwealth* v. *Gamble,* 62 Pa. St. 343, 349.

While the Constitution defines the powers of the federal judiciary, it does not prescribe in detail the duties. Those duties are, in the main, to be found in the nature of the office as it grew up under the common law. Some of the duties, however, are defined by statute. Thus, district judges are required to hold court regularly at stated places in their respective districts. Jud. Code, §§ 70–115, as amended; 28 U.S.C., §§ 142–196. And it is "the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." Jud. Code, § 118, as amended; 28 U.S.C., § 213. These duties, we submit, although defined by statute as to the time and place of performance, are an integral part of the constitutional office of judge. For refusal to hold court as required by law, a judge may be impeached.

The word "office" appears in both the tenure of office provision and the provision relating to compensation. It must be presumed to have the same meaning in both places. "Tenure of office during good behavior imports not only the length of the term but also the extent of the service." *Opinion of the Justices,* 271 Mass. 575, 580. Congress, therefore, may not compel a judge to retire to part time service against his will, because to do so would be to deprive him of one of the essential elements of office. It would seem to follow that if a judge voluntarily retires from regular, active service, he does not continue in office within the meaning of the Constitution.

It is argued that unless a retired judge remains "in office" he is necessarily without power to exercise judicial authority, and that, conversely, if he has the right to perform judicial duties, as Congress intended he should, it must follow that he remains in office within the meaning

of the Third Article. Since the word "office" is obviously used by counsel for the plaintiffs with respect to the compensation provision, the argument comes down to this,—that the right to receive undiminishable compensation is necessarily and under all circumstances coëxtensive with the privilege to perform judicial duties. Stated another way, the contention is that a judge can not relinquish the right to a protected salary and at the same time have the right, if called upon, to perform judicial duties. We submit that nothing in the Constitution compels this conclusion.

The purpose of the tenure of office and compensation provisions was to prevent the involuntary removal of a judge during good behavior or the diminution of his salary while he continues in office. It is doubtful whether the framers of the Constitution envisaged the somewhat anomalous situation of a judge being in office, in the sense that he retains the power to act in a judicial capacity, and at the same time being relieved of the duties and obligations incident to the office of judge. Nevertheless, while Congress may not deprive a judge of the judicial powers and privileges against his will, there is no constitutional prohibition upon its permitting him to retire from active service of his own volition. The only question is whether, having availed himself of the privilege extended to him, a judge may still claim the benefits and immunities conferred by Art. III.

The language of the Constitution should be interpreted "in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." *Popovici* v. *Agler,* 280 U.S. 379, 383. While the framers of that instrument were vitally interested in safeguarding the salaries of federal judges, they undoubtedly assumed that so long as a judge remained "in office" he would perform all the duties attached to the position, and that when he found himself no longer able to perform

those duties efficiently, he would resign and cease to be a judge. The Third Article provides that judges shall receive "for their services" a compensation. It can not have been intended that this compensation was to be paid for services to be rendered at will. By accepting the office a judge obligates himself to discharge all the duties of the office. The word "services" must mean the services commonly rendered by a judge—those which it is his duty to render. Thus, although the amount of compensation or salary does not depend upon the *quantum* of service, which may vary from time to time and from place to place, it was beyond reasonable doubt intended as consideration for performance of those duties which a judge is under obligation to perform. Cf. *Benedict* v. *United States*, 176 U.S. 357, 360.

It is, we submit, palpably unsound to say that the duty devolving upon a judge, who has accepted office and taken an oath faithfully to discharge and perform all the duties incumbent upon him as judge according to the best of his abilities, is the same as or in any way analogous to the obligation of a retired judge who has been relieved of the performance of the duties which he was required to perform prior to his retirement.

Since a retired judge is under no obligation other than that imposed by conscience, his salary can not be regarded as compensation in the usual sense. We submit, despite the statements quoted by the plaintiffs from the debates in Congress, that in reality retired pay is more analogous to a pension than to the compensation of a judge in regular active service. Such retired pay is not given by way of consideration for the discharge of duties *in praesenti*, but rather in recognition of services rendered in the past.

The provision that the President shall appoint a "successor" shows that the retirement creates a vacancy which must be filled. Since the new judge is a successor to the old one, there was no need to make provision for or

against the appointment of another judge upon the death or resignation of the one who has retired, for there is then no vacancy to be filled, the vacancy having occurred when the retirement took place. These provisions are in striking contrast to those authorizing the appointment of an additional judge when a judge who is eligible for retirement and unable to discharge efficiently all the duties of his office "shall nevertheless remain in office and not resign or retire." In such a case the new judge is in no sense a "successor." He can not succeed to an office which is still occupied. A vacancy does not occur until the death, resignation, or retirement of the disabled judge, but the Act recognizes that there is a vacancy at that time and expressly provides that when such vacancy occurs it shall not be filled. See *People* v. *Duane,* 121 N.Y. 367.

The word "successor" is a word of fixed meaning.

The effect of the retirement provisions has been considered in only two cases, neither of which, we submit, has any direct bearing upon the question here involved. *Maxwell* v. *United States,* 3 F. (2d) 906, aff'd, 271 U.S. 647; *McDonough* v. *United States,* 1 F. (2d) 147, cert. den., 266 U.S. 613.

The limitations upon the power of Congress appearing in § 1 of Article III were designed to protect the judiciary as a whole rather than to benefit any individual member or members thereof. *Evans* v. *Gore,* 253 U.S. 245, 253.

For more than eighty years after the ratification of the Constitution, there was no provision for the payment of pensions to resigned judges, and even at the present time the privilege of retirement is not open to Justices of this Court.

A diminution after an increase in compensation, even though the compensation is not reduced below the amount fixed by law at the date of the judge's appointment, would seem to be contrary to the intent of the Third Article of the Constitution. *James* v. *United States,* 202 U.S. 401;

*Evans* v. *Gore,* 253 U.S. 245; *Commonwealth ex rel. Hepburn* v. *Mann,* 5 W. & S. 403. See also *New Orleans* v. *Lea,* 14 La. Ann. 197.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Court of Claims has certified two questions:

"1. Does a United States District or Circuit Judge who, having served continuously for ten years and attained the age of seventy years, does not resign but retires under the provisions of section 260 of the Judicial Code, as amended, continue in office within the meaning of section 1 of article III of the Constitution which forbids diminution of the compensation of Judges during their continuance in office?

"2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of his compensation as a retired Judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of section 1 of article III of the Constitution?"

We are informed by the certificate in No. 656 that Wilbur F. Booth was appointed United States Circuit Judge for the Eighth Judicial Circuit on March 18, 1925, and qualified March 27, 1925. For many years prior to and up to the time of this appointment he had held the office of judge of the United States District Court for the District of Minnesota, and on November 28, 1931, he had served continuously as District or Circuit Judge for more than seventeen years. January 1, 1932, having attained the age of seventy, he retired, pursuant to the provisions of § 260 of the Judicial Code as amended. Since his retirement he has continued to perform the duties of a

retired United States Circuit Judge in the manner provided by law, and has participated in the hearing and decision of many cases pending in the Circuit Court of Appeals for the Eighth Circuit.

At the time of Judge Booth's appointment as Circuit Judge the annual compensation was fixed by law at $8,500 per annum. It was subsequently increased to $12,500 per annum, at which figure it stood when he retired. By § 13 of the Independent Offices Appropriation Act of June 16, 1933 [c. 101, 48 Stat. 283, 307] it was provided:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

By reason of this Act the plaintiff was paid during the period from June 15, 1933, to October 1, 1933, at the rate of $10,625 per annum. The amount withheld from him during that period was $697.93. He duly protested against the reduction, and brought suit in the Court of Claims, asserting that the Act violates the provision of the Constitution which forbids diminution of the compensation of federal judges during their continuance in office. The Government demurred to the petition.

The relevant facts certified in No. 657 are that Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, and qualified on February 27, 1897. From the date last mentioned to June 2, 1928, he served continuously in that capacity. Having attained the age of seventy years he retired June 2, 1928, pursuant to § 260 of the Judicial Code as amended, and has ever since continued to perform the duties of a retired United States District Judge in the manner required by law, and has, as conditions permitted and the business of the

court demanded, performed judicial acts as such retired judge.

At the date of his appointment the salary of the office was fixed by law at the rate of $5,000 per annum. It has been increased from time to time and at the date of plaintiff's retirement was at the rate of $10,000 per annum. Pursuant to § 13 of the Independent Offices Appropriation Act, *supra,* he received, during the period from June 15, 1933, to October 31, 1933, compensation at the rate of $8,500 per annum. He protested against the reduction and brought suit in the Court of Claims to recover the sum of $558.34, the amount withheld during the period mentioned. The Government demurred to the petition.

The pertinent portion of § 1 of Article III of the Constitution is:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

1. The first question asks, in effect, whether a United States Judge, upon retirement, relinquishes or retains his office. The answer is to be found in the Act of Congress authorizing retirement.[1] That Act provides for resigna-

[1] Judicial Code, § 260, as amended by the Act of February 25, 1919, c. 29, § 6, 40 Stat. 1157, U.S.C. Title 28, § 375; and the Act of March 1, 1929, c. 419, 45 Stat. 1422:

"When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously [or otherwise], and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon

tion and for retirement. In referring to the former it uses the expression "When any judge . . . resigns his office . . .," and provides for continuance of compensation after resignation. In contrast it declares, "But,

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the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

"In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously [or otherwise], and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

"Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled." The words enclosed in brackets were added by the Act of March 1, 1929.

instead of resigning, any judge . . . who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, . . ." not, be it noted, from office. The retiring judge may be called upon by the senior circuit judge to perform judicial duties in his own circuit or by the Chief Justice to perform them in another circuit, and be authorized to perform such as he may be willing to undertake. There is provision for appointment by the President of an additional judge for the circuit or district court where a sitting judge is found unable efficiently to discharge all his duties by reason of mental or physical infirmity of a permanent character. In that case the sitting judge unquestionably retains his office; and it is significant that the act declares either a retired judge, or one whose mental or physical condition has caused the President to appoint an additional judge, shall be treated as junior to the remaining judges of the court.

By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service, and it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service. It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge. The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not

surrender his commission, but continues to act under it. He loses his seniority in office, but that fact, in itself, attests that he remains in office. A retired District Judge need not be assigned to sit in his own district. *Maxwell* v. *United States,* 3 F. (2d) 906; affirmed 271 U.S. 647. And if a retired judge is called upon by the Chief Justice or a Senior Circuit Judge to sit in another district or circuit, and he responds and serves there, his status is the same as that of any active judge, so called. *McDonough* v. *United States,* 1 F. (2d) 147. It is impossible that this should be true, and that at the same time the judge should hold no office under the United States.

The Government argues that the holding of an office involves the performance of duties, and since no duties are obligatory on one who has retired under the Act, he cannot be said to hold any office. But Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it. This was the evident purpose; and the statements made by the member in charge of the bill on the floor of the House show that it was expected, as has proved to be the case, that retired judges would render valuable judicial service. Cong. Rec. 65th Cong. 3d Sess. Vol. 57, Part 1, pp. 368–369. It is too late to contend that services so performed were extra-legal and unconstitutional.

Some reference is made to the fact that under the Act a successor to the retiring judge is to be appointed, and it is claimed the direction is inconsistent with his retention of office. The phraseology may not be well chosen, but it cannot be construed to vacate the office of the retiring judge, in the light of the evident purpose that he shall continue to hold office and perform official duties.

2. Does the Constitution prohibit reduction of the compensation which was fixed by law at the time of appointment or that to which the judge was entitled at the date of retirement?

In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative. Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions (*Commonwealth ex rel. Hepburn* v. *Mann,* 5 Watts & S. (Pa.) 403; *New Orleans* v. *Lea,* 14 La. Ann. 197; *Long* v. *Watts,* 183 N.C. 99; 110 S.E. 765), and the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of § 1 of Article III.

*Question 1 Answered Yes.*

*Question 2 Answered Yes.*

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## HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* N. O. NELSON MANUFACTURING CO.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 239. Argued January 12, 1934.—Decided February 5, 1934.

1. On appeal from a judgment of the highest court of a State, in a suit in which the validity of a statute of the State is challenged, the decision of the state court as to the meaning of the statute is binding upon this Court. P. 358.
2. A state statute providing that any bond executed after its enactment for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers notwithstanding any provision of the bond to the contrary, is not an arbitrary restraint upon the liberty of contract enjoyed by surety companies under the Fourteenth Amendment. Pp. 358, 359.

So *held* where the bond was not required by the statute and where statutory effects of its voluntary execution were to exempt the building contract and the moneys collected or payable under it from statutory rights that would otherwise exist for protection of

materialmen and laborers, and to substitute the bond as their security, but in subordination to the interests of the obligee building owner.

3. The business of insurance is one peculiarly subject to supervision and control by the State. P. 360.

4. Liberty of contract is not an absolute concept, but is relative to many conditions of time and place and circumstance. P. 360.

147 So. 815, affirmed. See also 166 Miss. 222; 135 So. 497.

APPEAL from the affirmance of a judgment against building contractors and the surety on their bond in favor of the assignee of a materialman. The surety company, and the surety on its appeal bond in the court below, joined in the appeal to this Court. Another branch of the same litigation was here before, but that appeal was dismissed for defect of parties appellant. 285 U.S. 169.

*Mr. L. Barrett Jones,* with whom *Mr. W. Calvin Wells* was on the brief, for appellants.

*Mr. Gerard Brandon,* with whom *Mr. Gerard H. Brandon* was on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy hinges upon the validity of a statute of Mississippi whereby the bond of a contractor guaranteeing to an owner the faithful performance of a contract for the construction of a building shall inure to the benefit of persons furnishing material or labor, and this though the bond expresses an intention to exclude them.

The statute challenged by the appellants was enacted in March 1918, and is framed for the protection of subcontractors, materialmen, laborers and journeymen who have had a part in the making of buildings or of structures akin thereto. Laws of 1918, c. 128; Mississippi Code of 1930, §§ 2274–2281.

By section 1 (which amended § 3074 of the Code of 1906), materialmen or laborers, not paid by a contractor, may give notice in writing to the owner, and thereupon any amount due from the owner to the contractor shall be bound in the hands of the owner for the payment *pro rata* of claims covered by the notice.

By section 2, no contractor may "assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice" of materialmen or laborers, and "all such assignments, transfers, or dispositions" shall be in subordination to their rights, "provided, however, that this section shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond" conditioned as provided for in section 3 thereof.

By section 3, any bond for the faithful performance of a building contract shall include a guarantee that the contractor shall make payment to materialmen and laborers, and if such a provision is omitted, the bond shall inure to the protection of materialmen and laborers as if the provision were expressed. The text of this section is quoted in the margin.[1]

[1] Sec. 3. When any contractor or subcontractor entering into a formal contract wth any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein, for which

In October, 1926, Natchez Investment Company, Inc., the owner of land in Natchez, Mississippi, made a contract with builders, J. V. and R. T. Burkes, for the construction of a hotel. The Burkes made a subcontract with Acme Engineering Company for the plumbing, heating and ventilating work, and the subcontractor assigned its contract to the N. O. Nelson Manufacturing Company, the appellee in this court. By the principal contract, provision was made for the giving of a bond which was to secure materialmen and laborers as well as the owner.[2] Thereafter the contractors did furnish a bond for the cost of the building ($316,822) with the Hartford Accident & Indemnity Company as surety, but a bond giving narrower protection, or so the surety contends, than the one that had been promised. The bond that was furnished refers to and incorporates the contract between the owner and the builders. It provides that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully

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payment has not been made, shall have the right to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee. If the full amount of the liability of the surety therein is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the obligee, the remainder shall be distributed pro rata among said interveners. The bond herein provided for may be made by any surety company authorized to do business in the State of Mississippi.

[2] The specifications state that "it shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects." "The bond shall . . . secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications," and "shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi."

to perform the contract, the obligation shall be void, otherwise to remain in force, provided, however, that the obligee shall have complied with certain conditions precedent for the protection of the surety. One is that the terms of the building contract shall be faithfully fulfilled in so far as they call for performance on the part of the owner, the surety to be relieved of all liability in the event of a default. Another is that if the obligee shall have notice of any claim against the contractor for unpaid labor or material, no further payments shall be made by the obligee to the contractor until such claims are satisfied. Finally, in an effort to cut off materialmen and laborers, the bond provides that "no right of action shall accrue upon or by reason hereof to or for the benefit of any one other than the obligee named herein."

The contractors for the building made default in the performance of their contract owing large sums of money to materialmen and laborers, including Acme Engineering Co., appellee's assignor. Thereupon, the Investment Company, the owner, sued in the Chancery Court of Adams County, Mississippi for a decree construing the bond, adjudging that it was subject to the rights and liabilities defined in § 3 of the statute, and determining the proportionate interests of those entitled thereunder. The contractors, the surety, and various subcontractors, materialmen and laborers were joined as defendants, as well as an assignee of moneys due upon the contract. Other subcontractors and materialmen intervened and by cross-bill and otherwise sought relief upon the bond. The Supreme Court of Mississippi held upon demurrer that the bond was one for the faithful performance of a building contract within § 3 of the statute; that its effect was to substitute a new security for the protection of materialmen and laborers in place of that provided by §§ 1 and 2; and that by force of that substitution the contractor had become free to assign and dispose of the

contract and the proceeds thereof. An assignment to a bank of moneys due from the owner to the amount of upwards of $26,000 was accordingly sustained. *Hartford Accident & I. Co.* v. *Natchez Investment Co.,* 155 Miss. 31; 119 So. 366. The cause having been remanded to the Court of Chancery, there was a trial of the issues, which was followed by a new appeal. *Hartford Accident & I. Co.* v. *Natchez Investment Co.,* 161 Miss. 198, 219; 132 So. 535, 135 So. 497. On that appeal the court reiterated its ruling as to the operation of the bond. It held that "none of the provisions of the bond had the effect of writing out of the contract" the provisions of the statute, "and could not have that effect." "All stipulations contrary to the statutory provisions must be disregarded so far as persons furnishing labor or material are concerned." An appeal to this court was dismissed for defect of parties. *Hartford Accident & I. Co.* v. *Bunn,* 285 U.S. 169.

In the meantime, the N. O. Nelson Manufacturing Company, the present appellee, had intervened in the Court of Chancery by leave of that court, and had made claim to its proportionate share of the proceeds of the bond. The surety renewed the contest, as it was privileged to do (*Bigelow* v. *Old Dominion Copper Co.,* 225 U.S. 111, 127), insisting that the bond was unaffected by the statute, and that there could be no holding to the contrary without an arbitrary interference with liberty of contract and a resulting violation of the Fourteenth Amendment. The Chancellor, overruling these contentions, gave judgment upon the bond in favor of the intervening claimant. The Supreme Court of Mississippi affirmed upon the authority of its earlier opinions. 147 So. 815. See also *U. S. F. & G. Co.* v. *Parsons,* 147 Miss. 335; 112 So. 469. An appeal to this court followed, the surety on the appeal bond joining as appellant with the surety on the bond in suit. *Hartford Accident & I. Co.* v. *Bunn, supra.*

As to the meaning of the statute now challenged as invalid the Supreme Court of Mississippi speaks with ultimate authority. *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32; *Great Northern Ry. Co.* v. *Sunburst Co.,* 287 U.S. 358, 362; *Guaranty Trust Co.* v. *Blodgett,* 287 U.S. 509, 513. We assume in accordance with its ruling that the statute was intended to apply to such a bond as the one in controversy here, and to blot out the clauses repugnant to the statutory scheme. The only question in this court is whether the result is consistent with the Constitution of the United States. Opposition is asserted by counsel for the surety. We think it is unreal.

Materialmen and laborers may be secured by mechanics' liens upon land improved or affected by their material or labor, and this without reference to technical and ancient concepts of privity of contract. *Great Southern Hotel Co.* v. *Jones,* 193 U.S. 532, 550; *Jones* v. *Great Southern Hotel Co.,* 86 Fed. 370; *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.,* 254 U.S. 1, 9, 10. For like reasons they may be secured as against the owner by a lien upon any moneys due to the contractor, and secured as against the contractor by a lien upon any moneys collected from the owner. *Hartford Accident & I. Co.* v. *Natchez Investment Co.,* 155 Miss. 31, 51; 119 So. 366; *U. S. F. & G. Co.* v. *Parsons, supra;* cf. *United States* v. *American Surety Co.,* 200 U.S. 197; *Mankin* v. *United States,* 215 U.S. 533; *Illinois Surety Co.* v. *John Davis Co.,* 244 U.S. 376, 380. The fundamental liberties protected by the Fourteenth Amendment do not include immunity from restraints so deeply rooted in policy and justice. *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 157; *Advance-Rumely Thresher Co.* v. *Jackson,* 287 U.S. 283. The owner contracting with a builder or making payments under the contract may be required to give heed to the equities of a subcontractor or a workman adding

value to the land. The builder may be required to give heed to the same equities in contracting with the owner or in disposing of his contract or of the moneys paid thereunder.

The statute of Mississippi was framed in a genuine endeavor to make these equities prevail. Neither owner nor builder is commanded to give a bond, though decisions are not lacking that such a command will be upheld.[3] Cf. *Gant* v. *Oklahoma City,* 289 U.S. 98; *Brazee* v. *Michigan,* 241 U.S. 340. All that the statute does by force of § 3 is to standardize the form, at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. The form shall include a clause for the protection of materialmen and laborers: the consequences shall include the exemption of the owner from the burden of a lien, and a like exemption of the builder. *U. S. F. & G. Co.* v. *Parsons, supra.* The security of the bond becomes a substitute for the security of the building contract and of the moneys due thereunder. No arbitrary restraint of liberty of contract is laid upon the owner. His personal liability toward materialmen and laborers is not greater by a dollar than it was at the beginning. To the contrary, it is less. By force of the new security he is relieved of the burden of a lien, yet he has priority of interest in the proceeds of any suit upon the bond. See § 3 quoted *ante.* No arbitrary restraint of liberty is laid upon the builder. Upon the giving of a bond he is charged with a liability in favor of materialmen and laborers, a liability consistent with fair dealing between men in that relation, but he is relieved of the duty of holding present

[3] *Rio Grande Lumber Co.* v. *Darke,* 50 Utah 114; 167 Pac. 241; *Roystone Co.* v. *Darling,* 171 Cal. 526; 154 Pac. 15; *American Indemnity Co.* v. *Burrows Hardware Co.,* (Texas) 191 S.W. 574; cf., however, *Gibbs* v. *Tally,* 133 Cal. 373; 65 Pac. 970; *Hess* v. *Denman Lumber Co.,* (Texas) 218 S.W. 162, 164.

and future payments as a fund impressed with a trust and devoted to specific uses. *U. S. F. & G. Co.* v. *Parsons, supra.* Indeed, this very builder took advantage of that privilege, making an assignment of the contract and its proceeds to a bank; and because of the bond the assignment was upheld. *Hartford Accident & I. Co.* v. *Natchez Investment Co.,* 155 Miss. 31, 53; 119 So. 366. Plainly he is in no position to complain that the statute is invalid in its application to himself. Indeed, owner and builder do not declare themselves aggrieved, but through silence and inaction, if not otherwise, evince submission and consent. The only other person whose interests are affected is the surety on the bond. If the statute is valid in its application to owner and builder, to obligee and principal, there can be no privilege of the surety to contract on better terms. The secondary obligation must follow the primary one, and conform to its restraints. The surety has the alternative either to write its indemnities and guaranties upon the only terms permitted to obligee and principal, or to renounce the writing altogether. The business of insurance is one peculiarly subject to supervision and control. *German Alliance Ins. Co.* v. *Kansas,* 233 U.S. 389; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U.S. 71; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co., supra.* The Fourteenth Amendment does not make it necessary that materialmen and laborers shall be deprived of fair protection to the end that sureties for profit may be given an opportunity to diversify their bonds.

Liberty of contract is not an absolute concept. *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co., supra; Advance-Rumely Thresher Co.* v. *Jackson, supra; Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U.S. 186, 202; *Chicago, B. & Q. Ry. Co.* v. *McGuire,* 219 U.S. 549, 567; *Mutual Loan Co.* v. *Martell,* 222 U.S. 225, 235; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U.S. 253,

261. It is relative to many conditions of time and place and circumstance. The constitution has not ordained that the forms of business shall be cast in imperishable moulds. There is no question here of the impairment of the obligation of a contract by later legislation. The act assailed by the appellants was in existence for many years before the bond in suit was written. Principal and surety in writing it became subject to the statutes then in force, and by these they must abide.

The judgment of the Supreme Court of Mississippi is accordingly

*Affirmed.*

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## NEW JERSEY *v.* DELAWARE.

No. 13, original. Argued January 9, 10, 1934.—Decided February 5, 1934.

1. The boundary between Delaware and New Jersey within a circle of twelve-miles about the town of New Castle, is the low-water mark of the Delaware River on the East, or New Jersey, side; and below the circle it is the *Thalweg* or main channel of navigation in Delaware River and Delaware Bay. Pp. 363, 385.
2. Delaware's title to the river bed within the circle is derived as follows:

   (1) From a feoffment, describing the Delaware territory within the circle, including the river, its islands and soil, made by the Duke of York to William Penn, August 24, 1682, when the present territory of Delaware, having been taken over from the Dutch, was governed as a dependency of the Government and Colony of New York under governors commissioned by the Duke. P. 364.

   (2) Letters patent, March 22, 1682/3, from the Crown, granting to the Duke of York the identical lands and waters described in the deed of feoffment, and inuring to the feoffee by virtue of a covenant for further assurance contained in the deed of feoffment. P. 365.

   (3) Confirmation of the title by practically uninterrupted possession of the Delaware territory on the part of Penn and his successors, as Proprietaries and Governors, from the date of the feoffment to the Revolution. P. 368.

(4) Succession of the State of Delaware to dominion over the same territory. P. 370.

3. Early Acts and Resolutions of the legislature of the State of Delaware attacking the right of the Penns to the vacant and uncultivated lands within the State and for that purpose declaring that the right of soil was at the date of the Treaty of Paris in the British Crown and passed by that Treaty to the citizens of the State, had no effect, either as an estoppel or as a practical construction, upon the ancient boundaries of the Colony and State as laid down originally by the letters patent of 1683. P. 371.
4. The letters patent of 1683 were not surrendered. P. 373.
5. The Crown had power to grant away the soil beneath navigable waters as an incident to a grant or delegation of powers strictly governmental. P. 373.
6. Acquiescence by Delaware in wharfing out by riparian proprietors from the New Jersey side, did not affect her sovereign title to the river bed within the circle. P. 375.
7. Acts of dominion by New Jersey over the river bed beyond the low-water mark, within the twelve mile circle, such as service of process, assessments for taxation, the making of deeds, etc., could not serve to alter the boundary, not having been acquiesced in by Delaware. P. 376.
8. The compact between New Jersey and Delaware of March, 1905, relating to riparian rights, service of process, and rights of fishery, did not affect the boundary. P. 377.
9. When New Jersey and Delaware became independent States, the title to the soil of the river below the circle and to the soil of the bay, had not been granted but still was in the Crown of England; and the division of these waters is to be determined by the principles of international law. P. 378.
10. The modern rule of international law divides boundary rivers between States by the main channel of navigation, if there is one, rather than by the geographical center, and applies the same doctrine of equality to estuaries and bays in which the dominant sailing channel can be followed to the sea. P. 379.
11. The doctrine of *Thalweg* is applicable between States of the Union, where the boundary in question has not been fixed in some other way—as by agreement, practical location, prescription; and it applies even as between States that existed before the doctrine became fully established in international law. Pp. 380, 383.
12. Delaware's claim that there is not, or was not in 1783, any definite channel of navigation down Delaware Bay, and her contention that

the geographical center should be made the boundary in the river, below the circle, to avoid a sharp and inconvenient turn where the river meets the bay,—are rejected. Pp. 379, 384–385.

Final Hearing on the report of William L. Rawls, Esq., Special Master, in a suit to establish the boundary between the two States. Leave was granted to file the bill of complaint in this case on June 3, 1929 (279 U.S. 825), and it was filed on June 4, 1929. The defendant's answer was filed on October 7, 1929, and on January 6, 1930 (280 U.S. 529), the Special Master was appointed and the case referred to him. His report was filed October 9, 1934, and the cause was argued on exceptions to that report.

*Messrs. Duane E. Minard* and *George S. Hobart,* with whom *Mr. Wm. A. Stevens,* Attorney General of New Jersey, was on the brief, for plaintiff.

*Mr. Clarence A. Southerland,* with whom *Mr. Percy Warren Green,* Attorney General of Delaware, and *Mr. Reuben Satterthwaite, Jr.,* were on the brief, for defendant.

Mr. Justice Cardozo delivered the opinion of the Court.

Invoking our original jurisdiction, New Jersey brings Delaware into this court and prays for a determination of the boundary in Delaware Bay and River.

The controversy divides itself into two branches, distinct from each other in respect of facts and law. The first branch has to do with the title to the bed or subaqueous soil of the Delaware River within a circle of twelve miles about the town of New Castle. Delaware claims to be the owner of the entire bed of the river within the limits of this circle up to low water mark on the east or New Jersey side. New Jersey claims to be the owner

up to the middle of the channel. The second branch of the controvery has to do with the boundary line between the two states in the river below the circle and in the bay below the river. In that territory as in the river above, New Jersey bounds her title by the *Thalweg*. Delaware makes the division at the geographical centre, an irregular line midway between the banks or shores.

The Special Master appointed by this court in January, 1930 (280 U.S. 529) has now filed his report. As to the boundary within the circle, his report is in favor of Delaware. To that part of the report exceptions have been filed by New Jersey. As to the boundary in the bay and in the river below the circle, his report is in favor of New Jersey. To that part exceptions have been filed by Delaware. The two branches of the controversy will be separately considered here.

*First. The boundary within the circle.*

Delaware traces her title to the river bed within the circle through deeds going back two and a half centuries and more.

On August 24, 1682, the Duke of York delivered to William Penn a deed of feoffment for the twelve mile circle whereby he conveyed to the feoffee "ALL THAT the Towne of Newcastle otherwise called Delaware and All that Tract of Land lying within the Compass or Circle of Twelve Miles about the same scituate lying and being upon the River Delaware in America And all Islands in the same River Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of Twelve Miles about the said Towne." On October 28, 1682 there was formal livery of seisin of the lands and waters within the twelve mile circle. John Moll and Ephriam Herman, attorneys appointed in the deed of feoffment, gave possession and seisin "by delivery of the fort of the sd Town and leaving the sd William Penn in quiet and peaceable possession thereof and allso

by the delivery of turf and twig and water and Soyle of the River of Delaware." "We did deliver allso unto him one turf with a twigg upon it a porringer with River water and Soyle in part of all what was specified in the sd Indentures or deeds."

By force of these acts there was conveyed to the feoffee any title to the river bed within the circle that then belonged to the feoffor. New Jersey insists, however, that the feoffor, the Duke of York, was not then the owner of any territory west of the easterly side of the Delaware River, and hence at the time of the feoffment had no title to convey. Letters patent from Charles II, dated May 12, 1664, had granted to the Duke full title to and government of a large territory in America, embracing much of New England and in particular "all the land from the west side of Connecticut River to the east side of Delaware Bay," not including, however, lands or waters to the west. True the Duke had gone into possession of lands westward of the grant, including land within the circle, and through his delegates and deputies was exercising powers of government. His acts in that behalf were the outcome of conflicts with the Dutch. What is now the State of Delaware had been subject to the government of the Dutch until 1664, when with the victory of the English arms it became an English colony. From that time until August 24, 1682, the date of the deed of feoffment, Delaware was governed (with the exception of a brief period from July, 1763, to February 9, 1764) as a dependency of the Government and Colony of New York through governors commissioned by the Duke of York and Albany. Upon the delivery of the deed to Penn, the Duke was the *de facto* overlord of the land within the circle, though title at that time was still vested in the Crown.

The deed of feoffment had in it a covenant for further assurance at any time within seven years. At the in-

stance of Penn and with little delay, the feoffor took steps to carry out this covenant and thus rectify his title. On March 22, 1682/3, letters patent under the Great Seal of England were issued to the Duke of York for the identical lands and waters described in the deed of feoffment from York to William Penn.[1] There is no doubt that these letters were delivered to the Duke. The Special Master has found upon evidence supporting the conclusion that they were afterwards delivered to Penn from whom they passed to his descendants. The Master also found, and again upon sufficient evidence, that the letters patent so delivered "were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding." By force of this grant there passed to the Duke of York a title to the land within the circle which inured by estoppel to the grantee under the feoffment.

The applicable principle in such circumstances is among the rudiments of the law of property. The covenant generating the estoppel is commonly one of warranty or seisin. *Irvine* v. *Irvine,* 9 Wall. 617; *Van Rensselaer* v. *Kearney,* 11 How. 297, 323, 325; *Tefft* v. *Munson,* 57

[1] The following is the description:

"All that the Towne of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

Powers of government and other proprietary and seignorial rights were granted to the Duke along with ownership of the fee.

N.Y. 97; *Vanderheyden* v. *Crandall,* 2 Denio 9; aff'd 1 N.Y. 491; *White* v. *Patten,* 24 Pick. 324.[2] The effect is the same where the covenant is one for further assurance. *Taylor* v. *Debar,* 1 Chan. Cas. 274 (1676); *Lamb* v. *Carter,* 14 Fed. Cas. 991; 1 Sawy. 212; *Wholey* v. *Cavanaugh,* 88 Cal. 132; 25 Pac. 1112; *Hope* v. *Stone,* 10 Minn. 114; *Norfleet* v. *Russell,* 64 Mo. 176. To enforce that conclusion we do not need to wander far afield and consider other deeds than the specific one in question. There exists for our enlightenment the opinion of the Chancellor in an historic litigation where the relation between the feoffment of August, 1682, and the later patent from the Crown, was the very point at issue. A dispute had arisen between Lord Baltimore and Penn as to the title to part of the Delaware territory. On May 10, 1732, after Penn was in his grave, there was an agreement between his sons and Baltimore for the settlement of the boundaries between Pennsylvania, Delaware and Maryland. Three years later a bill was filed in Chancery for the specific performance of the agreement of May, 1732, to which suit the Attorney General was made a party as the representative of the Crown.[3] The Duke of York had become King under the name of James II on February 6, 1685, and George II sat upon the throne when the cause in Chancery was heard. The Lord Chancellor, Hardwicke, gave judgment for the Penns. *Penn* v. *Lord Baltimore,* 1 Ves. Sen. 444; also Ridg. *t.* H. 332. In his opinion he holds that the effect of the letters patent is to make the deed of feoffment good either by force of an estoppel or by converting the feoffor into a trustee for

[2] Compare, however, as to covenants of seisin, *Doane* v. *Willcut,* 5 Gray 328; *Allen* v. *Sayward,* 5 Me. 446.

[3] The Attorney General filed two answers in the cause, neither of which asserted any beneficial title in the Crown, but merely prayed that the court might "Preserve all such Rights Title and Interest of in or to the Premises as shall appertain or belong to his Majesty."

the feoffee. The objection is urged upon him that an estoppel will not prevail against the Crown. The Chancellor makes it plain that he is not favorably impressed. "For the Duke of York, being then [i.e., at the date of the feoffment] in nature of a common person, was in a condition to be estopped by a proper instrument." At the same time, he is diffident about declaring a technical estoppel, nor is there need to go so far. If his Majesty was not estopped, he was in any event a trustee of the title for the use of the feoffee, which will bring about a like result. "The Duke of York . . . while a subject was to be considered as a trustee; why not afterwards as a royal trustee?" "His successors take the legal estate under the same equity; and it is sufficient for plaintiffs if they have an equitable estate." So Lord Baltimore must make performance in accordance with the contract. True, the decree for performance will be "without prejudice to any prerogative, right, or interest in the Crown." This again is by virtue of the deference owing to the Crown by the keeper of his conscience. "Being liberated from the restraints of the lord chancellor, we are at liberty to say, that the duke, at the date of the deeds, being a subject, was, in this respect, only 'a common person,' and as much bound by estoppel as any other subject." Per Sergeant, Arbitrator, in the case of *Pea Patch Island,* 30 Fed. Cas. 1123, 1151.

In the meantime Penn had proceeded to organize a government for the Delaware territory. On October 29, 1682, he issued a summons to persons of note in the community to meet him at the Town of New Castle on November 2 for the holding of a General Court to settle the jurisdiction of the Territory. At that Court he announced his title derived from the Duke of York, and instructed the Magistrates that until laws were enacted by a proper assembly they should take for their guide the laws that had been provided by his Royal Highness for the Province

of New York, promising that they should be governed thereafter by such laws and orders as they should consent to by their own deputies and representatives. A general assembly having been summoned, an Act of Union was passed, December 7, 1682, whereby the three counties of Delaware territory were annexed to Pennsylvania. In the same month was enacted an Act of Settlement providing for a Provincial Council and Assembly and reciting the letters patent to Pennsylvania and the deeds of release and feoffment from the Duke of York. Following the establishment of this government, Penn and his successors as Proprietaries and Governors, and the Assembly and Council of the Province, together with the Assembly of the Lower Counties subsequently established, continued to exercise the power of government in all its plenitude over Pennsylvania and the Delaware territory. This continued until the Revolution except for a brief interruption during the reign of William and Mary.

There were, it is true, intermittent challenges both of the proprietary interest of Penn and his successors and of their governmental powers. As to these last, the most serious challenge was one that followed the accession of William and Mary in February, 1689, after the deposition of James II as the result of the "Glorious Revolution." Penn, who had been a favorite of royalty during the reign of James, was for a time under a cloud. In 1692, he was removed from the Government of Pennsylvania, including the New Castle country, and his place given to a successor. But he was soon restored to power, and, it seems, to the royal confidence. In August, 1694, there was an Order in Council by which he was reëstablished in his former office. In the same month letters patent issued under the Great Seal of State restoring him in the most formal way to the administration of the government of the "said province and territories," and revoking any other appointment inconsistent therewith.

This patent, it would seem, had settled for all time the validity of his exercise of governmental powers, however much it may have left in doubt his title to the land. Mutterings of uncertainty, however, continued to be heard as to his rights and powers in both aspects. In 1701, he had correspondence with the Board of Trade which showed itself restless on the subject of his ownership. At intervals during the reign of Anne and afterwards he was required to sign a declaration that the approval by the Crown of his governmental acts, such as the appointment of a deputy, was not to be construed in any manner to diminish "her Majesty's claim of right to the said three lower counties." But the claims of right thus reserved were never admitted by Penn to be valid, nor were they ever pressed by the Crown. Not even the petitions of jealous rivals, egging the Crown on, were of avail to wake it into action. Thus, in 1717, the Earl of Sutherland applied for a grant of the three Lower Counties, asserting that he was ready to prove that the title was in the Crown. The Attorney General issued a summons to Penn to be present at a hearing, but Penn, who had suffered a stroke of apoplexy, was unable to appear, and the proceeding was allowed to lapse. A like fate awaited similar petitions submitted in later years. Reservations of the royal claims might continue to be made by cautious scriveners. By the time of the Revolution they were little more than pious formulas. A title, good of record when reinforced by the patent of 1683, had been confirmed by a century of undisturbed possession. When the Treaty of Paris was signed in 1783, the land within the circle was part of the territory of Delaware, and the title was in the Penns or in persons claiming under them.

The Declaration of Independence had made Delaware a state with boundaries fixed as of that time. Nothing that was done by her legislature thereafter has had the

effect of cutting down her territorial limits, however much it may have affected the private ownership of the Penns and their successors. Nothing thereafter done has had the effect of adding to the territory then belonging to New Jersey. Even so, a word must be said as to resolutions and statutes that became a law in Delaware shortly after the treaty of peace, since they are much relied upon by New Jersey as marking the true boundary. The legislation is directed to the disposition of unappropriated lands. A resolution of January 16, 1793, recommends to the citizens of Delaware "to take up no Warrants, and to accept of no Patents or Deeds whatever, from John Penn the Younger and John Penn, or either of them, or their Agents or Attornies." A statute of February 2, 1793, visits the penalty of a fine on inhabitants refusing to abide by these recommendations and accepting any grants of vacant or uncultivated lands except from persons acting under the authority of the state. Another statute (February 7, 1794) recites in an elaborate preamble that "the right to the soil and lands within the known and established limits of this state, was heretofore claimed by the crown of Great Britain," that by the treaty of peace between his Britannic Majesty and the United States of America, his Majesty "relinquished all rights, proprietary and territorial within the limits of the said United States, to the citizens of the same, for their sole use and benefit; by virtue whereof the soil and lands within the limits of this state became the right and property of the citizens thereof," and that "the claims of the late and former pretended proprietaries of this state, to the soil and lands contained within the same, are not founded either in law or in equity."

We do not yield assent to the contention that the effect of these acts was to establish a new boundary between Delaware and New Jersey either as a result of estoppel or through practical construction. There is no element of estoppel. The declarations in respect of title were not

addressed to New Jersey, nor did action follow on the faith of them. There is not even a sufficient basis for a claim of practical construction. The declarations were framed *alio intuitu,* with an eye to private titles, not to public boundaries. In the economic unrest and disturbance of the day, the inhabitants of Delaware were ready to disavow the claims of the Penns and others to the ownership of vast areas of uncultivated land. This is far from meaning that there was a disavowal of the grants whereby the colony of Delaware had derived its form and being. What the legislation had in view was enlargement, not restriction, of the domain of common ownership. The truth, indeed, is that for the purpose of an inquiry into the boundaries between colonies or states, questions of private ownership are of secondary importance. The Penns' title may have been misjudged, or may even have failed for reasons not now apparent, and yet it does not follow that the boundaries of New Jersey had thereby been enlarged or those of Delaware curtailed. Such a result could not be wrought without successfully impeaching the letters patent of 1683 whereby a seigniory in the new world was conveyed by Charles to James. The effect of those letters was to define the territorial limits of the province or colony of Delaware, whether Penn and his successors took anything thereby or not. The colony of Delaware as defined by this patent was the one that declared its independence in 1776 and that succeeded in 1783 to any fragment of ownership abiding in the Crown. In resuming the title to uncultivated lands, its people had no thought of modifying the ancient boundaries, of relinquishing a foot of soil above the waters or below. The later history of the controversy between the states makes this abundantly clear, if it could otherwise be doubtful. What concerns us now is more than a question of *meum* and *tuum* between one man and another. Our concern

is with the meaning of an instrument of government, a patent of jurisdiction, which was to generate a state.

The letters patent of March, 1683, being basic to the defendant's title, there must be another word of reference to the contention for the complainant that the letters were surrendered in April, 1683, a month after they were granted. The Special Master, as we have already stated, has made a finding to the contrary, and has summarized the evidence. There would be no profit now in repeating the analysis. Not only does the Master find that there was no surrender of the patent, he finds that the original patent is in evidence before him. His holding that there was no surrender is in line with Lord Hardwicke's judgment in *Penn* v. *Lord Baltimore.* His holding that the original letters are extant and in the custody of Delaware is in line with the judgment of the arbitrator, rendered eighty-five years ago, in the case of *Pea Patch Island, supra.* We see no adequate reason for rejecting his conclusion.

Assuming the existence of the patent, New Jersey makes the claim that in its application to the river bed it is void upon its face in that the Crown was without power to grant away the soil beneath navigable waters. The objection will not hold. The letters patent to the Duke of York and the grant from York to Penn were not for private uses solely, but for purposes of government. There is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum,* the right to navigate and fish. *Commonwealth* v. *Alger,* 7 Cush. 53; *People* v. *N.Y. & S. I. Ferry Co.,* 68 N.Y. 71, 76; *People* v. *Steeplechase Park Co.,* 218 N.Y. 459, 473; 113 N.E. 521; *Shively* v. *Bowlby,* 152 U.S. 1, 13; Hale, De Jure Maris, p. 22. Never has it been doubted that the grant will be upheld

where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental. *Martin* v. *Waddell's Lessee,* 16 Pet. 367, 410; 413; *Massachusetts* v. *New York,* 271 U.S. 65, 89, 90. In such circumstances, "the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." *Martin* v. *Waddell's Lessee, supra,* p. 413. The grant from Charles II to York was upon its face an instrument of government. The feoffments from York to Penn were in furtherance of kindred ends. Penn had no thought of using his title to the soil as an obstruction to navigation or to any other common right. In a letter to one of his commissioners he writes as early as April, 1683, concerning boundary negotiations with the Province of New Jersey: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . Whatever bee ye Argument, they are bounded Westward by the River Delaware, yn they cannot go beyond low water mark for land. They have ye Liberty of ye River, but not ye Propriety." The title to the soil, which was subject to the *jus publicum* while it was vested in the King and his grantees, is subject to the same restrictions in the ownership of Delaware. The patent and the deeds under it are not void for want of power.

Delaware's chain of title has now been followed from the feoffment of 1682 to the early days of statehood, and has been found to be unbroken. The question remains whether some other and better chain can be brought forward by New Jersey. Unless this can be done, Delaware must prevail. But down to the Peace of 1783 at the end of the Revolution, New Jersey has no chain to offer. Up to that time, if not afterwards, her reliance is less upon

the strength of her own title than on the weakness of her adversary's. The supposed defects have already been reviewed in this opinion, and have been found to be unreal. There is still to be considered whether events during the years of statehood have worked a change of ownership. New Jersey argues that they have, though not even during those years does she build her claim of title upon instruments of record. Her claim is rather this, that through the exercise of dominion by riparian proprietors and by the officers of government, title to the subaqueous soil up to the centre of the channel has been developed by prescription. The Special Master held otherwise, and we are in accord with his conclusion.

The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. The structures were built and maintained without protest on the part of Delaware, and no doubt with her approval. There is nothing in their presence to indicate an abandonment by the Sovereign of title to the soil. By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state. *Yates* v. *Milwaukee,* 10 Wall. 497; *Scranton* v. *Wheeler,* 179 U.S. 141, 157, 158; *Shively* v. *Bowlby, supra,* at pp. 24, 55; *Brookhaven* v. *Smith,* 188 N.Y. 74; 80 N.E. 665; *United States* v. *Dern,* 289 U.S. 352, 357. New Jersey in particular has been liberal in according such a license (*State* v. *Jersey City,* 25 N.J.L. 525), and so, it seems, has Delaware (*Harlan & Hollingsworth Co.* v. *Paschall,* 5 Del. Ch. 435; *State* v. *Reybold,* 5 Harr. 484, 486), though in Delaware, unlike New Jersey, title to the foreshore is in the riparian proprietor. From acquiescence in these improvements of the river front there can

be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession.

Apart from these acts of dominion by riparian proprietors, there are other acts of dominion by New Jersey and its agents which are relied upon now as indicative of ownership. They include the service of process, civil and criminal; the assessment of improvements for the purpose of taxation;[4] and the execution of deeds of conveyance to the United States and others. Of all it is enough to say that they are matched by many other acts, equally indicative of ownership and dominion, by the Government of Delaware. The Master summarizes the situation with the statement that "at no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey, thereto, except as modified by the . . . Compact of 1905."

The truth indeed is that almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain. *Vermont* v. *New Hampshire,* 289 U.S. 593, 613; *Indiana* v. *Kentucky,* 136 U.S. 479, 509,

[4] The complainant points for illustration to the construction of important works for the use of the Dupont Co. 4,400 feet below low water level, and taxation of these works like other property in New Jersey. At that time controversy was flagrant between the two states. No inference of ownership can be drawn from dominion exerted in such conditions.

511; *Massachusetts* v. *New York, supra,* p. 95. Acquiescence is not compatible with a century of conflict. Only a few instances will be mentioned among many that are available. In 1813, the Delaware Assembly ceded to the United States an island in the Delaware River, east of the main channel and within the twelve mile circle, for the erection of a fort. A controversy arose between the United States as holder of the Delaware title and Henry Gale who claimed under New Jersey. In 1836, Gale brought ejectment in the United States Circuit Court against Beling, a tenant. Mr. Justice Baldwin charged the jury that Penn had no title, but the charge makes it plain that he had no knowledge of the letters patent of 1683, and that they were not in evidence before him. Later an arbitration was agreed upon between Humphrey, who had succeeded to the New Jersey title, and the Government of the United States, represented by the Secretary of War. In that proceeding the award was in favor of the Government. The opinion by the arbitrator, which was announced in January, 1849, is a careful and able statement of the conflicting claims of right. See the case of *Pea Patch Island, supra.* But the controversy would not down. In 1877, New Jersey began a suit in this court to establish the disputed boundary. It slumbered for many years, and finally in April, 1907, was discontinued without prejudice. 205 U.S. 550. If a record such as this makes out a title by acquiescence, one is somewhat at a loss to know how protest would be shown.

The complainant builds another argument upon a compact with the defendant which was ratified by the parties in March, 1905, and approved by Congress in January of 1907. 34 Stat. c. 394, p. 858. We are told that by this compact the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the en-

joyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go. "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

This opinion, though it has summarized many facts and arguments, has perforce omitted many others, important in the view of counsel. We content ourselves with the statement that they have not been overlooked. Omission is the less serious in view of the able and comprehensive report submitted by the Special Master. All that matters most in this keen but amicable controversy is there set forth at large, and there and in the supporting documents the student of our local history can live it over when he will.

We uphold the title of Delaware to the land within the circle.

*Second. The boundary below the circle in the lower river and the bay.*

Below the twelve mile circle there is a stretch of water about five miles long, not different in its physical characteristics from the river above, and below this is another stretch of water forty-five miles long where the river broadens into a bay.

The title to the soil of the lower river and the bay is unaffected by any grant to the Duke of York or others. The letters patent to James do not affect the ownership of the bed below the circle. Up to the time when New Jersey and Delaware became independent states, the title to the soil under the waters below the circle was still in the Crown of England. When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law. *Handly's Lessee* v. *Anthony,* 5 Wheat. 374, 379.

International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks. *Iowa* v. *Illinois,* 147 U.S. 1, 7, 8, 9; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U.S. 626, 631; *Louisiana* v. *Mississippi,* 202 U.S. 1, 49; *Arkansas* v. *Tennessee,* 246 U.S. 158, 169, 170; *Arkansas* v. *Mississippi,* 250 U.S. 39; *Minnesota* v. *Wisconsin,* 252 U.S. 273, 282. It applies the same doctrine, now known as the doctrine of the *Thalweg,* to estuaries and bays in which the dominant sailing channel can be followed to the sea. *Louisiana* v. *Mississippi, supra;* and compare 1 Halleck International Law, 4th ed., p. 182; Moore, Digest International Law, vol. 1, p. 617; *Matter of Devoe Manufacturing Co.,* 108 U.S. 401; *The Fame,* 8 Fed. Cas. 984, Story, J.; *The Open Boat,* 18 Fed. Cas. 751, Ware, J. The *Thalweg,* or downway, is the track taken by boats in their course down the stream, which is that of the strongest current. 1 Westlake, International Law, p. 144; Orban, Etude de Droit Fluvial International, p. 343; Kaeckenbeck, International Rivers, p. 176; Hyde, Int. Law, p. 244; Fiore, Int. Law Codified, § 1051; Calvo, Dictionnaire de Droit International. Delaware makes no denial that this is the decisive test whenever the physical conditions define the track of navigation. Her position comes to this, that the bay is equally navigable in all directions, or at all events was so navigable in 1783, and that in the absence of a track of navigation the geographical centre becomes the boundary, not of choice, but of necessity. As to the section of the river between the bay and the circle, the same boundary is to be accepted, we are told, as a matter of convenience.

The findings of the Special Master, well supported by the evidence, overcome the argument thus drawn from physical conditions. He finds that " as early as Fisher's Chart of Delaware Bay (1756) there has been a well-

defined channel of navigation up and down the Bay and River," in which the current of water attains its maximum velocity; that "Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation"; that the Bay, according to the testimony, "is only an expansion of the lower part of the Delaware River," and that the fresh water of the river does not spread out uniformly when it drains into the bay, but maintains a continuing identity through its course into the ocean. "The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel."

The underlying rationale of the doctrine of the *Thalweg* is one of equality and justice. "A river," in the words of Holmes, J. (*New Jersey* v. *New York,* 283 U.S. 336, 342), "is more than an amenity, it is a treasure." If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other. Considerations such as these have less importance for commonwealths or states united under a general government than for states wholly independent. Per Field, J., in *Iowa* v. *Illinois, supra,* p. 10. None the less, the same test will be applied in the absence of usage or convention pointing to another. *Iowa* v. *Illinois, supra.* Indeed, in 1783, the equal opportunity for use that was derived from equal ownership may have had a practical importance for the newly liberated colonies, still loosely knit together, such as it would not have today. They were not taking any chances in affairs of vital moment. Bays and rivers

are more than geometrical divisions. They are the arteries of trade and travel.

The commentators tell us of times when the doctrine of the *Thalweg* was still unknown or undeveloped. Anciently, we are informed, there was a principle of co-dominion by which boundary streams to their entire width were held in common ownership by the proprietors on either side. 1 Hyde, International Law, p. 243, § 137. Then, with Grotius and Vattel, came the notion of equality of division (Nys, Droit International, vol. 1, pp. 425, 426; Hyde, *supra*, p. 244, citing Grotius, De Jure Belli ac Pacis, and Vattel, Law of Nations), though how this was to be attained was still indefinite and uncertain, as the citations from Grotius and Vattel show.[5] Finally, about the end of the eighteenth century, the formula acquired precision, the middle of the "stream" becoming the middle of the "channel." There are statements by the commentators that the term *Thalweg* is to be traced to

[5] Grotius has this to say (De Jure Belli ac Pacis, Book 2, c. 3, § 18): "In Case of any Doubt, the Jurisdictions on each side reach to the Middle of the River that runs betwixt them, yet it may be, and in some Places it has actually happened, that the River wholly belongs to one Party; either because the other Nation had not got possession of the other Bank, 'till later, and when their Neighbours were already in Possession of the whole River, or else because Matters were stipulated by some Treaty."

In an earlier section (§ 16, subdivision 2) he quotes a statement of Tacitus that at a certain point "the Rhine began . . . to have a fixed Channel, which was proper to serve for a Boundary."

Vattel (Law of Nations, *supra*) states the rule as follows: "If, of two nations inhabiting the opposite banks of the river, neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case the dominion of each will extend to the middle of the river."

the Congress of Rastadt in 1797 (Engelhardt, Du Régime Conventionnel des Fleuves Internationaux, p. 72; Koch, Histoire des Traités de Paix, vol. 5, p. 156), and the Treaty of Lunéville in 1801. Hyde, *supra,* pp. 245, 246; Kaeckenbeck, International Rivers, p. 176; Adami, National Frontiers, translated by Behrens, p. 17. If the term was then new, the notion of equality was not. There are treaties before the Peace of Lunéville in which the boundary is described as the middle of the channel, though, it seems, without thought that in this there was an innovation, or that the meaning would have been different if the boundary had been declared to follow the middle of the stream. Hyde, *supra,* p. 246. Thus, in the Treaty of October 27, 1795, between the United States and Spain (Article IV), it is "agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the River Mississippi." Miller, Treaties and other International Acts of the United States of America, vol. 2, p. 321.[6] There are other treaties of the same period in which the boundary is described as the middle of the river without further definition, yet this court has held that the phrase was intended to be equivalent to the middle of the channel. *Iowa* v. *Illinois; Arkansas* v. *Tennessee; Arkansas* v. *Mississippi, supra.* See, e.g., the Treaty of 1763 between Great Britain, France and Spain, which calls for "a line drawn along the middle of the River Mississippi." The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid.

[6] See also the treaties collected in the Argument of the United States before the International Boundary Commission in the Chamizal Arbitration of 1910 between the United States and Mexico.

Nys traces the concept of the Thalweg to a period earlier than the Treaty of Munster, 1648. Droit International, v. 1, p. 426.

There was still a margin of uncertainty within which conflicting methods of division were contending for the mastery. Conceivably that is true today in unusual situations of avulsion or erosion. Hyde, *supra,* pp. 246, 247. Even so, there has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule (1 Westlake, International Law, p. 146), we are to utilize the formula that will make equality prevail.

In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right. In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the *Thalweg* had only a germinal existence. The gap is not so great that adjudication may not fill it. Lauterpacht, The Function of Law in the International Community, pp. 52, 60, 70, 85, 100, 110, 111, 255, 404, 432. Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. Hall, International Law, 8th ed., p. 7. International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality. Lauter-

pacht, *supra,* pp. 110, 255; Hall, *supra,* pp. 7, 12, 15, 16; Jenks, The New Jurisprudence, pp. 11, 12. "The gradual consolidation of opinions and habits" (Vinogradoff, Custom and Right, p. 21) has been doing its quiet work.[7]

It is thus with the formula of the *Thalweg* in its application to the division between Delaware and New Jersey. We apply it to that boundary, which goes back to the Peace of Paris, just as we applied it to the boundary between Illinois and Iowa, which derives from a treaty of 1763 (*Iowa* v. *Illinois; Keokuk & Hamilton Bridge Co.* v. *Illinois; Arkansas* v. *Tennessee; Arkansas* v. *Mississippi, supra*), or to that between Louisiana and Mississippi (202 U.S. 1, 16), which goes back to 1812, or between Minnesota and Wisconsin (252 U.S. 273), going back to 1846. Indeed, counsel for Delaware make no point that the result is to be affected by difference of time. In requests submitted to the Master they have asked for a finding that "there was in 1783 no well defined channel in the Delaware Bay constituting a necessary track of navigation and the boundary line between the States of Delaware and New Jersey in said bay is the geographical center thereof." The second branch of the request is dependent on the first. This is clear enough upon its face, but is made doubly clear by the exceptions to the report and by

[7] "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles. . . . This is the method of jurisprudence; it is the method by which law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals." The case of the Eastern Extension Australasia and China Telegraph Co., Ltd., decided November 9, 1923, by the British-American Arbitral Tribunal under the Convention of August 18, 1910, Nielsen's Report, pp. 75, 76, quoted by Lauterpacht, *supra,* p. 110.

the written and oral arguments. The line of division is to be the centre of the main channel unless the physical conditions are of such a nature that a channel is unknown.

We have seen that even in the bay the physical conditions are consistent with a track of navigation, which is also the course of safety. Counsel do not argue that such a track is unknown in the five miles of river between the bay and the circle. The argument is, however, that the geographical centre is to be made the boundary in the river as a matter of convenience, since otherwise there will be need for a sharp and sudden turn when the river meets the bay. Inconvenient such a boundary would unquestionably be, but the inconvenience is a reason for following the *Thalweg* consistently through the river and the bay alike instead of abandoning it along a course where it can be followed without trouble. If the boundary be taken to be the geographical centre, the result will be a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. *Minnesota* v. *Wisconsin, supra.* If the boundary be taken to be the *Thalweg,* it will follow the course furrowed by the vessels of the world.

The report will be confirmed, and a decree entered accordingly, which, unless agreed to by the parties, may be settled upon notice.

Within the twelve mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905.

Below the twelve mile circle, the true boundary between the complainant and the defendant will be adjudged to be the middle of the main ship channel in Delaware River and Bay.

The costs of the suit will be equally divided.

*It is so ordered.*

# UNITED STATES *v.* JEFFERSON ELECTRIC MANUFACTURING CO.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 171. Argued December 15, 18, 1933.—Decided February 12, 1934.

1. As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown. P. 396.
2. A manufacturer from whom money had been collected as taxes on account of sales of his products, upon the erroneous assumption that the articles sold were automobile parts or acccessories and the sales therefore taxable under Revenue Acts, 1924, § 600 (3) and 1918 and 1921, § § 900 (3), was entitled to a refund of the amount collected; but by Revenue Act, 1928, § 424, the right is qualified, if suit was not begun before April 3, 1928, by the condition that the burden of the illegal tax must be shown to rest upon the manufacturer alone and not upon the purchaser. Pp. 392–395.
3. Section 424, subdivision (a)(2) of the Act of 1928, in providing as to such cases that "no refund shall be made" unless it be established "to the satisfaction of the Commissioner" that the amount was not collected, directly or indirectly, from the purchaser, or if so collected has been returned to the purchaser, did not depart from the general system whereby a claim for a refund, having been duly but unsuccessfully urged before the Commissioner, may be fully and finally adjudicated in court; its effect was to add a new element in the right to refund—the non-shifting of the tax burden—which must be set up and proved as an element of the claim or cause of action, whether the proceeding be before the Commissioner or, subsequently, in court. P. 397.
4. The provision that this additional element is to be "established to the satisfaction of the Commissioner" does not mean that his

* Together with No. 196, *American Chain Co., Inc.* v. *Eaton, Collector,* certiorari to the Circuit Court of Appeals for the Second Circuit; and No. 329, *Routzahn, Collector,* v. *Willard Storage Battery Co.,* certiorari to the Circuit Court of Appeals for the Sixth Circuit.

decision shall be final, but is rather an admonition that the additional element is not lightly to be inferred but is to be established by proof that convinces in the sense of inducing belief. *Williamsport Wire Rope Co.* v. *United States,* 277 U.S. 551, distinguished. P. 397.

5. To warrant a judgment for the taxpayer in a suit for a refund of taxes of the designated class, the element added by subdivision (a)(2) *supra,*—i.e., that the tax burden is on the manufacturer and not on the purchaser—must be pleaded and proved and determined in his favor like other elements of the cause of action. P. 400.
6. In such a suit, the court, whether the District Court or the Court of Claims, can not render judgment for a refund subject to the condition that the claimant prove to the Commissioner that he alone has borne the burden of the tax. P. 400.
7. A conditional judgment would not be within the jurisdiction of the District Court, as limited by the Constitution. P. 400.
8. The statutes defining the jurisdiction of the District Courts and Court of Claims in suits of this class contemplate that their judgments shall fully and finally determine whether the claimants are entitled to the refunds for which they sue. P. 401.
9. The operation of subdivision (a)(2) of § 424 of the Revenue Act of 1928, is the same when the suit for refund is against the United States and when it is against the Collector. P. 403.
10. An Act of Congress providing that manufacturers who have been forced to pay erroneous and illegal taxes on sales shall have no refund unless they show that the burden of the taxes has not been shifted to the purchasers or unless they give bond to use the refunded money in reimbursing purchasers, does not infringe their rights under the due process clause of the Fifth Amendment when applied to taxes which under the prior law were recoverable by the manufacturers without such conditions, in suits already pending when the Act was passed. If the tax burden has been shifted to the purchasers, they and not the manufacturers are the real parties in interest. P. 401
11. Statutes providing for refunds of taxes and for suits therefor, proceed on the same equitable principles that underlie an action in assumpsit for money had and received. P. 402.
12. If a manufacturing company, by its invoice, represented to its purchaser that the amount shown thereon included the sales tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other

controlling circumstances, that it did not collect the tax from the purchaser but itself bore the burden thereof. P. 405.

13. Uncertainty and apparent conflict in findings of the Court of Claims may necessitate a reversal of the judgment and remand of the cause for a new trial and full and specific findings. P. 406.

14. In a law case tried to the District Court without a jury, a motion by the defense for judgment on all the evidence is rightly overruled if there is substantial evidence fairly tending to establish every element of the plaintiff's cause of action. P. 407.

15. Upon appeal from the District Court, sitting in a law case without a jury, it is beyond the province of the appellate court to reëxamine the evidence and reverse the judgment because of what it regards as error of fact. *Id.*

16. A finding that the plaintiff had sustained the burden of proof as to a designated issue, *held* inadequate as a finding of the facts involved in the issue and insufficient to support the judgment. P. 408.

17. Where a manufacturer's collections from purchasers were at the former prices but the invoices indicated that part of the amounts charged represented the tax on the sales and the remainder the "real sales price," and the tax was computed and paid by the manufacturer on the latter basis, thereby saving to itself the difference between the tax on the full amount and the tax on the "real sales price," it is a sound finding that the tax was collected from the purchasers; but to say that as the price theretofore in vogue was reduced by the amount of the tax, the manufacturer, in effect, returned the tax to the purchasers, is not a finding but an illogical argument. P. 409.

18. Where judgments of the District Court had been reversed by the Circuit Court of Appeals on untenable grounds but were erroneous because of insufficiencies of the special findings, *held* that the judgments of both courts should be reversed and the suits remanded to the District Court with directions to vacate its findings and grant new trials. P. 410.

69 Ct. Cls. 150; 38 F. (2d) 139; 2 F.Supp. 778, reversed.

58 F. (2d) 246, 248 (D.C.), and 63 F. (2d) 783 (C.C.A.), reversed.

65 F. (2d) 89 (C.C.A.), reversed.

CERTIORARI, 290 U.S. 607, 612, to review a judgment of the Court of Claims sustaining a claim of the Jefferson Electric Manufacturing Company and dismissing a counterclaim; a judgment of the Circuit Court of Appeals for

the Second Circuit reversing three judgments recovered by the Chain Company in the District Court for Connecticut; and a judgment of the Circuit Court of Appeals for the Sixth Circuit, affirming five judgments recovered by the Storage Battery Company in the District Court for the Northern District of Ohio, Eastern Division. All of the claims were for refunds of taxes collected on sales.

*Assistant Attorney General Wideman,* with whom *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, J. Louis Monarch, Francis H. Horan,* and *John R. Fillman* were on the brief, for petitioners in Nos. 171 and 329, and respondent in No. 196.

*Mr. Newton K. Fox,* with whom *Mr. Adrian C. Humphreys* was on the brief, for respondent in No. 171.

*Messrs. David S. Day* and *Chester I. Long,* with whom *Messrs. Peter Q. Nyce, Charles P. Swindler,* and *Samuel W. McIntosh* were on the brief, for petitioner in No. 196.

*Mr. Charles C. Norris, Jr.,* with whom *Mr. Augustus B. Stoughton* was on the brief, for respondent in No. 329.

By leave of Court, *Mr. George M. Morris* filed a brief as *amicus curiae.*

Mr. Justice Van Devanter delivered the opinion of the Court.

These are actions at law brought—in one instance against the United States and in two against a revenue collector—to recover in each instance money alleged to have been erroneously and illegally exacted as an excise tax—under subdivision 3 of § 900 of the Revenue Acts of 1918 [1] and 1921 [2] and subdivision 3 of § 600 of the

[1] C. 18, 40 Stat. 1057, 1122.

[2] C. 136, 42 Stat. 227, 291.

Revenue Act of 1924 [3]—from the plaintiff, a corporate manufacturer, on sales by it of articles which the revenue officers regarded as automobile parts or accessories.

In No. 171 [4] the Court of Claims awarded the plaintiff $20,017.58 with interest and denied a counterclaim interposed by the United States. In No. 196 [5] the District Court for the District of Connecticut gave the plaintiff judgments on three claims [6] for $329,250.00, $170,470.36 and $98,416.41 with interest on each sum; and the judgments were reversed by the Circuit Court of Appeals.[7]

In No. 329 [8] the District Court for the Northern District of Ohio rendered judgments for the plaintiff on five claims [9] for $89,195.36, $249,275.32, $189,853.88, $173,934.45 and $41,764.57 with interest on each sum; and the judgments were affirmed by the Circuit Court of Appeals.[10] The cases are here on certiorari.

After the taxes were collected, timely applications for refund were duly made by the plaintiffs, and the applications were denied. The actions were brought within the time generally limited therefor,[11] but not prior to April 30, 1928.

The applications for refund and the actions proceeded on the theory that the sales were not taxable under the Revenue Acts because the articles sold were not automobile parts or accessories within the meaning of those acts,

[3] C. 234, 43 Stat. 253, 322.

[4] 69 Ct. Cls. 150; 38 F. (2d) 139; 2 F.Supp. 778.

[5] 58 F. (2d) 246, 248.

[6] Each claim was asserted in a separate suit, but the suits were tried together and after judgment were consolidated for purposes of appeal.

[7] 63 F. (2d) 783.

[8] For opinion overruling motion to dismiss action see 8 Am. Fed. Tax Reports 11274.

[9] Here again the several claims were asserted in separate suits, but the suits were tried together and after judgment were consolidated for purposes of appeal.

[10] 65 F. (2d) 89.

[11] 26 U.S.C. § 156.

and not on the theory that the amount collected was in excess of what was properly collectible on taxable sales.

In each case the court's authority to entertain the action and the plaintiff's right to recover were challenged in various ways as precluded by § 424 of the Revenue Act of 1928,[12] which provides:

"Sec. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which

[12] C. 852, 45 Stat. 791, 866; 26 U.S.C. § 2424.

the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

As respects actions brought on or after April 30, 1928, to recover taxes charged to have been wholly invalid and not merely in excess of what was lawful, which is the situation here, the construction and application of § 424, particularly subdivision (a) (2), are matters about which there has been much contrariety of opinion, as is shown in three lines of decision.

The decisions in the first line regard subdivision (a) (2) as committing all claims for the refunding of taxes of the class in question here to the Commissioner of Internal Revenue for final determination and precluding any examination of such claims in the courts. This view has been taken by District Judges in two cases [13] and by a Circuit Judge in a dissenting opinion in another case.[14]

The decisions in the second line are to the effect that the subdivision relates to administrative action by the Commissioner, but not to proceedings in the courts, and leaves a taxpayer who has applied to the Commissioner unsuccessfully free to sue on his claim and the courts free to entertain the suit and adjudicate the claim—as could be and commonly was done before § 424 was enacted—save that under that section a judgment for the taxpayer in a suit brought on or after April 30, 1928, does not become obligatory or entitle him to the refund

[13] Sterling Spring Co. *v.* Routzahn, VIII–2 Int. Rev. Cum. Bull. 258; Twentieth Century Manufacturing Co. *v.* Hopkins, X–2 Int. Rev. Cum. Bull. 408.

[14] *McCaughn* v. *Electric Storage Battery Co.*, 63 F. (2d) 715, 718–719.

awarded by the judgment, unless and until (y) he satisfies the Commissioner that the tax was not collected directly or indirectly from the purchasers of the articles sold, or if so collected has been returned to the purchasers, or (z) gives the bond described in subdivision (a) (3). Such has been the ruling in two cases. In one the ruling was by the District Court for the Eastern District of Pennsylvania,[15] and the Circuit Court of Appeals for that circuit substantially sustained it, and in that connection said,[16] "This section clearly refers to a 'refund' of taxes by the Commissioner, and nowhere refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the court. In other words, this section is an administrative measure for the guidance of the Commissioner in the 'refund' of taxes, and does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit." The other case is No. 329 now under review, where the ruling was by the District Court for the Northern District of Ohio[17] and was fully sustained by the

[15] *Electric Storage Battery Co.* v. *McCaughn*, 52 F. (2d) 205.

[16] *McCaughn* v. *Electric Storage Battery Co.*, 63 F. (2d) 715, 718.

[17] For opinion overruling preliminary motion to dismiss, see Willard Storage Battery Co. *v.* Routzahn, Collector, 8 Am. Fed. Tax Rep. 11274. After the hearing on the merits the court, in rendering judgment for the plaintiff, said:

"The objection to the court's jurisdiction founded on sec. 424 . . . has heretofore been ruled on. There is an error in that opinion where it is said that any refund after judgment would be pursuant to sub (3) of sec. 424 and would be conditional and for the benefit of consumers. If refunds are made, they may be under either sub (2) or (3), depending upon whether the plaintiff bore the tax or passed it on, etc. Those are matters for the Commissioner to decide; the court has nothing to do with them, and no evidence respecting them was offered.

"According to two recent decisions of the Court of Claims . . . the absence of such evidence should prevent recovery. But with great respect, I am unable to agree with the holdings on that point. I still

Circuit Court of Appeals for that circuit, as is shown by the following excerpts from its opinion: [18]

"Section 424(a) deals not with rights of action, but with limitations upon the power of the commissioner to make refunds. Its provisions are not in conflict with the general provisions of law authorizing suits for refund of taxes. [Citing cases.]

"We agree with the authorities above cited, not only in reliance upon familiar principles governing repeal by implication, but also because the section appears to us to have an obvious literal meaning perfectly applicable to refunds by the commissioner after judicial determination of the legality of the tax.

. . . . . .

"If the claim for refund is made pursuant to a judgment of the court in an action begun prior to April 30, 1928, the commissioner is not forbidden to refund under the applicable statute, and this may well be without qualification, although this we are not required to decide. Failing to bring himself within the condition of paragraph 1, because of not having pursued his claim to judgment in an action begun prior to the critical date, the taxpayer must establish to the statisfaction of the commissioner . . . (b) that such amount was not collected directly or indirectly from the purchasers, or (c) that such amount, although collected from the purchasers, was returned to them."

The decisions in the third line, like those in the second, regard the subdivision as neither cutting off the right of

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think it is for the Commissioner alone to determine the facts necessary to be established as the basis of refunds under either sub (2) or (3). Where as here, taxes on sales not taxable have been collected, then on proof to the satisfaction of the Commissioner 'that such amount was not collected, directly, or indirectly, from the purchaser or lessee,' or if collected has been returned, they may be refunded."

[18] *Routzahn* v. *Willard Storage Battery Co.*, 65 F. (2d) 89.

a taxpayer to sue for a refund after applying unsuccessfully to the Commissioner nor abrogating the authority of the courts to entertain the suit. But, unlike those in the second, they regard the subdivision as substantively limiting the right to a refund of taxes of the designated class to instances where the taxpayer either has not directly or indirectly collected the tax from the purchaser or after so collecting it has returned it to him. In other words, they regard the subdivision as making this substantive limitation an element of the right to a refund of such taxes, and therefore as requiring that this element, like others, be satisfactorily established in any proceedings where an asserted right to a refund is presented for examination and determination, whether the proceeding be before the Commissioner or be a suit brought after an application to him has been unavailing. The Court of Claims has so ruled in two cases,[19] one being No. 171 now under review; and the District Court for the District of Connecticut came to a like conclusion in No. 196 [20] also now under review.

We are of opinion that the view taken in the third line of decisions is right.

When § 424 was enacted the internal revenue laws contained many related provisions constituting what this Court has termed a comprehensive " system of corrective justice " in respect of the assessment and collection of erroneous or illegal taxes.[21] A summary of this system—it still is part of the internal revenue laws—will portray it sufficiently for present purposes. Anterior to collection the Commissioner possesses exclusive authority to revise, correct or reject assessments and the courts are forbidden

[19] *Boyle Valve Co.* v. *United States,* 69 Ct. Cls. 129; 38 F. (2d) 135; *Jefferson Electric Mfg. Co.* v. *United States,* 69 Ct. Cls. 158, 38 F. (2d) 139.

[20] *American Chain Co.* v. *Eaton,* 58 F. (2d) 246; *id.,* 248.

[21] *Dodge* v. *Osborn,* 240 U.S. 118, 120–121.

to entertain suits "to restrain the assessment or collection." After collection aggrieved taxpayers are accorded a limited time within which to apply for refunds, and the Commissioner is authorized to grant the applications where the taxes are shown to have been erroneous or illegal; but a denial by him is not final. If the application is either denied or not acted on by the Commissioner the taxpayer is accorded a fixed period within which to bring suit for a refund against the United States or the collector who received the tax, and if in the suit he establishes that the tax was erroneous or invalid, that it was paid by him, and that his claim has been duly and seasonably presented and prosecuted, he is entitled to judgment for a refund of the amount paid with interest.[22]

As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.[23]

That rule is applicable here. The existing system developed through long years of experience comprehends the entire subject, including all claims for refund. Section 424 is a new enactment and relates to a designated class of such claims, concededly within the scope of the exist-

[22] 26 U.S.C. §§ 149, 154, 156, 157; 28 U.S.C. §§ 41 (5) (20), 250 (1), 284, 285, 286, 842; 31 U.S.C. § 225; *Philadelphia* v. *Collector*, 5 Wall. 720, 731–733; *Nichols* v. *United States*, 7 Wall. 122, 130–131; *Cheatham* v. *Norvekl*, 92 U.S. 85, 88–90; *United States* v. *Hvoslef*, 237 U.S. 1, 10; *United States* v. *Realty Co.*, 237 U.S. 28, 31–32; *Sage* v. *United States*, 250 U.S. 33, 38–39; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373.

[23] *United States* v. *Barnes*, 222 U.S. 513, 520, and cases cited; *United States* v. *Sweet*, 245 U.S. 563, 572; *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 384.

ing system. Obviously the section is intended to make some change as respects the particular class and must be given effect accordingly; but to determine what change is intended it must be examined in the light of the existing system.

As respects claims of the designated class § 424 plainly prescribes, in subdivision (a) (2), an additional substantive element of the right to a refund—the additional element being that the taxpayer has not directly or indirectly collected the tax from the purchaser, or, after so collecting it, has returned it to him, so that the burden of the tax has been borne by the taxpayer and not the purchaser. Of subdivision (a) (3) it suffices to observe that it enables a taxpayer who has not borne the burden of the tax but has collected it from purchasers, and so is not entitled to a refund under subdivision (a) (2), to obtain from the Commissioner a qualified refund by giving a bond promptly to use the amount refunded in reimbursing the purchasers. No such bond has been given in the cases now before us and in all the right to judgment for a refund is rested on other facts independently of that.

Apart from the change already described we think subdivision (a) (2) discloses no purpose to depart from the existing system. It does not purport to commit the decision of claims for refund exclusively to the Commissioner, or to give finality to his denials, or to take from aggrieved claimants the right to sue on their claims after denial or inaction by him, or to withdraw from the courts the power to entertain such suits. As to these matters, therefore, the rules prescribed in the existing system remain, as before, both applicable and controlling.

The clause in that subdivision saying the additional element to which it relates is to be "established to the satisfaction of the Commissioner" is much relied on; but we think it does not require a different conclusion. Only

by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion in respect of such refunds. A more rational view is that it is largely admonitive and means that the additional element is not lightly to be inferred but to be established by proof which convinces in the sense of inducing belief. Such words often are so construed where applied to one who, like the Commissioner, is charged with the duty of ascertaining a matter of fact as a basis for further action.[24]

While the clause speaks only of the Commissioner, this becomes of minor significance when it is reflected that under the existing system he is the one to whom all claims for refund must be presented and on whom the duty of making an examination and decision is primarily placed, and that it doubtless was assumed—rightly we think—that under that system a taxpayer could by suit secure a judicial reëxamination of his claim, and, if he did, the claim necessarily would be judged by the same substantive standards as if it were before the Commissioner. We say "necessarily," because subdivision (a) (2) says at the outset "No refund shall be made of any amount paid . . . unless," etc., and thus shows that it is to be applied by all who examine and determine claims for refunds—the courts as well as the Commissioner.

This view of the words "established to the satisfaction of the Commissioner" has support in a long continued practice under a similar provision in a customs law of 1864[25] under which certain customs duties, if paid under protest, were to be refunded to the importer when "shown to the satisfaction of the Secretary of the Treas-

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[24] *Bryan* v. *Moore*, 81 Ind. 9, 11–13; *Kenyon* v. *Mondovi*, 98 Wis. 50, 54; 73 N.W. 314; *Callan* v. *Hanson*, 86 Iowa 420, 423; 53 N.W. 282; *Sams Automatic Car Coupler Co.* v. *League*, 25 Colo. 129, 135; 54 Pac. 642; *Walker* v. *Collins*, 59 Fed. 70, 74.

[25] C. 171, § 16, 13 Stat. 215, § 3012½ Rev. Stat.

ury" to have been excessive. That provision remained in force many years,[26] and during that period was uniformly treated as neither investing the Secretary with final authority nor putting aside general provisions permitting suits for refunds, but as leaving the importer free, after an unavailing appeal to the Secretary, to sue under the general provisions and obtain a judicial reëxamination of his claim.[27]

Some reliance is placed on *Williamsport Wire Rope Co.* v. *United States,* 277 U.S. 551; but that case is not in point. It was a suit for the refunding of excess-profits and war-profits taxes assessed under § 301 of the Revenue Act of 1918, and the question presented was whether in such a suit a refusal by the Commissioner to make a special assessment under §§ 327 (a) and (d) and 328 was open to reëxamination. In answering the question in the negative, this Court referred to the purpose with which those sections provide for a special assessment, the language employed in expressing the conditions under which it is to be made, and the prescribed procedure; pointed out that the task involved is one requiring technical or special knowledge and experience in respect of such tax problems and ready access to data in the Bureau of Internal Revenue relating to a large group of taxpayers; and held that these exceptional conditions enforce the conclusion that Congress intended to confide the task to the Commissioner, subject only to a review by the Board of Tax Appeals where a direct appeal to that body is permitted, and thereby to exclude a reëxamination in the courts such as in other situations is had in suits for refunds. It is very plain that no such excep-

[26] See c. 407, § 29, 26 Stat. 142; c. 6, § 28, 36 Stat. 104.

[27] See *Arnson* v. *Murphy,* 109 U.S. 238; *Hager* v. *Swayne,* 149 U.S. 242; *Schoenfeld* v. *Hendricks,* 152 U.S. 691, 693; *White* v. *Arthur,* 10 Fed. 80, 88.

tional conditions are involved in giving effect to subdivision (a) (2) of § 424.

As to the effect to be given to that subdivision in suits for refunds, we are of opinion that, as it makes the right to a refund to depend on an additional element—that the taxpayer has not collected the tax, directly or indirectly, from the purchaser, or, if it was so collected, has returned it to him—the courts in adjudicating claims of the designated class are under a duty to give effect to the subdivision by regarding the additional element as a matter to be shown by suitable allegation and established by appropriate proof, like other elements of such a right or cause of action, and by determining the sufficiency of pleadings and evidence accordingly.[28]

We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser. That view rests on two untenable premises—one that the question whether the burden of the tax has thus been borne by the taxpayer is solely for administrative solution, and the other that a judgment for a refund may be given subject to the condition that it is to become obligatory and be given effect only if and when the claimant proves to the Commissioner that he alone has borne the burden of the tax. Our reasons for rejecting the first premise already have been shown. Those for rejecting the other will be shortly stated. A judgment so conditioned is merely a finding that the tax paid by the claimant was invalid, coupled with a declaration that it should be refunded to him if he proves to the Commissioner that in other respects he is entitled to it. Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of

[28] *Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205–206.

the Constitution to give or review judgments of that character, for they are not final or binding adjudications.[29] The District Courts are created and exist under that article. While the Court of Claims is created under a different article, the statute defining its jurisdiction of suits for refunds and those defining the jurisdiction of the District Courts are alike, in that both contemplate that the judgments in such suits shall fully and finally determine whether the claimants are entitled to the refunds for which they sue.

The contention is made that subdivision (a) (2), when construed and applied as we hold it should be, infringes the due process clause of the Fifth Amendment to the Constitution in that it strikes down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent, because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before § 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that § 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing

[29] *Hayburn's Case* 2 Dall. 409 and note; *United States* v. *Ferreira*, 13 How. 40 and note; *Gordon* v. *United States*, 2 Wall. 561; same case, 117 U.S. 697; *United States* v. *Jones*, 119 U.S. 477; *In re Sanborn*, 148 U.S. 222; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 456–457; *Muskrat* v. *United States*, 219 U.S. 346.

them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution.

The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said: [30]

"This is often called an equitable action and is less restricted and fettered by technical rules and formalities

[30] *Claflin* v. *Godfrey*, 38 Mass. 1, 6. To the same effect are *Steuerwald* v. *Richter*, 158 Wis. 597, 604; 149 N.W. 692; *Sanford* v. *First National Bank*, 238 Fed. 298, 301; *Portsmouth Cotton Oil Corp.* v. *Fourth National Bank*, 280 Fed. 879, 882.

than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex æquo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."

As our conclusion respecting the operation of subdivision (a) (2) is applicable both where the suit for a refund is against the United States and where it is against the collector, there is no need for considering the arguments advanced concerning the power of Congress to condition or withdraw the consent of the United States to be sued.[31]

We come now to consider and dispose of the three cases and to apply to them our conclusions respecting the construction and operation of subdivision (a) (2) of § 424.

No. 171.

In the petition the plaintiff alleged that it absorbed the taxes in question and paid the same from its own funds; that no other person or persons paid the same either directly or indirectly; and that no other person or persons has any right either at law or in equity to the refund sought or any part of it. The defendant's answer was a general traverse accompanied by a counter-claim based on an alleged allowance and payment to the plaintiff, through error and mistake, of certain claims for the re-

[31] See *Darrington* v. *Bank of Alabama,* 13 How. 12, 17; *Beers* v. *Arkansas,* 20 How. 527, 529; *In re Ayers,* 123 U.S. 443, 505; *Hans* v. *Louisiana,* 134 U.S. 1, 17–18; *United States* v. *Heinszen & Co.,* 206 U.S. 370, 391 (Harlan, J.); *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430–431.

funding of like taxes aggregating $69,264.66. The Court of Claims made special findings of fact whereon it gave judgment for the plaintiff. The findings show that the taxes in question were assessed on sales by the plaintiff of ignition coils which the revenue officers regarded as parts or accessories for automobiles, but which the court regarded as equally adapted to other uses not comprehended in the taxing acts; and that the taxing period in question began with May, 1919, and continued to the end of February, 1926. Pertinent portions of the findings are as follows:

"7. For the taxable period in question . . . plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense.'

"8. For a part of the taxable periods in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

"Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

"Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoices to customers the following: 'On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21 of amount indicated equal price,' during the period when the 5% tax rate was in effect, and substantially the same notation during the period when the 2½% rate was in effect, '1/21' being changed to '1/41' and '20/21' to

'40/41.' It does not definitely appear what the practice was thereafter as to notations on invoices.

"9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories.

"10. It is not possible from the state of the record to determine the amount of excise tax paid for the period when plaintiff made the aforesaid tax notations on invoices sent to its customers."

These findings, which are all that bear on the question of who paid the taxes and bore the burden thereof, are wanting in precision and apparently conflicting. If findings 7 and 9 were not otherwise qualified they might be regarded as meaning that the sales were at catalogue prices and that these prices did not include, and the purchasers did not pay, the tax or any part of it. But finding 8 makes it at least doubtful that findings 7 and 9 have that meaning, for it is plainly inferable from finding 8 that during much of the taxing period the plaintiff sold on invoices bearing notations indicating that when the tax was 5% of the selling price 1/21 of the amount shown on the invoice represented the tax and 20/21 represented the selling price; and that when the tax was 2½% of the selling price the fractions were changed to 1/41 and 40/41. The findings leave it uncertain whether the plaintiff in making its returns to the revenue officers gave the amount shown on the invoices or 20/21 (later 40/41) of that amount as the selling price; and they also leave it uncertain on which basis the tax was computed. If by its invoices the plaintiff represented to its purchasers that the amount shown thereon included the tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other controlling circumstances of which there is no

finding, that it did not collect the tax from the purchasers but itself bore the burden thereof.

Because of the uncertainty and apparent conflict in the findings the judgment must be reversed and the cause remanded to the Court of Claims for a new trial and full and specific findings.

No. 196.

This case comprises three separate suits, designated in the District Court as Nos. 3360, 3371 and 3421, which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. They were tried to the court under a stipulation in writing waiving a jury. The court made special findings of fact on which it based its judgments. In the complaints the plaintiff alleged that the tax was not paid directly or indirectly by the purchasers, but entirely by the plaintiff; that the sales were at a flat price and no amount for the tax was included therein; and that the plaintiff absorbed the tax. These allegations and some others were denied by the defendant in his answer. In various ways the defendant challenged the plaintiff's right to sue for a refund and the court's power to entertain such a suit, the challenge being grounded on subdivision (a) (2) of § 424; and the court held the challenge was not tenable. At the conclusion of the evidence the defendant moved for judgments thereon in his favor, and the motion was denied.

The Circuit Court of Appeals reëxamined the evidence, concluded therefrom, contrary to the findings of the District Court, that the articles on sales of which the tax was assessed were accessories for the taxable vehicles enumerated in the taxing acts, and on that ground sustained the tax and reversed the judgments, without considering the rulings relating to subdivision (a) (2) of § 424.

The questions presented for consideration here are those involved in the rulings of the District Court and that involved in the reversal by the Circuit Court of Appeals on

a reëxamination of the evidence. The challenge of the plaintiff's right to sue for a refund and of the court's power to entertain such a suit was rightly overruled. This is sufficiently shown in the earlier part of this opinion. Whether the District Court erred in denying the defendant's motion at the conclusion of the evidence for judgments thereon in his favor must be determined by ascertaining whether there was substantial evidence fairly tending to establish every element of the plaintiff's causes of action. We think there was such evidence. There was conflict in it; parts of it admitted of diverging inferences; and as to some matters the preponderating weight was difficult of ascertainment. But these were all matters for the trial court to determine. It was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict.[32] We are accordingly of opinion that the motion was rightly overruled, and that the Circuit Court of Appeals erred in not so holding. Even if there was some basis for thinking the weight of the evidence was with the defendant, as was strongly urged at our bar, it was not within the province of that court to reëxamine the evidence and reverse the judgments because of what it regarded as error of fact.[33]

Whether the special findings give the requisite support to the judgments rendered thereon is a different question and is one which is open to consideration here.[34] The findings are long and the view which we take of one of them makes it unnecessary to state the others. The one relates to the matter made essential by subdivision (a) (2) of § 424, and is the only finding on the subject. It reads as follows:

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[32] 28 U.S.C. § 773; *Copelin* v. *Insurance Co.*, 9 Wall. 461; *Dooley* v. *Pease*, 180 U.S. 126, 131.

[33] 28 U.S.C. § 879; *Martinton* v. *Fairbanks*, 112 U.S. 670, 672; *Davis* v. *Schwartz*, 155 U.S. 631, 636; *Law* v. *United States*, 266 U.S. 494, 496.

[34] 28 U.S.C. § 875.

" Paragraph 5 of the complaint alleged that the taxes in question were paid entirely by the plaintiff, and neither directly nor indirectly by the plaintiff's purchasers. These allegations also were denied.

"As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof. The evidence on this issue relating to the periods involved in cases Nos. 3360 and 3421, disclosed that the plaintiff at some time during the period between January 1 and December 31, 1923, reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question. Thereafter the plaintiff computed and paid the excise tax upon the basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax, 5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before. Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the real sale price, especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them."

Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371 is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of differing opinions. It is in the nature of a

legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it.

That which follows relates to suits Nos. 3360 and 3421 and evidently means that the plaintiff by its invoices was indicating to the purchasers that 1/21 of the amount it was collecting from them represented the tax on the sales and 20/21 represented its "real sales price"; and that the plaintiff itself computed the tax on the basis of this "real sales price" and thereafter paid the tax as so computed, thereby saving to itself the difference between the tax resulting from that computation and the tax which would have resulted had the full amount collected from the purchasers been used as the basis for the computation. If that be what is meant, the court rightly concluded that the tax was collected from the purchasers. It is of no importance that the prior sales price had been reduced by the amount of the tax, for under the taxing act the tax was to be computed on the price for which the articles actually were sold and not on some prior and discarded price. But the court's further conclusion that, as the price theretofore in vogue was reduced by the amount of the tax, the plaintiff in effect returned to the purchasers the tax it collected from them—because they got the articles for a price which was that much less than it would have been had the prior sales price been still in vogue—is shown by its mere statement to be not a finding of fact but unsatisfactory reasoning having little tendency to establish its objective. That conclusion must therefore be disregarded. It results that the finding, while showing that the plaintiff collected the tax from the purchasers, does not show whether it returned the tax to them. Thus the finding does not adequately respond to the issue arising on the plaintiff's allegation that it absorbed the

tax—for, having collected it from them, the plaintiff could absorb it only by returning it to them. With that matter left in this situation the finding plainly does not support the judgments which rest on it.

As the judgments of the District Court in the three suits must be reversed because of insufficiencies in the special findings, and as the reversal by the Circuit Court of Appeals was put on an untenable ground, we deem it the better course to enter here a judgment reversing the judgments of both courts and remanding the suits to the District Court with a direction to vacate its findings and grant a new trial in each suit.

No. 329.

This case comprises five separate suits which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. The trial was to the court under a written stipulation waiving a jury. The court made special findings and based its judgments on them. At the outset the plaintiff's right to recover on the facts stated in the petitions was challenged by the defendant by motions to dismiss and the motions were overruled. There were also motions at the close of the evidence for judgments thereon in favor of the defendant which also were overruled. These rulings and the sufficiency of the facts found to support the judgments are the matters presented for consideration here. There was neither allegation nor proof that the plaintiff had not collected the tax from the purchasers, or after so collecting it had returned it to them; and of course there was no finding on the subject. The suits proceeded throughout as if that question was one for administrative solution after judgment, if the plaintiff prevailed. What we have said in the earlier part of this opinion shows that this was a mistaken theory. The judgments in both courts

below must be reversed accordingly and the causes remanded to the District Court with directions to set aside the findings, and to sustain the motions to dismiss—but without prejudice to the exercise by that court of its discretion in permitting amendments of the petitions.

Our conclusions in Nos. 171, 196 and 329 when summarized require that the judgments in all be reversed and the causes remanded with directions as before indicated.

*Judgments reversed.*

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## BEST, ADMINISTRATOR, *v.* DISTRICT OF COLUMBIA.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 477. Argued February 9, 1934.—Decided March 5, 1934.

1. To warrant the direction of a verdict for the defendant on the opening statement of plaintiff's counsel, it is not enough that the statement be indefinite; it must clearly appear, after resolving all doubts and uncertainties in favor of the plaintiff, that no cause of action exists. P. 415.
2. Where a wharf, for unloading sand, lies adjacent to a public street from which, for want of a proper fence or barrier, its surface may be both seen and entered, and when children of tender years, attracted by the sand piles, are accustomed to enter and use it as a playground, going in and out at their pleasure, the owner is under a duty to take reasonable precautions either to prevent such use or to keep the flooring in repair so that children will not be exposed to the danger of falling through holes. *Railroad Co.* v. *Stout,* 17 Wall. 657; *Union Pacific Ry.* v. *McDonald,* 152 U.S. 262, applied. *United Zinc Co.* v. *Britt,* 258 U.S. 268, distinguished. P. 416.

62 App.D.C. 271; 66 F. (2d) 797, reversed.

CERTIORARI, 290 U.S. 619, to review a judgment affirming a judgment for the District of Columbia entered on a directed verdict, in an action for the death of a child, alleged to have been caused by negligence. The verdict

was directed at the close of the opening statement by counsel for the administrator.

*Mr. John H. Burnett,* with whom *Messrs. James A. O'Shea* and *Alfred Goldstein* were on the brief, for petitioner.

*Mr. Robert E. Lynch,* Assistant Corporation Counsel, District of Columbia, with whom *Mr. William W. Bride,* Corporation Counsel, was on the brief, for respondent.

There was a complete failure to offer proof of the following essential facts: That the wharf could be seen from the public space; that the child was attracted by the presence of the wharf, or of anything upon it; hidden danger there; prior accidents to children; invitation or permission to children to enter or play.

The statement that " children went in and out at their pleasure " and that " children used this place to play on and play in " is not enough to show an invitation or permission on behalf of the respondent. It is to be inferred that the watchman would have prevented the children from coming upon the premises; and the fact that the wharf " is not a place to which the public is admitted " definitely negatives any permission or invitation to a five-year-old child to play on the wharf on a Sunday.

Cases cited: *Sullivan* v. *Huidekoper,* 27 App.D.C. 154; *Sioux City & P. R. Co.* v. *Stout,* 17 Wall. 657; *Union Pacific R. Co.* v. *McDonald,* 152 U.S. 262; *Peters* v. *Bowman,* 115 Cal. 345; *Baltimore* v. *Palma,* 137 Md. 179; *Lease* v. *Bealmear,* 130 Atl. 66; *Trogia* v. *Butte Mining Co.,* 270 Fed. 75; *Savannah, F. & W. R. Co.* v. *Beavers,* 113 Ga. 398; *Zamaria* v. *Davis,* 284 Pa. 524; *Thompson* v. *Baltimore & Ohio R. Co.,* 218 Pa. 444; *Beichert* v. *G. M. Laboratories,* 242 N.Y. 168; *Lineburg* v. *St. Paul,* 71 Minn. 245; *Stendal* v. *Boyd,* 73 Minn. 53; *Gillespie* v. *McGowan,* 100 Pa. 144; *Hegeage* v. *District*

*of Columbia,* 42 App.D.C. 109; *McGraw* v. *District of Columbia,* 3 App.D.C. 405; *Branan* v. *Wimsatt,* 54 App.D.C. 374, cert. den., 265 U.S. 591; *Daniels* v. *New York & N. E. R. Co.,* 154 Mass. 349; *Walker* v. *Potomac & Fredericksburg R. Co.,* 105 Va. 226; *Walsh* v. *Fitchburg R. Co.,* 145 N.Y. 301; *Conrad* v. *Baltimore & Ohio R. Co.,* 64 W.Va. 176.

The doctrine announced in the "turntable case," *Sioux City & P. R. Co.* v. *Stout,* 17 Wall. 657, and the "slack pit case," *Union Pacific R. Co.* v. *McDonald,* 152 U.S. 262, is not applicable.

The case at bar should be controlled by *United Zinc Co.* v. *Britt* 258 U.S. 268. Cf. *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U.S. 141; 36 A.L.R. 1–294; 45 A.L.R. 973–993; *Erie R. Co.* v. *Duplak,* 286 U.S. 441.

The directing of the verdict at the conclusion of the opening statement was proper. *Hornblower* v. *George Washington University,* 31 App.D.C. 64; *Brown* v. *District of Columbia,* 29 App.D.C. 273; *Oscanyan* v. *Winchester Arms Co.,* 103 U.S. 261.

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

Petitioner's intestate, a child five years of age, while playing on a wharf belonging to the District of Columbia, fell through a hole in the wharf and was drowned. This action was for damages for the alleged negligence of the District. After a jury had been impaneled, an opening statement was made by plaintiff's counsel and thereupon the court, on motion of the defendant and without taking testimony, directed a verdict in defendant's favor upon the ground that no cause of action had been stated. The Court of Appeals affirmed the judgment, 62 App. D.C. 271; 66 F. (2d) 797, and this Court granted certiorari.

The opening statement by plaintiff's counsel was as follows:

"This is a case against the District of Columbia filed by Mr. Best as administrator for the estate of his son. The facts that we will show you, briefly, are these, that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there on this morning and while in there fell through one of the holes in this wharf.

"That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole. Of course the child died, having been drowned; and the damages that the plaintiff has suffered as representing the estate of the child will be determined by you in your verdict if you are convinced by a preponderance of the evidence that we have established our case.

"That this wharf is not part of the public highway but is on private property of the District of Columbia, and

is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District."

There is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff's counsel where that statement establishes that the plaintiff has no right to recover. The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced. *Oscanyan* v. *Arms Co.,* 103 U.S. 261, 263. The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials. *Liverpool, N.Y. & P. S.S. Co.* v. *Commissioners,* 113 U.S. 33, 37. But the power is not properly exercised if the opening statement leaves doubt as to the facts or permits conflicting inferences. Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & Danville R. Co.* v. *Powers,* 149 U.S. 43, 45; *Texas & Pacific Ry. Co.* v. *Harvey,* 228 U.S. 319, 324; *Gunning* v. *Cooley,* 281 U.S. 90, 94. The opening statement of counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence. " If a doubt exists," said the Court in the *Oscanyan* case, *supra,* " as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury." Plaintiff is entitled to the benefit of all inferences that may be drawn from his counsel's statement. To warrant the court in directing a verdict for defendant upon that statement, it is not enough that the statement be lacking in definiteness but it must clearly appear, after resolving all doubts in plaintiff's favor, that

no cause of action exists. See *Illinois Power & Light Corp.* v. *Hurley,* 49 F. (2d) 681, 684; *Stuthman* v. *United States,* 67 F. (2d) 521, 523.

The controversy in this case largely turns upon a difference of view as to the inferences to be drawn from the opening statement. Thus, respondent argues that there was a failure to show that " the wharf could be seen from the public space "; that " the child was attracted by the presence of the wharf itself, or any article or thing which may have been upon the wharf "; that " there was any latent or hidden danger at the place " where the child met his death; that " there was ever a prior accident to children at or near this wharf "; that " respondent invited or permitted petitioner's intestate or other children to enter or play on its wharf." But with respect to each of these circumstances (with a single unimportant exception) the opening statement of counsel permitted an inference in petitioner's favor. Thus, his counsel stated that " this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down." From this, it was not inadmissible to infer that the wharf, without a fence and close to the street, with the side portion of the barrier down, " could be seen from the public space " and readily entered. According to the statement, the wharf was a place where boats unloaded sand which was taken out and used by the District. The inference might be drawn that the wharf had sandpiles which would be highly attractive to children. Counsel stated that there were " ten to thirteen holes " in the wharf, of varying sizes, one of them being about three feet in diameter. The existence of these holes manifestly constituted a danger and the statement does not require the conclusion that the danger would be obvious to young children playing in the sand on the wharf. The fact that the opening statement did not refer to any prior accident to children is inconsequen-

tial. On the question whether the District permitted children to enter and play on the wharf, counsel's statement gave basis for an inference that children had this permission. While counsel conceded that the wharf was "not part of the public highway" but "was on private property of the District" and was "not a place to which the public was admitted," he also stated that "the children went in and out at their pleasure" and that "the children used this place to play on and play in." He said that at the time of the accident there was no one "to keep the children away," as "the watchman who was stationed arrived some time after this occurrence." The statement permitted the inference that, while a watchman was customarily there, still the place was used as a playground by children, going in and out as they pleased.

In view of the fair import of the opening statement, it was error for the trial court to refuse to take testimony, and to direct a verdict for respondent. None of the decisions of this Court bearing upon the liability of the District warranted that course. The case of *United Zinc Co.* v. *Britt,* 258 U.S. 268, which respondent cites as controlling authority, dealt with a situation materially different. There children were fatally injured by going into a pool of water, poisoned by acids, which had accumulated in the lower part of a dismantled chemical factory, about 100 or 120 feet distant from a traveled way. The Court stressed the facts that it was "at least doubtful whether the water could be seen from any place where the children lawfully were," that there was "no evidence that it was what led them to enter the land," and that it did not appear "that children were in the habit of going to the place." The decision did not overrule *Railroad Co.* v. *Stout,* 17 Wall. 657, or *Union Pacific Ry. Co.* v. *McDonald,* 152 U.S. 262, although both were distinguished in the light of their particular facts. The Court said that the case of *Stout,*

where the child was injured on a turntable "near a road without visible separation" and where it appeared that children had played there before to the knowledge of employees of the railroad, was perhaps "as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation." The Court added that in the very similar case of *Cooke* v. *Midland Great Western Ry. of Ireland* [1909] A.C. 229, a license was implied. Also distinguishing the case of *McDonald,* where a boy had fallen into burning coal slack "close by the side of a path on which he was running homeward from other boys who had frightened him," the Court said that "it hardly appears that he was a trespasser and the path suggests an invitation; at all events boys habitually resorted to the place where he was. Also the defendant was under a statutory duty to fence the place sufficiently to keep out cattle." The decision permitting recovery in those circumstances was said to be very far from establishing liability "for poisoned water not bordering a road" where it was "not shown to have been the inducement that led the children to trespass" and "not shown to have been the indirect inducement because known to the children to be frequented by others."

In *New York, N. H. & H. R. Co.* v. *Fruchter,* 260 U.S. 141, where a boy, climbing to the topmost girder of a municipal bridge and thence up a latticed tower, touched a live electric wire and was injured, the Court was unable to find any sufficient evidence from which a jury could properly conclude that the railroad company either directly or by implication "invited or licensed" him to climb to a point from which he could touch the bare wire thirty feet above the street. The cases of *Erie R. Co.* v. *Hilt,* 247 U.S. 97, and *Erie R. Co.* v. *Duplak,* 286 U.S. 440, turned upon the application of a statute of New Jersey as construed by the state court.

The question is one of negligence,—whether particular circumstances gave rise to a duty which had not been performed. Discussing general principles, the Court observed in the *Britt* case, that infants had no greater right to go upon other peoples' land than adults and that the mere fact that they were infants imposed no duty upon landowners to expect them and to prepare for their safety. On the other hand, it was said that while "temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult." The Court said that the principle if accepted should be very cautiously applied. We think that the present case falls within that appropriate application. Were the case merely one of an accessible wharf, it could not be said that the District would be subject to liability from the fact, without more, that a child strayed there and fell from the wharf into the water. The duty must find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection. Here, on the face of the opening statement, the location of the wharf, unfenced, close to the street with the barrier partly down, taken with the use of the wharf for unloading sand, made it a likely place for children to play. Sandpiles close at hand would constitute "a bait" they would inevitably follow. According to the statement, they did follow it and they used the wharf as a playground at their pleasure. As the authorities of the District had reason to anticipate that use, there was a duty to take reasonable precautions either to

prevent it or to keep the wharf in such a proper state of repair that children would not be exposed to the danger of falling through holes.

*Judgment reversed.*

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## HAMBURG-AMERICAN LINE *v.* UNITED STATES.

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

No. 343. Argued February 7, 1934.—Decided March 5, 1934.

1. An alien resident of the United States returning from a temporary visit abroad is a "non-quota immigrant." Immigration Act of 1924, § 4 (b). P. 422.
2. By §§ 10 (a), (b), (c), (f), and 13 (b), of the Immigration Act, and regulations thereunder, a permit to reënter granted to an immigrant who has been legally admitted to the United States and who departs therefrom temporarily, is the equivalent of an immigration visa for the purpose of determining his right to readmission, under § 13 (a), and the liability of a steamship company for bringing him back, under § 16 (a). P. 422.
3. Where a steamship company brings in a non-quota immigrant without immigration visa or reëntry permit, it is liable to fine under § 16 of the Act notwithstanding that the Secretary of Labor, acting on discretionary authority assumed to be conferred by § 13, admits him to the country, since subdivision (f) of § 13 provides that nothing in that section "shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16." P. 425.
4. Where an immigrant, unlawfully brought in without visa or reëntry permit, is nevertheless admitted, the fine of $1,000 can legally be imposed on the steamship company under § 16 (b) without requiring it to pay the passage money. P. 426.

65 F. (2d) 369, affirmed.

CERTIORARI, 290 U.S. 615, to review the affirmance of a judgment dismissing the complaint in an action by a steamship company to recover a fine exacted under the Immigration Act.

*Mr. Roger O'Donnell,* with whom *Messrs. Wm. J. Peters* and *Lambert O'Donnell* were on the brief, for petitioner.

*Mr. J. W. Morris* argued the cause, and *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Paul A. Sweeney* and *H. Brian Holland* filed a brief, for the United States.

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

Philip O'Reilly, a native of Ireland and resident in the United States, returned in October, 1928, on plaintiff's vessel, from a temporary visit abroad. He had neither an unexpired immigration visa nor a permit to reënter. On his arrival, the immigration officers ordered his exclusion, but he was eventually admitted by the Secretary of Labor. Later, the Secretary of Labor fined the plaintiff in the sum of $1000 for bringing the alien to the United States. Having paid under protest, plaintiff brought this action to recover the amount of the fine upon the ground that it was illegally imposed. Judgment dismissing the complaint on the pleadings was affirmed by the Circuit Court of Appeals. 65 F. (2d) 369. This Court granted certiorari, in view of the conflicting ruling in the Ninth Circuit. *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 F. (2d) 808.

The fine was imposed under § 16 of the Immigration Act of 1924, 43 Stat. 153, 163; 8 U.S.C. 216.[1] The provision is explicit and the case falls directly within its terms. The section makes it unlawful for a transportation com-

[1] This section provides:

"Sec. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa,

pany to bring to the United States "any immigrant who does not have an unexpired visa." The alien was a "non-quota immigrant" within the definition of the statute. *Id.*, § 4 (b), 8 U.S.C. 204 (b). If it appears to the satisfaction of the Secretary of Labor that "any immigrant has been so brought," the transportation company must pay to the collector of customs the sum of $1000, and in addition, for the benefit of the immigrant, an amount equal to that paid for his transportation. Section 16 further provides that "such sums shall not be remitted or refunded" unless the Secretary of Labor is satisfied that it could not have been ascertained, with reasonable diligence, that the person so transported was an immigrant.

Plaintiff insists that the admission of the alien took the case out of the statute. Section 16 makes no such excep-

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or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

"(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. . . .

"(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant."

tion. But plaintiff invokes § 13 of the Act of 1924 (*Id.*, 8 U.S.C. 213)[2] which, after providing generally in sub-division (a) for the exclusion of an immigrant who is without an unexpired immigration visa, creates a particular exception in sub-division (b) to meet the case of immigrants " who have been legally admitted to the United States and who depart therefrom temporarily." Immigrants of that sort may be admitted to the United States " without being required to obtain an immigration visa." The exception is limited. It applies only " in such classes of cases and under such conditions as may be by regulations prescribed." Acting under this authority, regulations were prescribed, which provided for the admission of such im-

[2] Section 13 contains the following provisions:

" Sec. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

"(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

. . . . . .

"(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

. . . . . .

"(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under section 16."

migrants without an immigration visa, but only in case they obtained a permit to reënter under the provisions of § 10 of the Act of 1924. *Id.*, 8 U.S.C. 210.[3] In authorizing such permits the evident purpose of § 10 was to enable aliens who were domiciled here and contemplated a temporary absence, to equip themselves with evidence which would identify them and facilitate their reëntry. They could thus avoid the trouble and delay incident to the procuring of an immigration visa from a consulate abroad.[4] The permit is *prima facie* evidence of the fact that the alien is returning from a temporary visit. The regulations prescribed under § 10 and § 13 (b) except

[3] Section 10 provides:

"Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner General for a permit to reënter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

"(b) If the Commissioner General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

"(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

. . . . .

"(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning."

[4] See House Report No. 350, 68th Cong., 1st Sess., p. 18.

aliens who have such permits from the requirement that an immigration visa must be obtained. See Immigration Rules of March 1, 1927; Rule 3, Subdiv. F, Pars. 1, 3; Subdiv. I, Par. 2. Valid permits may be presented "in lieu of immigration visas." Executive Order No. 4813 of February 21, 1928.

These provisions should be read in connection with § 16. And as they make the possession of a permit to reënter the equivalent of an unexpired visa, the permit should be taken to stand in place of the visa required by § 16. In this view, where the returning alien has the prescribed permit, no fine can be imposed. This conclusion, however, gives no aid to plaintiff as the alien in the instant case had neither visa nor permit. We are unable to agree with the contention that where a permit will suffice, § 16 must be regarded as having no application. As we have said, we think the proper construction of § 16, taken with § 13, is that the permit is merely a substitute for the visa and satisfies the requirement.

Plaintiff's argument that under § 13 a discretion is vested in the Secretary of Labor to admit the returning alien, and that the exercise of that discretion in his favor tolls the fine, is met by the provision of sub-division (f) of § 13: "Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under § 16." Plaintiff urges that if the alien is admitted, no liability for the fine can be said to have "*accrued.*" But § 16 does not make the liability turn upon the admissibility or admission of the alien. Whatever may have been the effect of prior statutory provisions, § 16 of the Act of 1924 makes it clear that the occasion for the fine is the bringing in of the alien without an unexpired visa or that which is prescribed as an equivalent. The question whether the Secretary of Labor had authority to admit the alien in this instance need not be considered, for if it were assumed that the Secretary under

§ 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.*

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## 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.*

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## 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-

cause he was neither party nor privy, the judgment was inoperative as to him. P. 440.

5. Where the Circuit Court of Appeals has erroneously directed the dismissal of a suit without passing on the merits, the cause will be remanded to that court for further proceedings. P. 441.

63 F. (2d) 911, reversed.

CERTIORARI, 290 U.S. 614, to review a decree reversing a final decree of injunction in a suit brought by the bank, as trustee of bondholders of an electric power company, to prevent the city from removing its poles and wires from the streets and from seeking to enforce a decree of ouster secured by the State against the mortgagor company.

*Mr. George D. Welles,* with whom *Messrs. Earl F. Boxell, Arthur A. Gammell,* and *Timothy N. Pfeiffer* were on the brief, for petitioner.

*Messrs. G. Ray Craig* and *H. C. Laughlin,* with whom *Messrs. Rex F. Bracy, E. G. Martin,* and *W. A. Eversman* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case is here on certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. Whether the injunction granted in this cause by the federal court for northern Ohio stays a judgment of ouster rendered by the Court of Appeals of the State in violation of Judicial Code § 265 is the main question requiring decision.[1]

In May, 1925, The Ohio Electric Power Company acquired the electric light and heating system then serv-

[1] Sec. 265. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

ing a part of the residents of the City of Norwalk, Ohio; and by a duly recorded mortgage deed of trust, transferred the property to a trustee to secure an issue of bonds. In March, 1926, the City Council passed a resolution in terms requiring the Power Company to remove from the streets, alleys and other public places within 30 days, its poles, wires and other electric equipment. These had been erected and were being maintained pursuant to an ordinance of the City, dated October 7, 1890. The City claimed that the Power Company had no right so to occupy the streets, alleys and public places, because the franchise granted by the ordinance was for a limited term and that term had expired without extension or renewal. The Power Company refused to comply with the City's demand, claiming that it had, under legislation of the State, acquired a perpetual franchise.

In May, 1926, the State brought, in the Court of Appeals of Ohio, at the relation of the prosecuting attorney for Huron County, an action in *quo warranto* against the Power Company to oust it from such use of the streets, alleys and public places. That court, holding that the franchise granted had expired, entered a judgment of ouster, *State ex rel. Martin* v. *Ohio Electric Power Co.,* 35 Ohio App. 481; 172 N.E. 615; and the judgment was affirmed by the Supreme Court of the State. *Ohio Electric Power Co.* v. *State ex rel. Martin,* 121 Ohio St. 235; 167 N.E. 877. The action had been instituted at the request, and had been prosecuted with the aid, of the City; but it was not a party thereto. The mortgage given by the Power Company and the bonds thereby secured were then (and still are) outstanding. But the State did not make the trustee a party respondent; and the trustee did not intervene, or seek to intervene, in the action. Neither the State nor the Power Company made mention of the existence of the mortgage either in its plead-

ings or otherwise. Whether the State, the relator, or the City knew of the mortgage, and whether the trustee knew of the action in *quo warranto,* does not appear.

Before any step had been taken by the State to enforce the judgment of ouster, the then trustee under the mortgage deed of trust, a citizen and resident of New York, brought this suit in the federal district court for northern Ohio. The Chase National Bank, likewise a citizen and resident of New York, has since been substituted as trustee and plaintiff. The City of Norwalk alone was made defendant. The bill set forth in addition to the facts stated above, that the plaintiff as such trustee is entitled to the continued use of the poles, wires and electrical equipment by the Power Company; that the judgment of ouster has not yet been executed; that the Power Company is still serving the Norwalk public; that the City is threatening to destroy, or forcibly remove, the poles, wires and equipment from the streets, alleys, and public places and to prevent the operation of the system or to seek to have enforced the judgment of ouster; and that such acts would result in irreparable injury to the plaintiff.

The District Court held that the plaintiff has as mortgagee a good and valid lien upon the poles, wires and electrical equipment, and the rights and franchises to use the streets, alleys and public places therefor; that " for the purpose of protecting, preserving and enforcing the lien of the mortgage " the Power Company " is and was at the time of the filing of the bill of complaint herein the owner "; that these rights were granted " in perpetuity as against any right or power of the City of Norwalk with reference thereto . . ."; and that the " franchises, rights and physical properties will be destroyed and rendered worthless " unless a permanent injunction issues. The decree enjoined the City, its officers, agents and employees, " and all persons whomsoever to whom notice of this order shall come," from destroying, or interfering with the con-

tinued operation by the Power Company of, the plant and distribution system; " from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, . . . of the judgment of ouster "; and " from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster." The injunction was granted to continue only as long as the plaintiff or its successor, or holders of bonds under the mortgage, should have any interest in or lien upon the properties and franchises of the Power Company in the City of Norwalk.

The Circuit Court of Appeals did not pass upon the question whether the plaintiff has, as mortgagee, an interest in or lien upon the alleged property and rights; nor upon the question whether the Power Company retains for the protection of the mortgagee, an existing right to use the streets, alleys and public places as claimed; nor specifically upon the question whether the franchises granted had expired. It held, one judge dissenting, that, although the District Court had jurisdiction of the parties and of the subject matter, that court was not justified in granting an injunction; and it reversed the decree with directions to dismiss the bill, 63 F. (2d) 911, for the following reasons:

(a) That the proceedings in the District Court came within the inhibitions of Judicial Code, § 265, in that the effect of the decree was to stay the *quo warranto* proceeding in the state courts.

(b) That the case does not fall within the exceptions which permit a federal court to interfere with the judgment of a state court, because there was no showing that the judgment in the action in *quo warranto* was void for lack of jurisdiction, or was based upon fraud or upon such accident or mistake as made its enforcement unconscionable.

(c) That because the plaintiff has not shown that it lacked knowledge of the action in *quo warranto,* or that it could not have intervened therein as mortgagee, and have asserted therein the claim which it presents now as the basis of the relief sought, it has failed to make the necessary showing of diligence.

There was error in the decree entered by the District Court; but the Circuit Court of Appeals was not justified in ordering that the bill be dismissed.

*First.* Independently of the prohibition of Judicial Code, § 265, the decree entered by the District Court was clearly erroneous in so far as it enjoined " all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the ouster in the state court." The City alone was named as defendant. No person other than the City was served with process. None came otherwise before the court. The prayer of the bill sought relief solely against the City and " its officers, officials, agents, employees and representatives." [2] It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provi-

[2] The prayer is that " the City of Norwalk, and the officers, officials, agents, employees and representatives of said defendant " be enjoined " from in any manner interfering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company, in the streets, alleys and other public places of the City of Norwalk and from taking any steps or doing any act to dismantle, wreck or remove any part of said system . . ." and " from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officer of any of the courts in the State of Ohio, of the judgment of ouster. . . ." (The latter prohibition to apply also to the attorneys of the City.)

sion merely makes explicit as to them that which the law already implies. See *In re Lennon,* 166 U.S. 548. But by extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law.[3] See *Alemite Mfg. Co.* v. *Staff,* 42 F. (2d) 832. Under the clause inserted in the decree, officials of the State of Ohio might be proceeded against for contempt, if they should apply to the state court to enforce its judgment, although acting solely in the performance of their official duty. To subject them to such peril violates established principles of equity jurisdiction and procedure. *Scott* v. *Donald,* 165 U.S. 107, 117; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 234.[4] Those principles require that the clause be limited to confederates or associates of the defendant.

*Second.* On the other hand, the decree of the Circuit Court of Appeals was clearly erroneous in so far as it refused to enjoin the "city and its agents from forcibly removing the wires and poles without state warrant." The trustee claimed that it had a valid mortgage lien upon the poles, wires and electrical equipment, and upon the right and franchise in perpetuity to use them on the streets, alleys and public places; and the bill alleged that removal by the City of the poles and wires would result in irreparable injury to the trustee. Neither the trustee nor the City had been a party, or privy, to the litigation in the state courts. These courts did not purport to pass

[3] *Harvey* v. *Bettis,* 35 F. (2d) 349; *Donaldson* v. *Roksament Stone Co.,* 178 Fed. 103; *Bliss* v. *Atlantic Handle Co.,* 212 Fed. 190; *Omeliah* v. *American Cap Front Co.,* 195 Fed. 539, 540. Compare *Tosh* v. *West Kentucky Coal Co.,* 252 Fed. 44, 48.

[4] Compare *United States Playing Card Co.* v. *Spalding,* 92 Fed. 368, 369.

upon the validity of the trustee's claim; and in no state court was that claim in litigation. However broad the scope of the prohibition prescribed by Judicial Code, § 265, it could not preclude the federal court from protecting the trustee's alleged property from wanton destruction by one not a party or privy to the judgment of ouster.

The contention is that in essence this "is a suit by a mortgagee to obtain a readjudication of the law and facts adjudicated by a state court of competent jurisdiction in a proceeding to which the mortgagor was a party"; and that, since the controlling question is one of the construction and application of statutes of Ohio, a federal court would, in any event, follow the decision of the highest court of the State. It is true that, in the absence of special circumstances, federal courts consider themselves bound by the construction theretofore given by the highest court of a State to its statutes. But, under well settled principles of jurisdiction, governing all courts, a decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit, unless he was made a party to the proceedings. *Old Colony Trust Co.* v. *Omaha,* 230 U.S. 100, 122.[5] For in every case where a mortgage was given before the litigation against the mortgagor was instituted, the mortgagee is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him. Obviously, the facts and considerations affecting the trustee's rights may be differ-

[5] *Louisville Trust Co.* v. *Cincinnati,* 76 Fed. 296; *Old Colony Trust Co.* v. *Tacoma,* 219 Fed. 775, 776; *Illinois Trust & Savings Bank* v. *Des Moines,* 224 Fed. 620, 624; *Williamson* v. *Clay Center,* 237 Fed. 329, 335. Compare *Dull* v. *Blackman,* 169 U.S. 243; *Bigelow* v. *Old Dominion Copper Co.,* 225 U.S. 111; *Postal Telegraph Co.* v. *Newport,* 247 U.S. 464, 476; *Doctor Jackpot Mining Co.* v. *Marsh,* 216 Fed. 261.

ent from those presented to the state court on behalf of the Power Company. Because there is diversity of citizenship, the trustee under the mortgage is entitled to have the adjudication of his alleged rights made in the federal court. Compare *Atchison, T. & S. F. Ry. Co.* v. *Wells,* 265 U.S. 101. As a decree enjoining the City "from removing the wires and poles without state warrant" would not interfere with the proceedings in the state court, that part of the injunction was not within the prohibition of Judicial Code, § 265. *Louisville Trust Co.* v. *Cincinnati,* 76 Fed. 296, 300, 317.

*Third.* The contention that the decree violates Judicial Code § 265, is rested mainly upon the clause which enjoins the City, its officers and attorneys "from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officer of any of the courts in the State of Ohio of the judgment of ouster" and "from applying to any of the courts of the State of Ohio for any writ or process of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster."

To enjoin the City from taking steps to enforce the judgment of ouster obviously does not stay that judgment. The City was not, and could not have been a party to the action in *quo warranto.*[6] The City's argu-

[6] The City states that it was not, and could not have been made, a party to the *quo warranto* proceedings; that the fact that *quo warranto* proceedings are brought by the State in its sovereign capacity is not a mere matter of form, but is of the essence of the proceeding; and that it is public not personal in nature, regardless of the person who furnishes the information upon which the action is based. In support of this proposition the City cited *State* v. *Maccabees,* 109 Ohio State 454; 142 N.E. 888; *State* v. *Conservancy District,* 100 Ohio State 483; 128 N.E. 87; *Hardin-Wyandot Co.* v. *Upper Sandusky,* 93 Ohio State 428; 113 N.E. 402; *Thompson* v. *Watson,* 48 Ohio State 552; 31 N.E. 742; *State* v. *Craig,* 21 Ohio C.C. 175.

ment is that the decree can have no effect unless it acts directly upon the Court of Appeals of Huron County itself, and upon the State of Ohio, which was the moving party in the *quo warranto* proceeding, and that hence, this action is an attempt to do so; that "the incidental effect of the decree upon the possible unauthorized action of the city officials is too negligible to be given consideration in determining its character"; and that the real purpose for which the decree was sought is to stay the proceeding in the state court. It may be assumed that in seeking an injunction from the federal court, the trustee's purpose—its hope—was to induce the officials of the State of Ohio to refrain from enforcing the judgment of ouster until adjudication of the trustee's rights should have been had in the federal court. That purpose or hope is not of legal significance in this connection. Full control of the ouster proceeding rests with the law officers of the State, subject to the control of the state court. See *Thompson* v. *Watson,* 48 Ohio State 552; 31 N.E. 742. The injunction, when limited as we hold it must be, is directed only to the City, its attorneys, agents and confederates. It prohibits them from attempting to induce the State to enforce the judgment of ouster. So limited, the decree will leave the State and the relator free to act; and the injunction will not stay the operation of the judgment.

*Fourth.* The contention is also made that the Circuit Court of Appeals properly ordered the bill dismissed because the trustee failed to allege, or prove, that it did not have knowledge of the proceeding in the state court or that it could not have intervened therein, as mortgagee, and asserted there the claims that it now makes as the basis of the relief sought. Where equitable relief is sought on the ground that a judgment entered upon proper service in a court of competent jurisdiction was obtained

through fraud or mistake, or is being used fraudulently, such a showing of diligence is ordinarily required. *Crim* v. *Handley,* 94 U.S. 652; *Brown* v. *Buena Vista,* 95 U.S. 157; *Knox County* v. *Harshman,* 133 U.S. 152; *Marshall* v. *Holmes,* 141 U.S. 589.[7] Compare *Wells, Fargo & Co.* v. *Taylor,* 254 U.S. 175. But here the injunction is sought on the ground that the judgment is inoperative as against the plaintiff because it was neither party nor privy thereto Compare *Atchison, T. & S. F. Ry. Co.* v. *Wells,* 265 U.S. 101; *Simon* v. *Southern Ry. Co.,* 236 U.S. 115; *Old Colony Trust Co.* v. *Omaha,* 230 U.S. 100.[8] The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine.[9] Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

The decree of the Circuit Court of Appeals is reversed. As it did not pass upon the merits of the trustee's claim, the cause is remanded to that court for further proceeding in conformity to this opinion.

*Reversed.*

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[7] *Louisville Trust Co.* v. *Cincinnati,* 76 Fed. 296; *Old Colony Trust Co.* v. *Tacoma,* 219 Fed. 775; *Illinois Trust Co.* v. *Des Moines,* 224 Fed. 620; *Williamson* v. *Clay Center,* 237 Fed. 329; *Firestone Tire & Rubber Co.* v. *Marlboro Cotton Mills,* 282 Fed. 811; *Seay* v. *Hawkins,* 17 F. (2d) 710; but compare *Denton* v. *Baker,* 93 Fed. 46.

[8] Also compare *National Surety Co.* v. *State Bank,* 120 Fed. 593.

[9] In *Northern Ohio Traction & Light Co.* v. *Ohio,* 245 U.S. 574, a proceeding in *quo warranto,* in which the Traction Company alone was named as defendant, it appears from the record in this court, that the Cleveland Trust Company, trustee under a mortgage, moved in the Supreme Court of Ohio for leave to be made a party and to file an answer; that consent thereto was given; that thereafter motion was allowed; and that the answer was filed and replied to.

# MIGUEL *v.* McCARL, COMPTROLLER GENERAL, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 435. Argued February 14, 15, 1934.—Decided March 5, 1934.

1. Where the duty to make a payment of public money is imposed so plainly by statute as to leave no play for judgment or discretion, the duty is purely ministerial and its performance may be compelled by mandamus or mandatory injunction. P. 451.
2. A native of the Philippine Islands who enlisted under the Act of February 2, 1901, "for service in the Army" as a Philippine Scout, became "an enlisted man in the Army" within the meaning of the Act of March 2, 1907, and, after having served 30 years, was eligible under the latter Act to be placed upon the retired list, with the pay and allowances therein prescribed. P. 452.
3. Provisions in later Acts cited in the opinion deal with the status of officers of the Philippine Scouts, but not enlisted men, and cast no doubt upon this right of the latter. P. 453.
4. A duty to pay, plainly imposed by the statutes, can not be affected by a contrary decision of the Comptroller General. P. 454.
5. The Chief of Finance of the Army being charged by law with the duty of disbursing all the funds of the War Department, including the pay of the Army, is the proper party defendant to a suit for a mandatory injunction brought by a retired enlisted man to enforce payment of retired pay and allowances. P. 455.
6. The disbursing officer to whom the voucher was presented, being a subordinate of the Chief of Finance, is not an indispensable party to such suit. *Id.*
7. The United States is not a necessary party to such a suit. *Id.*
8. It is not a ground for dismissing such a suit that recovery of the pay may be had in the Court of Claims. *Id.*
9. In granting relief by injunction requiring the Chief of Finance of the Army to satisfy claims for retired military pay and allowances, as to which the Comptroller General upon request under 31 U.S.C. (Supp.) § 74 had rendered an advance decision which was adverse to payment, *held* unnecessary to require the Comptroller General to recall the decision or to return the voucher. P. 455.

62 App.D.C. 259; 66 F. (2d) 564, reversed in part.

CERTIORARI, 290 U.S. 618, to review the reversal of a decree commanding the Chief of Finance of the Army to satisfy claims of the plaintiff for retired military pay and allowances; enjoining the Comptroller General from interfering, and requiring him to return from his files to a disbursing officer a voucher upon which he had rendered an adverse advance decision.

*Mr. Samuel T. Ansell,* with whom *Mr. George M. Wilmeth* was on the brief, for petitioner.

The Comptroller General had no jurisdiction to review the order of the President, acting through the Secretary of War, placing petitioner on the enlisted men's retired list of the Army with pay.

The Comptroller General was not required by law, when applied to by a disbursing officer, to decide the question of petitioner's right to retired pay notwithstanding the action of the President placing him on the retired list with pay.

The decision of the Comptroller General was not based on statutes of uncertain meaning. The status of petitioner was not doubtful under the applicable statutes and his right to mandamus was clear.

The Court of Appeals erred in holding by implication that no appropriation was available from which the retired pay could be paid to petitioner and that this was a question solely for the determination of the Comptroller General.

*Mr. Harrell O. Hoagland,* with whom *Mr. R. L. Golzé* was on the brief, for McCarl, Comptroller General, respondent.

What primarily is brought in question by the petitioner is the constitutional control (Art. I, § 9, cl. 7) by the legislative branch over the uses of public moneys, as maintained through the appropriation acts and the duly con-

stituted accounting officers. The form of the proceeding has for its object the frustration of such legislative control by coercing a subordinate administrative official to make payment on a disputed claim against the United States under a general appropriation not conceded to be available for such purpose, as contrasted with the procedure which has been authorized by Congress under the Tucker Act of a suit on the merits in the Court of Claims, in which any judgment obtained by the petitioner would be for submission to the legislative branch for an appropriation, payment thereunder to be made on settlement by the General Accounting Office.

The decision of the Comptroller General followed a practice which the government accounting officers have followed without interruption, at least since the Act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether payment on a claim is authorized under existing appropriations. Only in rare cases has Congress by specific language, plainly expressing its purpose, made the decision of some other official conclusive on the question whether payment is authorized.

The ruling of the Supreme Court of the District of Columbia in the present case, in failing to recognize that it was the statutory official duty of the Comptroller General to decide the question of petitioner's right to pay, was in conflict with the precedents of that court. Likewise it was in conflict with the decisions of the Court of Appeals of the District, holding that the duty of the Comptroller General to decide for the executive branch of the Government whether payment on a claim against the United States is authorized involves judgment and discretion which will not be controlled by mandamus or injunction. *U.S. ex rel. Margulies & Sons* v. *McCarl,* 10 F. (2d) 1012; 56 App.D.C. 147; cert. den., 273 U.S. 696; *McCarl* v. *Walters,* 59 App.D.C. 237; 38 F. (2d) 942;

*McCarl* v. *U.S. ex rel. Leland,* 59 App.D.C. 362; 42 F. (2d) 346; cert. den., 282 U.S. 839; *McCarl* v. *Rogers,* 60 App.D.C. 111; 48 F. (2d) 1023; *McCarl* v. *Hoeppel,* 62 App.D.C. 393; 68 F. (2d) 440. Distinguishing: *Smith* v. *Jackson,* 241 Fed. 747, 761; aff'd 246 U.S. 388; *McCarl* v. *Cox,* 8 F. (2d) 669; cert. den., 270 U.S. 652; *McCarl* v. *Pence,* 18 F. (2d) 809. Cf. *U.S. ex rel. Lisle* v. *Lynch,* 137 U.S. 280; *Brashear* v. *Mason,* 6 How. 92; *U.S. ex rel. Goodrich* v. *Guthrie,* 17 How. 284; *Decatur* v. *Paulding,* 14 Pet. 497; *Case* v. *Terrell,* 11 Wall. 199; *Hagood* v. *Southern,* 117 U.S. 52, 71; 22 R.C.L. 492, 494, §§ 172, 173; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324, 325.

The United States is bound by a decision of the Comptroller allowing active pay or retired pay to those claiming as officers or employees of the United States, whereas the claimants' substantive legal rights are not affected but they are left free to proceed against the United States in the Court of Claims to have their rights judicially decided, *St. Louis, B. & M. Ry. Co.* v. *United States,* 268 U.S. 169, 173–174; *U.S. ex rel. Skinner & Eddy Corp.* v. *McCarl,* 275 U.S. 1. This makes it even more clear why the courts have declared the Comptroller General may not be directed by mandamus or injunction to decide a claim in a particular way. See *McElrath* v. *United States,* 102 U.S. 426; *Geddes* v. *United States,* 38 Ct. Cls. 428; *Mullett* v. *United States,* 21 Ct. Cls. 485; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Charles* v. *United States,* 19 Ct. Cls. 316, 319; *Ex parte Rock,* 171 Fed. 240, 241–242.

The record does not present any facts establishing it to be the plain legal duty of the Chief of Finance, an unbonded subordinate in the War Department, to pay, or to cause any bonded disbursing officer to pay, retired pay and allowances to petitioner.

A decree in accordance with the prayers of the petitioner's bill would be contrary to law.

The decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act of July 31, 1894, § 8, 28 Stat. 162, 207, following the provisions of the earlier Act of March 30, 1868, 15 Stat. 54; Act of June 10, 1921, § 304, 42 Stat. 24; *U.S. ex rel. Skinner & Eddy Corp.* v. *McCarl,* 275 U.S. 1, 4–5; *In re Departmental Reference No. 167,* 59 Ct. Cls. 813.

Such a decision is required to be rendered "without direction from any officer." Act of June 10, 1921, § 304, 42 Stat. 24; 31 U.S.C., § 44.

No court may direct the decision of the Comptroller General to be rendered in a particular way. *James Howden & Co.* v. *Standard Shipbuilding Corp.,* 17 F. (2d) 530, 532; *In re Departmental Reference No. 167,* 59 Ct. Cls. 813; *Brumback* v. *Denman,* Law No. 3316, decided June 5, 1933, Dist. Ct. U.S., Nor. Dist. of Ohio, W.Div., refusing an order in the nature of a mandamus to the Comptroller General.

A decree in accordance with the prayers of the petitioner's bill would be contrary also to § 267 of the Judicial Code. *Hurley* v. *Kincaid,* 285 U.S. 95, 104.

Reservation in decisions by the Comptroller General of doubtful questions, for judicial decision in direct proceedings under the Tucker Act, does not prejudice the claimants. See, e.g., *Williams* v. *U.S.,* 289 U.S. 553; *St. Louis, B. & M. Ry. Co.* v. *United States,* 268 U.S. 169, 173–174; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Major Collins's Cases,* 14 Ct. Cls. 568, 15 *id.* 22. It does operate, however, to protect the interests of the United States and the authority of the legislative branch over the public moneys; *Mullett* v. *United States,* 21 Ct. Cls. 485, distinguishing *McElrath* v. *United States,* 102 U.S. 426; and also to make all interested parties secure from possible future litigation in case of unauthorized payments by disbursing officers. *Wisconsin Central R. Co.*

v. *United States* 164 U.S. 190; *United States* v. *Keehler,* 9 Wall. 83; *Heidt* v. *United States,* 56 F. (2d) 559, cert. den., 287 U.S. 601; *Fidelity & Deposit Co.* v. *United States,* 55 F. (2d) 100; *United States* v. *Moore,* 168 Fed. 36; *United States* v. *Dempsey,* 104 Fed. 197.

This is in reality an action against the United States. *In re Ayers,* 123 U.S. 443, 506; *Belknap* v. *Schild,* 161 U.S. 10, 25; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386–387; Letter of Attorney General Mitchell to the Secretary of War, of May 10, 1932. The United States is an indispensable party. *Morrison* v. *Work,* 266 U.S. 481, 485–486; *Lambert Co.* v. *Baltimore & Ohio R. Co.,* 258 U.S. 377, 383; *Hopkins* v. *Clemson College,* 221 U.S. 636, 642–643; *Oregon* v. *Hitchcock,* 202 U.S. 60, 68; *Belknap* v. *Schild,* 161 U.S. 10; *N.Y. Guaranty Co.* v. *Steele,* 134 U.S. 230, 232; *Louisiana* v. *Garfield,* 211 U.S. 70, 78; *Louisiana* v. *McAdoo,* 234 U.S. 627, 628–629; *Goldberg* v. *Daniels,* 231 U.S. 218, 221–222.

*Solicitor General Biggs,* with whom *Messrs. Erwin N. Griswold,* of the Department of Justice, and *Archibald King,* of the Office of the Judge Advocate General of the War Department, were on the brief, argued that the judgment should be reversed.

The Philippine Scouts are a part of the regular Army. The petitioner enlisted for service in the Army. Not only is this plain from the express terms of the statute under which he enlisted, but it has also been recognized by Congress in the appropriation acts. The practice under these statutes has also been uniform.

It seems impossible therefore to say that there is any substantial basis for contending that the Philippine Scouts are not members of the Army. If it may fairly be regarded as plain that petitioner, as a Philippine Scout, is a member of the Army, then there can be no doubt of the authority of the Secretary of War to retire him.

The determination of the War Department as to petitioner's eligibility to retirement was not subject to reexamination by the Comptroller General.

The act of the Secretary of War retiring the petitioner with pay was an exercise of the President's jurisdiction in a matter committed to him by the Constitution and by the statutes, and was, we submit, binding and conclusive. The Comptroller General was without power or jurisdiction to review and revise this act or to make independent decision of the same questions of law and of fact that were committed by the Constitution and laws to the decision of the President through his agents; and mere doubts as to the correctness of that decision (if doubts can be said to exist) did not justify refusal upon the Comptroller General's part to accord it credit.

The Comptroller General's duty was purely ministerial and his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. His attempted exercise of discretion in a field in which he had no discretion can not serve to shield him from those remedies.

The contention that this suit must fail because petitioner has a remedy at law through a suit in the Court of Claims is, we submit, not well taken. That a proceeding such as this may be maintained, although the claimant has a right of action in the Court of Claims, would seem to be established by this Court's decision in *Smith* v. *Jackson,* 246 U.S. 388. A similar result has been reached in many other cases.

Mr. Justice Sutherland delivered the opinion of the court.

The petitioner served as an enlisted man in the Philippine Scouts under successive enlistments from October 1, 1901, until October 31, 1931, at which time, upon proper

application, he was, by order of the Secretary of War acting for the President, placed on the retired list of the army with the rank of master sergeant in pursuance of the Act of March 2, 1907, c. 2515, 34 Stat. 1217, which provides:

"When an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, . . ."

A voucher for the retired pay and allowances for the month of November, 1931, was presented to the army disbursing officer for Manila, who, without making payment, forwarded it to the Comptroller General through the respondent Coleman, Chief of Finance, with a request for "an advance decision as to the legal authority for payment." The Comptroller General, on January 19, 1932, rendered a decision holding that " the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and advising the disbursing officer that he was not authorized to pay the voucher, which would be retained in the files of the office of the Comptroller General.

Petitioner thereupon brought this suit in the Supreme Court of the District of Columbia to enjoin the Comptroller General from interfering with the respondent Coleman, Chief of Finance, or with any finance or disbursing officer of the army, to prevent payment to petitioner of the retired pay and allowances due for the month of November and subsequent months; and to enjoin and command the Comptroller General to return forthwith to the disbursing officer the voucher then being retained in the files of his office. The bill further sought to enjoin and command respondent Coleman, Chief of Finance, to pay or cause to be paid to petitioner such retired pay and

allowances for November and subsequent months. Motions of respondents to dismiss the bill were denied by the supreme court of the District, and thereupon respondents filed separate answers. A motion to strike these answers and for a decree in favor of petitioner was granted by the supreme court of the District. Final decree against respondents followed in accordance with the prayer of the bill.

Upon appeal to the court of appeals of the District, this decree was reversed and the cause remanded to the supreme court of the District with instructions to dismiss the bill. 62 App.D.C. 259; 66 F. (2d) 564. The holding of that court rested upon the view that mandamus would not lie against the Comptroller General to determine the right of a retired member of the Philippine Scouts to receive retirement pay and allowances, because the question of his status was disputed in good faith on the merits; and that neither mandamus nor injunction should issue "in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion."

No appearance is made here by respondent Coleman, and no brief filed or argument made in his behalf. The Solicitor General, however, has filed a comprehensive brief (in which the Judge Advocate General of the War Department joins) urging the correctness of the petitioner's contention and uniting with him in challenging the decision below. The Comptroller General, contending that the decision is right and should be affirmed, states the point of inquiry to be whether the Chief of Finance and the Comptroller General can be compelled by mandatory injunction, the one to pay or cause to be paid the voucher in question, and the other to approve and allow credit for such payment, after the latter, on application for a decision by the disbursing officer before whom the

voucher was pending for payment, has rendered his decision holding such payment not authorized under existing appropriations.

The principal question upon which the case turns, and the only one we need consider, is whether the statutes involved so plainly require the payment of the voucher that such payment constitutes a mere ministerial act on the part of the disbursing officer. Following numerous cases theretofore decided, the applicable rule in respect of the writ of mandamus is stated in *Wilbur* v. *United States,* 281 U.S. 206, 218–219, as follows:

"Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In *Roberts* v. *United States,* 176 U.S. 221, this court held that where the proper construction of a statute is

clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus. The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. "But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired." This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane* v. *Hoglund,* 244 U.S. 174, 181; *Wilbur* v. *Krushnic,* 280 U.S. 306, 318. The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations. *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 31, 33. With the foregoing well settled rule in mind we turn to the pertinent legislation.

Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorizes the President, when in his opinion conditions in the Philippine Islands justify such action, "to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army."

Petitioner enlisted under this act, and it does not admit of doubt that thereby he enlisted "for service in the Army" as a member of the organization of Philippine Scouts. One who enlists for service in the army certainly

becomes " an enlisted man . . . in the Army "; and when he " shall have served thirty years " therein, he falls within the plain terms of the Act of March 2, 1907, *supra,* and, in accordance therewith, is entitled to " be placed upon the retired list " with the pay and allowances therein prescribed. Statutory provisions so clear and precise do not require construction. In such case, as this court has often held, the language is conclusive. " There can be no construction where there is nothing to construe." *United States* v. *Shreveport Grain Co.,* 287 U.S. 77, 83, and cases cited.

The court below cites § 26 of the National Defense Act of June 3, 1916, 39 Stat. 166, 185; §§ 22 and 26 of the Act of June 4, 1920, 41 Stat. 759, 770, 775; and § 17 of the Act of June 10, 1922, 42 Stat. 625, 632, in support of its view that this is a case of " doubtful inference from statutes of uncertain meaning " in the sense of the rule stated in *Wilbur* v. *United States, supra,* hereinbefore quoted. But those sections fail, in our opinion, to disclose anything which conflicts with the positive words of § 36 of the Act of 1901, *supra.* Section 26 of the 1916 act simply provides that captains and lieutenants of the Philippine Scouts who are citizens of the United States shall be entitled to retirement under the laws governing retirement of enlisted men of the regular army, but to be retired with the grade held by them at the date of their retirement. The section is confined to the officers named and has nothing to do with enlisted men. The provision was necessary, as pointed out in the brief of the Solicitor General, because prior to the enactment of the Act of June 4, 1920, *supra,* these officers were usually enlisted men of other branches of the regular army, whose appointments were of a provisional character. Special legislation was therefore required to enable them to retire with the pay and allowances of officers instead of enlisted men. The provisions in the Act of June 4, 1920, which are referred

to, relate to "all officers of the Philippine Scouts," but it is expressly provided that nothing in the act shall alter the status of enlisted men. Section 17 of the Act of June 10, 1922, likewise relates to officers and former officers of the Philippine Scouts, according them the status of officers in the regular establishment; and again it is provided that the act shall not be construed as affecting the enlisted men.

It is hard to see how it reasonably can be thought that these acts have any effect upon the status of the enlisted men, since they are limited, in express terms, to officers. They do not modify or purport to modify in any way the provisions of § 36 of the Act of 1901 in respect of such enlisted men. If that conclusion were not clear, the provisos would effectually settle the doubt. Putting aside those acts, therefore, as irrelevant, we have only to consider § 36 of the Act of 1901, which plainly establishes the status of petitioner as an enlisted man in the army, and the Act of March 2, 1907, which just as plainly directs that such an enlisted man, having served thirty years as such, shall be placed upon the retired list. In this situation the duty of the disbursing officer to pay the voucher in question "is so plainly prescribed as to be free from doubt and equivalent to a positive command," and, therefore, is "so far ministerial that its performance may be compelled by mandamus." *Wilbur* v. *United States, supra*, pp. 218–219. It seems unnecessary to add that this duty cannot be affected by a contrary decision of the Comptroller General.

It is said by the Comptroller General that there was no existing appropriation of public money available for payment of retired pay and allowances to petitioner. But this statement quite evidently is made only in the view that the petitioner does not come within the retirement provision of the Act of March 2, 1907, since there was

available an existing appropriation for retired pay and allowances of enlisted men retired under that provision.

The Chief of Finance is charged by law with the duty of disbursing all funds of the War Department, including the pay of the army. U.S.C., Title 10, § 172. The disbursing officer to whom the voucher was presented for payment, therefore, is simply a subordinate of the Chief of Finance, subject to his control and direction, and the suit was properly brought against the latter. The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. The disbursing officer as the mere agent of his superior officer is not an indispensable, although he might have been joined as a proper, party. Compare *Warner Valley Stock Co.* v. *Smith, supra,* pp. 34–35; *Gnerich* v. *Rutter,* 265 U.S. 388, 391–393; *Webster* v. *Fall,* 266 U.S. 507; *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. (2d) 214; *Dami* v. *Canfield,* 5 F. (2d) 533. We find no merit in the contention that the United States is a necessary party and this suit not maintainable without its consent, *Payne* v. *Central Pac. Ry. Co.,* 255 U.S. 228, 238; or in the further contention that the suit cannot be maintained because petitioner has a remedy at law in the court of claims for his retired pay. *Smith* v. *Jackson,* 246 U.S. 388; 241 Fed. 747, 760.

It follows that the decree of the court below, in so far as it directs a dismissal of the bill as against the respondent Coleman, must be reversed, and the decree of the supreme court of the District in respect of that respondent affirmed.

As to the Comptroller General, a different situation is presented. The request for an advance decision from him came from the Chief of Finance at the request of the disbursing officer. U.S.C. (Supp.), Title 31, § 74. The Comptroller General undertook nothing on his own

motion, and, as he asserts, did nothing either to coerce or invite the application for an advance decision. Having given that decision, his function in that regard ceased. The effect of the decision is a matter purely of law. Obviously, there is no occasion for compelling him by mandamus to recall his decision. However, he continues to retain possession of the voucher, upon the theory evidently that, having determined that the disbursing officers were without authority to make payment, it belongs in the files of his office. The view of the supreme court of the District, that a mandatory injunction will lie to compel a return of that voucher to the disbursing officer and to enjoin the Comptroller General from any interference with the Chief of Finance tending to prevent payment thereof to petitioner, has not, in the light of the case as now made, met with the concurrence of a majority of this court. In that situation, we, therefore, affirm, without discussion, the decree of the District court of appeals in so far as it relates to the Comptroller General. But it is not to be supposed that, upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in any way with its payment.

The decree of the court below will accordingly be reversed as to the respondent Coleman, and affirmed as to the Comptroller General. But, in accordance with precedent, *Wilbur* v. *Krushnic, supra,* p. 319, the mandatory injunction to Coleman should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes. A writ in that form is better suited to the circumstances than that indicated by the supreme court of the District.

*Reversed in part.*
*Affirmed in part.*

Counsel for Parties.

## UNITED STATES ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL.

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

No. 422. Argued February 8, 9, 1934.—Decided March 5, 1934.

1. The provision of § 3 (e) of the Inland Waterways Corporation Act, as amended, empowering the Interstate Commerce Commission, upon granting a certificate of public convenience and necessity to a prospective water carrier, to order all connecting common carriers to join with such water carrier in through routes and joint rates, and in such order to fix minimum differentials between all-rail rates and joint rates in connection with the water service, does not deprive a rail carrier affected of due process, since the rates so prescribed are tentative and the railway, upon complaint, may have a full hearing concerning them and a plenary determination by the Commission before they go into effect. P. 460.
2. A suit to enjoin enforcement of the Commission's order before the administrative process has been completed, is premature. P. 463.
3. A carrier which has not first availed itself of the remedy before the Commission is not in a position to seek equitable relief against rates fixed by the Commission's order. P. 463.
4. The provision of the statute which puts the burden of proof upon carriers complaining of the rates fixed by the Commission's *ex parte* order is not inconsistent with the due process clause of the Fifth Amendment. P. 464.

3 F.Supp. 1005, reversed.

APPEAL from a decree of the District Court, of three judges, setting aside an order of the Interstate Commerce Commission, in a suit brought by several railroad carriers against the United States and the Commission.

*Assistant Solicitor General MacLean,* with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins, Ashley Sellers, Daniel W. Knowlton,* and *Harry L. Underwood* were on the brief, for the United States and Interstate Commerce Commission, appellants.

*Mr. A. K. Shipe* for American Barge Line Co. et al., appellants.

*Mr. Clark C. Wren* filed a brief on behalf of the Inland Waterways Corp., appellant.

*Messrs. R. S. Outlaw* and *H. H. Larimore,* with whom *Messrs. Elmer A. Smith, A. B. Enoch, M. G. Roberts, M. Carter Hall, A. H. Kiskaddon, James Stillwell, Herbert S. Harr* and *M. B. Pierce,* were on the brief, for appellees.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by the Illinois Central Railroad Company and other railroad carriers, under the Urgent Deficiencies Act of October 22, 1913, U.S.C., Title 28, § 47, as amended by the Act of February 13, 1925, U.S.C., Title 28, § 345, to set aside, annul and enjoin the enforcement of an amended order of the commission, made under § 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended, c. 891, § 2, 45 Stat. 978. That section provides that any person, etc., about to engage in conducting a common carrier service upon certain designated waters may, upon application to the commission, obtain a certificate of public convenience and necessity in accordance with § 1 of the Interstate Commerce Act; and that the commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates," and shall, in such order, "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service," etc. The commission is further authorized to require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions

of these joint differential rates, and if they are unable to agree within a time specified in the act, the commission shall determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The act further authorizes the commission, upon complaint, at once, and if it so orders, without answer or other formal pleading, but upon reasonable notice, to enter upon a hearing concerning the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, etc., and after full hearings to " make such order with reference to any such matters as it may find to be proper and in the public interest." The burden of proof in such case is put upon the carrier or carriers making the complaint, and preference is to be given to the hearing and decision of the questions involved over all other questions pending before it, except where like preference is given by law; and the commission is directed to render a decision as speedily as possible.

Upon application under this section, the commission, after a hearing confined to that application, granted to the American Barge Line Company, a certificate of public convenience and necessity, Application of American Barge Line Co., 182 I.C.C. 521; and thereupon, without further hearing, entered an order directing the interested carriers to establish through barge-rail routes and rates. Subsequently, in August or September, 1932, because of competition from unregulated truck and water carriers, the railroad carriers published all-rail carload rates on cotton lower than those previously in effect. These rates were further reduced in November, 1932. But the railroad carriers declined to join in joint water and rail rates; and, thereupon, the Barge Line sought from the commission supplemental orders requiring the establishment of rail-barge-rail rates between designated points. The rail

carriers opposed the application and requested a hearing before action by the commission. This hearing the commission refused, and entered an order requiring the rail carriers to join with the Barge Line in publishing specified rail-barge-rail rates on cotton in carloads. The order, particulars of which need not be stated, was issued December 10, 1932, to become effective on January 25, 1933, which time was afterwards extended to June 1, 1933, a period altogether of nearly six months from the date of issue.

Appellees, on February 2, 1933, before the order had become effective, brought this suit and sought relief from the order, upon the grounds (1) that it was made without according them a full and fair hearing, and that § 3 (e) of the statute, in so far as it authorizes the commission to make and enforce the order without such hearing, contravenes the due process of law clause of the Fifth Amendment; and (2) that it also constitutes a delegation to the commission of legislative power. The court below held with appellees upon the first ground, and entered a decree enjoining, setting aside, annulling and suspending the order of the commission. 3 F.Supp. 1005.

1. Assuming that the order in question, if enforced, would have the effect of depriving appellees of property or of property rights, we first inquire whether the statute, as interpreted and applied by the commission, does have the effect of denying appellants a full and fair hearing in respect of the matter prior to the enforcement of the order, and, consequently, fails to satisfy the constitutional requirement of due process of law. The provision of the statute that a certificate of public convenience and necessity to conduct a common carrier service upon the waters designated may be obtained upon application to the commission and *thereupon* the commission shall make the order described in the statute, undoubtedly empowers the commission to make the order, in the first instance, without a hearing. The commission, however, seems never to

have held that it is not obliged upon complaint to grant a full and fair hearing after the making of the order but before putting it into effect. And both in the briefs filed on behalf of appellants, including the United States and the commission, and in the argument at the bar, the position is definitely taken that the order is tentative and the rates prescribed thereby cannot be enforced without a hearing if properly sought by appellees. The brief for the United States and the commission quotes from the concurring opinion of Commissioner Brainerd in Ex parte 94, Procedure Under Barge Line Act, 148 I.C.C. 129, 141, to this effect and adopts it as the view of the government and the commission. Upon the oral argument, in response to a direct question from the bench, this view was reiterated by the Assistant Solicitor General, his statement in effect being that the commission is bound to grant the hearing upon complaint being made by the railway carriers, and pending such hearing to postpone the effective date of the order upon a showing which is not frivolous. The conclusion of Commissioner Brainerd, thus adopted, is that if the commission issue a certificate of public convenience and necessity and enter an order without hearing, directing the establishment of through routes and joint rates and fixing reasonable minimum differentials, and later, before said rates become effective, a complaint be filed by an interested carrier, " it would then be our duty to hear said complaint and decide said matter before said rates become effective; that in the event such a hearing is not had and the matter disposed of before the effective date of said rates, it would be our further duty temporarily to suspend them until said matter is decided; . . ." And he declared that this procedure would be necessary to comply with the requirements of due process of law.

This is an admissible construction of the statutory provisions. That the order made by the commission upon

granting the certificate of public convenience and necessity is not final and conclusive is clear, since, by the affirmative provisions of the act, the railway carriers may file the through routes and joint rates pursuant to the preliminary order, and immediately, upon complaint, secure a full hearing from, and a plenary determination by, the commission. Pending that hearing, the commission is authorized to suspend the operation of the preliminary order for as long as seven months beyond the time when it would otherwise go into effect, Interstate Commerce Act, U.S.C., Title 49, § 15 (7); and it is made clear by what has already been said that upon application and proper showing the commission would consider itself bound to take such action.

The provisions of § 3 (e) with which we are dealing were enacted by Congress in an avowed effort to bring about coöperation on the part of the rail carriers with the water carriers. The report of the House Committee on the proposed legislation (H.Rept. 1537, 70th Cong., 1st Sess., pp. 5–6) recites the necessity of overcoming opposition on the part of the rail carriers in respect of through routes, joint rates, etc., without interminable delay and the heavy expense necessary to carry on proceedings before the Interstate Commerce Commission, as a necessary prerequisite to the realization of privately owned transportation service on the inland waterways of the country. Transportation Act, 1920, (U.S.C., Title 49, § 142) declares the definite policy of Congress to be "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States." *Chicago, R. I. & P. Ry.* v. *United States,* 274 U.S. 29, 36. In the light of the situation disclosed by this report and of the policy declared by the act just named, Congress evidently prescribed the course of procedure which § 3 (e) requires.

Without attempting to lay down any general rule, but confining ourselves to the statute and case in hand, we accordingly hold that it was not essential, under the due process of law clause, that a hearing should be accorded in advance of the initiating order. It is enough that opportunity was given for a full and fair hearing before the order became operative. Since no routes or rates were in existence when the order was made, that order constituted the preliminary step toward their creation, equivalent, in essence, to an *ex parte* order on the carriers to show cause why the designated routes and rates should not be established. The effect of that order was simply to put upon the rail carriers the necessity, within a comparatively brief period, of either availing themselves of the right to file the routes and rates and appear and be heard in opposition thereto (the operation of the order in the meantime being held in abeyance), or of suffering them to go into effect by default. The statute gives preference to the hearing and decision of the questions involved, and directs the commission to render a decision as speedily as possible. Congress evidently believed that the procedure thus prescribed would bring about an earlier settlement of the matter than otherwise would be the case. The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked. *Porter* v. *Investors Syndicate,* 286 U.S. 461, 470–471.

The constitutional question raised by appellees, therefore, vanishes from the case, because the commission concedes and stands ready to grant every administrative procedural right that appellees are lawfully entitled to claim. If the preliminary order be erroneous in any particular, it is susceptible of correction by the commission upon the hearing thus provided for. It will be time enough for appellees to seek the aid of a court of equity when they

shall have fully availed themselves of this administrative remedy, and the commission shall have taken adverse action. Until then they are in no situation to invoke judicial action.

The provision of the statute which puts the burden of proof upon the carriers is not inconsistent with the due process clause of the Constitution. *New England Divisions Case,* 261 U.S. 184, 199; *Minneapolis & S. L. R. Co.* v. *Minnesota,* 193 U.S. 53, 63.

2. The precise ground upon which appellees place their contention that the statute is invalid as constituting a delegation of legislative power is not entirely clear. Undoubtedly, the statute furnishes a sufficient primary standard to govern the action of the commission; and this appellees do not dispute. Their contention, as set forth in their brief, is that the only rule of decision laid down in § 3 (e) is that the through routes, rates and differentials to be established must be reasonable and lawful, and "such reasonableness and lawfulness can be determined only by a full and fair hearing, and the establishment of rates and routes and differentials without such hearing constitutes necessarily an exercise by the Commission of pure legislative power." Since the government and the commission concede that a full and fair hearing must be accorded before the order becomes effective, this objection to the statute, as a distinct ground, necessarily falls.

*Decree reversed.*

MR. JUSTICE STONE, concurring.

I concur in the result.

The statute, in words, authorizes the Commission to grant a hearing as to the reasonableness and lawfulness of the proposed rates and divisions, if complaint is filed, and the Commission has plenary power, upon consideration of the complaint, to postpone the effective date of

the order and to suspend the rates after the order becomes effective. §§ 15 (7), 16 (6), Interstate Commerce Act.

As respondents have failed to invoke these administrative remedies by filing a complaint with the Commission, it seems plain that their rights, constitutional or otherwise, have not been infringed, and I see no occasion for speculation as to what the statutory duty of the Commission may be in the event a complaint is filed, or to resort to concessions of counsel in brief and argument to define that duty, or to suggest that the statute falls short of constitutional requirements if it fails to command the administrative action which it permits. The mere power, unexercised, to withhold constitutional right is not a denial of it. It is enough that respondents have filed no complaint with the Commission designed to secure a hearing. Before administrative action which respondents may invoke, but have not, it cannot be said that there is any infringement of their constitutional rights to a hearing or to protection from the rates pending a hearing. Compare *Pacific Telephone & Telegraph Co.* v. *Seattle, ante,* p. 300; *Porter* v. *Investors Syndicate,* 286 U.S. 461, 470, 471.

Further, there is no intimation in the record that upon resort to the administrative remedies which the statute permits any relief to which respondents are justly and equitably entitled will be withheld. And there is no contention that the proposed rates will not yield a fair return or that they otherwise infringe constitutional rights. At most it appears that the interest sought to be protected is a prospective share in future traffic which it is feared may be diverted to the Barge Line, an interest to which the Constitution plainly affords no protection. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U.S. 768, 780; *Sprunt & Son* v. *United States,* 281 U.S. 249.

Thus, regardless of what the statute commands, there is no such showing of threatened denial of a hearing or of injury to a property right as would warrant resort to the equity powers of a federal court. *Vandalia R. Co.* v. *Public Service Comm'n,* 242 U.S. 255; *United States* v. *Los Angeles & St. L. R. Co.,* 273 U.S. 299, 314; *White* v. *Johnson,* 282 U.S. 367, 373; *Porter* v. *Investors Syndicate, supra.*

MR. JUSTICE BRANDEIS, MR. JUSTICE ROBERTS, and MR. JUSTICE CARDOZO concur in this opinion.

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## TRINITYFARM CONSTRUCTION CO. *v.* GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 355. Argued February 7, 1934.—Decided March 5, 1934.

Petitioner entered into a contract with the Federal Government for the construction of levees, in aid of navigation of the Mississippi River, in the performance of which gasoline was used to supply power for machinery. *Held* that a state excise tax on the gasoline so used was not invalid, as a tax on a means or instrumentality of the Federal Government, its effect, if any, upon that Government being consequential and remote. P. 472.

3 F.Supp. 785, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill to enjoin enforcement of state taxes.

*Mr. D. K. Woodward, Jr.,* with whom *Messrs. Victor A. Sachse* and *H. Payne Breazeale* were on the brief, for appellant.

The contracts are governmental means or instrumentalities. *Gillespie* v. *Oklahoma,* 257 U.S. 501; *Indian*

*Territory Oil Co.* v. *Oklahoma,* 240 U.S. 522; *Choctaw O. & G. Co.* v. *Harrison,* 235 U.S. 292; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393.

The tax is not a tax upon the gasoline itself, nor upon the "distribution," "storage," or "withdrawal" of the gasoline. Distinguishing: *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, and *Edelman* v. *Boeing Air Transport,* 289 U.S. 249.

The tax can arise solely with reference to gasoline "used or consumed,"—exploded for fuel.

If "use" were held to mean "withdrawal" from storage, the tax upon the privilege of withdrawal under the facts in this case would still be a direct burden on the federal contracts.

In the interstate cases above cited the act of withdrawal is held to have been completed before interstate commerce began and the burden of the tax with respect thereto is held too remote.

But, as said by Mr. Justice Holmes in *Gillespie* v. *Oklahoma,* 257 U.S. 501, distinguishing between attempts by a State to levy taxes on transactions in interstate commerce and upon the operation of the Federal Government, "The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance."

An examination of the facts here will demonstrate that the burden upon the federal contracts is direct, even if "use" be given the most comprehensive meaning yet accorded to it.

Up to the time the gasoline came to rest in appellant's storage tanks it was in interstate commerce and no contention is made that it was subject to the questioned tax. It was then stored in appellant's tanks, on or near appellant's work and was a part of appellant's equipment, assembled for performance of its federal contract, like the tanks which contained it, the tractors and trucks in which

it was presently to be consumed. Like them it had been brought to the site solely and exclusively because the federal contract had been made and was then actually being performed. Every act with respect to the gasoline which could possibly be subject to the tax, of necessity occurred after and not before the performance of the federal contract had begun—a situation wholly different from that passed upon in the interstate commerce cases where the taxable acts were completed before interstate transportation commenced.

After the gasoline came to rest in appellant's storage tanks, it was "used" in four ways, in the broadest possible sense of the word. It remained stored where it was; it was withdrawn from storage; it was put in appellant's fuel tanks; and it was exploded and consumed as engine fuel in actual levee construction.

In legal effect it matters not at all which act the State may select as the basis of its levy. Each act occurs after and not before the federal contract is commenced; each act is part performance of that contract; each act is done solely because of the federal contract; each act adds part of the cost or expense of performing the federal contract; each act is essential to the performance of that contract.

If the State may tax the storage of gasoline used in performing a federal contract, it may not be denied the power to tax the storage of coal, oil or other fuel, or, for that matter, the "storage" of draglines or other equipment while not actively engaged in work upon the contract.

Surrender to the State the right to tax any one of the acts enumerated and it will have power to destroy the contract; to defeat the ability of the Government to enter into such contracts.

It is in evidence and undisputed that the asserted tax would add to the cost of the work; that the bid price of appellant to the Government would have been higher

upon these identical contracts had appellant conceded the validity of the asserted tax; that future bids will be proportionately higher if the tax is sustained. A burden more direct upon the contract, and through it upon the Government, can not easily be conceived—a burden falling with equal force and certainty regardless of the act subjected to the tax.

The invalidity of taxes of this nature is established by an unbroken line of decisions of this Court. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Stockton* v. *Baltimore Ry. Co.,* 32 Fed. 9; *Pembina Co.* v. *Pennsylvania,* 125 U.S. 181; *Horn Silver Mining Co.* v. *New York,* 143 U.S. 302; *Sault Ste. Marie* v. *International Transit Co.,* 234 U.S. 333; *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218; *Helson* v. *Kentucky,* 279 U.S. 245.

The difference between an excise tax based on sales and one based on use of property is obvious and substantial. *Hart Refineries* v. *Harmon,* 278 U.S. 499.

When it is asserted a contract with the Federal Government is not a means selected by Congress for carrying out its delegated powers, careless thinking or want of knowledge is apparent. That the holder of such a contract is not an agent in the strict legal sense may be admitted; that the contract is a means to the delegated end may not be intelligently denied. What is meant, most frequently, is that the incidence of the tax on the governmental means is not admitted or, if it exists, that it is too remote. Cf. *Osborn* v. *Bank,* 9 Wheat. 737, 865.

*Messrs. Peyton R. Sandoz* and *Justin C. Daspit,* with whom *Mr. Gaston L. Porterie,* Attorney General of Louisiana, was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Appellant has contracts with the United States for the construction of levees in Louisiana to control the waters of

the Mississippi River. It consumes much gasoline in the operation of machinery employed to do the work. It imports its supply from other States in carload lots and places it in a central tank from which distribution is made to other tanks located on its right of way in proximity to the machines. Appellee, an officer of Louisiana, is required to enforce the provisions of its statutes that impose an excise of five cents per gallon in respect of gasoline so imported and used.[1] The state supreme court has held that the exaction is an excise tax levied upon all gasoline or motor fuel sold, used or consumed in the State (*State* v. *Tri-State Co.*, 173 La. 682; 138 So. 507) and we accept that characterization. Claiming that these enactments are repugnant to several clauses of the Federal Constitution, appellant brought this suit to enjoin the collection of the tax in respect of the gasoline so used by it. A three judge court, having granted a temporary injunction, heard the case on the merits, upheld the tax and dismissed the bill. 3 F.Supp. 785.

The appellant seeks reversal on the ground that the contracts are federal means or instrumentalities, that the enactments referred to impose a direct burden upon them

[1]Act No. 6, Special Session of 1928, as amended by Act No. 8 of 1930, Act No. 16 of 1932, levies a tax of four cents a gallon "on all gasoline, or motor fuel, sold, used or consumed in the State of Louisiana for domestic consumption." § 1. The tax is collected from "dealers" who, as defined by § 2 of the Act, include "the person . . . who imports such gasoline or motor fuel from any other State or foreign country for distribution, sale or use in the State of Louisiana." And on "all gasoline or motor fuel imported from other States and used by him, the 'dealer' . . . shall pay the tax on the amount so imported and used, the same as if it has [*sic*] been sold for domestic consumption." Section 14 provides that the tax "shall not apply to sales to the United States Government or any agency or department thereof." Act No. 1, extraordinary Session of 1930, imposed an additional tax of one cent a gallon.

and that the State was without power to impose the tax. And on that basis it seeks to invoke the rule that, consistently with the Federal Constitution, a State may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessarily arises out of our dual government. It has often been given effect.[2] And reciprocally it safeguards every State against federal tax on its governmental agencies or operations.[3] Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Co.* v. *United States,* 283 U.S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.

The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi

[2] *McCulloch* v. *Maryland,* 4 Wheat. 316, 400, 436. *Weston* v. *Charleston,* 2 Pet. 449, 463, 466, *et seq.* *Dobbins* v. *Erie County,* 16 Pet. 435, 443, 447. *Farmers & Mechanics Bank* v. *Minnesota,* 232 U.S. 516, 526. *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U.S. 292. *Indian Oil Co.* v. *Oklahoma,* 240 U.S. 522. *Gillespie* v. *Oklahoma,* 257 U.S. 501. *Panhandle Oil Co.* v. *Knox,* 277 U.S. 218. Cf. *Susquehanna Power Co.* v. *Tax Comm'n,* 283 U.S. 291.

[3] *Collector* v. *Day,* 11 Wall. 113. *United States* v. *Railroad Co.,* 17 Wall. 322, 327. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, 584. *South Carolina* v. *United States,* 199 U.S. 437, 452, 461. *Indian Motocycle Co.* v. *United States,* 283 U.S. 570. *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393. Cf. *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514. *Group No. 1 Oil Corp.* v. *Bass,* 283 U.S. 279. *Burnet* v. *A. T. Jergins Trust,* 288 U.S. 508.

River, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect of its relation to the federal undertaking is wholly unlike those considered in *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U.S. 292; *Indian Oil Co.* v. *Oklahoma,* 240 U.S. 522; and *Gillespie* v. *Oklahoma,* 257 U.S. 501. Appellant is an independent contractor. *Casement* v. *Brown,* 148 U.S. 615, 622. It is not a government instrumentality. Cf. *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514. *Group No. 1 Oil Corp.* v. *Bass,* 283 U.S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. *Thomas* v. *Gay,* 169 U.S. 264, 275. *Metcalf & Eddy* v. *Mitchell, supra,* 524 *et seq. Wheeler Lumber Co.* v. *United States,* 281 U.S. 572, 579. Appellant's claim of immunity is without foundation.

*Affirmed.*

Mr. Justice Cardozo concurs in the result.

## PAGEL ET AL. *v.* PAGEL, ADMINISTRATOR, ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 526. Argued February 16, 1934.—Decided March 5, 1934.

War risk insurance money paid to the estate of the insured soldier is subject to the claims of his creditors. P. 476.

189 Minn. 383; 249 N.W. 417, affirmed.

CERTIORARI, 290 U.S. 620, to review the affirmance of a judgment of a District Court of Minnesota entered on appeal from a Probate Court. This is a continuation of the litigation reported sub nom. *Pagel* v. *MacLean,* 283 U.S. 266.

*Mr. George L. Barnard,* with whom *Mr. L. D. Barnard* was on the brief, for petitioners.

*Mr. Charles A. Swenson* for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case presents the question whether war risk insurance money paid to the estate of an insured soldier is exempt from the claims of his creditors. Title 38, U.S. Code, contains the applicable statutes. They are: § 454: "The . . . insurance . . . shall not be subject to the claims of creditors of any person to whom an award is made"; § 511: "In order to give to every commissioned officer and enlisted man . . . protection for themselves and their dependents, the United States . . . shall grant . . . life insurance . . . payable only to a spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law, or sister-in-law, or to any or all of them"; § 514: " . . . If the designated beneficiary . . . survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the

estate of the insured the present value of the monthly installments thereafter payable."

Jacob E. Hallbom, the insured soldier, obtained a ten thousand dollar policy and designated as beneficiary his father, Peter J. Hallbom. He died intestate October 20, 1925, leaving no spouse or child. He was survived by his father and others within the permitted class of beneficiaries. Thereupon, until the death of the father, February 22, 1928, the Bureau paid him the monthly installments according to the terms of the policy. He was survived by his wife, a son, a widow and child of a deceased son (who died after the death of the insured), daughters, and children of a deceased daughter. They were mother, brother, sisters, sister-in-law, nephews and nieces of the insured.

The Bureau paid Pagel, administrator of the estate of the insured, $9,116, being the value of the installments payable after the death of the designated beneficiary. The other assets in his hands were not sufficient to pay expenses of administration or the claims of creditors, which amounted to about $3,800. The probate court directed payment of such claims. The mother, Selma Hallbom, claiming under the War Risk Insurance Act to be entitled to the entire sum as beneficiary, appealed to the district court, which reversed the order of the probate court. The state supreme court affirmed. 179 Minn. 402; 229 N.W. 344. It held the money not subject to claims of creditors; that upon the death of the designated beneficiary the value of the unpaid installments became payable to the estate of the insured for distribution to such persons then living and within the permitted class of beneficiaries, § 511, as would be entitled to the personal property of the insured under Minnesota intestacy laws, and that such persons were entitled as beneficiaries and not as heirs.

Pending the application of the administrator for a writ of certiorari, the mother died and, after the granting of the writ, 282 U.S. 819, MacLean, who had been appointed special administrator of her estate, was here substituted as respondent. Her death having given rise to questions involving the rights of persons who were not parties, we vacated the judgment and remanded the case for further proceedings. 283 U.S. 266. The state supreme court remanded to the district court with the suggestion that the brothers and sisters of the insured be made parties. 183 Minn. 429; 237 N.W. 21.

The surviving brother and sisters appeared and claimed the insurance money as beneficiaries. The administrator of the deceased brother intervened as a creditor and prayed that his claim be paid out of the insurance money. The children of the deceased son and daughter became parties and prayed that, after payment of claims against the estate of the insured, the residue be distributed to the father and mother. The court held that, upon the death of the designated beneficiary, the insurance money became an asset of the estate of the insured and subject to the claims of creditors. It directed that the balance be distributed to the heirs in accordance with state law, and that heirship be determined as of the date of the death of the insured. The surviving brother and sisters and the special administrator of the mother appealed to the supreme court. That court, in view of *Singleton* v. *Cheek*, 284 U.S. 493, held its former decision erroneous and affirmed the judgment of the district court. 189 Minn. 383; 249 N.W. 417. We granted a writ of certiorari.*

* There is a conflict between decisions announced since our decision in *Singleton* v. *Cheek* (February 15, 1932), 284 U.S. 493. *Hunt* v. *Slagle* (July 29, 1932), 45 Ga. App. 470; 165 S.E. 287, holds in favor of the exemption. There is dictum to the same effect in *Mixon* v. *Mixon* (November 23, 1932), 203 N.C. 566; 166 S.E. 516. And see *Brown* v. *United States* (May 9, 1933), 65 F. (2d) 65.

In *Singleton* v. *Cheek, supra,* 496, we held that, when the insured and designated beneficiary die successively intestate, the commuted amount of the installments not accrued when the beneficiary dies is to be paid to the estate of the insured for distribution to his heirs and that the heirs are to be determined as of the time of his death in accordance with the laws of the state where he resided and are not limited to the class of beneficiaries designated by the Act. The question whether insurance money paid to the estate is subject to claims of creditors was not involved in that case. The purpose of the exemption, § 454, is to safeguard to the insured soldier and the beneficiary payments made under the policy to them or for their benefit. *Spicer* v. *Smith,* 288 U.S. 430, 434. Upon the death of the insured, the father whom he had designated as beneficiary was by the Bureau awarded monthly payments to continue until death. The language of the statute limits the exemption to "any person to whom an award is made." It is clear that the statute does not extend the exemption beyond the insured and beneficiary. And, as said by the state supreme court after referring to our decision in *Singleton* v. *Cheek,* "it cannot be held now that exemption of the fund survives both insured and beneficiary for benefit of the heirs of the former." 189 Minn. 383, 388.

*Affirmed.*

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## GLOBE INDEMNITY CO. *v.* UNITED STATES TO THE USE OF STEACY-SCHMIDT MANUFACTURING CO., INC.

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

No. 419. Argued February 13, 14, 1934.—Decided March 5, 1934.

The Heard Act, 40 U.S.C., § 270, requires that to secure the performance of a government construction contract and payment for labor and material furnished by subcontractors, the contractor

shall furnish a bond, and provides that if no suit is brought by the United States within six months from "the completion and final settlement" of the contract, a subcontractor may sue on the bond, provided the action be commenced within one year after "the performance and final settlement" of the contract and not later. *Held:*

1. That where the administrative officer having the work in charge (in this case the Secretary of the Interior) has found that the contract has been performed and has stated the amount due the contractor, and approved his claim therefor, this is "final settlement" within the meaning of the statute, although the officer, instead of ordering payment, refer the claim "for direct settlement," to the General Accounting Office. P. 481.

2. Under the Budget and Accounting Act, the function of the General Accounting Office in auditing and settling claims against the Government, is the same as that which, before the Act, was exercised by the Accounting Office in the Treasury Department. P. 479.

3. A construction of the Heard Act as not fixing the time of "final settlement" by the final settlement in the department having charge of the contract but as subjecting it to change by subsequent action of the Comptroller General, would be out of harmony with administrative practice, inconvenient of operation, and inconsistent with the obvious purpose of the statute to protect the interests of laborers and materialmen. P. 483.

66 F. (2d) 302, reversed.

CERTIORARI, 290 U.S. 618, to review a judgment which reversed a judgment for the Globe Indemnity Company in an action against it as surety on a bond securing a construction contract with the United States. The bond was given under the Heard Act, and the plaintiff relied on its provisions securing claims for material and labor.

*Mr. Frederic L. Ballard,* with whom *Messrs. Robert Brigham* and *Morris Cheston* were on the brief, for petitioner.

*Mr. Samuel W. Cooper* for respondent.

By leave of Court, *Mr. Edward H. Cushman* filed a brief on behalf of the Truscon Steel Co., as *amicus curiae.*

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent brought this suit in the District Court for Eastern Pennsylvania to recover on a bond given by petitioner, as surety, to secure the performance of a government construction contract as provided by the Heard Act, which requires the contractor to furnish a surety bond to the government as obligee, conditioned upon satisfactory performance of the contract and payment by the contractor for labor and material furnished by subcontractors for the construction. Act of August 13, 1894, 28 Stat. 278; as amended, Act of February 24, 1905, 33 Stat. 811, and March 3, 1911, 36 Stat. 1167; 40 U.S.C.A., § 270. In authorizing suits on the bond, the Heard Act provides:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall . . . have a right of action . . . provided that . . . it . . . shall be commenced within one year after the performance and final settlement of the said contract and not later . . ."

The contract was for materials for use in the construction of an irrigation project and was entered into on behalf of the United States by the Department of the Interior under the provisions of the Reclamation Act of June 17, 1902, 32 Stat. 388, 389; 43 U.S.C.A., §§ 391, 419. Under date of June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of the contractor to the General Accounting Office "for direct settlement," by a letter which stated that the contract had been completely performed and that, after deducting a stipulated amount as liquidated damage for delay in performance, the balance due was $8,889.30. The letter concluded: "The claim has received administrative examination, is approved for $8,889.30 and I recommend that the amount found due be paid" from a designated ap-

propriation. Four months later, on October 26, 1927, the General Accounting Office issued its formal certificate of settlement confirming the balance found due by the Department of the Interior. The claim was paid by the Treasurer of the United States on November 5, 1927.

The defense to the present suit on the bond was that it had been begun October 17, 1928, more than one year after performance and final settlement of the contract. The sole question presented is whether "final settlement," within the meaning of the Heard Act was effected by the action of the Interior Department of June 16, 1927, or only by the certificate of the General Accounting Office of October 26th. Judgment for the petitioner by the District Court was reversed by the Court of Appeals for the Third Circuit, 66 F. (2d) 302, which held that the Budget and Accounting Act of 1921, 42 Stat. 23, 31 U.S.C.A., §§ 41, *et seq.*, had transferred the authority to make settlements of such contracts from the Department of the Interior to the General Accounting Office, that consequently final settlement did not occur until the action of the General Accounting Office upon the contractor's claim, and that the suit brought within a year was in time. Certiorari was granted to resolve an alleged conflict between this decision and that in *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995; compare *Lambert Lumber Co.* v. *Jones Engineering & Construction Co.*, 47 F. (2d) 74.

The Budget and Accounting Act set up the General Accounting Office under the direction of the Comptroller General of the United States. Section 304, 31 U.S.C.A., § 44, transferred to it the powers and duties of the Comptroller of the Treasury and of the six Auditors of the Treasury Department, and authorized the heads and disbursing officers of executive departments to apply for the decision of the General Accounting Office upon any question involving a payment to be made by them, which de-

cision, it is declared, shall govern such office in passing upon the account. And by § 305, 31 U.S.C.A., § 71, it is provided that " all claims and demands whatever by the government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office." But none of these duties imposed on the Comptroller General were new. Like provisions applicable to the Comptroller of the Treasury or the Auditors of the Treasury Department are found in § 8 of the Act of July 31, 1894, 28 Stat. 207, and in Rev. Stat. § 236. The chief change effected by the Budget and Accounting Act was that it transferred powers lodged with officers of the Treasury Department to the Comptroller General and made his office independent of the executive branch of the government. But the function which he exercises in auditing and settling claims against the government is precisely that which was previously exercised by the Accounting Office in the Treasury Department. Before, as after, the Budget and Accounting Act, claims against the United States might be paid from the proper appropriation upon approval of the authorized officer of the department concerned, without previous settlement or audit by the accounting office. Before, as after, department heads or disbursing officers might ask the accounting office to render a decision upon a question involving payment to be made by them, in order to protect the disbursing officers and their bondsmen from liability for a payment unauthorized by law.[1]

[1] The history, procedure and function of the Accounting Office of the Treasury before 1921 and of the General Accounting Office are discussed in detail in Smith, The General Accounting Office (Institute for Government Research, Service Monograph No. 46); Willoughby, The Legal Status and Functions of the General Accounting Office (Institute for Government Research, Studies in Administration). The settlement and adjustment of claims against the government receive particular treatment in Willoughby, c. IV.

Prior to the enactment of the Budget and Accounting Act this Court had decided *Illinois Surety Co.* v. *United States to the use of Peeler,* 240 U.S. 214. There the Treasury Department had directed that a voucher be issued for the balance which it found to be due upon a contract entered into with the Department for the construction of a public building. The Treasury Auditors apparently did not pass upon the claim before payment. The issue presented was whether suit by a subcontractor upon a bond given under the Heard Act was premature when begun six months after the date of the Department's determination, but less than six months after payment. It was held that it was not; that the term "final settlement" in the Heard Act was not intended to denote payment, but had been used to describe an administrative determination of the amount due upon completion of the contract. Similar determinations made by other departments before the enactment of the Budget and Accounting Act have repeatedly been held to constitute final settlement within the meaning of the Heard Act. *Pederson* v. *United States for the use of Washington Iron Works,* 253 Fed. 622; *United States for use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.,* 254 Fed. 958; *Mandel* v. *United States for use of Wharton & N. R. Co.,* 4 F. (2d) 629; *Antrim Lumber Co.* v. *Hannan,* 18 F. (2d) 548.

In the light of this history we cannot say that Congress, merely by transferring the function previously performed by the Treasury to the General Accounting Office, intended to disturb this construction of the statute or to make final administrative determinations in the executive departments any the less final settlements within the meaning of the Heard Act than they had been before. *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co., supra.*

Respondent does not directly challenge this conclusion. It does not assert that the General Accounting Office can alone make a final settlement of a government contract, or deny that in some circumstances the authorized officer of the department concerned may make it, but it insists that where, as in this case, the claim, in advance of payment, is referred to the General Accounting Office, its decision alone is controlling and is therefore the final settlement which, under the Heard Act, fixes the period within which suit by a subcontractor may be brought.

It is true, as respondent points out, that the question thus raised is different from that involved in the earlier cases, where payment preceded audit by the accounting office, and from that in the *Peeler* case. The contract in the *Peeler* case was under the administrative control of the Treasury Department and when that case arose and was decided the power to settle contracts, now lodged with the Comptroller General, was in the Treasury Department. Thus the question presented there was not whose was the authority to make the final settlement, but at what stage the decision of the department, authorized to make it, became final. Here the question is whether the decision of the Comptroller General supplanted that of the Department of the Interior, which concededly would have been a final settlement if there had been no action by the Comptroller General before payment. This question must be resolved in view of the purpose sought to be accomplished by the Heard Act and of the administrative procedure for the settlement, auditing and payment of claims against the government.

The Heard Act relates only to bonds given as surety for those entering into contracts for the construction of public buildings or works. It serves the dual purpose of securing to the United States the protection of a surety

bond conditioned upon the performance of the contract, and of protecting those who furnish labor or material to the contractor by the further condition that the contractor shall pay for such labor and material. The statute provides that subcontractors may intervene in any suit brought on the bond of the government, but if the government does not bring suit it makes the time of completion and final settlement of the contract the crucial date for measuring the period within which subcontractors are permitted to bring suit on the bond.

The policy of the statute to afford protection to the interests of laborers and material men would not be effected unless they were allowed to bring suit with reasonable promptness after the United States has determined that it will have no claim on the bond and unless the date of final settlement which fixes the time within which suit is permitted could be ascertained with reasonable certainty and finality. A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due, fulfills these requirements. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra.* Such was the determination made here by the Interior Department, which alone was in possession of the knowledge and data necessary to prompt decision. The Department, in forwarding the claim, made every determination prerequisite to payment. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra; Mandel* v. *United States, supra.* It declared that the contract had been completely performed; it stated the balance due after deducting the stipulated amount for liquidated damages for delay; it declared that the claim had received administrative examination and

was approved for the balance found due; and it recorded its findings. Such a determination would be "final settlement" for purposes of the Heard Act if payment had preceded action by the Comptroller General. *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co., supra.* If, as respondent maintains, this determination may be supplanted by a subsequent settlement by the Comptroller General, the subcontractors could never be certain that the departmental determination would mark the period of limitation, and suits begun within the statutory period measured from this determination might have to be discontinued and begun anew if the departmental head or disbursing officer should later refer the claim to the Comptroller General. A construction so out of harmony with administrative practice, so inconvenient in operation and so inconsistent with the obvious purpose of the statute is not to be entertained.

No such consequences either to the government or to subcontractors can result from treating the departmental settlement as the final one within the meaning of the Heard Act. There is no more occasion for delaying suit on the bond because of the contingency that the departmental determination may not be approved by the Comptroller General in his auditing of the accounts, than because of the contingency that any administrative determination may not be approved by the courts. See *Illinois Surety Co.* v. *United States to the use of Peeler, supra,* 221; *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co., supra,* 997.

A different question would be presented if the department concerned declined to settle the claim and referred it to the General Accounting Office for settlement. See *Lambert Lumber Co.* v. *Jones Engineering & Const. Co., supra.*

*Reversed.*

# HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEWPORT CO.

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

No. 515. Argued February 15, 16, 1934.—Decided March 5, 1934.

1. Under § 280 (1) of the Revenue Act of 1926, an income and excess profits tax which might lawfully have been assessed, under an earlier Act, against a transferor of all of his property, before the transfer, may be assessed against the transferee in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by the 1926 Act. P. 487.
2. Under § 278 (c) of the Revenue Act of 1926, the time for assessment may be extended by waiver even though the period limited for assessment by § 277 had expired before the waiver was given. P. 488.
3. Any doubt that § 1106 (a) of the Revenue Act of 1926, in providing that the bar of the statute of limitations should not only operate to bar the remedy but should extinguish the right, was not intended to make § 278 (c)—the waiver section—inapplicable to assessments barred by limitations, was removed by § 612, Revenue Act of 1928, which repealed § 1106 (a) retroactively as of the effective date of the 1926 Act. P. 489.
4. Congress, with the consent of the taxpayer, has power to reëstablish his tax liability and to authorize assessment of the tax, even though extinguished by the running of the statute of limitations, and Congress evidenced that purpose by repealing § 1106 (a) as of its effective date, leaving unaffected § 278 (c). P. 491.
5. An assessment made after time but with consent of the taxpayer by waiver given under § 278 (c) was validated by the subsequent act of Congress repealing § 1106 (a) as of its effective date. Pp. 488–490.

65 F. (2d) 925, reversed.

CERTIORARI, 290 U.S. 620, to review the affirmance of a decision of the Board of Tax Appeals, 22 B.T.A. 833, overruling a deficiency assessment of income and profits taxes.

*Mr. Erwin N. Griswold,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* were on the brief, for petitioner.

*Mr. Charles F. Fawsett,* with whom *Mr. Richard S. Doyle* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari to review a judgment of the Court of Appeals for the Seventh Circuit, 65 F. (2d) 925, affirming a decision of the Board of Tax Appeals, that a deficiency assessment against respondent as transferee of the assets of the Newport Chemical Works, Inc., for 1917 income and profits taxes of the transferor was barred by the statute of limitations.

In 1919 the Chemical Works, a Maine corporation, after it had filed its tax return for 1917, transferred all its assets to the respondent, a Delaware corporation, which, as consideration for the transfer, issued its stock to the stockholders of the transferor and assumed all liabilities of the transferor. On March 1, 1920, the Supreme Court of Maine entered a decree which purported to dissolve the Chemical Works. The statutory period of limitation for the assessment and collection of the 1917 taxes, as the government concedes, expired on April 1, 1923, five years after the return for that year had been filed. Whether this period was extended by waiver so as to include the date of deficiency assessment fixed by the Commissioner's sixty-day letter of March 14, 1927, depends on the validity and effect of several documents filed with the Commissioner by the Chemical Works or by respondent.

During the period from December 15, 1920, to November, 1926, six documents, asserted by the government to be waivers extending the time for assessment, were executed by the Chemical Works by an officer or its general counsel, and lodged with the Commissioner. On or about November 6, 1926, a further waiver extending the period

for assessment to December 31, 1927, executed by respondent by its president, was filed with the Commissioner.

The court below and the Board of Tax Appeals both held, as respondent argues here, that the period for assessment and collection of the tax, which had been indefinitely extended by the terms of the first waiver, was terminated and the assessment barred on April 1, 1924, by a departmental ruling (Mimeograph 3085, II–1 Cum. Bull. 174, April 11, 1923); that all the subsequent waivers, before that of November 6, 1926, were void because they were given by the Chemical Works, which had been previously dissolved; and that, as the assessment against the Chemical Works had thus been barred prior to the Revenue Act of 1926, the right to assess the respondent as transferee could not, under the provisions of that Act, be revived by respondent's waiver of November 6, 1926.

Several independent grounds are urged by the government to support the challenged deficiency assessment. The only one which we need now consider is that the waiver of November 6, 1926, unaided by the earlier ones, extended the time for the assessment against the respondent, as transferee of the Chemical Works, until its expiry date, December 31, 1927. Before that date the assessment had been made.

Respondent, as such transferee, became liable for any tax which might have been lawfully assessed against its transferor before the transfer, and § 280 (a) (1) of the Act of 1926 directs that such liability "shall . . . be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed" by that Act. *Phillips* v. *Commissioner,* 283 U.S. 589. If, as respondent maintains and as the court below held, any assessment was barred before respondent's waiver of November 6, 1926, the effect of that waiver upon the right to assess respondent pursuant to § 280 must be determined by the Revenue Act of 1926.

The provisions of the Act applicable to limitations and waivers are found in §§ 277 and 278. Section 277 fixes the period of limitation, but § 278 (c) provides:

"Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Had these provisions stood alone the waiver of November 6, 1926, if otherwise valid, would have extended the time for assessment to the specified date, December 31, 1927, even though it was made after the period for assessment had expired. There is nothing in § 278 (c) or related sections which requires that a waiver be given prior to the expiration of the statutory period, and this Court has uniformly held that, under the identical § 278 (c) of the 1924 Act, the defense of the statute of limitations may be waived by the taxpayer after, as well as before, the expiration of the statutory period. *McDonnell* v. *United States,* 288 U.S. 420; *Stange* v. *United States,* 282 U.S. 270; *Brown & Sons Lumber Co.* v. *Burnet,* 282 U.S. 283, 287; *Burnet* v. *Railway Equipment Co.,* 282 U.S. 295, 298.

To avoid this conclusion here, respondent relies on § 1106 (a) of the Act of 1926, which provides that "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; . . ." This section, it is said, indicates a Congressional intent that, once the liability of the taxpayer is extinguished, it should not be revived by waiver. The government argues that this attempted distinction between the defense of the bar of the statute of limitations and the defense that the liability has been extinguished is, at most, only formal and does not affect the application of § 278 (c); that a defense founded on a right which may

be waived by failure to plead it may likewise be waived by formal document authorized by statute. *Burnet* v. *Desmornes,* 226 U.S. 145; see *Atlantic Coast Line* v. *Burnette,* 239 U.S. 199, 200; *Finn* v. *United States,* 123 U.S. 227, 233; compare *Stange* v. *United States, supra.* But doubts as to the effect which Congress intended, if any, to be given to the quoted provision of § 1106 (a) in construing § 278 (c)[1] were removed by § 612 of the Revenue Act of 1928, which declared that § 1106 (a) was repealed as of February 26, 1926, its effective date. Congress thus indicated its intention that the section should be erased from the books as though it had never been enacted, so that § 278, like other surviving sections of the 1926 Act,

[1] The legislative history of § 1106 (a) shows that its purpose was not to prevent a taxpayer from voluntarily agreeing to pay a tax after the period of limitation had expired. It was proposed in order to avoid the effect of a decision of the Court of Claims in *Toxaway Mills* v. *United States,* 61 Ct. Cls. 363, 372, holding that if a tax had been collected after the running of the statute of limitations the taxpayer could not set up that fact as entitling him to recover, but could establish a right to a refund only by proving that there had been an overpayment of the tax, on the theory that the statute of limitations did not extinguish the liability but merely barred the remedy. As stated in the Conference Report on this section of the bill, H.Rep. 356, 69th Cong., 1st Sess., p. 55:

"This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims, *Toxaway Mills* v. *United States* . . . Obviously this section does not apply in the case of fraud or in the case of a waiver."

And see 67 Cong. Rec., Part IV, p. 3531. But in conference § 1106 (a) was qualified by the addition of a clause denying a right to a refund unless taxpayers had in fact overpaid the tax. See Conference Rep., H.Rep. 356, 69th Cong., 1st Sess., pp. 26, 55. Congress, in enacting these provisions, was thus concerned with refunds rather than assessments and obviously did not enact the provision for the purpose of rendering invalid waivers executed after the running of the statute. See also Sen. Rep. 960, 70th Cong., 1st Sess., p. 41; Report of Joint Committee on Internal Revenue Taxation, 70th Cong., 1st Sess., House Doc. No. 139, p. 16.

must be construed free of such restrictive influence, if any, as § 1106 (a) would otherwise impose. Thus it must be dealt with as was the identical section in the Act of 1924 which was before the Court in *Stange* v. *United States, supra.*[2]

[2] It is true that § 506 (a) of the Act of 1928 amended § 278 (c) of the Act of 1926 by providing for extension, by consent, of the time within which an assessment might be made only if the consent were given before the expiration of the period of limitation. But § 506 (b) further provided that any such consent, given after the expiration of the period of limitation, should be valid and effective according to its terms if entered into after the enactment of the Act of 1928 and before January 1, 1929. It was also provided, in § 506 (c), that "The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined in accordance with the law in existence at the time such waiver was filed." The application of subdivision (c) of § 506 is by its terms limited to amendments made by the section and it seems plain that it was intended to be a qualification of subdivision (a) and not a limitation upon § 612. Compare *United States* v. *Morrow,* 266 U.S. 531. Thus construed it prevents any retroactive operation of subdivision (a) by saving the effect of waivers already given although after the expiration of the period of limitation. That effect is to be determined by the application of the provisions of the Act of 1926, with § 1106 (a) eliminated as provided by § 612 of the Act of 1928. The declared purpose of § 506 was to preserve the Commissioner's rights to waivers filed under prior acts and to fix January 1, 1929, as the date of change from the old practice to the new. See H.Rep. 2, 70th Cong., 1st Sess., p. 29; Sen. Rep. 960, 70th Cong., 1st Sess., p. 36; Conference Rep., H.Rep. 1882, 70th Cong., 1st Sess., p. 21. If subdivision (c) were construed as a limitation upon § 612 it would nullify the operation of § 612, and would produce a "whimsical result." See *Commissioner* v. *Oswego & Syracuse R. Co.,* 62 F. (2d) 518, 520. For waivers executed after the period of limitation had run would be valid if filed prior to February 26, 1926, the effective date of the 1926 Act. Like waivers would be invalid if executed between February 26, 1926, and May 29, 1928, the effective date of the 1928 Act. But by § 506 (b), *supra,* they would be valid if executed between May 29, 1928 and January 1, 1929. Scope is given for the operation of § 612, see *Bernier* v. *Bernier,* 147 U.S. 242, 246, and

That Congress, with consent of the taxpayer, has power to reinstate his tax liability and to authorize assessment of the tax cannot be doubted. *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 426; *Mascot Oil Co.* v. *United States,* 282 U.S. 434. The taxpayer cannot complain that Congress has availed itself of the consent which he has given, and cannot object that it did so by revival of the tax "liability," rather than by removing the bar of the statute as in *McDonnell* v. *United States, supra,* and *Stange* v. *United States, supra;* see *Wm. Danzer & Co.* v. *Gulf & S. I. R. Co.,* 268 U.S. 633, 636; *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 409.

We have considered, but do not discuss respondent's arguments based on the construction of the waiver of November 6, 1926, which are without merit. We do not doubt that rightly construed the waiver conformed to the requirements of §§ 278 and 280 of the Act of 1926, and that by it respondent consented to the deficiency assessment.

*Reversed.*

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## LANDRESS *v.* PHOENIX MUTUAL LIFE INSURANCE CO. ET AL.

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

No. 295. Argued February 5, 1934.—Decided March 5, 1934.

1. A death resulting from sunstroke, the insured having under normal conditions voluntarily exposed himself to the sun while playing golf, is not within the meaning of a policy insuring against death effected solely by external and accidental means. P. 495.
2. That an injury was accidental in the understanding of the average man—that the *result* was something unforeseen or extraordinary—

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incongruous results are avoided by treating § 1106 (a) as though it had never been a part of the 1926 Act, as § 612 directs. See *United States* v. *Katz,* 271 U.S. 354.

is not enough to establish liability under a policy which limits liability to such injuries as are effected by external accidental *means*. Pp. 495, 497.

65 F. (2d) 232, affirmed.

CERTIORARI, 290 U.S. 614, to review a judgment affirming a judgment against the claimant on policies of insurance in two cases which were consolidated for trial in the district court.

*Mr. William L. Frierson,* with whom *Mr. R. P. Frierson* was on the brief, for petitioner.

The decision below is based squarely on the view that the death resulted from the voluntary act of exposure to the heat of the sun and hence the injury was not effected through accidental means.

In other words, because insured did only what he intended in the way he intended, it follows that the resulting injury was not brought about by accidental means. This ignores (1) the rule that when one does an intentional act he is deemed to intend only the consequences which naturally and in ordinary course of things result from such an act, and (2) the fact that death is not one of the things which can reasonably be expected to result from playing golf.

The Court must determine which of two lines of cases has correctly interpreted *Mutual Accident Assn.* v. *Barry,* 131 U.S. 100.

The court below and some other courts hold, in effect, that the intervening accidental cause can not be inferred or presumed from the fact that the result of the intentional act is out of all proportion to what was reasonably to be expected from the act. According to them, it is necessary to show, in some affirmative way, just what the intervening cause was. These cases recognize that an unexpected and unintended result may properly be, and usually is, called an accidental result, but draw a distinc-

tion between an accidental result and a result brought about by accidental means. And so, in this case, counsel seem to agree that insured suffered an accidental death, but insist that the declarations do not show that it was brought about by accidental means. This, it seems to us, is a plain contradiction of terms. How is it possible for any result to be accidental unless there is an element of the accidental in the means by which it is produced? Certainly the distinction is too fine to be perceived by the ordinary policyholder who, giving the language used its ordinary meaning, naturally supposes he is insured against accidental results.

The distinction has been rejected by most of the federal courts. They hold, in effect: (1) That when a result is one which does not, in the usual course of things, follow and is not reasonably to be expected to follow, from a given act, it is an accidental result. (2) That every accidental result is necessarily brought about by some accidental means or cause. (3) That when it appears that a result was accidental, it is not necessary to show which of the many accidental causes that might have produced it did actually intervene.

This is the sound and rational construction to be put on policies of this kind.

Cases cited and discussed: *Order of United Commercial Travelers* v. *Shane,* 64 F. (2d) 55; *Jensma* v. *Sun Life Ins. Co.,* 64 F. (2d) 457; *Lewis* v. *Ocean Accident Co.,* 224 N.Y. 18; *Aetna Life Ins. Co.* v. *Brand,* 265 Fed. 6; *Maryland Casualty Co.* v. *Spitz,* 246 Fed. 817; *Mutual Life Ins. Co.* v. *Dodge,* 11 F. (2d) 486; *State Life Ins. Co.* v. *Allison,* 269 Fed. 93; *Mutual Accident Assn.* v. *Barry,* 131 U.S. 100; *Norris* v. *New York Life Ins. Co.,* 49 F. (2d) 62; *New York Life Ins. Co.* v. *Gustafson,* 55 F. (2d) 236; *Richards* v. *Standard Accident Ins. Co.,* 58 Utah 622; *Lower* v. *Metropolitan Ins. Co.,* 111 N.J.L. 426.

But even under the rule invoked by opposing counsel, the demurrers to the third counts should have been overruled. Those counts alleged that the intervening accidental means or cause was the condition, unknown to the insured, which, for the time being, rendered him supersensitive to the heat of the sun. This makes a case under the sound rule that a voluntary act is an accidental act if performed under conditions which, if known, would have deterred from performance.

If one in sound health receives an accidental blow which produces a disease followed by death, that death has resulted, independently of all other causes, from an accidental blow (*Ryan* v. *Continental Casualty Co.*, 47 F. (2d) 474; *Order of United, etc.* v. *Edwards*, 52 F. (2d) 187; *Lower* v. *Metropolitan Ins. Co.*, 111 N.J.L. 426.)

But sunstroke should not be held to be a disease. It does not have that meaning in the popular mind. *Richards* v. *Standard Accident Ins. Co.*, 58 Utah 622; *Lower* v. *Metropolitan Ins. Co.*, 111 N.J.L. 426.

*Mr. Vaughn Miller* for Phoenix Mutual Life Insurance Co., respondent.

*Mr. J. F. Finlay* for Travelers Insurance Co., respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari to review a judgment of the Court of Appeals for the Sixth Circuit, 65 F. (2d) 232, which affirmed a judgment of the district court, denying recovery on two policies of accident insurance. Separate suits brought by petitioner, the beneficiary of the policies under which her deceased husband was the insured, were consolidated and were heard and decided on demurrer. The insured, while playing golf, suffered a sunstroke, from which he died. Petitioner sought recov-

ery of amounts stipulated, in one policy, to be paid if death should result

"directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and not directly or indirectly, wholly or partly from disease or physical or mental infirmity,"

and, in the other policy, if death should result

"from bodily injuries effected directly and independently of all other causes through external, violent and accidental means."

Both declarations, in each of four counts, alleged that the deceased in the month of August, while in good health and while playing golf in his accustomed manner at a place where many others were playing without injury, was suddenly and unexpectedly overcome from the force of the sun's rays upon his head and body and that shortly afterward he died; that an autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death. In one count of each declaration it was alleged that at the time the insured received the injury resulting in his death there was, unknown to him, a temporary disorder or condition of his body, not amounting to a physical or mental infirmity within the meaning of the policies, which, for the time being, rendered him more than ordinarily sensitive to the heat of the sun and that this temporary and unknown condition "intervened between his intentional act of playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed."

Petitioner argues that the death, resulting from voluntary exposure to the sun's rays under normal conditions, was accidental in the common or popular sense of the term and should therefore be held to be within the liability clauses of the policies. But it is not enough, to establish liability under these clauses, that the death or injury

was accidental in the understanding of the average man—that the result of the exposure "was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident," see *Lewis* v. *Ocean Accident & G. Corp.*, 224 N.Y. 18, 21; 120 N.E. 56; see also *Aetna Life Ins. Co.* v. *Portland Gas & Coke Co.*, 229 Fed. 552—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental. The external means is stated to be the rays of the sun, to which the insured voluntarily exposed himself. Petitioner's pleadings do not suggest that there was anything in the sun's rays, the weather or other circumstances, external to the insured's own body and operating to produce the unanticipated injury, which was unknown or unforeseen by the insured.

We do not intimate that injuries resulting from as impalpable a cause as the inadvertent introduction into the body of noxious germs may not be deemed to be effected by external accidental means. See *Western Commercial Travelers Assn.* v. *Smith*, 85 Fed. 401; *Jensma* v. *Sun Life Assur. Co.*, 64 F. (2d) 457. Nor do we say that in other circumstances an unforeseen and hence accidental result may not give rise to the inference that the external means was also accidental. Compare *Jensma* v. *Sun Life Assur. Co., supra; Gustafson* v. *New York Life Ins. Co.*, 55 F. (2d) 235. But, in the light of such knowledge as we have, no such inference can arise from the bare allegation of death by sunstroke, compare *Pope* v. *Prudential Ins. Co.*, 29 F. (2d) 185; *Ryan* v. *Continental Casualty Co.*, 47 F. (2d) 472, with no indication that some unforeseen or unintended condition or combination of circumstances, external to the state of the victim's body, contributed to the

accidental result. The petitioner has thus failed to plead facts establishing the liability defined by the policy.

In *U.S. Mutual Accident Assn.* v. *Barry,* 131 U.S. 100, the insured suffered an internal injury caused by his jumping voluntarily from a platform to the ground, a distance of four or five feet. Recovery was allowed of amounts stipulated by the policy to be paid upon proof of bodily injury "effected through external violent and accidental means." There was evidence from which the jury might have inferred that the insured alighted in a manner not intended, causing a jar or shock of unexpected severity. This Court held that the trial judge correctly left to the jury the question whether the insured jumped or alighted in the manner he intended and properly charged that, if he did not, it might find that the injury was caused by accidental means, pp. 109, 110, 121.

This distinction between accidental external means and accidental result has been generally recognized and applied where the stipulated liability is for injury resulting from an accidental external means. See *Aetna Life Ins. Co.* v. *Brand,* 265 Fed. 6; *Lincoln National Ins. Co.* v. *Erickson,* 42 F. (2d) 997; *Jensma* v. *Sun Life Assur. Co., supra; Order of United Commercial Travelers* v. *Shane,* 64 F. (2d) 55; contra, *Mutual Life Ins. Co.* v. *Dodge,* 11 F. (2d) 486. And injury from sunstroke, when resulting from voluntary exposure by an insured to the sun's rays, even though an accident, see *Ismay, Imrie & Co.* v. *Williamson* [1908] A. C. 437, has been generally held not to have been caused by external accidental means. *Nickman* v. *New York Life Ins. Co.,* 39 F. (2d) 763; *Paist* v. *Aetna Life Ins. Co.,* 54 F. (2d) 393; *Harloe* v. *California State Life Ins. Co.,* 206 Cal. 141; 273 Pac. 560; *Continental Casualty Co.* v. *Pittman,* 145 Ga. 641; 89 S.E. 716; *Semancik* v. *Continental Casualty Co.,* 56 Pa. Super. Ct. 392; see *Elsey* v. *Fidelity & Casualty Co.,* 187 Ind. 447;

120 N.E. 42; *Richards* v. *Standard Accident Ins. Co.*, 58 Utah 622; 200 Pac. 1017; contra, *Continental Casualty Co.* v. *Bruden*, 178 Ark. 683; 11 S.W. (2d) 493; *Lower* v. *Metropolitan Life Ins. Co.*, 111 N.J.L. 426; 168 Atl. 592.

*Affirmed.*

MR. JUSTICE CARDOZO, dissenting.

I am unable to concur in the decision of the Court.

1. A cause does not cease to be violent and external because the insured has an idiosyncratic condition of mind or body predisposing him to injury. *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N.Y. 81; 171 N.E. 914; *Leland* v. *Order of U. C. Travelers*, 233 Mass. 558, 564; 124 N.E. 517; *Collins* v. *Casualty Co.*, 224 Mass. 327; 112 N.E. 634; *Taylor* v. *N.Y. Life Ins. Co.*, 176 Minn. 171; 222 N.W. 912. Under a policy phrased as this one, the insurer may be relieved of liability if the predisposing condition is so acute as to constitute a disease. See cases *supra*. Here the complaint alleges that the idiosyncrasy was not a physical or mental disease, and that it appeared from an autopsy that there was no bodily infirmity or disease which could have been a contributing cause of death. Since the case is here on demurrer, those allegations must be accepted as true. The plaintiff may be unable to prove them at the trial. She should have the opportunity. There has been no failure to "plead facts establishing the liability defined by the policy."

2. Sunstroke, though it may be a disease according to the classification of physicians, is none the less an accident in the common speech of men. *Ismay, Imrie & Co.* v. *Williamson*, [1908] A.C. 437, 439. *Lane* v. *Horn & H. Baking Co.*, 261 Pa. 329; 104 Atl. 615. The suddenness of its approach and its catastrophic nature (*Connally* v. *Hunt Furniture Co.*, 240 N.Y. 83, 87; 147 N.E. 366) have made that quality stand out when thought is uninstructed in the mysteries of science. *Lower* v. *Metropolitan Life*

*Ins. Co.,* 111 N.J.L. 426; 168 Atl. 593, collating the decisions. Violent it is for the same reason, and external because the train of consequences is set in motion by the rays of the sun beating down upon the body, a cause operating from without.

"In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death." Per Loreburn, L. C., in *Ismay, Imrie & Co.* v. *Williamson, supra.*

3. The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." Halsbury, L. C. in *Brintons* v. *Turvey,* L.R. [1905] A.C. 230, 233. Cf. *Lewis* v. *Ocean Accident & Guaranty Corp.,* 224 N.Y. 18, 21; 120 N.E. 56; *Innes* v. *Kynoch,* [1919] A.C. 765, 775. On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company. *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U.S. 167, 174; *Stipcich* v. *Metropolitan Life Ins. Co.,* 277 U.S. 311, 322. The proposed distinction will not survive the application of that test.

When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. So courts of high authority have held. *Lower* v. *Metropolitan Life Ins. Co.,*

*supra* (a case of sunstroke); *Gallagher* v. *Fidelity & Casualty Co.*, 163 App. Div. 556; 148 N.Y.S. 1016; 221 N.Y. 664; 117 N.E. 1067 (sunstroke); *Jensma* v. *Sun Life Assurance Co.*, 64 F. (2d) 457; *Western Commercial Travelers' Assn.* v. *Smith*, 85 Fed. 401; *Mutual Life Ins. Co.* v. *Dodge*, 11 F. (2d) 486; *Lewis* v. *Iowa State Traveling Men's Assn.*, 248 Fed. 602.[1] So the holder of this policy might reasonably assume.

If he had thought about the subject, he might have had his impressions fortified by the ruling of the House of Lords that a workman who suffers a heat-stroke has a claim for relief under the Workmen's Compensation Act. *Ismay, Imrie & Co.* v. *Williamson, supra.* The British Act (6 Edw. 7, c. 58, § 1) gives compensation for personal injury "by accident" arising out of and in the course of the employment. Injury by heat-stroke was held to be injury "by accident." The result would hardly have been different, certainly one insured would not have looked for any difference, if for the phrase "injury by accident" the lawmakers had substituted the words injury "by means of accident," or injury by accidental means.

The principle that should govern the interpretation of the policy in suit was stated with clarity and precision by Sanborn, J., in a case quoted in the margin.[2]

The insured did not do anything which in its ordinary consequences was fraught with danger. The allegations

[1] The decisions are collated in 17 A.L.R. 1197, with the comment that by the weight of authority sunstroke suffered unexpectedly is within the coverage of a policy insuring against injury by external, violent and accidental means. Compare *Continental Casualty Co.* v. *Bruden*, 178 Ark. 683; 11 S.W. (2d) 493; *Higgins* v. *Midland Casualty Co.*, 281 Ill. 431; 118 N.E. 11; *Elsey* v. *Fidelity & Casualty Co.*, 187 Ind. 447; 120 N.E. 42; *Continental Casualty Co.* v. *Clark*, 70 Okla. 187; 173 Pac. 453; *Bryant* v. *Continental Casualty Co.*, 107 Tex. 582; 182 S.W. 673; *Richards* v. *Standard Accident Ins. Co.*, 58 Utah 622; 200 Pac. 1017.

of the complaint show that he was playing golf in the same conditions in which he had often played before. The heat was not extraordinary; the exertion not unusual. By misadventure or accident, an external force which had hitherto been beneficent, was transformed into a force of violence, as much so as a stroke of lightning. The opinion of the court concedes that death "from sunstroke, when resulting from voluntary exposure to the sun's rays," is "an accident." Why? To be sure the death is not intentional, but that does not make it an "accident" as the word is commonly understood, any more than death from indigestion or pneumonia. If there was no accident in the means, there was none in the result, for the two were inseparable. No cause that reasonably can be styled an accident intervened between them. The process of causation was unbroken from exposure up to death. There was an accident throughout, or there was no accident at all.

The judgment should be reversed.

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[2] *Western Commercial Travelers' Assn.* v. *Smith, supra,* p. 405: "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means."

The principle thus formulated has been accepted in many of the decisions cited in footnote 1, *supra.*

# NEBBIA *v.* NEW YORK.

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, NEW YORK.

No. 531. Argued December 4, 5, 1933.—Decided March 5, 1934.

1. As a basis for attacking a discriminatory regulation of prices, under the equal protection clause of the Fourteenth Amendment, the party complaining must show that he himself is adversely affected by it. P. 520.
2. A regulation fixing the price at which storekeepers may buy milk from milk dealers, at a higher figure than that allowed dealers in buying from producers, and allowing dealers a higher price than it allows storekeepers in sales to consumers, *held* consistent with the equal protection clause of the Fourteenth Amendment, because of the distinctions between the two classes of merchants. P. 521.
3. As part of a plan to remedy evils in the milk industry which reduced the income of the producer below cost of production and threatened to deprive the community of an assured supply of milk, a New York statute sought to prevent destructive price-cutting by stores which, under the peculiar circumstances, were able to buy at much lower prices than the larger distributors and to sell without incurring delivery costs; and, to that end, an order of a state board acting under the statute fixed a minimum price of ten cents per quart for sales by distributors to consumers and of nine cents per quart for sales by stores to consumers. *Held* that, as applied to a storekeeper, the regulation could not be adjudged in conflict with the due process clause of the Fourteenth Amendment, since, in view of the facts set forth in the opinion, it appeared not to be unreasonable or arbitrary or without relation to the purpose of the legislation. Pp. 530 *et seq.*
4. The use of private property and the making of private contracts are, as a general rule, free from governmental interference; but they are subject to public regulation when the public need requires. P. 523.
5. The due process clause of the Fourteenth Amendment conditions the exertion of regulatory power by requiring that the end shall be accomplished by methods consistent with due process, that the regulation shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. P. 525.

6. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. P. 525.
7. The power of a State to regulate business in the public interest extends to the control and regulation of prices for which commodities may be sold, where price regulation is a reasonable and appropriate means of rectifying the evil calling for the regulation. Pp. 531 *et seq.*
8. There is no principle limiting price regulation to businesses which are public utilities, or which have a monopoly or enjoy a public grant or franchise. *Munn* v. *Illinois*, 94 U.S. 113. P. 531.
9. To say that property is "clothed with a public interest," or an industry is "affected with a public interest," means that the property or the industry, for adequate reason, is subject to control for the public good. Pp. 531–536.
10. There is no closed class or category of businesses affected with a public interest; and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. P. 536.
11. Decisions denying the power to control prices in businesses found not to be "affected with a public interest" or "clothed with a public use" must rest finally upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. P. 536.
12. So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. P. 537.
13. The legislature is primarily the judge of the necessity of such an enactment; every possible presumption is in favor of its validity, and though the court may think the enactment unwise, it may not be annulled unless palpably in excess of legislative power. P. 537.

14. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices,—reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. P. 538.
15. This is especially clear where the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. P. 538.
16. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. P. 539.
17. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. P. 539.

262 N.Y. 259; 186 N.E. 694, affirmed.

The New York Court of Appeals affirmed the conviction of a storekeeper for selling milk at a price below that allowed by an order promulgated by a state board pursuant to statutory authority. The appeal here is from the judgment of the County Court entered on remittitur.

*Mr. Arthur E. Sutherland, Jr.*, with whom *Mr. Arthur E. Sutherland* was on the brief, for appellant.

Statutes similar to this have repeatedly been condemned under the Fourteenth Amendment for fixing prices of common commodities or services. Almost identical was *Williams* v. *Standard Oil Co.*, 278 U.S. 235, involving a Tennessee statute which attempted to do for gasoline exactly what the statute here attempts to do for milk. The difference between the preambles of the two Acts is of rhetoric, not of substance. The only important point of difference lies in the clause of the present Act

which purports to end the powers of the Milk Control Board on March 31, 1934.

In several important cases construing the Fourteenth Amendment, this Court has selected the dairy and the grocery as among the best possible examples of essentially private businesses, to which the traditional "public utility" concept can not be applied. Cf. *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, where, in speaking of the ice business, it was said: "It is a business as essentially private in its nature as the busines of *the grocer, the dairyman,* the butcher, the baker, the shoemaker, or the tailor."

The Milk Control Law, here under discussion, was drawn with the *Ice* case before the author, for the preamble contains quotations from the opinion in that case. In an effort to escape from the effect of that decision, the Legislature did not start out with a requirement that all new milk dealers obtain a "certificate of convenience and necessity." Instead, it proceeded to fix the minimum price of milk as though the supply were less than is actually the case. Obviously some persons, like Nebbia, will not be able to sell at the heightened price, inasmuch as there is an oversupply of milk for sale. To such a dealer the Legislature gives the alternative of voluntarily ceasing sales, or being obliged to cease under penal sanctions or injunctive process, or by being denied a license to carry on business. If enough people can thus be put out of the milk business, the effect will be the same as though a "certificate of convenience and necessity" were exacted as a condition of continuing to sell milk. The difference is one of form only. Under the *Ice* case, the "public utility" concept which the Legislature has attempted to apply to the New York milk industry, is unconstitutional.

In *Adkins* v. *Children's Hospital,* 261 U.S. 525, the method of fixing the minima was strikingly like the

method here. The opinion emphasized as one of the principal faults of the statute that "the declared basis" of the minimum wage "is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals."

Similarly in the case at bar, the laudable desire to see the dairy farmer happier and more prosperous has brought the New York Legislature to say that, regardless of the retail value of milk as fixed by oversupply and limited demand, the dealer must sell to his customers at a fixed minimum, or else not sell.

If he does sell, under § 312 (c) a dealer must "give fair and reasonable effect to the intent" of the legislature "that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers." If he fails to live up to this vague standard, the dealer may have his license suspended or be proceeded against civilly and criminally.

In the *Adkins* case, this Court further said: "Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity and not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed."

In the case at bar, the New York Legislature has created a Board of three men to attempt to determine what prices for milk will yield the producer and dealer a reasonable return, and insure a supply of good milk; and makes underselling this price a jail offense.

Price or wage fixing by state statute has been found invalid in *Wolff Packing Co.* v. *Industrial Court,* 262 U.S.

522 (Kansas statute regulating wages in the meat packing business during a declared "emergency"); *Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1 (Minnesota statute forbidding a purchaser of dairy products to pay a higher price for the products in one locality than he paid in another); *Tyson Bros.* v. *Banton,* 273 U.S. 418 (New York statute limiting the charge for theatre ticket brokerage to 50¢); *Ribnik* v. *McBride,* 277 U.S. 350 (New Jersey statute regulating rates charged by an employment agency).

The Milk Control Law, as applied by the order of the Board, discriminates unfairly against Nebbia as a "cash-and-carry" dealer in milk. Having paid 8¢ per quart and 5¢ per pint to the dealer who supplied him, he was obliged to resell over his counter at not less than 9¢ per quart and 6¢ per pint. Some rival in trade, having no store, but a wagon and delivery route, had no lower limit set for the price at which he was obliged to buy his milk; and was allowed to sell pints of milk as low as Nebbia, with delivery to the customer's door as a bonus. When delivering a quart of milk, the route dealer had to charge only a cent more than Nebbia, a most inadequate differential.

The unquestioned surplus of wholesome milk in New York State results in competition to obtain buyers. Nebbia is obliged to sell as cheaply as possible to hold his business. This, of course, makes milk more accessible to the buying public in a time of dearth. Nebbia was obliged by the Board to pay 8¢ a quart to the dealer who supplied him, and was obliged by pressure of competition caused by surplus milk to sell at 9¢ a quart. The practical effect is to limit his "mark-up" or gross profit per quart to one cent. He is equally limited on purchases and sales of pints, and it is noteworthy that Nebbia and the route dealer each had to charge 6¢ per pint for milk; but the route dealer is allowed to give delivery service

as a bonus. Nebbia, with a "cash and carry" business, can not legally give bread with milk to equalize this advantage.

Under § 301 of the Act, if Nebbia could conceivably buy his milk from a producer (i.e., farmer) who delivers milk only to a dealer, the law might be construed to allow him to pay the producer whatever price they agreed on, provided Nebbia, as required by § 312–c, would "give fair and reasonable effect to . . . the intent of the legislature that . . . the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers." If Nebbia failed in this attempt to follow an indefinite standard, he could be jailed, fined, enjoined, or have his license suspended, under § 312–c of the Milk Control Law. See *International Harvester Co.* v. *Kentucky,* 234 U.S. 216; *United States* v. *Cohen Grocery Co.,* 255 U.S. 81.

The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment.

The Fourteenth Amendment was not adopted in fair weather; nor was its operation intended to be limited to times of general content, when no State is pressed to abridge the liberty and property of the individual. Surely the protection of the Constitution does not cease when the need for it is greatest! *Ex parte Milligan,* 4 Wall. 2, 120; *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 88; *Sterling* v. *Constantin,* 287 U.S. 378

*Wilson* v. *New,* 243 U.S. 332, is an illustration of the power of Congress to regulate common carriers by rail in interstate commerce. This Court has often pointed out that power to regulate the affairs of the traditional "public utility" does not include power to fix prices or rates in the "common callings" such as those of the dairymen, the grocer, the butcher and the baker.

The Housing cases, *Block* v. *Hirsh*, 256 U.S. 135; *Brown Holding Co.* v. *Feldman*, 256 U.S. 170, undoubtedly went to the very limit of the police power. They were based upon a shortage of houses and a multitude of persons anxious for housing, which allowed a grasping landlord to victimize the tenant for his own profit. The statutes which penalize forestalling, engrossing, usury, and combining to restrain trade express the same policy. At the opposite extreme is the statute now before this Court. With the State of New York flooded with wholesome milk, the Legislature and Milk Control Board purport to fine and jail anyone who sells it to the public below the price set by order. There is a certain grammatical symmetry in the statement that if a Legislature can provide for fixing a maximum price for houses it can provide for fixing a minimum price for milk; but the resemblance between the two is purely verbal.

In *Wolff Packing Co.* v. *Industrial Court*, 262 U.S. 522, the Kansas Legislature had declared the meat business to be affected with a public interest. It was argued that the packing business was so affected, the existence of an emergency was urged upon this Court, and the cases said to uphold the "emergency doctrine," *Wilson* v. *New*, 243 U.S. 332; *Block* v. *Hirsh*, 256 U.S. 135; and *Brown Holding Co.* v. *Feldman*, 256 U.S. 170, were all cited as authorities for upholding the Kansas legislation. But the Court held the statute unconstitutional. The opinion by Chief Justice Taft includes these words, which might well have been written of the case at bar: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." The Chief Justice then referred to certain businesses which he had previously discussed, which "have come to

hold such a peculiar relation to the public that" some government regulation is superimposed upon them, and significantly he lists the *Housing* case, *Block* v. *Hirsh,* 256 U.S. 135, as an example of such a business. Of such businesses he says: "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product, and transferred the work from the shop with few employees to the great plant with many. . . . But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods."

The milk situation in New York is at the pole opposite to monopoly. A great abundance of wholesome milk is for sale by a multitude of dealers and storekeepers, of whom appellant is one. The statute and order seek arbitrarily to fix prices for this milk at a level higher than the natural abundance would indicate. Such regulation is unconstitutional, and can not stand.

*Mr. Henry S. Manley,* with whom *Mr. John J. Bennett, Jr.,* Attorney General of New York, and *Mr. Henry Epstein,* Solicitor General, were on the brief, for appellee.

The necessity for any particular exercise of the police power is a matter to be determined in the first instance by the legislature. In the present case such a legislative determination has been made and no reason appears why it should be disturbed.

That the period 1930–1933 has brought this Nation and every part of it some unprecedented problems is of course

known to the Supreme Court of the United States. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248, 260; dissent, *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 306.

The Milk Control Law was designed and enacted for the purpose of regulating the price of milk in the State of New York temporarily and during a serious emergency. After a long and exhaustive investigation of conditions in the milk industry in the State, the Legislature found and determined that such an emergency existed. It is within the power of the Legislature to make this finding of fact, which is at least highly persuasive.

It being accepted as a fact that a public emergency exists, and that the legislation is of a temporary nature, greater latitude than usual is permissible. *Wilson* v. *New,* 243 U.S. 332; *Block* v. *Hirsh,* 256 U.S. 135, 157; *Levy Leasing Co.* v. *Siegel,* 258 U.S. 242, 245; *People ex rel. Durham R. Corp.* v. *La Fetra,* 230 N.Y. 429, 445.

The temporary and emergent character of the legislation being accepted, it is well within the scope of the police power. *People ex rel. Durham R. Corp.* v. *La Fetra, supra; People* v. *Perretta,* 253 N.Y. 305, 309.

See also *Barbier* v. *Connolly,* 113 U.S. 27; *Manigault* v. *Springs,* 199 U.S. 473, 480; *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U.S. 561, 592; *Noble State Bank* v. *Haskell,* 219 U.S. 104; *Eubank* v. *Richmond,* 226 U.S. 137, 142, 143; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 558; *Sligh* v. *Kirkwood,* 237 U.S. 52, 59; *Hall* v. *Geiger-Jones Co.,* 242 U.S. 539, 548; *Miller* v. *Schoene,* 276 U.S. 272, 279–280; *Highland* v. *Russel Car & S. P. Co.,* 279 U.S. 254, 260–262; *United States* v. *Macintosh,* 283 U.S. 605, 622.

Undoubtedly self-regulation of business through free competition is a good worthy of considerable sacrifice, but it is not always the preponderant value. *Stephenson* v.

*Binford,* 287 U.S. 251, 274. It has been said that the Constitution is not "the partisan of a particular set of ethical or economical opinions." Mr. Justice Holmes in *Otis* v. *Parker,* 187 U.S. 606, 609. "We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power." *Noble State Bank* v. *Haskell,* 219 U.S. 104, 110. And no matter how great a value is set on free competition, some care must be taken not to strive for "a mere delusive liberty." *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360–361. Distinguishing: *Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1; *Williams* v. *Standard Oil Co.,* 278 U.S. 235; *New State Ice Co.* v. *Liebmann,* 285 U.S. 262.

The Legislature of New York has found the facts relative to the milk industry. The enactment itself expresses the legislative judgment as to the appropriate remedy.

The considerations which were decisive as to the ice business of Oklahoma are none of them applicable to the business of milk distribution in New York State; the legislative finding that the latter is "a business affecting the public health and interest" has abundant support; it is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

Fixing minimum prices to consumers is a common form of utility regulation. *Munn* v. *Illinois,* 94 U.S. 113; *Mobile* v. *Yuille,* 2 Ala. 140; *Guillotte* v. *New Orleans,* 12 La. Ann. 432; *Slaughter House Cases,* 16 Wall. 36; *Great Northern Util. Co.* v. *Pub. Serv. Comm'n,* 88 Mont. 180; *Public Service Comm'n* v. *Utilities Co.,* 289 U.S. 130; *South Glens Falls* v. *Pub. Serv. Comm'n,* 225 N.Y. 216, 222–223.

Perhaps the fixing of maximum prices to be charged by those engaged in a business carries with it some obligation to fix minimum prices; if the profits to be had in a business are limited by law, the Government should protect from destructive competition those whose property is risked in the business.

As seen by the Legislature through the report of its committee, New York had more milk than the available fluid markets could take (in the Spring and early Summer a double supply), nearly all produced under conditions that made it available for the fluid markets and competing for the premium to be obtained there. The distributors, down to the smallest store, carried on a brisk competition, but at the farmers' expense. Falling prices in the cities and villages, secret discounts and free milk and other price concessions, promptly were reflected in lower prices to farmers. In the four years from March 1929 to March 1933, the retail price of milk fell 37%, but the price paid to the farmers fell 61%. The dealers' margin was decreased only 17%.

All agriculture is notoriously difficult to control through the law of supply and demand. This is true for a number of reasons, not the least important being that a farm is also a home, and a farmer and his family will cling to the soil regardless of profit. Dairying is a branch of agriculture, and it is a biological industry, the " cow cycle " ordinarily being fifteen years from peak to peak. The dairy industry will destroy itself, producing below the cost of production with no more manifestation of logical control than a herd of buffalo plunging over a cliff.

Milk is an ideal disease carrier and has need to be produced for the fluid market under safeguards which cost money and which can not be maintained when the milk check is all absorbed in the feed bill. Milk is a perishable food and the presence of excess milk in a city market

under ordinary conditions of human cupidity is a health menace.

The business of receiving and distributing milk requires a considerable investment of capital and its operating expenses are relatively constant per unit of sale. It is a natural monopoly of organization handling an essential commodity, and if it were compelled to accept its even share of such price reductions as those which occurred in the period 1929–1933, or were subjected to stress through the reverse condition of milk shortage, its tendency to monopoly would rapidly be realized and would be attended by various public distresses.

Primarily what the Legislature desired to accomplish was to save the dairy industry from destruction, by giving it a price for milk nearer to the cost of production. The direct approach to this problem was by setting a minimum price to be paid by distributors to producers.

Perhaps this simple approach would have been effective. The original form of the bill, which contained no provision for fixing minimum prices to be paid by consumers, evidently intended this method of approach. Somebody must have been strongly impressed by the desirability of ending the destructive competition at the place where it was being waged, and so the minimum-price-to-the-consumer provision was added.

We believe it was a wise addition, as has been demonstrated by the prompt success which attended its original use by the Board. At least it is probable that retail prices of milk can not be raised in line with other commodities without either the exercise of this power or else the usual strikes and disorders.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. John W. Bricker,* Attorney General of Ohio, and *Charles G. Williams,* and *Isadore Topper,* Assistant Attorneys General; *Messrs. William A. Stevens,*

Attorney General of New Jersey, and *Robert Peacock,* Assistant Attorney General; and *Messrs. Warren B. Burrows,* Attorney General of Connecticut, *Ernest L. Averill,* Deputy Attorney General, and *H. Roger Jones* and *William H. Nelson,* Assistant Attorneys General.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Legislature of New York established, by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things, to "fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.[1]

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

[1] *People* v. *Nebbia,* 262 N.Y. 259; 186 N.E. 694.

On March 10, 1932, the senate and assembly resolved "That a joint Legislative committee is hereby created . . . to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material, a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings, with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

In part those conclusions are:

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase

the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include: a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets; and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-

shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin.[2]

[2] Chapter 158 of the Laws of 1933 added a new Article (numbered 25) to the Agriculture and Markets Law. The reasons for the enactment are set forth in the first section (§ 300). So far as material they are: that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices exist in the production, sale and distribution of milk and milk products, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled; these conditions are a menace to the public health, welfare and reasonable comfort; the production and distribution of milk is a paramount industry upon which the prosperity of

Section 312 (e), on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form

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the state in a great measure depends; existing economic conditions have largely destroyed the purchasing power of milk producers for industrial products, have broken down the orderly production and marketing of milk, and have seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. The danger to public health and welfare consequent upon these conditions is declared to be immediate and to require public supervision and control of the industry to enforce proper standards of production, sanitation and marketing.

The law then (§ 301) defines the terms used; declaring, *inter alia*, that "milk dealer" means any person who purchases or handles milk within the state, for sale in the state, or sells milk within the state except when consumed on the premises where sold; and includes within the definition of "store" a grocery store.

By § 302 a state Milk Control Board is established; and by § 303 general power is conferred upon that body to supervise and regulate the entire milk industry of the state, subject to existing provisions of the public health law, the public service law, the state sanitary code, and local health ordinances and regulations; to act as arbitrator or mediator in controversies arising between producers and dealers, or groups within those classes, and to exercise certain special powers to which reference will be made.

The Board is authorized to promulgate orders and rules which are to have the force of law (§ 304); to make investigations (§ 305); to enter and inspect premises in which any branch of the industry is conducted, and examine the books, papers and records of any person concerned in the industry (§ 306); to license all milk dealers and suspend or revoke licenses for specified causes, its action in these respects being subject to review by certiorari (§ 308), and to require licensees to keep records (§ 309) and to make reports (§ 310).

A violation of any provision of Article 25 or of any lawful order of the Board is made a misdemeanor (§ 307).

By § 312 it is enacted (a): "The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk . . . and be most in the public interest. The board shall take into considera-

. . . it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price . . ., and no method or device shall be lawful whereby milk is bought or sold . . . at a price less or more than such price . . . whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise . . ."

*First.* The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and

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tion all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer." (b) After such investigation the board shall by official order fix minimum and maximum wholesale and retail prices to be charged by milk dealers to consumers, by milk dealers to stores for consumption on the premises or for resale to consumers, and by stores to consumers for consumption off the premises where sold. It is declared (c) that the intent of the law is that the benefit of any advance in price granted to dealers shall be passed on to the producer, and if the board, after due hearing, finds this has not been done, the dealer's license may be revoked, and the dealer may be subjected to the penalties mentioned in the Act. The board may (d) after investigation fix the prices to be paid by dealers to producers for the various grades and classes of milk.

Subsection (e), on which the prosecution in the present case is founded, is quoted in the text.

Alterations may be made in existing orders after hearing of the interested parties (f) and orders made are subject to review on certiorari. The board (§ 319) is to continue with all the powers and duties specified until March 31, 1934, at which date it is to be deemed abolished. The Act contains further provisions not material to the present controversy.

five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the quart and six cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors, is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk. Compare *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89; *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563; *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527.

*Second.* The more serious question is whether, in the light of the conditions disclosed, the enforcement of § 312 (e) denied the appellant the due process secured to him by the Fourteenth Amendment.

Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 [3] and subsequent statutes [4] have been carried into the gen-

[3] Laws of 1862, Chap. 467.

[4] Laws of 1893, Chap. 338. Laws of 1909, Chap. 9; Consol. Laws, Chap. 1.

eral codification known as the Agriculture and Markets Law.[5] A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control.[6] The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (§§ 46, 47, 55, 72–88). Proprietors of milk-gathering-stations or processing plants are subject to regulation (§ 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (§§ 57, 57a, 252). In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry.[7] The challenged amend-

[5] Laws of 1927, Chap. 207; Cahill's Consolidated Laws of New York, 1930, Chap. 1.

[6] Many of these regulations have been unsuccessfully challenged on constitutional grounds. See *People* v. *Cipperly,* 101 N.Y. 634; 4 N.E. 107; *People* v. *Hill,* 44 Hun 472; *People* v. *West,* 106 N.Y. 293; 12 N.E. 610; *People* v. *Kibler,* 106 N.Y. 321; 12 N.E. 795; *People* v. *Hills,* 64 App. Div. 584; 72 N.Y.S. 340; *People* v. *Bowen,* 182 N.Y. 1; 74 N.E. 489; *Lieberman* v. *Van de Carr,* 199 U.S. 552; *St. John* v. *New York,* 201 U.S. 633; *People* v. *Koster,* 121 App. Div. 852; 106 N.Y.S. 793; *People* v. *Abramson,* 208 N.Y. 138; 101 N.E. 849; *People* v. *Frudenberg,* 209 N.Y. 218; 103 N.E. 166; *People* v. *Beakes Dairy Co.,* 222 N.Y. 416; 119 N.E. 115; *People* v. *Teuscher,* 248 N.Y. 454; 162 N.E. 484; *People* v. *Perretta,* 253 N.Y. 305; 171 N.E. 72; *People* v. *Ryan,* 230 App. Div. 252; 243 N.Y.S. 644; *Mintz* v. *Baldwin,* 289 U.S. 346.

[7] See Cahill's Consolidated Laws of New York, 1930, and Supplements to and including 1933: Chap. 21, §§ 270–274; Chap. 41, §§ 435, 438, 1740, 1764, 2350–2357; Chap. 46, §§ 6–a, 20, 21.

ment of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights [8] nor contract rights [9] are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation, which embraces every thing within the territory of a State . . . all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, . . . are component parts of this mass." [10]

Justice Barbour said for this court:

". . . it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated.

[8] *Munn* v. *Illinois*, 94 U.S. 113, 124, 125; *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 566; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351; and see the cases cited in notes 16–23, *infra*.

[9] *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591; *Atlantic Coast Line* v. *Riverside Mills*, 219 U.S. 186, 202; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U.S. 549, 567; *Stephenson* v. *Binford*, 287 U.S. 251, 274.

[10] *Gibbons* v. *Ogden*, 9 Wheat. 1, 203.

That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police,* are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive." [11]

And Chief Justice Taney said upon the same subject:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States." [12]

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power,[13] as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be

[11] *New York* v. *Miln,* 11 Pet. 102, 139.

[12] *License Cases,* 5 How. 504, 583.

[13] *United States* v. *Dewitt,* 9 Wall. 41; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196, 215.

imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity,[14] and the Fourteenth, as respects state action,[15] do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community.[16] The state may control the

[14] *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 228–229.

[15] *Barbier* v. *Connolly,* 113 U.S. 27, 31; *Chicago, B. & Q. R. Co.* v. *Drainage Comm'rs,* 200 U.S. 561, 592.

[16] *Clark* v. *Nash,* 198 U.S. 361; *Strickley* v. *Highland Boy Mining Co.,* 200 U.S. 527.

use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location,[17] or their use for certain kinds of advertising; [18] may in certain circumstances authorize encroachments by party walls in cities;[19] may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety;[20] or may establish zones within which certain types of buildings or businesses are permitted and others excluded.[21] And although the Fourteenth Amendment extends protection to aliens as well as citizens,[22] a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.[23]

Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process.[24] These measures not

[17] *Cusack Co.* v. *Chicago,* 242 U.S. 526; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U.S. 269.

[18] *Packer Corp.* v. *Utah,* 285 U.S. 105.

[19] *Jackman* v. *Rosenbaum Co.,* 260 U.S. 22.

[20] *Fischer* v. *St. Louis,* 194 U.S. 361; *Welch* v. *Swasey,* 214 U.S. 91; *Hadacheck* v. *Sebastian,* 239 U.S. 394; *Reinman* v. *Little Rock,* 237 U.S. 171.

[21] *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Zahn* v. *Board of Public Works,* 274 U.S. 325; *Gorieb* v. *Fox,* 274 U.S. 603.

[22] *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369.

[23] *Terrace* v. *Thompson,* 263 U.S. 197; *Webb* v. *O'Brien,* 263 U.S. 313.

[24] Forbidding transmission of lottery tickets, *Lottery Case,* 188 U.S. 321; transportation of prize fight films, *Weber* v. *Freed,* 239 U.S. 325; the shipment of adulterated food, *Hipolite Egg Co.* v. *United States,* 220 U.S. 45; transportation of women for immoral purposes, *Hoke* v. *United States,* 227 U.S. 308; *Caminetti* v. *United States,* 242 U.S. 470; transportation of intoxicating liquor, *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U.S. 311; requiring the public weigh-

only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.[25]

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one

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ing of grain, *Merchants Exchange* v. *Missouri,* 248 U.S. 365; regulating the size and weight of loaves of bread, *Schmidinger* v. *Chicago,* 226 U.S. 578; *Petersen Baking Co.* v. *Bryan,* 290 U.S. 570; regulating the size and character of packages in which goods are sold, *Armour & Co.* v. *North Dakota,* 240 U.S. 510; regulating sales in bulk of a stock in trade, *Lemieux* v. *Young,* 211 U.S. 489; *Kidd, Dater & Price Co.* v. *Musselman Grocer Co.,* 217 U.S. 461; sales of stocks and bonds, *Hall* v. *Geiger-Jones Co.,* 242 U.S. 539; *Merrick* v. *Halsey & Co.,* 242 U.S. 568; requiring fluid milk offered for sale to be tuberculin tested, *Adams* v. *Milwaukee,* 228 U.S. 572; regulating sales of grain by actual weight, and abrogating exchange rules to the contrary, *House* v. *Mayes,* 219 U.S. 270; subjecting state banks to assessments for a state depositors' guarantee fund, *Noble State Bank* v. *Haskell,* 219 U.S. 104.

[25] Prescribing hours of labor in particular occupations, *Holden* v. *Hardy,* 169 U.S. 366; *B. & O. R. Co.* v. *I.C.C.,* 221 U.S. 612; *Bunting* v. *Oregon,* 243 U.S. 426; prohibiting child labor, *Sturges & Burn Co.* v. *Beauchamp,* 231 U.S. 320; forbidding night work by women, *Radice* v. *New York,* 264 U.S. 292; reducing hours of labor for women, *Muller* v. *Oregon,* 208 U.S. 412; *Riley* v. *Massachusetts,* 232 U.S. 671; *Miller* v. *Wilson,* 236 U.S. 373; fixing the time for payment of seamen's wages, *Patterson* v. *Bark Eudora,* 190 U.S. 169; *Strathearn S.S. Co.* v. *Dillon,* 252 U.S. 348; of wages of railroad employes, *St. Louis, I. M. & St. P. Ry. Co.* v. *Paul,* 173 U.S. 404; *Erie R. Co.* v. *Williams,* 233 U.S. 685; regulating the redemption of store orders issued for wages, *Knoxville Iron Co.* v. *Harbison,* 183 U.S. 13; *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U.S. 224; regulating the assignment of wages, *Mutual Loan Co.* v. *Martell,* 222 U.S. 225; requiring payment for coal mined on a fixed basis other than that usually practiced, *McLean* v. *Arkansas,* 211 U.S. 539; *Rail & River Coal Co.* v. *Yaple,* 236 U.S. 338; establishing a system of compulsory workmen's compensation, *New York Central R. Co.* v. *White,* 243 U.S. 188; *Mountain Timber Co.* v. *Washington,* 243 U.S. 219.

pleases. Certain kinds of business may be prohibited; [26] and the right to conduct a business, or to pursue a calling, may be conditioned.[27] Regulation of a business to prevent waste of the state's resources may be justified.[28] And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.[29]

[26] Sales of stock or grain on margin, *Booth* v. *Illinois,* 184 U.S. 425; *Brodnax* v. *Missouri,* 219 U.S. 285; *Otis* v. *Parker,* 187 U.S. 606; the conduct of pool and billiard rooms by aliens, *Clarke* v. *Deckebach,* 274 U.S. 392; the conduct of billiard and pool rooms by anyone, *Murphy* v. *California,* 225 U.S. 623; the sale of liquor, *Mugler* v. *Kansas,* 123 U.S. 623; the business of soliciting claims by one not an attorney, *McCloskey* v. *Tobin,* 252 U.S. 107; manufacture or sale of oleomargarine, *Powell* v. *Pennsylvania,* 127 U.S. 678; hawking and peddling of drugs or medicines, *Baccus* v. *Louisiana,* 232 U.S. 334; forbidding any other than a corporation to engage in the business of receiving deposits, *Dillingham* v. *McLaughlin,* 264 U.S. 370, or any other than corporations to do a banking business, *Shallenberger* v. *First State Bank,* 219 U.S. 114.

[27] Physicians, *Dent* v. *West Virginia,* 129 U.S. 114; *Watson* v. *Maryland,* 218 U.S. 173; *Crane* v. *Johnson,* 242 U.S. 339; *Hayman* v. *Galveston,* 273 U.S. 414; dentists, *Douglas* v. *Noble,* 261 U.S. 165; *Graves* v. *Minnesota,* 272 U.S. 425; employment agencies, *Brazee* v. *Michigan,* 241 U.S. 340; public weighers of grain, *Merchants Exchange* v. *Missouri,* 248 U.S. 365; real estate brokers, *Bratton* v. *Chandler,* 260 U.S. 110; insurance agents, *La Tourette* v. *McMaster,* 248 U.S. 465; insurance companies, *German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389; the sale of cigarettes, *Gundling* v. *Chicago,* 177 U.S. 183; the sale of spectacles, *Roschen* v. *Ward,* 279 U.S. 337; private detectives, *Lehon* v. *Atlanta,* 242 U.S. 53; grain brokers, *Chicago Board of Trade* v. *Olsen,* 262 U.S. 1; business of renting automobiles to be used by the renter upon the public streets, *Hodge Co.* v. *Cincinnati,* 284 U.S. 335.

[28] *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210. Compare *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8, 21–22.

[29] Contracts of carriage, *Atlantic Coast Line* v. *Riverside Mills,* 219 U.S. 186; agreements substituting relief or insurance payments

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another,[30] by giving trade inducements to purchasers,[31] and by other forms of price discrimination.[32] The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies,[33] which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees.[34] Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effec-

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for actions for negligence, *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U.S. 549; affecting contracts of insurance, *Orient Ins. Co.* v. *Daggs,* 172 U.S. 557; *Whitfield* v. *Aetna Life Ins. Co.,* 205 U.S. 489; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U.S. 71; *Hardware Dealers Mut. F. I. Co.* v. *Glidden Co.,* 284 U.S. 151; contracts for sale of real estate, *Selover, Bates & Co.* v. *Walsh,* 226 U.S. 112; contracts for sale of farm machinery, *Advance-Rumely Co.* v. *Jackson,* 287 U.S. 283; bonds for performance of building contracts, *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.,* 291 U.S. 352.

[30] *Central Lumber Co.* v. *South Dakota,* 226 U.S. 157.

[31] *Rast* v. *Van Deman & Lewis Co.,* 240 U.S. 342.

[32] *Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245.

[33] State statutes: *Smiley* v. *Kansas,* 196 U.S. 447; *National Cotton Oil Co.* v. *Texas,* 197 U.S. 115; *Waters-Pierce Oil Co.* v. *Texas (No. 1),* 212 U.S. 86; *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322; *Grenada Lumber Co.* v. *Mississippi,* 217 U.S. 433; *International Harvester Co.* v. *Missouri,* 234 U.S. 199.

Federal statutes: *United States* v. *Joint Traffic Assn.,* 171 U.S. 505, 559, 571–573; *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 228–9; *Northern Securities Co.* v. *United States,* 193 U.S. 197, 332; *United Shoe Mach. Corp.* v. *United States,* 258 U.S. 451, 462–464.

[34] *Slaughter House Cases,* 16 Wall. 36; *Conway* v. *Taylor's Executor,* 1 Black 603; *Crowley* v. *Christensen,* 137 U.S. 86.

tively although indirectly control the prices charged by them.[35]

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

[35] *Madera Water Works* v. *Madera*, 228 U.S. 454; *Jones* v. *Portland*, 245 U.S. 217; *Green* v. *Frazier*, 253 U.S. 233; *Standard Oil Co.* v. *Lincoln*, 275 U.S. 504.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing

maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois,* 94 U.S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly." This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's *De Portibus Maris,* to the effect that when private property is "affected with a public interest, it ceases to be *juris privati* only"; but the court proceeded at once to define what it understood by

the expression, saying: " Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large " (p. 126). Thus understood, " affected with a public interest " is the equivalent of " subject to the exercise of the police power "; and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

" From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation." [36]

In the further discussion of the principle it is said that when one devotes his property to a use, " in which the public has an interest," he in effect " grants to the public an interest in that use " and must submit to be controlled for the common good. The conclusion is that if Munn and Scott wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only

[36] As instances of Acts of Congress regulating private businesses consistently with the due process guarantee of the Fifth Amendment the court cites those fixing rates to be charged at private wharves, by chimney-sweeps and hackneys, cartmen, wagoners and draymen in the District of Columbia (p. 125).

to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

In the same volume the court sustained regulation of railroad rates.[37] After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers in order that they may better serve the public, it was said that they are engaged in employment "affecting the public interest," and therefore, under the doctrine of the *Munn* case, subject to legislative control as to rates. And in another of the group of railroad cases then heard[38] it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.

The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, *Munn* v. *Illinois, supra.* Nor is it the enjoyment of a monopoly; for in *Brass* v.

[37] *Chicago, B. & Q. R. Co.* v. *Iowa,* 94 U.S. 155. It will be noted that the emphasis is here reversed, and the carrier is said to be in a business affecting the public, not that the business is somehow affected by an interest of the public.

[38] *Peik* v. *C. & N. W. Ry. Co.,* 94 U.S. 164.

*North Dakota,* 153 U.S. 391, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.

In *German Alliance Insurance Co.* v. *Lewis,* 233 U.S. 389, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates. The court was at pains to point out that it was impossible to lay down any sweeping and general classification of businesses as to which price-regulation could be adjudged arbitrary or the reverse.

Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. *Griffith* v. *Connecticut,* 218 U.S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U.S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature,

are not a deprivation of due process. *Frisbie* v. *United States,* 157 U.S. 160; *Capital Trust Co.* v. *Calhoun,* 250 U.S. 208; *Calhoun* v. *Massie,* 253 U.S. 170; *Newman* v. *Moyers,* 253 U.S. 182; *Yeiser* v. *Dysart,* 267 U.S. 540; *Margolin* v. *United States,* 269 U.S. 93. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. *Cotting* v. *Kansas City Stockyards Co.,* 183 U.S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. *Stephenson* v. *Binford,* 287 U.S. 251, 274.

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522, 535. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were

not met because the laws were found arbitrary in their operation and effect.[39] But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 337–8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enact-

[39] See *Wolff Packing Co.* v. *Industrial Court, supra; Tyson & Bro.* v. *Banton*, 273 U.S. 418; *Ribnik* v. *McBride*, 277 U.S. 350; *Williams* v. *Standard Oil Co.*, 278 U.S. 235.

ment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[40]

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process.[41] Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained.[42] If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests,[43] produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does

[40] See *McLean* v. *Arkansas,* 211 U.S. 539, 547; *Tanner* v. *Little,* 240 U.S. 369, 385; *Green* v. *Frazier,* 253 U.S. 233, 240; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U.S. 251, 257–8; *Gant* v. *Oklahoma City,* 289 U.S. 98, 102.

[41] See note 32, *supra.*

[42] *Public Service Comm'n* v. *Great Northern Utilities Co.,* 289 U.S. 130; *Stephenson* v. *Binford, supra.* See the Transportation Act, 1920, 41 Stat. 456, §§ 418, 422, amending § 15 of the Interstate Commerce Act, and compare *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462; *New England Divisions Case,* 261 U.S. 184, 190, 196.

[43] See *Public Service Comm'n* v. *Great Northern Utilities Co., supra.*

not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

*Affirmed.*

Separate opinion of MR. JUSTICE McREYNOLDS.

By an act effective April 10, 1933 (Laws, 1933, Ch. 158), when production of milk greatly exceeded the demand, the Legislature created a Control Board with power to " regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale. . . ." The " board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article . . . A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. . . . A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor. . . ." After considering " all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer . . ." the board " shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state."

April 17, this Board prescribed nine cents per quart as the minimum at which "a store" might sell.* April 19, appellant Nebbia, a small store-keeper in Rochester, sold two bottles at a less price. An information charged that by so doing he committed a misdemeanor. A motion to dismiss, which challenged the validity of both statute and order, being overruled, the trial proceeded under a plea of not guilty. The Board's order and statements by two witnesses tending to show the alleged sale constituted the entire evidence. Notwithstanding the claim, that under the XIV Amendment the State lacked power to

* Official Order No. 5, effective April 17, 1933. Ordered that until further notice and subject to the exceptions hereinafter made, the following shall be the minimum prices to be charged for all milk and cream in any and all cities and villages of the State of New York, of more than One Thousand (1,000) population, exclusive of New York City and the Counties of Westchester, Nassau and Suffolk:

Milk—Quarts in bottles: By milk dealers to consumers 10 cents; by milk dealers to stores 8 cents; by stores to consumers 9 cents.

Pints in bottles: By milk dealers to consumers 6 cents; by milk dealers to stores 5 cents; by stores to consumers 6 cents. . . .

. . . . .

The Control Act declares:

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Producer" means a person producing milk within the State of New York.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

"Consumer" means any person, other than a milk dealer, who purchases milk for fluid consumption.

prescribe prices at which he might sell pure milk, lawfully held, he was adjudged guilty and ordered to pay a fine.

The Court of Appeals affirmed the conviction. Among other things, it said, pp. 264 *et seq.*:—

The sale by Nebbia was a violation of the statute "inasmuch as the Milk Control Board had fixed a minimum price for milk at nine cents per quart."

"The appellant not unfairly summarizes this law by saying that it first declares that milk has been selling too cheaply in the State of New York and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a business affecting the public health and interest until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders."

In fixing sale prices the Board "must take into consideration the amount necessary to yield a 'reasonable return' to the producer and the milk dealer. . . . The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional . . . in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without state interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its na-

ture. This is the vital distinction pointed out in *New State Ice Co.* v. *Liebmann* (285 U.S. 262, 277). . . .

"The question is as to whether the business justifies the particular restriction, or whether the nature of the business is such that any competent person may, conformably to reasonable regulation, engage therein. The production of milk is, on account of its great importance as human food, a chief industry of the State of New York. . . . It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it. . . . The State seeks to protect the producer by fixing a minimum price for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss. . . . Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself. . . .

"Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.

"We are accustomed to rate regulation in cases of public utilities and other analogous cases and to the extension of such regulative power into similar fields. . . . This case, for example, may be distinguished from the Oklahoma ice case (*New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 277), holding that the business of manufacturing and selling ice cannot be made a public business, to which it bears a general resemblance. The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice. . . . Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority. . . .

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference

with the rights of property and contract . . .; with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; . . . that statutes . . . aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view; . . .

"With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions or in emergencies; with cheerful submission to the rule of the Supreme Court that legislative authority to bridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the 'due process' clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us.

"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade. . . .

"We are unable to say that the Legislature is lacking in power, not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the prices to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction. . . . The policy of non-interference with individual freedom must at times give way to the policy of compulsion for the general welfare."

Our question is whether the Control Act, as applied to appellant through the order of the Board, number five, deprives him of rights guaranteed by the XIV Amendment. He was convicted of a crime for selling his own

property—wholesome milk—in the ordinary course of business at a price satisfactory to himself and the customer. We are not immediately concerned with any other provision of the act or later orders. Prices at which the producer may sell were not prescribed—he may accept any price—nor was production in any way limited. "To stimulate the production of a vital food product" was not the purpose of the statute. There was an oversupply of an excellent article. The affirmation is "that milk has been selling too cheaply . . . and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime."

The opinion below points out that the statute expires March 31, 1934, "and is avowedly a mere temporary measure to meet an existing emergency"; but the basis of the decision is not explicit. There was no definite finding of an emergency by the court upon consideration of established facts and no pronouncement that conditions were accurately reported by a legislative committee. Was the legislation upheld because only temporary and for an emergency; or was it sustained upon the view that the milk business bears a peculiar relation to the public, is affected with a public interest, and, therefore, sales prices may be prescribed irrespective of exceptional circumstances? We are left in uncertainty. The two notions are distinct if not conflicting. Widely different results may follow adherence to one or the other.

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The theory that legislative action which ordinarily would be ineffective because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited, was lucidly discussed and its weakness disclosed by the dissenting opinion in *Home*

*Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398. Sixty years ago, in *Milligan's* case, this Court declared it inimical to Constitutional government and did "write the vision and make it plain upon tables that he may run that readeth it."

Milligan, charged with offenses against the United States committed during 1863 and 1864, was tried, convicted and sentenced to be hanged, by a military commission proceeding under an Act of Congress passed in 1862. The crisis then existing was urged in justification of its action. But this Court held the right of trial by jury did not yield to emergency; and directed his release. "Those great and good men [who drafted the Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." *Ex parte Milligan* (1866), 4 Wall. 2, 120.

The XIV Amendment wholly disempowered the several States to "deprive any person of life, liberty, or property, without due process of law." The assurance of each of these things is the same. If now liberty or property may be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority when stirred by distressful

exigency. Amid the turmoil of civil war Milligan was sentenced: happily this Court intervened. Constitutional guaranties are not to be "thrust to and fro and carried about with every wind of doctrine." They were intended to be immutable so long as within our charter. Rights shielded yesterday should remain indefeasible today and tomorrow. Certain fundamentals have been set beyond experimentation; the Constitution has released them from control by the State. Again and again this Court has so declared.

*Adams* v. *Tanner,* 244 U.S. 590, condemned a Washington initiative measure which undertook to destroy the business of private employment agencies because it unduly restricted individual liberty. We there said—"The fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

*Buchanan* v. *Warley,* 245 U.S. 60, held ineffective an ordinance which forbade negroes to reside in a city block where most of the houses were occupied by whites. "It is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases." *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190, 196—"The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment."

*Adkins* v. *Children's Hospital,* 261 U.S. 525, 545.—"That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause

[Fifth Amendment], is settled by the decisions of this Court and is no longer open to question."

*Meyer* v. *Nebraska,* 262 U.S. 390, 399, held invalid a State enactment (1919), which forbade the teaching in schools of any language other than English. "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

*Schlesinger* v. *Wisconsin,* 270 U.S. 230, 240. "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

*Near* v. *Minnesota,* 283 U.S. 697, overthrew a Minnesota statute designed to protect the public against obvious evils incident to the business of regularly publishing malicious, scandalous and defamatory matters, because of conflict with the XIV Amendment.

In the following, among many other cases, much consideration has been given to this subject. *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 88; *Wolff Co.* v. *Industrial Court,* 262 U.S. 522 and 267 U.S. 552; *Pierce* v. *Society of Sisters,* 268 U.S. 510; *Tyson & Bro.* v. *Banton,* 273 U.S. 418; *Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1; *Ribnik* v. *McBride,* 277 U.S. 350; *Williams* v. *Standard Oil Co.,* 278 U.S. 235; *Sterling* v. *Constantin,* 287 U.S. 378. All stand in opposition to the views apparently approved below.

If validity of the enactment depends upon emergency, then to sustain this conviction we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The asserted right is federal. Such rights may demand and often have received affirmation and protection here. They do not vanish simply because the power of the State is arrayed against them. Nor are they enjoyed in subjection to mere legislative findings.

If she relied upon the existence of emergency, the burden was upon the State to establish it by competent evidence. None was presented at the trial. If necessary for appellant to show absence of the asserted conditions, the little grocer was helpless from the beginning—the practical difficulties were too great for the average man.

What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If three days after this act became effective another "very grievous murrain" had descended and half of the cattle had died, would the emergency then have ended, also the prescribed rates? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected? To these questions we have no answers. When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will disappear?

It is argued that the report of the Legislative Committee, dated April 10th, 1933, disclosed the essential facts. May one be convicted of crime upon such findings? Are

federal rights subject to extinction by reports of committees? Heretofore, they have not been.

Apparently the Legislature acted upon this report. Some excerpts from it follow. We have no basis for determining whether the findings of the committee or legislature are correct or otherwise. The court below refrained from expressing any opinion in that regard, notwithstanding its declaration "that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review." On the other hand it asserted—"This court should consider only the legitimacy of the conclusions drawn from the facts found."

In New York there are twelve million possible consumers of milk; 130,000 farms produce it. The average daily output approximates 9,500,000 quarts. For ten or fifteen years prior to 1929 or 1930 the per capita consumption steadily increased; so did the supply. "Realizing the marked improvement in milk quality, the public has tended to increase its consumption of this commodity." "In the past two years the per capita consumption has fallen off, [possibly] 10 per cent." "These marked changes in the trend of consumption of fluid milk and cream have occurred in spite of drastic reductions in retail prices. The obvious cause is the reduced buying power of consumers." "These cycles of overproduction and underproduction which average about 15 years in length, are explained by the human tendency to raise too many heifers when prices of cows are high and too few when prices of cows are low. A period of favorable prices for milk leads to the raising of more than the usual number of heifers, but it is not until seven or eight years later that the trend is reversed as a result of the falling prices

of milk and cows." "Farmers all over the world raise too many heifers whenever cows pay and raise too few heifers when cows do not pay."

"During the years 1925 to 1930 inclusive, the prices which the farmers of the state received for milk were favorable as compared with the wholesale prices of all commodities. They were even more favorable as compared with the prices received for other farm products, for not only in New York but throughout the United States the general level of prices of farm products has been below that of other prices since the World War."

"The comparatively favorable situation enjoyed by the milk producers had an abrupt ending in 1932. Even before that, in 1930 and 1931, milk prices dropped very rapidly." "The prices which farmers received for milk during 1932 were much below the costs of production. After other costs were paid the producers had practically nothing left for their labor. The price received for milk in January, 1933, was little more than half the cost of production."

"Since 1927 the number of dairy cows in the state has increased about 10 per cent. The effect of this has been to increase the surplus of milk." "Similar increases in the number of cows have occurred generally in the United States and are due to the periodic changes in number of heifer calves raised on the farms. Previous experience indicates that unless some form of arbitrary regulation is applied, the production of milk will not be satisfactorily adjusted to the demand for a period of several years." "Close adjustment of the supply of fluid milk to the demand is further hindered by the periodic changes in the number of heifers raised for dairy cows."

"The purpose of this emergency measure is to bring partial relief to dairymen from the disastrously low prices for milk which have prevailed in recent months. It is recognized that the dairy industry of the state cannot be

placed upon a profitable basis without a decided rise in the general level of commodity prices."

Thus we are told the number of dairy cows had been increasing and that favorable prices for milk bring more cows. For two years notwithstanding low prices the per capita consumption had been falling. "The obvious cause is the reduced buying power of consumers." Notwithstanding the low prices, farmers continued to produce a large surplus of wholesome milk for which there was no market. They had yielded to "the human tendency to raise too many heifers" when prices were high and "not until seven or eight years" after 1930 could one reasonably expect a reverse trend. This failure of demand had nothing to do with the quality of the milk—that was excellent. Consumers lacked funds with which to buy. In consequence the farmers became impoverished and their lands depreciated in value. Naturally they became discontented.

The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing—whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative and the "anarchy and despotism" prefigured in *Milligan's* case are at the door. The futility of such legislation in the circumstances is pointed out below.

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*Block* v. *Hirsh,* 256 U.S. 135 and *Marcus Brown Holding Co.* v. *Feldman,* 256 U.S. 170 are much relied on to support emergency legislation. They were civil proceedings; the first to recover a leased building in the District of

Columbia; the second to gain possession of an apartment house in New York. The unusual conditions grew out of the World War. The questioned statutes made careful provision for protection of owners. These cases were analyzed and their inapplicability to circumstances like the ones before us was pointed out in *Tyson & Bro.* v. *Banton,* 273 U.S. 418. They involved peculiar facts and must be strictly limited. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 416, said of them—"The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act."

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Is the milk business so affected with public interest that the Legislature may prescribe prices for sales by stores? This Court has approved the contrary view; has emphatically declared that a State lacks power to fix prices in similar private businesses. *United States* v. *Cohen Grocery Co.,* 255 U.S. 81; *Adkins* v. *Children's Hospital,* 261 U.S. 525; *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522; *Tyson & Bro.* v. *Banton,* 273 U.S. 418; *Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1; *Ribnik* v. *McBride,* 277 U.S. 350; *Williams* v. *Standard Oil Co.,* 278 U.S. 235; *New State Ice Co.* v. *Liebmann,* 285 U.S. 262; *Sterling* v. *Constantin,* 287 U.S. 378, 396.

*Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522, 537.—Here the State's statute undertook to destroy the freedom to contract by parties engaged in so-called "essential" industries. This Court held that she had no such power. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the

mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. . . . An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes." On a second appeal, 267 U.S. 552, 569, the same doctrine was restated:—" The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. 'The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.' "

*Fairmont Creamery Co.* v. *Minnesota,* 274 U.S. 1, 9.—A statute commanded buyers of cream to adhere to uniform prices fixed by a single transaction.—" May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise

does not ordinarily produce evil consequences, but the reverse."

*Williams* v. *Standard Oil Co.*, 278 U.S. 235, 239.—The State of Tennessee was declared without power to prescribe prices at which gasoline might be sold. "It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'" Considered affirmatively, "it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

*New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 277.—Here Oklahoma undertook the control of the business of manufacturing and selling ice. We denied the power so to do. "It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, . . . And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use."

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Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which "A," engaged in an ordinary business, may sell, in order to enable "B," a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation

of the fundamental right which one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good. This Court has declared that a State may not by legislative fiat convert a private business into a public utility. *Michigan Comm'n* v. *Duke,* 266 U.S. 570, 577. *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U.S. 583, 592. *Smith* v. *Cahoon,* 283 U.S. 553, 563. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution.

*Munn* v. *Illinois* (1877), 94 U.S. 113, has been much discussed in the opinions referred to above. And always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills, &c. were subject to legislative control at common law and then to show that warehousing at Chicago occupied like relation to the public would have been pointless if "affected with a public interest" only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all ordinary business affairs. Nothing in the

opinion lends support, directly or otherwise, to the notion that in times of peace a legislature may fix the price of ordinary commodities—grain, meat, milk, cotton, &c.

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Of the assailed statute the Court of Appeals says—"It first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials." Also—"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade." Maybe, because of this conclusion, it said nothing concerning the possibility of obtaining increase of prices to producers—the thing definitely aimed at—through the means adopted.

But plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate. If a statute to prevent conflagrations should require householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it. Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the out-

put is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. The Legislative Committee pointed out as the obvious cause of decreased consumption, notwithstanding low prices, the consumers' reduced buying power. Higher store prices will not enlarge this power; nor will they decrease production. Low prices will bring less cows only after several years. The prime causes of the difficulties will remain. Nothing indicates early decreased output. Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores and thereby aid the producer whose output and prices remain unrestrained! It is not true as stated that "the State seeks to protect the producer by fixing a minimum price for his milk." She carefully refrained from doing this; but did undertake to fix the price after the milk had passed to other owners. Assuming that the views and facts reported by the Legislative Committee are correct, it appears to me wholly unreasonable to expect this legislation to accomplish the proposed end—increase of prices at the farm. We deal only with Order No. 5 as did the court below. It is not merely unwise; it is arbitrary and unduly oppressive. Better prices may follow but it is beyond reason to expect them as the consequent of that order. The Legislative Committee reported—"It is recognized that the dairy industry of the State cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices."

Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him

with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate and must sell quickly or lose his stock through deterioration. The fanciful scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!

The statement by the court below that—"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . .; with the natural law of supply and demand," is obviously correct. But another, that "statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view," conflicts with views of Constitutional rights accepted since the beginning. An end although apparently desirable cannot justify inhibited means. Moreover the challenged act was not designed to stimulate production—there was too much milk for the demand and no prospect of less for several years; also "standards of prices" at which the producer might sell were not prescribed. The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption of any "concept of jurisprudence" which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject

to the caprice of the hour; government by stable laws will pass.

The somewhat misty suggestion below that condemnation of the challenged legislation would amount to holding "that the due process clause has left milk producers unprotected from oppression," I assume, was not intended as a material contribution to the discussion upon the merits of the cause. Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.

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The judgment of the court below should be reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER authorize me to say that they concur in this opinion.

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## HANSEN *v.* HAFF, ACTING COMMISSIONER OF IMMIGRATION.

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

No. 325. Argued February 6, 1934.—Decided March 5, 1934.

1. A reëntry permit does not entitle an alien to remain in the country if of a prohibited class. P. 561.
2. An alien of a prohibited class is liable to deportation within five years of entry or reëntry. Act of February 5, 1917, § 19; 8 U.S.C., § 155. P. 561.
3. In § 3, Act of February 5, 1917, prohibiting entry to any person coming into the country "for the purpose of prostitution or for any other immoral purpose," the words "any other immoral pur-

pose" are limited by the principle of *ejusdem generis* to objectives of the same character as prostitution. P. 562.

4. An alien woman who on her return to this country from a trip abroad is attended by a man with whom she has had, and still intends to continue, illicit sex relations, but whose paramount object in entering is to resume her former residence here and pursue a legitimate occupation, is not a person coming into the United States for an immoral purpose, within the meaning of § 3 of the Act. P. 562.

65 F. (2d) 94, reversed.

CERTIORARI, 290 U.S. 615, to review the affirmance of an order denying a writ of habeas corpus in the case of a woman held for deportation under the Immigration Act.

*Mr. Roger O'Donnell,* with whom *Mr. Stephen M. White* was on the brief, for petitioner.

*Assistant Attorney General Sweeney,* with whom *Solicitor General Biggs* and *Mr. Harry S. Ridgely* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

By § 3 of the Immigration Act of 1917[1] Congress ordained "That the following classes of aliens shall be excluded from admission into the United States: . . . prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose." In reliance upon this mandate the petitioner was ordered deported, and the question is whether she is within the proscribed class.

She is a citizen of Denmark, and first came here in 1922, making her home in Los Angeles, California, where she was employed as a domestic servant. In 1924 she became acquainted with a married man and in 1925 commenced

[1] Act of February 5, 1917, c. 29, 39 Stat. 874; U.S.C. Title 8, § 136.

having illicit relations with him; she did not live with him and was not supported by him, but resided where she was employed and supported herself from her own earnings, although he gave her money and clothing from time to time. In 1926 she made a trip to Denmark to visit her parents, and returned to Los Angeles in 1928, where she again took service as a domestic. In May, 1931, she made a second visit to Denmark to see her relatives. On this occasion she was accompanied by the man with whom she had been intimate, who paid part of her expenses. He went to Europe to attend a convention in Vienna. For a portion of the time they travelled together in Europe, having illicit relations. They returned together through Canada, coming from Vancouver to Seattle, where they entered the United States, she being admitted by the authorities as a returning resident. They went to a hotel in Seattle where they registered as man and wife. Upon her arrest by immigration officers she admitted her purpose to continue the relationship of husband and wife with the man, until they should arrive in Los Angeles, but denied that it was her intention to continue it after arrival in that city.

Upon these facts, developed at the hearing before a board of inspectors, the Secretary of Labor ordered the petitioner deported. She petitioned the District Court for a writ of habeas corpus, an order to show cause was issued and, after hearing, the writ was denied. On appeal the Circuit Court of Appeals affirmed.[2] The case is here on certiorari

The petitioner's previous residence here and her possession of a reëntry permit do not entitle her to remain in this country. *Lapina* v. *Williams,* 232 U.S. 78; *Lewis* v. *Frick,* 233 U.S. 291. She was liable to deportation at

[2] 65 F. (2d) 94.

any time within five years of her entry at the Port of Seattle, if she was a member of one of the prohibited classes of aliens.[3]

Was she a prostitute, or person coming into the country "for the purpose of prostitution or for any other immoral purpose" within the intent of § 3 of the Act of 1917? The respondent does not contend that she is a prostitute or that her purpose in entering the United States was to practice prostitution, but he affirms that she did come for an immoral purpose as defined by the statute. We cannot adopt this conclusion.

The principle of *ejusdem generis* limits the connotation of the words "any other immoral purpose" to such as are of like character with prostitution, *United States* v. *Bitty*, 208 U.S. 393, 401; and extra-marital relations, short of concubinage, fall short of that description.

Moreover, it can not be said that the petitioner's entry was for the purpose of having such relations. The respondent argues that as she had indulged in misconduct before leaving, had continued that misconduct while on her trip abroad and intended to continue it at least until she should arrive in Los Angeles, the Secretary of Labor was justified in disbelieving her statement that the relations would cease when she took up her residence in that city. This may be conceded; but it does not follow that her purpose in returning to the United States was to continue her irregular and improper conduct. The fact is that she was returning to her former residence, and nothing is disclosed to indicate that she did not intend, as she claimed, to resume her employment as a domestic. Her entry cannot be said to be with the purpose "only that she might live in a state of concubinage." *United States* v. *Bitty, supra*, 403. People not of good moral character,

[3] Act of February 5, 1917, c. 29, § 19, 39 Stat. 889; U.S.C. Title 8, § 155.

like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance. Compare *Ex parte Rocha,* 30 F. (2d) 823.

The Mann Act [4] creates the offense of transporting in interstate commerce a woman or girl " for the purpose of prostitution or debauchery, or for any other immoral purpose . . ." This court has said that act " seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited." *Caminetti* v. *United States,* 242 U.S. 470, 491. Accordingly it has been held that the transportation denounced must have for its object or be a means of effecting or facilitating the sexual intercourse of the participants. If the purpose of the journey is not sexual intercourse, though that be contemplated, the statute is not violated. *Welsch* v. *United States,* 220 Fed. 764; *Fisher* v. *United States,* 266 Fed. 667; *Sloan* v. *United States,* 287 Fed. 91; *Alpert* v. *United States,* 12 F. (2d) 352; *Hunter* v. *United States,* 45 F. (2d) 55. So here, by the language of the act, the purpose of the entry is made controlling. And we think it plain that in no proper sense may the entry of the petitioner be said to have been for the purpose of immoral sexual relations.

*Reversed.*

MR. JUSTICE BUTLER, dissenting.

The statute forbids admission of " persons coming into the United States for the purpose of prostitution or for any other immoral purpose." The doctrine of this decision is that " extra-marital relations " of an unmarried

[4] Act of June 25, 1910, c. 395, 36 Stat. 825; U.S.C. Title 18, §§ 397–400.

woman that fall short of concubinage are not within the condemnation of the statute. But there is no ground for the assumption that petitioner is not the concubine of a married man. Since 1924 she has continued illicit relations with him. They cohabited as, and held themselves out to be, husband and wife abroad and in this country while not in the vicinity of his home. Admittedly, these relations were to continue until again they reached that neighborhood. There is abundant warrant for the Secretary's conclusion that petitioner returned to this country as, and intending to continue to be, that man's concubine. The findings quote Webster's definition—" a woman who cohabits with a man without being his wife." The Secretary found her to be such a person. He relied upon, and I think rightly applied, the opinion in *United States* v. *Bitty,* 208 U.S. 393.

Bitty was indicted under a provision of the Act of February 20, 1907, 34 Stat. 898, forbidding " the importation into the United States of any alien woman . . . for the purpose of prostitution, or for any other immoral purpose." The indictment alleged importation of a woman for an " immoral purpose," namely, " that she should live with him as his [Bitty's] concubine." The circuit court dismissed the indictment on the ground that the facts alleged did not constitute a violation of the statute. This court reversed. The phrase there construed is in the same words as that now under consideration. They undoubtedly have the same meaning. In that case defendant's counsel maintained that Congress did not by that Act intend to legislate against " those isolated cases where certain individuals come into this country with their mistresses." But repelling that construction, this court said (p. 401) that: " In forbidding the importation of alien women ' for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the

case of importations for prostitution, were to be deemed immoral." After reference to the rule of *ejusdem generis* relied on by the defendant, the court said (p. 402): "But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country, as to the relations which may rightfully, from the standpoint of morality, exist between man and woman, in the matter of sexual intercourse. . . . (p. 403.) The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose."

Moreover, the statute is not limited to prostitution and concubinage. While the Secretary regarded her as a concubine, his decision may not fairly be held to depend upon that characterization. Plainly it rests upon the ground there stated "that she entered for an immoral purpose" condemned by the statute. The law does not require him more definitely to classify. Refinements of nomenclature adopted for the sake of decency in speech may not be used to conjure up doubts and distinctions that obscure the real substance of the statute. The meaning of the findings is that petitioner's doings and course of living constitute a kind of immorality that bars admission. The

Secretary rightly may have deemed that her admitted intention temporarily to continue, when coupled with environment, opportunity and temptation under which habitual transgression had developed and for years persisted, amounted to a fixed purpose indefinitely to remain in concubinage. That is enough.

And there is nothing in the opinion in *United States* v. *Bitty, supra,* or elsewhere, to support the idea that Congress intended to keep out only those coming exclusively for the purposes referred to and to admit prostitutes, concubines and the like intending to follow legitimate occupation while practicing, incidentally or otherwise, any of the immoralities covered by the statute. Indeed, the court's opinion implies that if concubinage were her principal or primary purpose she ought to be excluded even though she intended regularly to pursue her work as a domestic. The making of exclusion to depend upon the determination whether the immoral purpose is dominant or subordinate goes far to strike down the statute by making its enforcement difficult and in many cases practically impossible. Congress undoubtedly intended to exclude those who entertain a purpose here to practice prostitution or immorality of that sort. That is the construction adopted by the Secretary, the District Court and the Circuit Court of Appeals. They are right. Petitioner's application for a writ of habeas corpus was properly denied.

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## LIFE & CASUALTY INSURANCE CO. OF TENNESSEE *v.* McCRAY.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 89. Argued February 5, 1934.—Decided March 5, 1934.

1. A state statute by which a life insurance company, if it fail to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reason-

able in amount, and for a reasonable attorney's fee for collection, to be taxed by the court, is consistent with the due process and equal protection clauses of the Fourteenth Amendment, even though payment of the policy was resisted in good faith and upon reasonable grounds. Pp. 569–570.

So *held* where the statute was in effect when the policy was issued.

2. The nature of the insurance business and the peculiar hardships commonly experienced by the beneficiary when payment does not follow promptly the death of the insured, justify these special requirements. Pp. 569–570.
3. Damages of twelve per cent. of the face of the policy (the amount fixed by the Arkansas statute here under consideration) can not be adjudged unreasonable and oppressive, in view of the contrary finding implied in the statute itself and of like measures in other States long acquiesced in. P. 570.
4. The presumption of validity which applies to legislation generally, is fortified by continued acquiescence. P. 572.
5. A statutory penalty for refusal to pay an obligation when due may be unconstitutional if so extravagant in amount as to deter the honest debtor from making a *bona fide* defense in court, and yet may be valid if the amount be gauged reasonably as a stimulus to prompt settlement and as compensation to the creditor in case of delay. P. 572.

187 Ark. 49; 58 S.W. (2d) 199, affirmed.

APPEAL from a judgment affirming a recovery in an action on a policy of life insurance. Twelve per cent. damages and attorneys' fees were included in the judgment.

*Mr. Moreau P. Estes,* with whom *Messrs. P. M. Estes* and *Myron T. Nailling* were on the brief, for appellant.

*Messrs. Joseph M. Hill* and *Henry L. Fitzhugh* submitted for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

On March 3, 1930, the appellant, an insurance company, issued to Jonas McCray a policy of life insurance for $500

payable to his wife, the appellee in this court. The policy lapsed in June, 1931, for non-payment of a premium within the period of grace, but in August, 1931, it was reinstated with the company's consent. On May 10, 1932, the insured committed suicide. If suicide occurred within a year from the date of issue of the policy, the insurer's liability was limited to a return of any premiums paid by the insured. If suicide occurred after the expiration of the year, the liability was the same as upon a death from other causes. The appellee made proof of claim against the insurer, insisting that the year was to be calculated from the original date of issue. The company refused payment upon the ground that the year was to be calculated from the time of reinstatement. Judgment went against the insurer in the trial court, and again, upon appeal, in the Supreme Court of the State. 187 Ark. 49; 58 S.W. (2d) 199. The controversy here grows out of the amount of the recovery. To the face of the policy with interest at six per cent there were added certain statutory allowances, which are contested in this court. One of the additions was an attorney's fee of $200 ($100 for the trial and $100 for the appeal). The other was an award of twelve per cent computed on the payments due under the contract. These increments are authorized by a statute of Arkansas which is quoted in the margin.[1] The

[1] Section 6155, Digest of the Statutes of Arkansas (Crawford & Moses, 1921): "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected."

insurer contests the validity of the statute, insisting that it is condemned by the Fourteenth Amendment. The case is here upon appeal.

1. The Fourteenth Amendment does not prohibit the award of an attorney's fee, moderate in amount, when payment of a policy of life insurance has been wrongfully refused.

We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the fees of an attorney. There are systems of procedure neither arbitrary nor unenlightened, and of a stock akin to ours, in which submission to such a burden is the normal lot of the defeated litigant, whether plaintiff or defendant. The taxing master in the English courts may allow the charges of the barrister as well as the fees of the solicitor.[2] Nothing in the Fourteenth Amendment forbids a like procedure here. The assurance of due process has not stereotyped bills of costs at the rates known to the Fathers. *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co.*, 260 U.S. 35; *Dohany* v. *Rogers*, 281 U.S. 362, 368. Nor is there an unjust discrimination, an arbitrary denial of the equal protection of the laws, in laying the burden on insurers and not on all defendants. Diversity of treatment in respect of the costs of litigation has its origin and warrant in diversity of social needs. *Dohany* v. *Rogers, supra.* Dependents left without a breadwinner will be exposed to sore distress if life insurance payments are extracted slowly and painfully, after costly contests in the courts. Health and accident insurance will often be

[2] The practice under the law of England is explained clearly and fully by Arthur L. Goodhart in the article "Costs" in his "Essays in Jurisprudence and the Common Law," pp. 190, 198–201, first published in 38 Yale L.J. 849.

the sources from which the sick and the disabled are to meet their weekly bills. Fire insurance moneys, if withheld, may leave the business man or the householder without an office or a home. Classification prompted by these needs is not tyrannical or arbitrary. As to that, the judgments of this court in situations precisely apposite have set a closure to debate. *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U.S. 308; *Iowa Life Ins. Co.* v. *Lewis,* 187 U.S. 335; *Farmers & Merchants Ins. Co.* v. *Dobney,* 189 U.S. 301.

2. The Fourteenth Amendment does not prohibit a fixed award of damages, moderate in amount, in addition to the costs and the fees of the attorney, when the payment of a policy of life insurance has been wrongfully refused.

The appellant concedes that such an allowance is permissible when the refusal to pay is wanton or malicious. *Fraternal Mystic Circle* v. *Snyder,* 227 U.S. 497. The argument is that the allowance is to be condemned as a denial of due process when the defense is in good faith and on grounds not wholly frivolous. We find a different meaning in the Constitution and the precedents. The same social needs that sustain the award of an attorney's fee when payment is resisted, sustain in like circumstances an increment to the policy within the bounds of moderation. This is not a case where the increment has been authorized after the writing of the policy. The statute was enacted in 1905, and the insurance was written in 1930. Here at the delivery of the policy, the insurer was informed that if it failed to make payment in accordance with its contract, "twelve per cent damages" would be owing to the insured. We discover nothing arbitrary or oppressive in imposing such a contract upon the business of insurance, a business subject, as all agree, to control and regulation. *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151; *O'Gorman & Young* v. *Hart-*

*ford Fire Ins. Co.*, 282 U.S. 251. There has been no failure to give heed to "the rudiments of fair play" (*Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165, 168), as there was in *St. Louis, I. M. & S. Ry. Co.* v. *Wynne*, 224 U.S. 354, where the damages were imposed though the insured had rejected a tender of what was due and had made demand for more, or in *Polt's* case (*supra*), a suit against a railroad for loss of property destroyed by fire where the damages were unliquidated and yet the recovery was to be doubled if the verdict exceeded by a penny what was offered by the wrongdoer. To nullify this statute the appellant must be able to show that an award of twelve per cent. is so extravagant in amount as to outrun the bounds of reason and result in sheer oppression. This we cannot bring ourselves to say in the face of a contrary finding by the framers of the statute, with all the presumptions of correctness attaching to their judgment. Still less can we bring ourselves to say it in the face of kindred statutes in force in other states.

The legislation now challenged is a sample of a type. Statutes very similar have been adopted in Texas, Arizona, Louisiana, and South Dakota. The Texas act, like this one, calls for damages of 12% in addition to attorney's fees. Texas Revised Civil Statutes, 1925, Art. 4736. In Arizona, the increment is as high as 15%, though it is limited to policies of insurance against fire. Arizona Revised Code, 1928, § 1828. In Louisiana, the percentage for fire policies is 12% and 25% for fire and theft losses affecting automobiles. Louisiana General Statutes, 1932, §§ 4179, 4246. In South Dakota there is an increment of 10%, confined to loss by fire. South Dakota Compiled Laws, 1929, § 9195.

These statutes and others not unlike them have been considered by this court without complaint or suggestion that the percentage was too high. Thus, in *Fidelity Mutual Life Assn.* v. *Mettler*, 185 U.S. 308, 325, 326,

the Texas statute was before us. Carried forward now into the revised codes, it was enacted for the first time in 1879. The attack upon its validity was confined to its discriminatory features, the burden being laid upon some forms of insurance, though inapplicable to others. This court upheld the act as valid, and in so doing repeated with apparent approval the ruling of the Supreme Court of Texas (86 Tex. 654; 26 S.W. 982) that the twelve per cent was given as damages for the failure to comply with the contract by payment, and the fee as compensation for the cost of collection. 185 U.S. at p. 325. During the half century and more in which the act has been in force, no one, it seems, has protested to any court that the percentage is immoderate. The same statute came before us again in *Iowa Life Ins. Co.* v. *Lewis, supra,* at p. 355. We renewed our approval, and said of our earlier opinion (*Fidelity Mutual Life Assn.* v. *Mettler*): "We are . . . entirely satisfied with the case and its reasoning." p. 355. Cf. *Farmers' & Merchants Ins. Co.* v. *Dobney, supra,* at p. 305. The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years. *Corn Exchange Bank* v. *Coler,* 280 U.S. 218; *Ownbey* v. *Morgan,* 256 U.S. 94.

The argument is made that the statutory percentage, though it might be legitimate as an award of damages, is illegitimate if intended as a penalty, a clog upon the privilege of access to the courts. The statute speaks of it as "damages." There are places here and there in the opinions of the Supreme Court of Arkansas where the word penalty is used. *Arkansas Insurance Co.* v. *McManus,* 86 Ark. 115, 124, 125; 110 S.W. 797; *Security Insurance Co.* v. *Smith,* 183 Ark. 254, 258; 35 S.W. (2d) 581; *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 332; 47 S.W. (2d) 585. How little weight is to be given to this use is perceived when we discover that upon one page of an opinion the percentage is spoken of as a penalty and

on another page of the same opinion is described as an award of damages. See *Arkansas Insurance Co.* v. *McManus, supra,* with its quotation from *Seaboard Air Line Ry.* v. *Seegers,* 207 U.S. 73, 77. There is little doubt that the terms were thought of as equivalents.

The result will not be changed, however, though the increment to the judgment be classified as penal, if the amount is not immoderate. The measure, not the name, controls. The insurer is not penalized for taking the controversy into court. It is penalized (if penalty there is) for refusing to make payment in accordance with its contract, and penalized in an amount that bears a reasonable proportion to the loss or inconvenience likely to be suffered by the creditor. Repeated judgments of this court bear witness to the truth that such a tax upon default is not put beyond the pale by calling it a penalty. Thus, in *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U.S. 217, the court had before it a Mississippi statute whereby a common carrier was required to settle claims within a stated time. If this was not done, there was to be a liability to the consignee for " twenty five dollars damages in each case, in addition to actual damages," whenever the amount of the claim was two hundred dollars or less. This court upheld the additional exaction though describing it as a penalty. The statute did no more than provide " a reasonable incentive for the prompt settlement without suit of just demands," and demands " of a class admitting of special legislative treatment." Cf. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt, supra,* p. 168. In *Seaboard Air Line Ry.* v. *Seegers, supra,* the penalty for delay was fifty dollars, and the court was not deterred by the label from enforcing the statute and adjudging its validity. There was approval of the statement of the court below that " the penalty, in case of a recovery in court " would operate " as a deterrent of the carrier in refusing to settle just claims,

and as compensation of the claimant for . . . trouble and expense." More recently, in *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co., supra,* a statute of Nebraska prescribing the liability of carriers imposed a charge of seven per cent on the amount of the recovery as well as reasonable attorney's fees. We held that "a reasonable penalty" (pp. 43, 45) might be assessed against the wrongdoer as a stimulus to settlement without vexatious delay.

"Penalty" is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. *Huntington* v. *Attrill,* 146 U.S. 657, 668; *Brady* v. *Daly,* 175 U.S. 148, 154, 157; *St. Louis, I. M. & S. Ry. Co.* v. *Williams,* 251 U.S. 63, 66; *Loucks* v. *Standard Oil Co.,* 224 N.Y. 99, 103; 120 N.E. 198.[3] One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal. It is no answer in such circumstances that he has acted in good faith. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States,* 229 U.S. 373, 377. Reparation may still be due, for all his good intentions, yet reparation within bounds. It is all "a question of more or less." *Sexton* v. *Kessler & Co.* 225 U.S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the

[3] Often the recovery is fixed at an unvarying amount because of the difficulty of proving damages with accuracy in varying situations. *Brady* v. *Daly, supra; Chatterton* v. *Cave,* [1878] 3 App. Cas. 483, 492; *Cox* v. *Lykes Bros.,* 237 N.Y. 376, 379; 143 N.E. 226; *Calvin* v. *Huntley,* 178 Mass. 29, 32; 59 N.E. 435.

court room open. *Ex parte Young,* 209 U.S. 123; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U.S. 651, 661, 662. On the other hand, the penalty may be no more than the fair price of the adventure. *St. Louis, I. M. & S. Ry. Co.* v. *Williams, supra,* p. 66. In that event, the litigant must pay for his experience, like others who have tried and lost.

3. Other objections affecting the merits of the recovery have been put before us by the appellant in briefs and in oral argument.

Our jurisdiction upon appeal from a judgment of a state court does not permit us to review them.

4. To the extent that *Standard Accident Ins. Co.* v. *Rossi,* 35 F. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy,* 38 F. (2d) 557, are inconsistent with this opinion, we are unable to approve or follow them.

The judgment is

*Affirmed.*

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissent in respect of the 12% penalty or damages.

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## LIFE & CASUALTY INSURANCE CO. OF TENNESSEE *v.* BAREFIELD.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 509. Argued February 5, 1934.—Decided March 5, 1934.

Decided upon the authority of *Life & Casualty Insurance Co.* v. *McCray, ante,* p. 566.

187 Ark. 676; 61 S.W. (2d) 698, affirmed.

APPEAL from a judgment affirming a recovery on an accident insurance policy together with damages and attorneys' fees.

*Mr. Moreau P. Estes,* with whom *Messrs. P. M. Estes* and *Myron T. Nailling* were on the brief, for appellant.

No appearance for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In a suit upon a policy of accident insurance, the respondent recovered a judgment in accordance with a stipulation declaring the extent of the liability if the insurer was liable at all.

Attorney's fees and twelve per cent damages were added to the recovery in accordance with the statute. Section 6155, Arkansas Digest, Crawford & Moses, 1921.

The case presents the same question as No. 89, *Life & Casualty Ins. Co. of Tennessee* v. *McCray, ante,* p. 566, and is ruled by that decision.

The judgment is

*Affirmed.*

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## TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA *v.* PRINSEN.

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

No. 429. Argued February 9, 1934.—Decided March 5, 1934.

A certificate of membership in a fraternal benefit association providing benefits for accidental death, exempts the association if death occur "when" a member is "participating" in the transportation of explosives. In this case, the assured, an officer of a powder company, for the purpose of making delivery of a large quantity of dynamite caps ordered by a customer, rode in the customer's truck, driven by the customer's agent, from the company's office to the company's magazine beyond the city limits, where the goods were loaded on the vehicle. On the return trip to the office, where the assured was to be let off, the truck, still driven by the agent, was in collision with a train. There was an

immediate explosion, the truck was destroyed, and the assured was blown to pieces. *Held:*

1. At the time of his death, the assurred was "participating" in the moving or transportation of the dynamite caps within the meaning of the certificate, and there could be no recovery on the certificate. P. 579.

2. The assured was more than a voluntary guest on the vehicle; he was a business "invitee." P. 580.

3. To exempt the insurer, it was not necessary to find a causal connection between the death and the forbidden act, since the effect of that act was to aggravate the hazard in the very event that happened. P. 581.

65 F. (2d) 841, reversed.

CERTIORARI, 290 U.S. 618, to review a judgment reversing a judgment for the Protective Association in a suit brought by the beneficiary upon a certificate of membership.

*Mr. Emmett M. Bagley,* with whom *Mr. Paul H. Ray* was on the brief, for petitioner.

*Mr. Joseph H. Peterson,* with whom *Messrs. Harley W. Gustin* and *D. Worth Clark* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

James Prinsen when he died was a member of the petitioner, a fraternal benefit association, incorporated under the laws of Missouri. By his certificate of membership, benefits in case of death were payable to his wife, Uluetta Prinsen, the respondent in this court. The payment to be made to her in the event of death by accident was $5,000, unless the accident occurred while the member was engaged in enumerated activities. Death suffered in such circumstances was excluded from the coverage. By the terms of the certificate the association was not to be liable if disability or death occurred "when a member is par-

ticipating . . . in the moving or transportation of gunpowder, dynamite, or other explosive substance or substances." [1]

At the time of his death Prinsen was an officer of the Western Powder Company, which had an office in Salt Lake City, Utah, and a powder magazine outside the city limits. The Tintic Powder and Supply Company gave an order to the Hercules Powder Company for 300,000 dynamite caps, and the Hercules company asked the Western company to fill the order. The request was received by Prinsen, and with it a notice that within a few days the Hercules representative, Begaman, would come to Salt Lake City to accept delivery. On February 3, 1931, Begaman appeared at the Western office with a

[1] The full text of the exception follows: "This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death benefits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances; when inflicted by a member on himself, while sane or insane; when there are no visible marks of injury upon the body (the body itself not being deemed such a mark in case of death); when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics; when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, or wrestling; when or while a member is acting as a sailor or soldier or is participating in war or riot; when or while a member is acting as an aviator or balloonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant; when a member is participating in public or agreed automobile racing, or in wrecking, mining, blasting, or in the moving or transportation of gunpowder, dynamite, or other explosive substance or substances; when a member is murdered; when resulting from hazardous adventure or an altercation or quarrel; when there is a disappearance of a member; when the result of voluntary over-exertion (unless in a humane effort to save a human life); when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

motor truck in which he was to carry the explosives. He and Prinsen then drove to the magazine beyond the city. The magazine was opened with a key which Prinsen had brought with him, and delivery of the caps was made by piling them in boxes on the truck. The two men then boarded the truck again to go back to the Western office, Begaman driving the car, and Prinsen sitting beside him on the box. A small additional payment was made by Hercules to Western for the trip to the magazine, but Tintic, not Hercules, was the owner of the truck. On the way back, the truck was in collision with an engine while crossing the tracks of the Denver and Rio Grande Railroad. There was an immediate explosion, in which the truck was destroyed and Prinsen was blown to pieces. Begaman and the railway engineer were killed at the same time.

The respondent brought suit on the membership certificate to recover the benefits payable in the event of death by accident. The association defended on the ground that the member was killed while "participating" in the transportation of explosives. In the District Court a verdict was directed in favor of the defendant. The Court of Appeals reversed, one judge dissenting. 65 F. (2d) 841. This court granted certiorari to resolve a possible conflict with other federal decisions. *Pittman* v. *Lamar Life Ins. Co.*, 17 F. (2d) 370; *Head* v. *New York Life Ins. Co.*, 43 F. (2d) 517.

We assume in favor of the respondent that "participation" in the carriage of explosives imports something more than the presence of the assured in the vehicle of carriage. One who becomes a passenger in an aeroplane may thereby participate in aeronautics (cf. *Head* v. *New York Life Ins. Co., supra; Bew* v. *Travelers Ins. Co.*, 95 N.J.L. 533; 112 Atl. 859; *Pittman* v. *Lamar Life Ins. Co., supra*), but it does not follow that he participates in the carriage of the mails, and this though the plane to his

knowledge is in part devoted to that use. One who travels in a sleeping car does not participate thereby in the movement of explosives, though information is brought home to him that in a baggage car forward explosives are in transit. But Prinsen's relation to this enterprise was not so remote or passive as the relation of the passenger in the cases just supposed. He had gone upon a truck which had been specially devoted by its owner to the transportation of explosives, and had gone there for the very purpose of making transportation possible. The respondent would have us split into separate parts a transaction that is unitary in aim and essence. Plainly the assured was facilitating the delivery of explosives in traveling with Begaman to the suburban magazine. Plainly he was still engaged in and about a like service when he opened the magazine and placed the caps upon the truck. But his participation in the errand did not end abruptly then and there. The return journey to his office had the same motive and occasion that induced the journey out. It was not an adventitious incident that there were explosives in the truck when he left the magazine. To the contrary, it was part of the plan from the beginning that the truck should take him out, and then, when laden, take him back. To say that he was riding on the truck "while" explosives were transported is to state but half the case. The case is rather this, that he was riding on the truck "because" explosives were transported. If he had not known in advance that this was the substance to be carried, he would not have stirred out of his office. There was a relation more intimate than contiguity in time or space between his presence on the truck and the presence of the explosive caps. The relation was no accident; it was pre-ordained and causal.

The respondent tells us that the assured at the time of the collision was a voluntary guest, and makes much of

the label. The payment or non-payment of a fare has little, if any, bearing upon the problem to be solved, yet the label, unless scrutinized, may have capacity to mislead. In his relation to this enterprise, Prinsen was more than a voluntary guest. He was a business "invitee," riding out and back at the invitation of the owner because of a business interest common to them both. *Bennett* v. *Railroad Co.,* 102 U.S. 577, 582, 584; *Heskell* v. *Auburn L., H. & P. Co.,* 209 N.Y. 86; 102 N.E. 540; *Haefeli* v. *Woodrich Engineering Co.,* 255 N.Y. 442, 448; 175 N.E. 123; *Indermaur* v. *Dames,* L.R. 1 C.P. 274; American Law Institute, Restatement of Torts, Tentative Draft, No. 4, §§ 202, 213. We may see the case more clearly if we ask ourselves the question whether Begaman would have been free to leave the "guest" at the magazine after delivery of the caps, and refuse to bring him home. Plainly not, without breach of duty to the Tintic company, the employer, which had sent the car out with instructions to the driver to carry Prinsen back. The result is all one whether the instructions in respect of carriage were tacit or express. By reasonable implication, the return trip as well as the outward one was within the orbit of the errand. *Cudahy Packing Co.* v. *Parramore,* 263 U.S. 418, 426; *Bountiful Brick Co.* v. *Giles,* 276 U.S. 154, 158; *Voehl* v. *Indemnity Ins. Co.,* 288 U.S. 162.

The argument is made that a causal connection between the death and the explosion is not a necessary inference from the facts in evidence. The assured was blown to pieces, the fragments of his body being so small that an autopsy was impossible. We are told that even so the impact of the engine may have been fatal without more. The contract does not say that the holder of the policy is to have no claim against the insurer if he dies "by reason of" his participation in the carriage of explosives. The contract says that he is to have no claim

against the insurer if he dies "when" he is participating in the carriage of explosives, just as it provides for a like result when he is acting as a sailor or a soldier, or is participating in war or riot, or is under the influence of narcotics or of intoxicating liquors.[2] Courts of high authority have held that in policies so phrased there is no need of any causal nexus between the injury or death and the forbidden forms of conduct.[3] While the proscribed activity continues, the insurance is suspended as if it had never been in force. Other courts prefer the view that to work such a suspension, there must have been an aggravation of the hazard to which death or injury was owing.[4] In

[2] A nice discrimination is maintained throughout the policy in suit between causes of the casualty and aggravations of the hazard. Thus, liability is excluded when the accident is "the result" of voluntary overexertion, or "the result" of voluntary or unnecessary exposure to danger, or when "caused" by any bodily or mental infirmity or disease. There is no such insistence upon a causal sequence when the insurer is participating in a war or a riot, or in aeronautics or in the transportation of explosives.

[3] *Order of United Commercial Travelers* v. *Greer,* 43 F. (2d) 499; *Flannagan* v. *Provident Life & Accident Ins. Co.,* 22 F. (2d) 136; *Murdie* v. *Maryland Casualty Co.,* 52 F. (2d) 888; *Shader* v. *Railway Passenger Ins. Co.,* 66 N.Y. 441; *Conner* v. *Union Automobile Ins. Co.,* 122 Cal. App. 105; 9 P. (2d) 863; *Bradshaw* v. *Farmers & Bankers Life Ins. Co.,* 107 Kan. 681; 193 Pac. 332; *Order of United Commercial Travelers* v. *Tripp,* 63 F. (2d) 37. Cf. *U. S. Fidelity & Guaranty Co.* v. *Guenther,* 281 U.S. 34; *Metropolitan Life Ins. Co.* v. *Conway,* 252 N.Y. 449, 452; 169 N.E. 642.

[4] *Matthes* v. *Imperial Accident Assn.,* 110 Iowa 223; 81 N.W. 484; *Bradley* v. *Mutual Benefit Life Ins. Co.,* 45 N.Y. 422; cf. *Jones* v. *U.S. Mutual Accident Assn.,* 92 Iowa 652; 61 N.W. 485; *Accident Insurance Co.* v. *Bennett,* 90 Tenn. 258; 16 S.W. 723; *Murray* v. *New York Life Ins. Co.,* 96 N.Y. 614; *Benham* v. *American Central Life Ins. Co.,* 140 Ark. 612; 217 S.W. 462; *Kelly* v. *Fidelity Mutual Life Ins. Co.,* 169 Wis. 274, 276; 172 N.W. 152; *Bloom* v. *Franklin Life Ins. Co.,* 97 Ind. 478; *Cluff* v. *M. B. Life Ins. Co.,* 13 Allen 308.

that aspect the insurer might be liable if the insured had fallen from the box while asleep or inattentive, the dynamite caps remaining unexploded in the truck. So, policies excluding liability while the assured is doing an act in violation of the law have been read as directed to acts that aggravate the danger, with the result that liability is unaffected by violation of the Sunday laws or of the laws against profanity. See the cases cited in note 4, *supra.*

In so far as these readings of the policy diverge, there is no need to choose between them for the decision of the case at hand, nor to search for a formula that may have capacity to reconcile them. If the first meaning is accepted, the controversy ends. If the second is accepted, it is still clear beyond debate that the effect of the forbidden act was to magnify the risk of death in the event of a collision, to aggravate the danger in the very event that happened. Less than this may be required to relieve the insurer of liability, but surely nothing more.

The good sense of this construction of the policy has illustration in the case before us. At the very least the explosion was a concurrent cause of death, if not indeed the sole one. The policy does not mean that in the event of a proscribed activity there shall be a segregation of causes operating in unison and a distribution of the consequences assignable to each. One of the essential purposes to be served by the limitation of the risk is to put an end to such a process of dissection and comparison. By the form of its policy the insurer has given notice to assured and beneficiary that it will refuse to become entangled in these mystifying subtleties. At the moment of the casualty the insurance was suspended by an aggravation of the hazard, and suspended it remained till the forbidden hazard was removed.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

*Reversed.*

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

If "participation" means coöperation in the transportation, more than is involved in presence on the transporting vehicle with the knowledge that an explosive is being carried, I can perceive no ground for saying that there was participation here. That deceased had made the journey to deliver the caps and, as a "business invitee," had a right to return on the vehicle on which he had placed it, seems to me as irrelevant as though the deceased had embarked as a passenger on a railroad train on which the explosion occurred after he or his firm had shipped dynamite upon it. By the terms of the policy, participation, to exclude liability, must be at the time of the injury. After the return journey began, deceased did nothing to facilitate the transportation. He neither controlled nor had the right to control it. He was merely present. The distinction drawn between this case and that of mere presence, so difficult of statement and application, appears to me to obscure rather than to define the meaning of the term and to violate the cardinal principle that, so far as their language reasonably admits, insurance contracts are to be interpreted most favorably to the insured.

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## CHASSANIOL *v.* CITY OF GREENWOOD.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 428. Argued February 6, 1934.—Decided March 12, 1934.

The business of buying and selling cotton locally produced, processed and warehoused, is local in character; and a local occupation tax upon the buyer does not contravene the Commerce Clause, although the course of the business be such that all of the cotton so bought is

ultimately shipped by the buyer in interstate or foreign commerce. *Federal Compress & Warehouse Co.* v. *McLean, ante,* p. 17. P. 586. 166 Miss. 848; 148 So. 781, affirmed.

APPEAL from the affirmance of a judgment of a Circuit Court of Mississippi, which sustained on appeal an order of the City Council of Greenwood refusing a refund of taxes.

*Mr. Edward W. Smith,* with whom *Messrs. Sam C. Cook, Marcellus Green,* and *Garner W. Green* were on the brief, for appellant.

*Messrs. J. A. Lauderdale* and *A. H. Bell,* with whom *Mr. J. A. Tyson* was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The City of Greenwood, Mississippi, laid by ordinance, in 1931 and in 1932, a tax " upon every person engaged in the business of buying or selling cotton for himself " within the city. In each year a tax of $50 was assessed to Chassaniol. He paid it under protest; and duly applied for refund to the City Council, claiming that the tax was illegal, and that the ordinances and the statutes authorizing it as construed and applied were void, because they violate the commerce clause of the Federal Constitution. The City Council refused the refund. Its action in denying this claim under the Constitution was sustained by both the Circuit Court of Leflore County and by the Supreme Court of the State, 166 Miss. 848; 148 So. 781. Whether they erred in so holding is the only question presented for decision by this appeal.

Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. All of the cotton there dealt in is grown and ginned in Mississippi. It reaches the Greenwood warehouses, about 70 per cent. by rail, the rest by automobile, truck, or wagon. There, it is compressed substantially as described in *Federal Compress & Warehouse Co.* v. *McLean, ante,* p. 17.

Purchases and sales are made upon the market by transfer and delivery of receipts issued by the local warehouses under the United States Warehouse Act. The prices are governed largely by transactions on the cotton exchanges of New York, Chicago, New Orleans and Liverpool.

There are at Greenwood about 25 cotton buyers, each of whom, like Chassaniol, purchases and sells cotton for himself. The buyer becomes the absolute owner. He makes the profit or bears the loss. But when he buys he customarily has in hand and in mind orders or contracts for that particular grade, for immediate or future delivery in other states or countries to the extent of about 90 per cent., on the average, of all cotton purchased by him. The remaining 10 per cent., he buys because, as often happens, growers of cotton refuse to sell less than their whole lot; and the lot may include a quantity greater than, or some bales of a grade different from, that for which the buyer has orders or contracts. The surpluses so bought are called "overs." Sometimes the "over" is held by the buyer until he gets an order or contract on which it can be placed. Sometimes the "over" is sold to another buyer at Greenwood. And some of the cotton bought as an "over" changes ownership several times within the State. But eventually the "overs," like the rest of the cotton, are shipped in interstate or foreign commerce.

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in

*Federal Compress Co.* v. *McLean;* and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.

There is nothing in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 or in *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50, inconsistent with this conclusion. The regulations involved in those cases were found to impose a direct burden upon interstate commerce itself. *Stafford* v. *Wallace,* 258 U.S. 495, is also in harmony with the rule here applied. See *Minnesota* v. *Blasius,* 290 U.S. 1, 7–8.

*Affirmed.*

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## ARROW-HART & HEGEMAN ELECTRIC CO. *v.* FEDERAL TRADE COMMISSION.

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

No. 363. Argued February 8, 1934.—Decided March 12, 1934.

After commencement of a proceeding by the Federal Trade Commission to compel a holding company to divest itself of the voting stock of two competing operating companies, held by it in alleged violation of the Clayton Act, a reorganization was brought about through united participation of the owners of the holding company's shares and of the preferred stock of the operating companies, which the holding company never owned, whereby all the properties of the operating companies were acquired, through mergers, by a new corporation and the holding company was completely dissolved, pursuant to the state law.

*Held*, that the jurisdiction of the Commission was ousted; that it had no power,—even on the assumption that the reorganization was a device of the dissolved corporation to evade §§ 7 and 11 of the Act—to bring in the new corporation as a respondent and require it to divest itself of one or the other of the operating plants. *Thatcher Mfg. Co.* v. *Federal Trade Comm'n*, 272 U.S. 554; *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U.S. 554. P. 594.

65 F. (2d) 336, reversed.

CERTIORARI, 290 U.S. 622, to review a judgment affirming an order of the Federal Trade Commission.

*Mr. Charles Neave*, with whom *Messrs. Arthur F. Mullen, Arthur L. Shipman, Charles Welles Gross*, and *Wallace W. Brown* were on the brief, for petitioner.

*Solicitor General Biggs*, with whom *Assistant Attorney General Stephens* and *Messrs. Moses S. Huberman, Robert E. Healy*, and *Everett F. Haycraft* were on the brief, for respondent.

After the Commission issued its complaint, the original respondent, by means of its illegal stock control, caused petitioner to be created by the consolidation of the two manufacturing corporations. The purpose of the consolidation was to oust the Commission of its jurisdiction. All of the directors, officers, and stockholders of the original respondent became the directors, officers and voting stockholders of petitioner. Under § 11 of the Clayton Act, read in the light of its general purpose and applied with a view to effectuate such purpose, the Commission had jurisdiction to join petitioner, as a party respondent, in the pending proceeding and to order petitioner to divest itself of the assets of one or the other of the manufacturing corporations. *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U.S. 554, 559. Unless this be true, the Commission has no power to enforce compliance with this provision of the Clayton Act.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals[1] affirmed an order of the Federal Trade Commission issued pursuant to § 7 of the Clayton Act.[2] A writ of certiorari was granted upon the claim of petitioner that the formation of a holding company which acquired all the voting shares of two manufacturing corporations was not in violation of the section, or, if it was, the merger of the two manufacturing corporations and dissolution of the holding company after complaint by the Federal Trade Commission deprived the latter of jurisdiction to make any order against the company formed by the merger. A proper understanding of these contentions requires a somewhat detailed statement of events prior and subsequent to the issuance of the complaint.

The Arrow Electric Company, hereafter called Arrow, and the Hart & Hegeman Manufacturing Company, hereafter called Hart & Hegeman, were Connecticut corporations engaged in the manufacture and sale in interstate commerce of electric wiring devices. Both were solvent and successful. There was no community of ownership of the stock of the two concerns. Each had valuable trade names by which its goods were known to consumers.

[1] 65 F. (2d) 336.

[2] Act of October 15, 1914, c. 323, § 7, 38 Stat. 731; U.S.C. Title 15, § 18. The relevant paragraph is as follows:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

Shortly after the death of the principal stockholder, who was also the president, of Hart & Hegeman, the major interests in that company got into touch with those controlling Arrow, and after some negotiation it was agreed that economies could be effected if the business of both were brought under common control. In view, however, of the competition between the goods known by the names of the two manufacturing companies, it was thought that the trade names and the identity of the goods could best be preserved by retaining the separate corporate entities and the sales forces of the two organizations. The plan evolved was, therefore, that of a holding company which should own all of the common shares of both corporations, under the control of which the manufacturing and sales organizations should be kept separate and distinct and in competition with each other as theretofore. In order to bring about an equitable division of the stock of the proposed holding corporation, Arrow issued to its common stockholders a dividend in preferred stock. The recipients sold the preferred shares to a syndicate, which in turn sold them to the public. Hart & Hegeman increased its common stock and issued the new stock as a stock dividend. It also created an issue of preferred stock, which was sold to the public. Prior to the acquisition of the common stock by the holding company the capitalization was as follows:

Arrow—Common stock, $750,000, par $25. Preferred stock, $2,000,000, par $100.

Hart & Hegeman—Common stock, $500,000, par $25, Preferred stock, $1,333,300 par $100.

The holders of preferred stock in each company were without the right to vote for directors except upon default in the payment of six successive dividends, in which case the preferred stockholders were entitled to elect the board. In October, 1927, Arrow-Hart & Hegeman, Incorporated, hereafter called the holding company, was

organized under the laws of Connecticut. It had only common stock. The owners of all of the common shares of Arrow exchanged them for 120,000 shares of the stock of the holding company and the owners of all the common shares of Hart & Hegeman exchanged them for 80,000 shares of the same stock.

On March 3, 1928, the Federal Trade Commission issued a complaint in which it charged the effect of the holding and voting of all of the common shares of the two operating companies might be to substantially lessen competition between the companies in electrical wiring devices, to restrain commerce in those devices, and to create a monopoly. The holding company filed an answer traversing these allegations. Shortly thereafter counsel advised that the company be dissolved and its assets, consisting of the stock of Arrow and of Hart & Hegeman, be distributed amongst its stockholders, and that thereupon the two latter companies merge into a single corporation under the laws of Connecticut, thus transferring to the new corporation to be formed by merger all of the assets of Arrow and of Hart & Hegeman.

It was discovered that such a program might cast heavy taxes upon the stockholders, and a modification was suggested to work out the plan in accordance with the reorganization sections of the Revenue Act of 1928. The stockholders of the holding company and the preferred stockholders of both the operating companies were notified of the original plan and of its modification, and proxies were asked so that their votes might be recorded at corporate meetings intended to be held to carry out the proposal. A two-thirds vote of both preferred and common stock is required by the law of Connecticut to authorize a merger.

In lieu of the original program of distribution of the shares owned by the holding company to its stockholders, the shares of Arrow were transferred to a new company,

called the Arrow Manufacturing Company, and those of Hart & Hegeman to another new company, known as the H. & H. Electric Company, against the issue of all of the shares of these companies respectively. The stock so to be issued by these two new holding companies was, by the direction of the original holding company, issued directly to its stockholders. As soon as this transfer of all its assets had been made to the two new holding companies by the old one, the latter by corporate action dissolved. Thereafter, pursuant to directors' action, the stockholders, preferred and common, of the four companies having an interest in the assets (Arrow, Hart & Hegeman, Arrow Manufacturing Company, and the H. & H. Electric Company) approved a merger agreement whereby the petitioner, The Arrow-Hart & Hegeman Electric Company, was formed, which directly owned in its own right all of the assets formerly belonging to Arrow and to Hart & Hegeman. These transactions were consummated on or prior to December 31, 1928, except that the dissolution of the first holding company did not become final until April 11, 1929, the law of Connecticut providing that a final certificate of dissolution should not issue until four months after the filing of the resolution for dissolution.

January 11, 1929, counsel notified the Commission of the dissolution of the holding company and the formation of the petitioner. June 29, 1929, the Commission issued a supplemental complaint, entitled jointly against the holding company (the original respondent) and the petitioner (the corporation formed by the merger). After reciting in greater detail than above set forth the action taken, this complaint asserted that the formation of the petitioner was brought about by the contrivance and at the instigation of the holding company; that the conveyance of the stocks of Arrow and Hart & Hegeman to the two new holding companies failed to restore the assets

to the ownership and control of separate groups in the manner the shares were held and controlled before the formation of the original holding company; that the result of the whole plan was not a restoration of competition as required by the act of Congress, and that the Commission's jurisdiction having timely attached could not be ousted by the steps subsequently taken.

Petitioner answered the supplemental complaint, the matter was heard, and the Commission made its findings. In addition to the facts above recited, the Commission found that at the time of the acquisition of the stocks of Arrow and Hart & Hegeman by the holding company, those corporations were in direct and substantial competition in interstate commerce, and after the formation of the holding company competition between them had been substantially curtailed. The Commission concluded: The acquisition by the holding company of the shares of the two manufacturing companies might substantially lessen competition between them, restrain interstate commerce, and create a monopoly; the divestment by the holding company was not a compliance with the Clayton Act; the petitioner was organized by the holding company, and its creation was an artifice to evade the provisions of §§ 7 and 11 of the Clayton Act; and the effect of the organization of the petitioner and "the acquisition by it of the common or voting stocks of" Arrow and Hart & Hegeman has been, is, and may be to suppress competition between the two manufacturing companies, to restrain interstate commerce, and to create a monopoly.

The Commission entered an order commanding the petitioner to cease and desist from violation of the provisions of § 7 of the Clayton Act, and to divest itself "of all the common stock of" Hart & Hegeman "so as to include in such divestment" the said company's manufacturing plants and equipment, and all other property necessary to the conduct and operation thereof as a complete

going concern, and so as neither directly nor indirectly to retain any of the fruits of the acquisition of common stock of Hart & Hegeman; or, in the alternative, to divest itself of " all the common stock of " Arrow in the same manner. It was further ordered " that such divestment of the common stock or assets " of Arrow or Hart & Hegeman, as the case might be, should not be made directly or indirectly to the petitioner or any stockholders, officers, employees, or agents of or under the control of the petitioner.

The findings with respect to the effect of the acquisition and ownership by the holding company of the shares of the two manufacturing corporations are attacked as unsupported in fact and unjustified in law. The record is said to disclose that competition was not in fact diminished but preserved. And it is further argued that if competition was or might be in some measure curtailed by the device of a holding company the result is unimportant and insignificant unless the public was injured, and not only is there a total absence of proof of injury to the public, but much affirmative evidence that consumers were benefited by reduction of prices consequent on manufacturing efficiency made possible by unified control.

It is unnecessary to discuss or to decide the questions thus raised, for we think the Commission lacked authority to issue any order against the petitioner.

Section 7 of the Clayton Act forbids any corporation to acquire the whole or any part of the share capital of two or more corporations, where the effect of the acquisition or the use of the stock by voting or otherwise may be to substantially lessen competition between such corporations, restrain competition in interstate commerce or create a monopoly in any line of commerce. Section 11 [3] specifies the remedy which the Commission may apply,

[3] U.S.C., Title 15, § 21.

namely, that it may, after hearing, order the violator to divest itself of the stock held contrary to the terms of the Act. The statute does not forbid the acquirement of property, or the merger of corporations pursuant to state laws, nor does it provide any machinery for compelling a divestiture of assets acquired by purchase or otherwise, or the distribution of physical property brought into a single ownership by merger.

If, instead of resorting to the holding company device, the shareholders of Arrow and Hart & Hegeman had caused a merger, this action would not have been a violation of the Act. And if, prior to complaint by the Commission, the holding company, in virtue of its status as sole stockholder of the two operating companies, had caused a conveyance of their assets to it, the Commission would have been without power to set aside the transfers or to compel a reconveyance. *Thatcher Mfg. Co.* v. *Federal Trade Comm'n,* 272 U.S. 554, 560, 561.

Clearly, also, if the holding company had, before complaint filed, divested itself of the shares of either or both of the manufacturing companies, the Commission would have been without jurisdiction. And it might with impunity, prior to complaint, have distributed the shares it held pro rata amongst its stockholders. The fact that in such case the same group of stockholders would have owned shares in both companies, whereas theretofore some owned stock in one corporation only, and some held stock solely in the other, would not have operated to give the Commission jurisdiction. For if the holding corporation had effectually divested itself of the stock, the Commission could not deal with a condition thereafter developing although thought by it to threaten results contrary to the intent of the Act. Compare *National Harness Mfrs. Assn.* v. *Federal Trade Comm'n,* 268 Fed. 705; *Chamber of Commerce* v. *Federal Trade Comm'n,* 280 Fed. 45.

Moreover, the holding company could have ousted the Commission's jurisdiction after complaint filed, by divesting itself of the shares, for that was all the Commission could order. And if it had so divested itself the transferees of the shares could immediately have brought about a corporate merger without violating the Clayton Act. We think that is precisely the legal effect of what was done in the present case. The holding company divested itself of the shares, and thereafter the owners of these common shares united with the holders of the preferred shares to bring about a merger.

The Commission apparently was doubtful of its authority to promulgate the order which it entered. This is evidenced by the terms of the findings and the order. In its final conclusion the Commission refers to "the acquisition by the said new respondent [the petitioner] through merger, of the common or voting stocks of the said Hart & Hegeman Manufacturing Company and Arrow Electric Company . . .," and denominates this a violation of § 7 of the Clayton Act. This, of course, is in the teeth of the obvious fact that the petitioner never acquired the stock of either Arrow or Hart & Hegeman. In its order the Commission directs that the petitioner cease and desist from violation of the provisions of § 7 of the Act, and "divest itself absolutely, in good faith, of all common stock of the Hart & Hegeman Manufacturing Company acquired by it as a result of the merger"; and then adds that it shall do this so as to include in such divestment the manufacturing plants and assets of Hart & Hegeman; and in the alternative the order applies to the stock and manufacturing plants of Arrow. This is a tacit admission that the Commission is without jurisdiction to act unless the alleged violator holds stocks of other corporations. The Commission's own findings show that the petitioner never held any stock of either company, but the

order, nevertheless, requires that the petitioner divest itself of those stocks.

The argument on behalf of the Commission is that while it is true the petitioner never owned any stock of Arrow or Hart & Hegeman, the holding company, against whom the complaint was originally directed, did hold such stocks in violation of the statute when the proceeding was initiated; and, instead of parting with the shares in good faith, ineffectually attempted to alter the status by initiating and carrying through the merger, the dissolution of which is the aim of the Commission's order.

We think the Commission's premise with respect to the activities of the holding company in bringing about the merger is without support. When the Commission filed its complaint those who had previously been the common stockholders of Arrow and Hart & Hegeman, respectively, had become the owners of the shares of the holding company. While those shares represented at two removes the physical assets of the enterprise, they nevertheless evidenced the equity ownership of those assets. At that time Arrow and Hart & Hegeman were still separate corporate entities, and about 73% of their outstanding capital stock was preferred stock held by the public, in no wise affected by the creation of the holding company. After the holding company had conveyed the Arrow stock to a new holding company, and the Hart & Hegeman stock to another new holding company, the only persons who could bring about a merger and consequent consolidation of assets were the preferred and common stockholders of Arrow and Hart & Hegeman. Under the laws of Connecticut two-thirds of the outstanding stock of each class had to vote affirmatively to authorize a merger. While the holding company proposed the plan for accomplishing a merger, and sponsored the preliminary steps to that end, obviously that company had no power to consum-

mate it. That power resided in the equity owners of the assets, the preferred and common stockholders of Arrow and Hart & Hegeman. The common stockholders acted through the two holding companies, but the ultimate decision and action was theirs, through whatever instrumentality effected. Quite as vital to the accomplishment of the plan was the consent of preferred stockholders. It is true the consent was given through execution of proxies; but the shareholders were at liberty to give or to withhold their proxies, and it would be quite beyond reason to hold, as the Commission suggests, that all corporate entities and all stockholder relationship to the property should be disregarded and the original holding company be treated as the sole and efficient agent in the accomplishment of the merger. To do this would be to disregard the actualities, including the fact that the holding company had been effectually dissolved before the merger was voted upon by any of those having an equity interest in the assets.

But if we assume that the holding company against which the complaint was originally directed, brought about a change in legal status, so that before the Commission acted that company ceased to exist, as did the shares it formerly owned, and a corporation formed by merger held all the assets in direct ownership, the respondent's position is no better. The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy. Com-

pare *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U.S. 619, 623. Where shares acquired in violation of the Act are still held by the offending corporation an order of divestiture may be supplemented by a provision that in the process the offender shall not acquire the property represented by the shares. *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U.S. 554. In the present case the stock which had been acquired contrary to the Act was no longer owned by the holding company when the Commission made its order. Not only so, but the holding company itself had been dissolved. The petitioner, which came into being as a result of merger, was not in existence when the proceeding against the holding company was initiated by the Commission, and never held any stock contrary to the terms of the statute. If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any anti-trust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other than those found in the Clayton Act. And if any remedy for such violation is afforded, a court and not the Federal Trade Commission is the appropriate forum. Compare *Federal Trade Comm'n* v. *Western Meat Co., supra.*

The judgment is

*Reversed.*

MR. JUSTICE STONE, dissenting.

I think the decree should be affirmed.

While this proceeding was pending before the Federal Trade Commission to compel a holding company to divest itself of the controlling common stock of two competing corporations which it had acquired in violation of § 7 of the Clayton Act, that stock was used to effectuate a merger of the competing corporations. It is now declared that, however gross the violation of the Clayton Act, how-

ever flagrant the flouting of the Commission's authority, the celerity of the offender, in ridding itself of the stock before the Commission could complete its hearings and make an order restoring the independence of the competitors, leaves the Commission powerless to act against the merged corporation. This is the case, it is said, because the Clayton Act does not, in terms, forbid mergers, which may be formed by the stockholders of independent competing corporations; and, since the holding company was not the "sole and efficient agent in the accomplishment of the merger," which was affected upon the consent of the various classes of stockholders of the merged companies, it is concluded that the holding company, by its divestment of the stock, complied with the Clayton Act and in effect did "all the Commission could order," so there is no longer any ground for complaint. Further, notwithstanding the authority broadly conferred on the Commission "to enforce compliance" with § 7 "whenever . . . any person . . . has violated" its provisions, it is said that as the statute in terms specifies only a single method by which compliance can be compelled—ordering the offender to divest itself of the stock—the Commission can make no other form of order.

Apart from the objection that the decision now reached is calculated to encourage hasty and ill considered action by the Commission in order to avoid defeat of its jurisdiction by the adroit manipulations of offenders against the Clayton Act, I am unable to construe so narrowly a statute designed, as I think, to prevent just such suppression of competition as this case exemplifies.

1. It is true that the Clayton Act does not forbid corporate mergers but it does forbid the acquisition by one corporation of the stock of competing corporations so as substantially to lessen competition. It follows that mergers effected, as they commonly are, through such ac-

quisition of stock necessarily involve violations of the Act, as this one did. Only in rare instances would there be hope of a successful merger of independently owned corporations by securing the consent of their stockholders in advance of the acquisition of a working stock control of them. Hence the establishment of such control by the purchase or pooling of the voting stock, often effected in secrecy, is the normal first step toward consolidation. It is by this process that most corporate consolidations have been brought about, often by adding one consolidation to another through periods of years. Compare *Standard Oil Co.* v. *United States,* 221 U.S. 1; *United States* v. *American Tobacco Co.,* 221 U.S. 106; *United States* v. *U.S. Steel Corp.,* 251 U.S. 417; see Bonbright and Means, The Holding Company, 30, 50.

Unless we are to close our eyes to this open chapter in the record of corporate concentration, an examination of the legislative history of the Clayton Act, and that of the earlier Sherman Act, can leave no doubt that the former was aimed at the acquisition of stock by holding companies not only as itself a means of suppressing competition but as the first and usual step in the process of merging competing corporations by which a suppression of competition might be unlawfully perpetuated. Thus one of the evils aimed at, the merger of competing corporations through stock control, was reached in its most usual form by forbidding the first step, the acquisition of the stock of a competing corporation, and by conferring on the Trade Commission authority to deal with the violation. It seems plain, therefore, that the illegality involved in acquiring the common stock of the competing companies, which was the first step toward the merger, was neither lessened nor condoned by taking the next and final steps in completing it. There is, then, no basis for contending that the Act has not been violated, or that

the violation has been excused simply because events were pushed to the very conclusion that § 7 was designed to forestall.

2. It is also true that the holding company divested itself of the stock of the two competing operating companies before the Commission had an opportunity to make its order; but it does not follow that it had done all that the Commission could command and that thus the statute was satisfied. Mere divestment of the stock is not enough. The manner of divestment is likewise subject to the requirements of the Clayton Act. This Court has recognized that the purpose of the Act is to restore the competition suppressed by the acquisition of the stock and has specifically held, over objections such as are now made, that the Commission has power not only to order divestment but to prescribe that it shall be done in a manner that will restore competition. *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U.S. 554.

Here the Commission has held that the divestment was not a compliance with the statute. In determining whether it was right in this conclusion, the manner of divestment and the activity of the holding company after the complaint of the Commission was filed and before the final merger of the two operating companies are of crucial significance.

When the complaint was filed the holding company was in complete control of the two operating companies through ownership of their common stock, which alone had voting power. From the moment of the acquisition of the stock it had been and it continued to be a violator of the Clayton Act. Promptly after the complaint was filed it took measures to secure the fruits of its violation. It first proposed by letter to its stockholders a consolidation of the two operating companies, and at a special meeting its board of directors formulated a detailed plan for merger. This plan involved the organization of the two

new holding companies, the transfer to them respectively by the first holding company of its respective holdings of the common stock in the two operating companies in exchange for the distribution by the new holding companies of their stock to the stockholders of the first holding company. Thus for each share in the first holding company owned by its stockholders they were to receive one share in each of the new holding companies. The original holding company was then to be dissolved and the four remaining companies, the two new holding companies and the two operating companies, were to be merged.

The plan, from the beginning, contemplated that the four companies should be bound by formal agreement to effect the merger. It was adopted at a specially called meeting of the stockholders of the first holding company and was carried into effect under its active direction and control. Before its dissolution, by exercising that control it had created the two new holding companies, committed all four of its subsidiary corporations to the merger both by their corporate action and by binding agreement, and had secured the approval of its action by its own stockholders. It will be observed that the original holding company did not divest itself of the stock of the two competing operating companies in the only manner by which competition could have been restored—by returning the stock to the respective stockholders of the operating companies, from whom it had been secured, or to their successors. Instead, it continued the suppression of competition by placing the stock of the two operating companies respectively in control of the two new holding companies, tied by contract to effect the merger, and by the method of distributing the stock of the new holding companies equally to its own stockholders it lodged common ownership and control of both the new holding companies in the two groups of stockholders of the original operating companies. The first holding company created the two new

ones and throughout guided their policy, as it did that of the two operating companies. Acting in concert and in accord with the prearranged plan, all coöperated in executing it, and all, together with their creature, the merged company, were conscious beneficiaries of the violation of the statute.

By thus manipulating its illegally acquired stock control of the operating companies, the first holding company avoided such a distribution of the stock as would have restored competition, and made easy the merger which, if the stock had been returned to those from whom it had originally been acquired, would have been difficult or impossible. Upon these and other facts, which need not now be detailed, the Commission made its finding, abundantly supported by evidence, that the course of action taken by the holding company was not to restore competition between the operating companies, but was " an artifice and subterfuge designed in an attempt to evade the Clayton Act, to perpetuate the elimination of competition," which it had brought about by the acquisition of the stock of the operating companies.

That the stockholders in the successive holding companies, who were the ultimate owners of the operating companies, consented to all this; that two-thirds of the non-voting preferred stock of the operating companies which had never been lodged in the holding companies consented to it; that the merger might possibly have been effected in some other way, had competitive conditions been restored; all seems without significance. While under local statutes merger could not have been effected without the consent of the preferred stock, equally the consent of the stock acquired through violation of the Clayton Act and its active promotion of the merger were essential to the desired end. A prohibited act is no less illegal because its success involves the coöperation of other actors. It was the suppression of competition

by the holding company, through the use which it made of the illegally acquired stock of the operating companies, and its manner of disposing of the stock so as to continue that suppression, which were violations of the Clayton Act and in conflict with the authority of the Commission. This was not any the less so because others consented.

Doubts whether the divestment effected by the first holding company was all that the Commission could have ordered are dissipated by our decision in *Federal Trade Comm'n* v. *Western Meat Co., supra.* There we upheld an order of divestment which directed that in transferring the stock the respondent corporation could not use it to acquire any of the property of the competing corporation, and that none of the stock could be transferred to anyone having any connection with or in any way under the influence of the offending corporation. Here we need not go so far.

3. There remains the question whether the Commission is now powerless to undo a consummation which, at an earlier stage, it could have prevented. It is said, as a matter of statutory construction, that the grant to the Commission of specific power to command offenders to divest themselves of illegally acquired stock excludes the possibility of its ordering anything more or different, however incidental or necessary it may be to the exercise of the granted power.

It would seem that this point also had been settled by our decision in the *Western Meat Company* case, where the offending company, through stock ownership, had acquired possession of the property and control of the business of a competitor. It wished to be free to divest itself of the stock without restriction, in order that it might acquire ownership of the competitor's property by transferring the stock to hands that would make merger easy. It was argued to us there, as it is here, that the statute

provides only that the Commission may order divestment of the stock; that it does not say that the Commission can command relinquishment of the power, derived from the stock ownership, to bring the competitor, or its property, under the control of the offending corporation, either directly, or through transfer of the stock into friendly hands. But that argument was rejected, and the order directing divestment of both the property and stock by placing both in the hands of those not under the influence or control of the offender was upheld. This Court said, p. 559:

"Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent."

No more here, than there, should it be said that the purpose of the statute must be defeated because the lawmakers did not attempt to provide with a meticulous precision how the Commission should proceed in every contingency that might arise. The dominating purpose of the statute is to restore to its original state the competition suppressed by the acquisition of the stock, and, just as we rejected a rigid literalism there in order to effect that purpose, and upheld an order which was but incidental, though necessary, to the effective exercise of the power specifically granted, so we should reject it now. Just as in that case we upheld the Commission's order directing the surrender of one of the fruits of the wrongful stock ownership—the power to place a competing unit under the offender's domination—so should we now sus-

tain the order commanding relinquishment of another of the fruits of that ownership—the accomplished merger.

Even if the question were a new one in this Court, no plausible reason has been advanced for interpreting this remedial statute as though it were a penal law. The Clayton Act was designed to prevent abuses growing from deficiencies due to the generality of the Sherman Act. It sought to accomplish that end by conferring upon the Commission the power to strike at specific practices. In this, as in most schemes for regulation by administrative bodies, there must be a balance between the general and the particular. When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation. In carrying such schemes into operation the function of courts is constructive, not destructive, to make them, wherever reasonably possible, effective agencies for law enforcement and not to destroy them.

That the merged corporation is different from the original offender should lead to no different conclusion. It is but the creature and *alter ego* of the offender, created by the offender's exercise of power over the illegally acquired stock for the very purpose of perpetuating the suppression of competition which the Commission from the start had power to forbid. To declare that an offender, whose cause is pending before the Commission, can effect through its creatures and agents what it may not itself do, nullifies the statute.

Some scope may be given to the doctrine of *lis pendens*. It is true that the Commission is an administrative body, and not a court. But it exercises many of the powers conventionally deemed judicial. It is authorized to bring offenders before it to determine whether they are violators of the Act and, if so, "to enforce compliance" by

commanding that the violation cease. There is as much reason to believe that Congress did not intend to deny to the Commission the authority to exercise effectively the granted power, and thus to preserve its jurisdiction until its function could be executed, as there would be were similar powers extended to a court of inferior jurisdiction. This is the more evident when it is remembered that obedience to the Commission's orders cannot be compelled without first subjecting them to the scrutiny of a court. Recognition of its authority involves neither departure from accepted principles nor any risk of abuse.

These considerations demand our rejection of the contention that an offender against the Clayton Act, properly brought before the Commission and subject to its order, can evade its authority and defeat the statute by taking refuge behind a cleverly erected screen of corporate dummies.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE CARDOZO concur in this opinion.

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## MASSEY v. UNITED STATES.

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

No. 707. Argued March 5, 1934.—Decided March 12, 1934.

A conviction for conspiracy to violate the National Prohibition Act was affirmed by the Circuit Court of Appeals, but mandate was stayed to allow application to this Court for writ of certiorari. Petition for the writ was filed within time, soon after the repeal of the Eighteenth Amendment had been consummated. *Held* that the judgment should be reversed and the cause remanded to the District Court with direction to vacate the sentence and dismiss the indictment,—on the authority of *United States* v. *Chambers*, *ante*, p. 217.

66 F. (2d) 666, reversed.

CERTIORARI to review a judgment of the Circuit Court of Appeals affirming a conviction of conspiracy to violate the National Prohibition Act. The writ of certiorari, at first denied, *post,* p. 669, was granted on a petition for rehearing, *post,* p. 655.

*Mr. Edward F. Colladay,* with whom *Mr. William A. McClellan* was on the brief, for petitioner.

*Solicitor General Biggs,* with whom *Mr. W. Marvin Smith* was on the brief, for the United States.

PER CURIAM.

It appeared, on rehearing, that the petitioner and others were indicted on March 4, 1932, in the District Court of the United States for the Southern District of Indiana for conspiring to violate the National Prohibition Act; that the petitioner was found guilty by a jury on May 20, 1932, and, with others, was sentenced to fine and imprisonment by a judgment entered in that court on June 3, 1932; that, on appeal, the judgment, as to the petitioner, was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on August 7, 1933, and that a petition for rehearing duly filed by him in that court was denied on October 10, 1933. It further appeared that on October 11, 1933, the Circuit Court of Appeals, upon consideration of a motion by the petitioner for a stay of mandate pending a petition to this Court for writ of certiorari, stayed its mandate until its further order, and ordered that the petitioner proceed with diligence and promptly file the petition for writ of certiorari in this Court. Petition for writ of certiorari was filed in this Court on January 6, 1934 and within the time provided by law.

The Solicitor General appeared on behalf of the Government upon the rehearing and stated his view to be that this case is controlled by the decision in *United States*

v. *Chambers, ante,* p. 217, and that the judgment of the court below should be reversed.

The Court is of the opinion that it appears from the record that no final judgment was rendered herein against the petitioner prior to the ratification of the Twenty-first Amendment. The judgment of the Circuit Court of Appeals, as entered in the cause of this petitioner, is accordingly reversed, and the cause is remanded to the District Court with direction to vacate that part of its judgment which sentences this petitioner, and to dismiss the indictment as to him. *United States* v. *Chambers, ante,* p. 217.

*Reversed.*

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## EX PARTE BALDWIN ET AL.

PETITION FOR WRIT OF MANDAMUS.

No. 19, original. Argued February 12, 1934.—Decided March 19, 1934.

1. The writ of mandamus will not be issued by this Court at the instance of a trustee in bankruptcy to compel the District Court to accept jurisdiction on removal of a suit in a state court, brought against him as such trustee and affecting the title and possession of property of which he has taken possession as part of the bankrupt estate. There is an adequate remedy by application to the court of bankruptcy to enjoin the prosecution of the suit. P. 614.
2. All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of the petition in bankruptcy, into the custody of the court of bankruptcy. P. 615.
3. Where a court of competent jurisdiction has, through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts, and the court having possession may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. P. 615.
4. The jurisdiction in such cases is exclusive of the jurisdiction of other courts although otherwise the controversy would be cognizable by them. P. 615.

5. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy jurisdiction originated; and an injunction to protect its possession may issue either from the federal court of original jurisdiction, or from the federal court of the district in which the state court suit is brought or in which the plaintiff in that suit resides. P. 615.
6. The exclusive jurisdiction acquired by a court of bankruptcy through taking possession of land as part of the bankrupt's estate is not limited to prevention of interference with use of the land but extends also to the adjudication of questions respecting the title. P. 616.
7. The inherent power of a bankruptcy court to protect its jurisdiction over property of which it has taken possession from interference by suit against the trustee thereafter begun in a state court, is expressly reserved in § 265, Jud. Code, and is not abridged by § 23 (a) of the Bankruptcy Act, relating to suits over property brought by trustees in bankruptcy against adverse claimants, nor by § 66, Jud. Code, which provides that every receiver or manager of any property appointed by any court of the United States, may be sued without previous leave of that court, in respect of any act or transaction of his in carrying on the business connected with such property, subject, however, to the equity jurisdiction of the appointing court so far as may be necessary to the ends of justice. P. 616.
8. A suit brought in a state court against trustees in bankruptcy to forfeit to the plaintiffs a railroad right of way in the trustees' possession, upon the ground that the bankrupt railway company broke an agreement requiring it to maintain train service,—*held* subject to the jurisdiction of the bankruptcy court, notwithstanding that, as a mere incident, damages also were prayed against the trustees because of their failure to maintain the service after they took over the railway. P. 618.
9. Non-feasance of the trustees in bankruptcy in not reviving train service which the bankrupt wholly ceased to maintain before they took possession, was not an "act or transaction" of the trustees, within the meaning of § 66, Jud. Code. *Id.*

Rule discharged.

Upon the return of the District Court for the Southern District of Texas, and of Thomas M. Kennerly, judge thereof, to a rule to show cause why a writ of mandamus

should not issue commanding that jurisdiction be taken of a petition for the removal to that court of a suit pending in a court of Texas against the petitioners, Baldwin and Thompson, trustees in bankruptcy, the Beaumont, Sour Lake & Western Railway Company, and the Houston North Shore Railway Co.

*Messrs. Robert H. Kelley* and *Harry R. Jones,* with whom *Messrs. Edward J. White* and *Frank Andrews* were on the brief, for petitioners.

*Mr. Lon E. Blankenbecker* for Tyrrell & Garth Investment Co., plaintiff in the state court.

Mr. Justice Brandeis delivered the opinion of the Court.

This petition for a writ of mandamus, filed in this Court by leave, prays that the federal court for southern Texas and Thomas M. Kennerly, judge thereof, be commanded to take jurisdiction, on a petition for removal, of a suit instituted in a state court of Texas by Tyrrell-Garth Investment Company. The petitioners are the defendants in that suit.[1] Two of them, Baldwin and Thompson, are the trustees in bankruptcy of the Missouri Pacific Railroad system and are operating it. They were appointed by orders of the federal court for eastern Missouri entered in proceedings for reorganization under § 77 of the Bankruptcy Act as amended March 3, 1933, c. 204, § 1, 47 Stat. 1474. The other two petitioners are Texas corporations—Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company—and are parts of the Missouri Pacific system.[2]

[1] There is another defendant in the state court suit (Johnson) who did not join in the petition for removal. The allegations concerning him are not here material.

[2] All the stock of these corporations is owned by New Orleans, Texas & Mexico Railway Company; and nearly all of the latter's voting stock is owned by the Missouri Pacific.

The federal court entered an order denying the petition for removal and returned the papers to the petitioners, on the ground that it appears from the petition for removal that the suit is not one in which it is sought to hold the trustees "responsible in their own person and/or property but only in their representative capacity. See *Ruff* v. *Gay*, 3 F.Supp. 264; 67 F. (2d) 684." The Trustees claim that they are entitled to a writ of mandamus, because the suit in the state court is removable under § 33 of the Judicial Code as amended by Act of August 23, 1916, c. 399, 39 Stat. 532, being an action against officers of a court "of the United States on account of acts done under color of their office and in performance of their duties as such officers." [3]

The petition for mandamus alleges that among the properties of which the Trustees took possession is an interurban railway in Texas, owned by the Houston North Shore Railway and leased to the Beaumont, Sour Lake & Western Railway; that they had taken possession of this property prior to the institution of the suit in the state court; and that the necessary effect of the institution and prosecution of the suit in the state court "is and will be to materially interfere with and obstruct the jurisdiction and powers of the federal court for eastern Missouri, with respect to the properties and assets of said debtors, the Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them."

The petition for mandamus shows further, by reference to the complaint of the Investment Company, that a part

[3] Judicial Code, § 33 as amended, provides: "When any civil suit . . . is commenced in any court of a State . . . against any officer of the courts of the United States 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 suit . . . may, at any time before the trial or final hearing thereof be removed for trial into the district court . . . in the district where the same is pending."

of the interurban railway's right of way had been acquired by mesne conveyance from the predecessor in title of the Investment Company; that, after the Trustees took possession of this interurban railway, the Investment Company brought the suit in the state court in which it claims that it is the owner of the fee of a part of the land over which the railway extends and that the easement of right of way has been forfeited by failure of the Texas corporations and the Trustees to operate trains thereon in accordance with the conditions contained in a contract which accompanied the grant of the right of way,[4] and prayed as follows: That the deeds conveying the right of way be cancelled; that they be "annulled and held for naught as an existing cloud upon plaintiff's title to the lands and properties therein conveyed"; that the two railways and the trustees be enjoined from making further use of the lands for the operation of the interurban railway or otherwise; and that the complainant recover from Houston North Shore Railway and the trustees "in their capacity as trustees" damages in the sum of $150,000.

We are of opinion that the Trustees may be entitled to have their controversy with the Investment Company adjudicated in the federal court, but are not entitled to the remedy of mandamus, because to secure adjudication in the federal court of their rights and duties, they could have applied, and still can apply so far as now appears, either in the original bankruptcy proceeding, or by an ancillary bill in Texas, for an injunction to restrain the Investment Company from prosecuting its suit in the state court.

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[4] The contract provided for an easement subject to forfeiture for non-user for the purpose of an interurban railroad. "Non-user" is defined as failure to operate the railroad for 30 successive days; and "operation" as involving a passenger schedule over which first-class coaches must run over the entire line by electric or gas engines on a regular schedule of at least one train not less than every two hours of each day from six o'clock a.m. until twelve o'clock midnight.

*First.* All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian* v. *Central Trust Co.,* 193 U.S. 93, 112; compare *Riehle* v. *Margolies,* 279 U.S. 218, 223; *Straton* v. *New,* 283 U.S. 318. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. *Murphy* v. *John Hofman Co.,* 211 U.S. 562, 569. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated. The injunction to protect its possession may issue either from the court of original jurisdiction, or from the federal court for the district in which the state court suit is brought or in which the plaintiff in that suit resides. *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U.S. 734, 737–8.[5]

*Second.* It is immaterial that the Investment Company, after the petition for removal had been presented to the federal court, amended its complaint in the state court by striking therefrom so much of the prayer as sought to enjoin the two railways and the Trustees from

[5] See *In re Patterson Lumber Co.,* 228 Fed. 916; 247 Fed. 578; *In re Lookout Mountain Hotel Co.,* 50 F. (2d) 421. As to railroads, see § 77 added to the Bankruptcy Act by Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467, 1474.

making further use of the lands for operation of the interurban railway or otherwise.[6] The purpose of the amendment was evidently to confine the litigation in the state court to the issue of the right and title to the property, as distinguished from its use during the pendency of the bankruptcy proceedings, in the hope of thereby removing the obvious interference with the jurisdiction of the bankruptcy court. But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare *Chicago Board of Trade* v. *Johnson,* 264 U.S. 1, 11; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U.S. 426, 433. The jurisdiction extends also to the adjudication of questions respecting the title. *White* v. *Schloerb,* 178 U.S. 542; *In re Eppstein,* 156 Fed. 42. Compare *Wabash R. Co.* v. *Adelbert College,* 208 U.S. 38, 54; *Security Mortgage Co.* v. *Powers,* 278 U.S. 149, 153.[7]

*Third.* The inherent power of the bankruptcy court to protect its jurisdiction, over property of which it has taken possession, from interference by suit thereafter begun in a state court has not been abridged by any legis-

[6] From the answer to the petition for removal filed by the Investment Company in the federal court it appears that, after the filing of the petition for removal, and before action thereon by the federal court, the Investment Company had moved in the state court to dismiss so much of the prayer in its suit as seeks an injunction against the Trustees in their official capacity and the two railway companies; and that the state court granted the motion "without prejudice to the plaintiff hereafter to seek such injunction against said defendant railway companies when and if they shall be discharged from jurisdiction and control of" the federal court for eastern Missouri. We have no occasion to consider the effect of the amendment so far as concerns the right of removal.

[7] *Whitney* v. *Wenman,* 198 U.S. 539. *In re Rochford,* 124 Fed. 182, 186; *In re Moody,* 131 Fed. 525; *Fidelity Trust Co.* v. *Gaskell,* 195 Fed. 865; *In re Dialogue,* 241 Fed. 290; cases in Note 8, *infra.*

lation of Congress. The power is expressly reserved to the bankruptcy court in Judicial Code § 265, which contains the general prohibition against staying proceedings in state courts. Nor is this power of the bankruptcy court affected by § 23 (a) of the Bankruptcy Act of 1898, c. 541, 30 Stat. 552, which declares:

"The United States circuit [district] courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

That section relates only to suits in which the Trustees are plaintiffs. It has no restrictive effect on the right of trustees or receivers to protect their possession or title through proceedings in the bankruptcy court.[8]

Nor is the inherent power of the bankruptcy court to protect its jurisdiction in respect to property of which it has taken possession abridged by Judicial Code § 66, which declares:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

[8] *J. I. Case Plow Works* v. *Finks*, 81 Fed. 529; *In re McCallum*, 113 Fed. 393; *In re Lipman*, 201 Fed. 169; *In re Williams*, 53 F. (2d) 486.

That section does not abridge the exclusive jurisdiction of the court over property of which it has taken possession. *In re Tyler,* 149 U.S. 164, 182–4.[9]

*Fourth.* It is true that the Investment Company seeks, in addition to the adjudication of the forfeiture of the right of way, damages " in the sum of $150,000 " from the two railways and " from the trustees in their said capacity as trustees " for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident. Moreover, the breach of contract for which damages are claimed is not " an act or transaction of the ' trustees ' in carrying on the business connected with such property." The breach alleged is that of " wholly " ceasing to maintain the passenger train schedule. It is alleged that this breach had occurred months before the commencement of the bankruptcy proceeding. The only wrong with which the Trustees are charged is in not " now maintaining " the service. Such non-feasance is not an " act or transaction " within the meaning of § 66.[10]

We have no occasion to determine otherwise the scope of Judicial Code § 33. Nor need we consider whether the federal court, if it had entertained the petition for removal, would have been obliged to dismiss the suit on the ground that the state court was without jurisdiction because the bankruptcy court had possession of the *res.*

[9] See also *New River Coal Co.* v. *Ruffner Bros.,* 165 Fed. 881; *Dickinson* v. *Willis,* 239 Fed. 171.

[10] Compare *Buckhannon & W. R. Co.* v. *Davis,* 135 Fed. 707, 711; *Love* v. *Louisville R. Co.,* 178 Fed. 507; *Dickinson* v. *Willis,* 239 Fed. 171; *Field* v. *Kansas City Refining Co.,* 296 Fed. 800; 9 F. (2d) 213.

Compare *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 738–9; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 382.[11] It is sufficient that the extraordinary remedy of mandamus should be denied, because the Trustees may by the common remedy of injunction prevent any interference with the jurisdiction of the bankruptcy court. Compare *Ex parte Park Square Automobile Station*, 244 U.S. 412, 414; *Ex parte Riddle*, 255 U.S. 450; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U.S. 533. Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court.[12]

*Rule discharged.*

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## PUGET SOUND POWER & LIGHT CO. *v.* SEATTLE.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 344. Argued January 12, 15, 1934.—Decided March 19, 1934.

1. A tax imposed by a city upon the gross receipts of a private corporation, engaged in the business of furnishing electric light and power to consumers for hire, can not be adjudged violative of the equal protection clause of the Fourteenth Amendment merely because the city, under authority from the State, engages in the same kind of business, in active competition with the private corporation. P. 623.
2. With respect to such business and its taxation, the city and the private corporation are clearly to be classed in different categories, for reasons that are in no way affected by calling the city's activity "proprietary" instead of "governmental." P. 624.

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[11] Compare *In re Zehner*, 193 Fed. 787; *First Trust Co.* v. *Baylor*, 1 F. (2d) 24, 27. See note 12, *infra*.

[12] *McHenry* v. *La Société Francaise*, 95 U.S. 58; *In re Johnson*, 127 Fed. 618; *In re Zehner*, 193 Fed. 787; *First Trust Co.* v. *Baylor*, 1 F. (2d) 24, 27; *In re Schulte-United*, 50 F. (2d) 243; *In re Gas Products Co.*, 57 F. (2d) 342; compare *In re Schermerhorn*, 145 Fed. 341; *In re Locust Bldg.*, 272 Fed. 988; *Field* v. *Kansas City Refining Co.*, 296 Fed. 800; 9 F. (2d) 213.

3. The Fourteenth Amendment does not protect private business from the risk of competition with business carried on by the State in the exercise of its reserved power. P. 625.
4. Objection to the vagueness and uncertainty of a tax as defined by a municipal ordinance, *held* obviated by its practical construction in this case by a competent administrative officer with the approval of the state court. *Pacific Telephone & Telegraph Co.* v. *Seattle, ante,* p. 300. P. 626.
5. Surrender of the power of taxation is not implied in a contract by a city granting to a public utility the license or franchise to use the streets for a term of years; and a later ordinance exacting payment of an annual tax on the gross receipts of the utility company as a condition precedent to its use of the streets does not impair the obligation of the contract. P. 627.

172 Wash. 668; 21 P. (2d) 727, affirmed.

APPEAL from the affirmance of a judgment dismissing the complaint of the Power & Light Company on demurrer, in a suit to recover the amount of a gross receipts tax paid to the State, and to enjoin future collections.

*Mr. Clarence R. Innis,* with whom *Messrs. Elmer E. Todd, Frank E. Holman,* and *William M. Allen* were on the brief, for appellant.

*Messrs. Walter L. Baumgartner* and *A. C. Van Soelen* for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Washington, 172 Wash. 668; 21 P. (2d) 727, sustaining a municipal license or excise tax, assailed by appellant as infringing the Fourteenth Amendment and the contract clause of the Federal Constitution.

An ordinance of the City of Seattle of May 23, 1932, imposes an annual license tax upon the privilege of carrying on the business of selling or furnishing electric light

and power to consumers. The tax is 3% of the gross income from the business "in the city" during the fiscal year next preceding the tax year for which the license is required. The suit, brought to recover an installment of the tax already paid and to enjoin the collection of future installments, was heard and decided upon demurrer to appellant's complaint.

Both appellant, a Massachusetts corporation, acting under a municipal franchise, and appellee, the City of Seattle, acting by state authority, are engaged and actively compete in the business of furnishing electric light and power to consumers for hire. By state law the city is given plenary power to fix rates for the electric current which it distributes, and its rates are not subject to regulation and control by the Public Service Commission, as are those of appellant. § 10390, Remington's Rev. Stat. of Washington. Revenues of the city from its electric light business are required by the city charter, Art. VIII, § 9, to be deposited in a special "city light fund," separate from the general funds of the city, and transfer from one fund to the other, except by direction of the city council, is forbidden by the city charter. Art. IX, § 17. Section 6 of the ordinance, in terms, imposes the same tax on the city "so far as permitted by law," as that levied on appellant. But it appears that the city, acting under a state statute, § 9491, Remington's Rev. Stat. of Washington, enacted before the taxing ordinance, has issued bonds, the payment of which, both principal and interest, is secured by the revenue of its electric light business. Appellant contends that by the statute, municipal ordinance, and the terms of the bonds themselves, this pledge is superior to all other charges upon the gross revenue and that the city cannot lawfully pay the tax. It appears that in fact the city has not paid the tax or made any provision for paying it. The state court, in passing on this question, said:

"The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; . . ." [p. 671]

Whether by this statement the court intended to decide that the city could not lawfully pay the tax, or assumed that to be the case for the purpose of the decision, it is unnecessary to determine, for appellant further insists that even though the tax were paid by the city to itself it would impose no actual burden.

Asserting that no effective tax is imposed with respect to the business carried on by the city, appellant argues that the taxation of its competing business is a denial of equal protection and deprives it of its property without due process. The tax is also assailed because the measure of it is vague and uncertain and because, by imposing a license tax upon the privilege of doing the business, the ordinance impairs appellant's franchise contract which gave it the right to conduct the business.

In sustaining the constitutionality of the tax, the state court found it unnecessary to ascertain whether, under the city charter and ordinances, and state law, the tax if paid by the city must be paid from its city light fund rather than from its general fund, or to what extent moneys may now or hereafter be transferred from one

fund to the other, or how far the general fund raised by taxation may be used otherwise, either directly or indirectly, to aid the city's electric lighting business. We do not attempt to resolve these questions here. Decision that the city is not authorized by existing law to aid its light fund by taxation, without disposing of the constitutional question decided by the state court, would entail the decision of other questions, arising under the equal protection and contract clauses, not raised or considered in the case. Moreover the appellant insists that in any case payment of the tax would neither relieve appellant of its burden nor impose a comparable burden on the city, since the same hand would both pay and receive the tax, and there is no constitutional limitation on the power of the city to use the tax when collected for the maintenance of the city's business. *Standard Oil Co.* v. *City of Lincoln,* 114 Neb. 245; 207 N.W. 172, 208 *id.* 962; aff'd *per curiam,* 275 U.S. 504. All the questions thus suggested are met and disposed of by decision of the constitutional question which the state court decided and which we decide here.

1. There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its

contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.

In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, *Green* v. *Frazier,* 253 U.S. 233; *Jones* v. *Portland,* 245 U.S. 217, and compete with private interests engaged in a like activity. *Standard Oil Co.* v. *Lincoln, supra; Madera Water Works* v. *Madera,* 228 U.S. 454; *Helena Water Works Co.* v. *Helena,* 195 U.S. 383.

We need not stop to inquire whether the equal protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extraordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes. Compare *Springfield Gas Co.* v. *Springfield,* 257 U.S. 66; *Hollis* v. *Kutz,* 255 U.S. 452; *Emergency Fleet Corp.* v. *Western Union,* 275 U.S. 415. The state may tax different types of taxpayers differently even though they compete. *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527; *Alaska Fish Salting & By-Products Co.* v. *Smith,* 255 U.S. 44; *Hammond Packing Co.* v. *Montana,* 233 U.S. 331; *Quong Wing* v. *Kirkendall,* 223 U.S. 59. It could not plausibly be argued that a private nonprofit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. Compare *Louisville Gas Co.* v. *Coleman,* 277 U.S. 32, 40; *German Alliance Ins. Co.* v. *Kansas,* 233 U.S. 389, 418; *Citizens Telephone Co.* v. *Fuller,* 229 U.S. 322. A business which in private hands might be exempted from taxation because not conducted for private profit is no less privileged because its capital is supplied by the government which controls it in the public interest. These considerations are in no way affected by calling the city's activity "proprietary" instead of "governmental." Compare *South Carolina* v. *United States,* 199 U.S. 437, with *Murray* v. *Wilson Distilling Co.,* 213 U.S. 151 and *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514.

The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Con-

stitution does not. *Helena Water Works Co.* v. *Helena, supra; Vicksburg* v. *Henson,* 231 U.S. 259. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, *Memphis Gas Co.* v. *Shelby County,* 109 U.S. 398, 400; *St. Louis* v. *United Railways Co.,* 210 U.S. 266, 276, nor can it relieve property of congenital defects, *Madera Water Works* v. *Madera, supra,* 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

Such was the decision in *Madera Water Works* v. *Madera, supra,* where this Court pointed out that in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed. See also *Springfield Gas Co.* v. *Springfield, supra.* Such must be our decision now.

2. The definition of gross income by § 2 of the ordinance, which is assailed as vague and indefinite, is that considered in *Pacific Telephone & Telegraph Co.* v. *Seattle, ante,* p. 300. By §§ 10 and 20 the comptroller of the city is required to make rules and regulations, having the force of law, for carrying the ordinance into effect, and to provide blank forms of return upon which the taxpayer is to enter such information as the comptroller may require to enable him to compute the tax. As appellant alleges that it has received its license and paid the first installment of the tax, it appears that a practical construction has been

given to the ordinance by an administrative officer competent to give it, which the state court has upheld. It is thus apparent that the ordinance, as construed, is sufficiently definite to enable the appellant to comply with it and as appellant's return for taxation and the method of computing the tax are not disclosed by the record no constitutional infirmity in the ordinance is revealed. See *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249; *Pacific Telephone & Telegraph Co.* v. *Seattle, supra.*

3. Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co.* v. *Shelby County,* 109 U.S. 398, and in *St. Louis* v. *United Railways Co.,* 210 U.S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it. See *Wiggins Ferry Co.* v. *East St. Louis,* 107 U.S. 365; *New Orleans City & Lake R. Co.* v. *New Orleans,* 143 U.S. 192; *Postal Telegraph Cable Co.* v. *Charleston,* 153 U.S. 692; cf. *Knoxville Water Co.* v. *Knoxville,* 200 U.S. 22.

*Affirmed.*

MR. JUSTICE VAN DEVANTER, specially concurring.

I concur in the judgment of affirmance, but not in the principal part of the court's opinion.

The appellant, the power company, assails the ordinance imposing the tax on the following grounds:

1. The ordinance contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that it lays the tax on the appellant's electric light and power business but not on the like and competing business of the city.

2. The ordinance offends the due process clause of that Amendment in that it prescribes severe penalties and liabilities for nonpayment of the tax and yet defines "gross income," on which the tax is to be computed, so vaguely that the amount of the tax cannot be ascertained with reasonable certainty.

3. The ordinance impairs the franchise contract entitling the appellant to conduct its business within the city for a term of fifty years, and thereby infringes the contract clause of the Constitution, in that it makes the continued enjoyment of the franchise depend on the payment of the tax.

The assault is confined to this taxing ordinance. Other ordinances, some provisions in the city's charter, and still other enactments, have a real bearing on the matter, but their validity under the Constitution of the United States is not called in question.

I agree that the second and third grounds of the assault must be held untenable for the reasons stated in the opinion; and I further agree that the first ground must fail—but for reasons essentially different from those which the opinion announces.

The first ground proceeds on the theory that the city is free to accord equal treatment to the two competitive businesses, but by its ordinance unreasonably and arbitrarily discriminates against the business of the appellant and in favor of its own business by subjecting the former to the tax and omitting or refusing to subject the latter to a like burden. It therefore is of first importance to ascertain what the ordinance provides and what are the

circumstances which surrounded its adoption and in which it is to be applied.

The ordinance was approved by the Mayor May 25, 1932, and was to become effective July 1 of that year. It provides in § 2 that the word "person" in the several sections shall be taken to include a corporation unless the context plainly shows otherwise; in subdivision (c) of § 5 that the tax shall be applied to "every person engaged in or carrying on" the business of selling or furnishing electric light and power within the city; and in § 6 that subdivision (c) of § 5 "shall, as far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance"—the "other provisions" obviously being those which require sworn returns, application for license, etc.

The electric light and power business of the appellant and the like business of the city have been and are highly competitive, and are the only ones in the field. Both had their inception in ordinances adopted in 1902—the one under which the city entered the field being a little older than the one granting the franchise under which the plaintiff has proceeded. Both businesses have been greatly extended and enlarged in relative keeping with the growth of the city.

The city's business is conducted, as is required by statutory and charter provisions, as an independent unit distinct from all other activities of the city, whether governmental or proprietary; and the accounts, revenues, expenses and funds pertaining to the business are kept, handled and adjusted, as is similarly required, separately from other accounts, revenues, expenses and funds of the city. This independence and separation is not merely formal, but real and persistent. The city in its governmental capacity is a customer of its proprietary light

and power business and obtains therefrom electric current needed for street lighting and other municipal purposes. For this current the city in its governmental capacity pays each year a sum which is determined after a public hearing in which all who are interested are given an opportunity to participate. The payment is effected by transferring money from the city's tax-supported general fund, which is devoted to governmental uses, to the separate fund into which the revenues of the proprietary light and power business are required to be paid. The amount to be paid for such current in 1932 was given in the city's budget as $438,750.

The decisions of the Supreme Court of the State leave no doubt that the situation is as just stated. In *Uhler* v. *Olympia,* 87 Wash. 1; 151 Pac. 117, 152 *id.* 998, which relates to a proposed city-owned water system designed to supply for hire both private and municipal needs, that court says (p. 4): "The revenues to be received under the plan proposed . . . do not partake of the character of general funds, nor can the general fund be invaded if they are not sufficient"; and again (p. 14): "The city, in meeting functions that are called governmental, is taking [water] from the city . . . in its proprietary capacity; therefore the general fund of the city may be charged and the special fund credited with a reasonable charge for the water used [by the city] where it is so provided in the ordinance. The city, as a governmental entity, stands in the same relation to the system as a private citizen who is patronizing it." And that court further holds that, while it is admissible under the laws of the state for a city to make "temporary loans" from the tax-supported general fund to a special utility fund or vice versa, or from one special utility fund to another, if the borrowing fund is solvent and has an assured income from which repayment may be made, it is not admissible to

make loans from one of these funds to another which is insolvent, or to make contributions or permanent diversions from one to another; and that attempted infractions of these restrictions may be prevented by injunction. *Asia* v. *Seattle,* 119 Wash. 674, 679–680; 206 Pac. 366; *Griffin* v. *Tacoma,* 49 Wash. 524, 529; 95 Pac. 1107; *Uhler* v. *Olympia,* 87 Wash. 1, 7; 151 Pac. 117, 152 *id.* 998; *Von Herberg* v. *Seattle,* 157 Wash. 141, 147, 150–151; 288 Pac. 646.

Since 1916 the city has financed the extension and development of its electric light and power business by issuing and selling revenue bonds, without submitting the matter to the electorate or creating an indebtedness on the part of the city. The total of such bonds outstanding at the end of 1931 was approximately $32,000,000. By law and by their own terms these bonds are payable only from a bond fund specially created from revenues derived by the city from its electric light and power business.

The appellant in its complaint alleges that the gross revenues of the business are by law, underlying ordinances, and the terms of the bonds, pledged to the payment of the bonds, principal and interest; and that " such pledge constitutes a charge upon such gross revenues prior and superior to all other charges whatsoever, including charges for maintenance and operation." Counsel for the city, while not questioning the allegation in other respects, insist that under the applicable law the pledge is not of the gross revenues, but at most is only of what remains after paying costs of maintenance and operation, and that the tax in question if laid on the city's business pursuant to the ordinance may be paid from the gross revenues like other costs of maintenance and operation.

Section 9491 of Remington's Revised Statutes of Washington, under which appellant alleges the bonds were issued, makes provision for setting aside and paying into a

special bond fund "any fixed proportion" or "any fixed amount" of the "gross revenues" from the business in aid of which bonds are issued, and for making the bonds payable "only out of such special fund." These provisions are followed by another in the same section declaring:

"In creating any such special fund or funds the common council or other corporate authorities of such city or town shall have due regard to the cost of operation and maintenance of the plant or system as constructed or added to, and to any proportion or part of the revenue previously pledged as a fund for the payment of bonds, warrants or other indebtedness, and shall not set aside into such special fund a greater amount or proportion of the revenue and proceeds than in their judgment will be available over and above such cost of maintenance and operation and the amount or proportion, if any, of the revenue so previously pledged."

The charter of the city also contains a provision, § 18 (Fifteenth), enabling the city to establish, operate and maintain a plant or system for furnishing electric power and light for industrial, individual and municipal uses, "and to provide and secure payment therefor in whole or in part by net earnings therefrom."

Section 9491, under which the appellant alleges the revenue bonds were issued, is not confined to enabling cities to supply an electric light and power service, but is also directed to enabling them through the issue of like bonds to supply a street railroad service or a water service. In 1919 the appellant, which then owned a street railroad system in Seattle as well as an electric light and power system, sold and transferred its street railroad system to the city and received in payment fifteen million dollars of revenue bonds with a supporting pledge like that which the appellant sets forth in its complaint in

the present case.[1] Controversy soon arose as to whether that pledge includes the entire gross revenue of the street railroad system or only what remains after paying the cost of maintenance and operation; and much litigation ensued in which the appellant persistently sought to establish the broader construction of the pledge.[2] The litigation resulted in decisions recognizing and sustaining the pledge in several respects,[3] but leaving undetermined the question whether it includes all of the gross revenue or only what is left after the cost of maintenance and operation is paid. The case of *Von Herberg* v. *Seattle,* 157 Wash. 141, decided in 1930, appears to have been the last of the series. The appellant was a party and set up its contention as in the other cases. In concluding the decision the court said: "We accordingly express no opinion upon the question of whether or not wages and operating expenses of the street railway must be paid before the application of any money in the street railway fund to the payment of the bonds evidencing the purchase price of the system."

In view of that acute and undetermined controversy and its obvious bearing on the pledge given in support of the revenue bonds pertaining to the city's electric light and power business, it is easy to perceive why the city in adopting the ordinance of 1932 and providing in § 6 that the tax should be applicable to the city's business, inserted the words "as far as permitted by law." Evi-

[1] *Twichell* v. *Seattle,* 106 Wash. 32; 179 Pac. 127; *Old Colony Trust Co.* v. *Seattle,* 271 U.S. 426.

[2] *Puget Sound Power & Light Co.* v. *Seattle,* 284 Fed. 659; *Von Herberg* v. *Seattle,* 27 F. (2d) 457; *Puget Sound Power & Light Co.* v. *Von Herberg,* 278 U.S. 644; *Puget Sound Power & Light Co.* v. *Seattle,* 29 F. (2d) 254;

[3] *Twichell* v. *Seattle,* 106 Wash. 32; 179 Pac. 127; *Asia* v. *Seattle,* 119 Wash. 674; 206 Pac. 366; *Von Herberg* v. *Seattle,* 157 Wash. 141; 179 Pac. 127.

dently the city understood that, if the entire gross revenue from the business was pledged, it might be for that reason unable to pay out any part of the revenue for another purpose. It also is easy to perceive that the appellant, by reason of its interest in the street railroad revenue bonds, may have regarded the present suit as a suitable vehicle for getting its contention respecting such a pledge before a court and possibly establishing indirectly what it had been unable to establish through its earlier and direct efforts. Certainly the appellant could not reasonably have expected to enhance its chances of success in the present suit by introducing such a contention respecting the pledge given in support of the electric light and power revenue bonds.

Of the circumstances in which the ordinance was adopted and of the provision in § 6 declaring the tax applicable to the city's business, the state court said in the present suit:

"The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges." [p. 671.]

Counsel differ widely respecting so much of this excerpt as speaks of the existing pledge as an obstacle to applying the tax to the city's business. Counsel for the city say this statement rests only on an allegation in the appellant's complaint and was made in the absence of a full presentation of the matter and without intention to render a decision thereon; and they present arguments and citations giving color to their assertion. On the other hand, counsel for the appellant insist the statement is decisive and point to its letter as justifying them in so insisting. It is obvious that the statement, when separately considered, makes strongly for the latter view; but when it is read in connection with prior decisions, which it does not mention, and with charter and statutory provisions, which are not noticed, there arises a real doubt whether it was made as a decisive utterance or as a recital of what was alleged and only assumed to be true.[4] This is a matter on which only the state court can speak with ultimate authority; and as its solution, as will appear later on, is not essential for present purposes, it properly may be put to one side. When this is done, the appellant's charge of unreasonable discrimination amounting to a denial of equal protection needs to be examined with three suggested views of the existing pledge in mind—one treating it as including only the net revenues from the city's business, as the city asserts; another treating it as including the entire gross revenues, but subject to payment therefrom of any tax lawfully imposed on the city's business; and still another treating it as including the entire gross revenues and preventing, by reason of the contract clause of the Constitution, payment therefrom of the tax named in the ordinance, as the appellant insists.

[4] Inaccurate statements of counsel sometimes lead to erroneous assumptions by courts. *Langford* v. *Monteith*, 102 U.S. 145, 147.

The ordinance, in § 6, provides that the tax "shall, as far as permitted by law, be applicable" to the city's proprietary business. Unless the pledge be in the way it is plain that there is no legal obstacle to carrying this provision into effect.[5] The state court does not suggest the presence of any other obstacle; and counsel for the appellant do not show that there is any. On the other hand, counsel for the city concede that the ordinance imposes the tax on the city's business and assert the city's willingness to pay the tax out of the gross revenues from that business.

True, the appellant alleges in its complaint that the city budget for 1932 did not allocate any of the revenues from the city's business for such payment. But this allegation is of no significance. As counsel for the city point out, the budget was adopted late in 1931, while the taxing ordinance was not adopted until May 25, 1932, and did not become effective until July 1 of that year. Appellant's complaint was filed shortly after the ordinance became effective and before the time fixed for making up and settling another budget.

In view of the terms of the ordinance, and of the city's attitude declared by its counsel, it is manifest that, if the pledge be only of the net revenues, the tax falls on

[5] *Louisville* v. *Commonwealth,* 62 Ky. 295; *Commonwealth* v. *Makibben,* 90 Ky. 384; 14 S.W. 372; *Clark* v. *Louisville Water Co.,* 90 Ky. 515; 14 S.W. 502 (affirmed 143 U.S. 1); *Newport* v. *Commonwealth,* 106 Ky. 434; 50 S.W. 845, 51 *id.* 433; *Covington* v. *Commonwealth,* 107 Ky. 680; 39 S.W. 836 (affirmed 173 U.S. 231); *Western Saving Fund Society* v. *Philadelphia,* 31 Pa. St. 175, 183; *Chadwick* v. *Maginnes,* 94 Pa. St. 117; *Erie County* v. *Commissioners,* 113 Pa. St. 368; 6 Atl. 138; *Vilas* v. *Manila,* 220 U.S. 345, 356. And see *Atlantic & N. C. R. Co.* v. *Commissioners,* 75 N.C. 474; *South Carolina* v. *United States,* 199 U.S. 437; *Los Angeles* v. *Los Angeles Gas & Electric Corp.,* 251 U.S. 32; *Bank of United States* v. *Planters Bank,* 9 Wheat. 904, 907; *Curran* v. *Arkansas,* 15 How. 304, 309.

the city's business just as on the other, and that the charge of unreasonable discrimination is without any basis.

If the pledge be of the gross revenues but subject to payment therefrom of any tax lawfully laid on the city's business, thereby leaving the city free to pay the tax imposed by the ordinance out of such revenues, it still is manifest that the ordinance treats both businesses alike, and therefore that there is no discrimination.

If the pledge be of the entire gross revenues and, by reason of the contract clause of the Constitution, prevents the application of part of the revenues to the payment of the tax, it is very plain that such discrimination as results is neither arbitrary on the part of the city nor within the condemnation of the equal protection clause. The contract clause and the equal protection clause are both parts of the Constitution; and of course action taken or omitted in obedience to the contract clause cannot be regarded as a violation of the equal protection clause. Nor does the latter clause require that a right or exemption which under the other clause must be accorded to a particular business be also accorded to a similar business not otherwise entitled to it.[6]

It follows that in none of the suggested views of the pledge can the appellant's charge of unreasonable discrimination be sustained. And, this being so, there is no need for now considering which of the suggested views of the pledge is right.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur in this opinion.

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[6] *Raley & Bros.* v. *Richardson,* 264 U.S. 157; *Packer Corporation* v. *Utah,* 285 U.S. 105, 109; *Des Moines National Bank* v. *Fairweather,* 263 U.S. 103, 116–117; *Union Bank & Trust Co.* v. *Phelps,* 288 U.S. 181, 187.

## SEATTLE GAS CO. *v.* SEATTLE.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 359. Argued January 12, 15, 1934.—Decided March 19, 1934.

Decided upon the authority of *Puget Sound Power & Light Co.* v. *Seattle, ante,* p. 619.
172 Wash. 701; 21 P. (2d) 732, affirmed.

APPEAL from the affirmance of a judgment sustaining a demurrer and dismissing the complaint in a suit by the Gas Company to recover money paid under protest as a tax, and to enjoin future assessments.

*Mr. DeWolfe Emory,* with whom *Mr. C. K. Poe* was on the brief, for appellant.

*Messrs. Walter L. Baumgartner* and *A. C. Van Soelen* for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Washington, 172 Wash. 701; 21 P. (2d) 732, upholding a municipal license or excise tax, assailed by appellant as repugnant to the Fourteenth Amendment and the contract clause of the Federal Constitution. The ordinance, which imposes a tax of 3% of the gross income from appellant's business of furnishing gas to consumers in the City of Seattle, and the federal questions raised are the same as those in *Puget Sound Power & Light Co.* v. *City of Seattle,* decided this day, *ante,* p. 619. Appellant's bill of complaint, demurrer to which was sustained by the state court, alleges that the appellant is engaged in the distribution of gas, used for lighting in the City of Seattle, in competition with the city, the appellee, which conducts an electric light business, and that its constitutional rights are in-

fringed by the imposition of the tax. Appellant seeks recovery of an installment of the tax which it has paid, and an injunction restraining the collection of future installments. For the reasons stated at length in the opinion in *Puget Sound Power & Light Co.* v. *City of Seattle, supra,* the judgment is

*Affirmed.*

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER, concur in the result.

## DECISIONS PER CURIAM, FROM JANUARY 9, 1934, TO AND INCLUDING MARCH 19, 1934.*

No. 178. NORTON, DEPUTY COMMISSIONER, U.S. EMPLOYEES' COMPENSATION COMM'N, *v.* VESTA COAL CO. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued January 11, 1934. Decided January 15, 1934. *Per Curiam:* As it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed. *Assistant Solicitor General MacLean,* with whom *Solicitor General Biggs* and *Mr. W. Clifton Stone* were on the brief, for petitioner. *Mr. William A. Challener* for respondent. Reported below: 63 F. (2d) 165.

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No. 399. NATIONAL LINEN SERVICE CORP. *v.* LYNCHBURG ET AL. Appeal from the Supreme Court of Appeals of Virginia. Submitted January 16, 1934. Decided January 22, 1934. *Per Curiam:* Judgment affirmed. *State Board of Tax Comm'rs* v. *Jackson,* 283 U.S. 527, 537; *Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159; *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573; *Lawrence* v. *State Tax Comm'n,* 286 U.S. 276, 283, 284. *Messrs. H. A. Alexander, Herbert J. Haas, Bertram S. Boley,* and *Joseph F. Haas* were on the brief for appellant. *Messrs. T. G. Hobbs, S. V. Kemp,* and *Franklin Daniel* for appellees. Reported below: 160 Va. 644.

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No. 293. ATKINS *v.* HERTZ DRIVURSELF STATIONS, INC. Appeal from the Supreme Court of New York. Argued January 19, 1934. Decided January 22, 1934. *Per Cur-*

* For decisions on applications for certiorari, see *post,* pp. 654, 658.

*iam:* Judgment affirmed. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 293–301; *Quong Wing* v. *Kirkendall,* 223 U.S. 59, 62, 63; *Packard* v. *Banton,* 264 U.S. 140, 144; *Silver* v. *Silver,* 280 U.S. 117, 122–124; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158; *Hodge Drive-It-Yourself Co. v. Cincinnati,* 284 U.S. 335, 338; *Lawrence* v. *State Tax Comm'n,* 286 U.S. 276, 283, 284; *Continental Baking Co. v. Woodring,* 286 U.S. 352, 373; *Sproles* v. *Binford,* 286 U.S. 374, 396. *Mr. John P. McGrath,* with whom *Mr. Joseph S. Robinson* was on the brief, for appellant. *Messrs. Henry J. Smith* and *J. M. Sheen* were on the brief for appellee. Reported below: 261 N.Y. 352; 185 N.E. 408.

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No. 294. KENT-COFFEY MFG. CO. *v.* MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. Argued January 19, 1934. Decided January 22, 1934. *Per Curiam:* This case is controlled by the decision in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113, and not by the decision in *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123. The judgment is affirmed. *Messrs. Mark Squires* and *Samuel J. Ervin, Jr.,* for appellant. *Mr. Dennis G. Brummitt,* Attorney General of North Carolina, with whom *Mr. A. A. F. Seawell,* Assistant Attorney General, was on the brief, for appellee. Reported below: 204 N.C. 365; 168 S.E. 397.

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No. 311. IDA A. VAN DYKE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 312. CLEVE W. VAN DYKE *v.* SAME. Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Argued January 19, 1934. Decided January 22, 1934. *Per Curiam:* Judgments affirmed. *Burnet* v. *Clark,* 287 U.S. 410; *Dalton* v. *Bowers,* 287 U.S. 404. *Messrs. R. A.*

*Bartlett* and *William E. Brooks* were on the briefs and submitted for petitioners. *Mr. H. Brian Holland,* with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *John G. Remey* were on the briefs, for respondent. Reported below: 63 F. (2d) 1020.

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No. —, original. Ex parte Marks. January 22, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Ralph Marks, pro se.*

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No. —, original. Principality of Monaco *v.* Mississippi. February 5, 1934. Return to the rule to show cause presented.

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No. 358. Bosworth, Receiver, *v.* Continental Illinois Bank & Trust Co. Certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued February 7, 1934. Decided February 12, 1934. *Per Curiam:* Judgment reversed. *Dakin* v. *Bayly,* 290 U.S. 143. *Mr. Edward R. Adams,* with whom *Messrs. Amos C. Miller, Sidney S. Gorham, Henry W. Wales, F. G. Awalt, George P. Barse, John F. Anderson,* and *George B. Springston* were on the brief, for petitioner. *Messrs. Isaac H. Mayer* and *David F. Rosenthal,* with whom *Messrs. Carl Meyer* and *Frank D. Mayer* were on the brief, submitted for respondent. Reported below: 65 F. (2d) 632.

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No. 740. Ohio ex rel. Eastman *v.* Stuart et al. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted February 3, 1934. Decided February 12, 1934. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Yesler* v. *Washington Harbor Line Comm'rs,* 146 U.S. 646, 657; *Farson Son & Co.* v. *Bird,* 248 U.S. 268,

271; *Doyle* v. *Atwell,* 261 U.S. 590; *Howat* v. *Kansas,* 258 U.S. 181, 189, 190; *McCoy* v. *Shaw,* 277 U.S. 302, 303. *Messrs. Erwin R. Effler, Rufus H. Baker,* and *Harold W. Fraser* for appellant. *Messrs. Frazier Reams* and *J. S. Rhinefort* for appellees. Reported below: 127 Ohio St. 167; 187 N.E. 242.

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No. 753. CRAFT ET AL. *v.* HIRSH. Appeal from the Supreme Court of Alabama. Jurisdictional statement submitted February 3, 1934. Decided February 12, 1934. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. George W. Yancey* for appellants. No appearance for appellee. Reported below: 227 Ala. 257; 149 So. 683.

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No. —. UNITED STATES ET AL. *v.* OHIO ET AL.; and

No. —. SAME *v.* WHEELING & LAKE ERIE RY. CO. ET AL. Motion submitted February 7, 1934. Decided February 12, 1934. On consideration of the motion of the defendants and cross-appellants in the above entitled causes, it is ordered that the orders of the District Court, entered in these causes on January 19, 1934, be and the same are hereby vacated in so far as they stay the operation and enforcement of the order of the Interstate Commerce Commission. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 672–675. *Solicitor General Biggs* and *Messrs. Elmer B. Collins, J. Stanley Payne, John Fox Weiss, Charles R. Webber, M. Carter Hall, Leo P. Day, Guernsey Orcutt, Frederic D. McKenney, August G. Gutheim, Henry C. Hall,* and *Alex. M. Bull* in support of the motion. *Mr. John W. Bricker,* Attorney General of Ohio, and

*Messrs. Donald C. Power, Atlee Pomerene, Clan Crawford, Andrew P. Martin,* and *Ernest Ballard* in opposition thereto.

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No. 602. ARCHERD *v.* OREGON. February 12, 1934. Petition for rehearing denied. See 290 U.S. 604.

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No. 664. SCHMELING *v.* F. W. WOOLWORTH CO. February 12, 1934. Petition for rehearing denied. See 290 U.S. 605.

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No. 586. NEW YORK TELEPHONE CO. *v.* MALTBIE ET AL. Appeal from the District Court of the United States for the Southern District of New York. Motion to dismiss submitted February 3, 1934. Decided February 19, 1934. *Per Curiam:* The District Court, specially constituted as required by statute (28 U.S.C. 380), permanently enjoined, as confiscatory, the enforcement of the rate orders which are the subject of this suit. The injunction is unqualified. Appellant, having obtained this relief, is not entitled to prosecute an appeal from the decree in its favor, for the purpose of reviewing the portions of the decree fixing the value of appellant's property as of the years 1924, 1926, and 1928, and the rate of return to be allowed. The matters set forth in these portions of the decree are not to be regarded as *res judicata* in relation to subsequent legislative action by the Public Service Commission in fixing rates for the future or in any judicial proceeding relating to such rates. The motion to dismiss the appeal is granted. *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n,* 289 U.S. 287, 304, 305; *State Corporation Comm'n* v. *Wichita Gas Co.,* 290 U.S. 561; *Lewis* v. *United States,* 216 U.S. 611, 612, 613; *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U.S. 376, 377, 378; *New Orleans* v. *Emsheimer,* 181 U.S. 153, 154. *Messrs. Edward L.*

*Blackman* and *Charles T. Russell* for appellant. *Messrs. Arthur J. W. Hilly, Daniel F. Cohalan, Thomas F. Fennell, Melvin L. Krulewitch, Frank E. Carstarphen,* and *Harry Hertzoff* for appellees.

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No. 421. FALBO *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Argued February 14, 1934. Decided February 19, 1934. *Per Curiam:* Judgment affirmed. *Lumbra* v. *United States,* 290 U.S. 551. *Mr. Graham K. Betts,* with whom *Messrs. Samuel B. Bassett* and *Warren E. Miller* were on the brief, for petitioner. *Mr. Will G. Beardslee,* with whom *Solicitor General Biggs* and *Messrs. Wilbur C. Pickett, Randolph C. Shaw,* and *W. Marvin Smith* were on the brief, for the United States. Reported below: 64 F. (2d) 948.

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No. 748. IUPPA & BATTLE CO. ET AL. *v.* STATE INDUSTRIAL BOARD ET AL. Appeal from the Supreme Court, Appellate Division, of New York. Jurisdictional statement submitted February 10, 1934. Decided February 19, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U.S. 594; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *Wabash R. Co. v. Flannigan,* 192 U.S. 29; *Roe* v. *Kansas,* 278 U.S. 191; *American Baseball Club* v. *Philadelphia,* 290 U.S. 595. *Messrs. Charles J. O'Brien, Arthur E. Sutherland,* and *Arthur E. Sutherland, Jr.,* for appellants. *Mr. Joseph A. McLaughlin* for appellees. Reported below: 262 N.Y. 537, 564; 188 N.E. 54, 66.

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No. 749. MILLER CABINET CO. *v.* STATE INDUSTRIAL BOARD ET AL. Appeal from the Supreme Court, Appellate Division, of New York. Jurisdictional statement

submitted February 10, 1934. Decided February 19, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U.S. 594; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *Wabash R. Co.* v. *Flannigan,* 192 U.S. 29; *Roe* v. *Kansas,* 278 U.S. 191; *American Baseball Club* v. *Philadelphia,* 290 U.S. 595. *Messrs. Charles J. O'Brien* and *Arthur E. Sutherland, Jr.,* for appellant. *Mr. Joseph A. McLaughlin* for appellees. Reported below: 240 App. Div. 741; aff'd, 263 N.Y. 581.

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No. 361. INTERSTATE COMMERCE COMM'N *v.* PENNSYLVANIA R. CO. ET AL. Certiorari to the Circuit Court of Appeals for the Third Circuit. February 19, 1934. This case is restored to the docket and assigned for reargument on Monday, March 5 next, after the cases heretofore assigned for that day. The Court desires to hear further argument with respect to the construction of the provision of § 7 of the Clayton Act that "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

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No. —, original. ARIZONA *v.* CALIFORNIA ET AL. February 19, 1934. A rule is ordered to issue returnable on Monday, April 2 next, requiring the defendants to show cause why leave to file the bill to perpetuate testimony should not be granted.

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No. —, original. EX PARTE SPRUILL. February 19, 1934. Motion for leave to file petition for writ of injunction is denied. *Georgia M. Spruill, pro se.*

No. 13, original. NEW JERSEY *v.* DELAWARE. February 19, 1934. An order is entered fixing the compensation and allowing the expenses of the Special Master herein.

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No. 399. NATIONAL LINEN SERVICE CORP. *v.* LYNCHBURG ET AL. February 19, 1934. Petition for rehearing denied. See *ante,* p. 641.

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No. 693. U. S. FIDELITY & GUARANTY CO. *v.* HOWARD, RECEIVER. February 19, 1934. Petition for rehearing denied. See *post,* p. 663.

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No. 779. UNITED STATES *v.* CAMPBELL. February 19, 1934. Motion to reinstate appeal submitted by *Mr. Frederick B. Campbell* for the appellee, and the motion denied. See *post,* p. 686.

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No. 726. JARVIS ET AL. *v.* CALIFORNIA. Appeal from and on petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California. Jurisdictional statement submitted February 17, 1934. Decided March 5, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Federal Compress & Warehouse Co.* v. *McLean, ante,* pp. 17, 21–23; *Southern Ry. Co.* v. *King,* 217 U.S. 524, 534; *Darnell* v. *Indiana,* 226 U.S. 390, 398; *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U.S. 50, 54–55; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.,* 276 U.S. 71, 88. The petition for writ of certiorari is denied. *Mr. Charles Lorin Clark* for appellants. *Mr. U. S. Webb* for appellee. Reported below: 135 Cal. App. —; 27 P. (2d) 77.

No. 768. WESTERN & ATLANTIC RAILROAD *v.* MICHAEL. Appeal from the Supreme Court of Georgia. Motion to dismiss submitted February 17, 1934. Decided March 5, 1934. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Pizitz* v. *Yeldell,* 274 U.S. 112, 116; *Staten Island Ry. Co.* v. *Phoenix Indemnity Co.,* 281 U.S. 98, 107, 108; *Silver* v. *Silver,* 280 U.S. 117, 123; *Sproles* v. *Binford,* 286 U.S. 374, 396. *Mr. Fitzgerald Hall* for appellant. *Mr. Samuel D. Hewlett* for appellee. Reported below: 178 Ga. 1; 172 S.E. 66.

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No. 18, original. PENNSYLVANIA *v.* ARKANSAS. March 5, 1934. The answer of the defendant is received and ordered to be filed.

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No. 128. TEXAS & PACIFIC RAILWAY CO. *v.* POTTORFF, RECEIVER. March 5, 1934. Ordered, that the opinion in this case be amended as follows: By striking out the following now appearing in note 15 on page 8 [259] of said opinion:

" To insure fulfilment of this function the Government subjects national banks to close and constant supervision so as to maintain the solvency of the bank. It is made a crime to accept a deposit with knowledge of insolvency. Only when the bank's condition measures up to the prescribed standards of safety and liquidity may deposits be received."

Opinion reported as amended, *ante,* p. 245.

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No. —, original. EX PARTE UNITED ENGINEERING & FOUNDRY CO. March 5, 1934. The motion for leave to file petition for writ of mandamus is denied. *Messrs. Melville Church, A. Leo Weil,* and *Jo. Baily Brown* for petitioner.

No. 311. IDA A. VAN DYKE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 312. CLEVE W. VAN DYKE *v.* SAME. March 5, 1934. Petition for rehearing denied. See *ante*, p. 642.

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No. 347. STANDARD OIL CO. *v.* CALIFORNIA. March 5, 1934. Petition for rehearing denied. See *ante*, p. 242.

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No. 653. NEW AMSTERDAM CASUALTY CO. *v.* UNITED STATES. March 5, 1934. Petition for rehearing denied. See *post*, p. 662.

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No. 588. HINDERLIDER, STATE ENGINEER, ET AL. *v.* LA PLATA RIVER & CHERRY CREEK DITCH CO. Appeal from the Supreme Court of Colorado. Argued March 6, 7, 1934. Decided March 12, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Haseltine v. Central National Bank*, 183 U.S. 130; *Schlosser* v. *Hemphill*, 198 U.S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Comm'n*, 226 U.S. 99, 101; *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 135, 136; *Georgia Ry. Co.* v. *Decatur*, 262 U.S. 432, 437. *Mr. Ralph L. Carr* and *Mr. Paul P. Prosser*, Attorney General of Colorado, with whom *Messrs. Charles Roach* and *Jean S. Breitenstein* were on the brief, for appellants. *Mr. Reese McCloskey* for appellee. Reported below: 93 Colo. 128; 25 P. (2d) 187.

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No. —, original. EX PARTE RICHFIELD OIL CO. ET AL. March 12, 1934. The motions for leave to file petitions for writs of mandamus are denied. *Mr. George B. Springston* for petitioners.

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No. —, original. EX PARTE GOLDSMITH. March 12, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. H. Ely Goldsmith, pro se.*

Nos. 34 and 35. KEYSTONE DRILLER CO. *v.* GENERAL EXCAVATOR CO.; and

Nos. 36 and 37. SAME *v.* OSGOOD CO. Motion submitted March 5, 1934. Decided March 12, 1934. The motion to recall the mandates in these cases is denied. See 290 U.S. 240.

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No. 400. MARION ET AL. *v.* SNEEDEN, RECEIVER. March 12, 1934. Petition for rehearing denied. See *ante,* p. 262.

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No. 680. WINN, ADMINISTRATOR, *v.* CONSOLIDATED COACH CORP. March 12, 1934. Petition for rehearing denied. See *post,* p. 668.

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No. 361. INTERSTATE COMMERCE COMM'N *v.* PENNSYLVANIA RAILROAD CO. ET AL. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued February 7, 8, 1934. Reargued March 12, 13, 1934. Decided March 19, 1934. *Per Curiam:* Decree affirmed, by an equally divided Court. MR. JUSTICE ROBERTS took no part in the consideration or decision of this case. *Mr. Daniel W. Knowlton,* with whom *Messrs. William H. Bonneville, H. L. Underwood,* and *E. M. Ebert* were on the brief, for petitioner. *Mr. Henry Wolf Biklé,* with whom *Messrs. F. D. McKenney* and *C. B. Heiserman* were on the brief, for respondents. Reported below: 66 F. (2d) 37.

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No. 608. COLUMBUS GAS & FUEL CO. *v.* PUBLIC UTILITIES COMM'N ET AL. Appeal from the Supreme Court of Ohio. Argued March 13, 1934. Decided March 19, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Haseltine* v. *Central National Bank,* 183 U.S. 130; *Schlosser* v. *Hemphill,* 198 U.S. 173, 175, 176; *Louisiana Navigation Co.* v. *Oyster Comm'n,* 226

U.S. 99, 101, 102; *Gulf Refining Co.* v. *United States,* 269 U.S. 125, 135, 136; *Georgia Ry. Co.* v. *Decatur,* 262 U.S. 432, 437; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., ante,* p. 650. *Mr. Edward C. Turner,* with whom *Mr. Albert M. Calland* was on the brief, for appellant. *Messrs. John L. Davies* and *James W. Huffman* for appellees. Reported below: 127 Ohio St. 109; 187 N.E. 7.

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No. 814. New York ex rel. Sackett *v.* Lynch et al. Appeal from the Supreme Court of New York. Motion to dismiss submitted February 24, 1934. Decided March 19, 1934. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented federal question. *Kipley* v. *Illinois,* 170 U.S. 182, 186, 187; *Layton* v. *Missouri,* 187 U.S. 356, 358; *Jacobi* v. *Alabama,* 187 U.S. 133, 135; *Saltonstall* v. *Saltonstall,* 276 U.S. 260, 267, 268. *Mr. Wm. F. Unger* for appellant. *Mr. Henry Epstein* for appellees. Reported below: 238 App. Div. 881.

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No. 804. Betts *v.* Railroad Comm'n. Appeal from the District Court of the United States for the Southern District of California. Motion to affirm submitted February 20, 1934. Decided March 19, 1934. *Per Curiam:* The motion of the appellee to affirm is granted, and the decree is affirmed. *Napa Valley Electric Co.* v. *Railroad Comm'n,* 251 U.S. 366; *Grubb v. Public Utilities Comm'n,* 281 U.S. 470, 475–479; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 164, 165. *Mr. Leslie R. Hewitt* for appellant. *Messrs. Arthur T. George* and *Ira H. Rowell* for appellee. Reported below: 6 F.Supp. 591.

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No. 840. Liggett & Myers Tobacco Co. *v.* South Carolina. Appeal from the Supreme Court of South Carolina. Motion to dismiss submitted March 5, 1934.

Decided March 19, 1934. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment of the Supreme Court of the State of South Carolina, insofar as the appellant seeks here to review it, was based upon a non-federal ground adequate to support it. *Quong Ham Wah Co.* v. *Industrial Comm'n,* 255 U.S. 445, 448, 449; *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32, 33; *Swiss Oil Corp.* v. *Shanks,* 273 U.S. 392, 411, 412; *Hicklin* v. *Coney,* 290 U.S. 169, 171; *Live Oak Water Users Assn.* v. *Railroad Comm'n,* 269 U.S. 354, 359; *Girard Trust Co.* v. *Ocean & Lake Realty Co.,* 286 U.S. 523; *Real Estate-Land Title & Trust Co. v. Springfield,* 287 U.S. 577. *Mr. Christie Benet* for appellant. *Messrs. John M. Daniel* and *Sam. M. Wolfe* for appellee. Reported below: 171 S.C. 511; 172 S.E. 857.

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No. 780. GRIFFIN *v.* MCCARTHY. Appeal from the Supreme Court of Washington. Motion to dismiss submitted February 27, 1934. Decided March 19, 1934. *Per Curiam:* The motion of the appellant for leave to file statement as to jurisdiction is granted. The motion of the appellee to dismiss the appeal herein is granted, and 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, as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), the petition for writ of certiorari is denied. *Mr. William H. Griffin, pro se. Mr. Hugh M. Caldwell* for appellee. Reported below: 174 Wash. 74; 24 P. (2d) 595.

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No. —, original. EX PARTE HOLMES. March 19, 1934. The motion for leave to file petition for writ of mandamus is denied. *Mr. Dock Holmes, pro se.*

No. —, original. Ex parte Poresky. March 19, 1934. The motion for leave to file petition for writ of mandamus is denied. *Mr. Joseph Poresky, pro se.*

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No. —, original. Ex parte Heilbroner et al. March 19, 1934. The motion for leave to file petition for writ of prohibition and/or mandamus is denied. *Mr. Wilbur C. Davidson* for petitioners.

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No. 738. Big Lake Oil Co. *v.* Heiner, Collector of Internal Revenue. March 19, 1934. Petition for rehearing denied. See *post,* p. 677.

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No. 768. Western & Atlantic Railroad *v.* Michael. March 19, 1934. Petition for rehearing denied. See *ante,* p. 649.

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## DECISIONS GRANTING CERTIORARI, FROM JANUARY 9, 1934, TO AND INCLUDING MARCH 19, 1934.

No. 663. Gay, Receiver, *v.* Ruff. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Robert M. Hitch* and *Archibald B. Lovett* for petitioner. *Mr. Thomas W. Hardwick* for respondent. Reported below: 67 F. (2d) 684.

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No. 669. Minnich *v.* Gardner et al. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Henry George Gress* for petitioner. *Mr. Clarence A. Fry for* respondents. Reported below: 66 F. (2d) 561.

No. 660. SAUDER, ADMINISTRATRIX, ET AL. *v.* MID-CONTINENT PETROLEUM CORP. January 22, 1934. The petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit is granted. *Mr. Harry W. Colmery* for petitioners. *Messrs. James C. Denton* and *Richard H. Wills* for respondent. Reported below: 67 F. (2d) 9.

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No. 689. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INDEPENDENT LIFE INSURANCE CO. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Wm. Marshall Bullitt* and *J. A. Newman* for respondent. Reported below: 67 F. (2d) 470.

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No. 709. EASTMAN KODAK CO. ET AL. *v.* GRAY. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. William H. Davis, George E. Middleton, Allen Hunter White,* and *Dean S. Edmonds* for petitioners. *Messrs. Thomas Raeburn White* and *Leon Edelson* for respondent. Reported below: 67 F. (2d) 190.

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No. 722. ROCKFORD LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Wm. Marshall Bullitt* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 67 F. (2d) 213.

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No. 707. MASSEY *v.* UNITED STATES. On petition for rehearing. February 19, 1934. The order entered February 12 [*post,* p. 669] denying petition for writ of certiorari in this case is revoked. The petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit is granted, limited to the question presented upon the petition for rehearing. *Messrs. E. F. Colladay* and *William A. McClellan* for petitioner. Reported below: 66 F. (2d) 666.

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No. 655. BOYNTON, ATTORNEY GENERAL, *v.* HUTCHINSON GAS CO. February 19, 1934. Petition for writ of certiorari to the Supreme Court of Kansas granted. *Messrs. Roland Boynton, John G. Egan,* and *Arthur V. Roberts* for petitioner. *Messrs. Robert D. Garver* and *Robert Stone* for respondent. Reported below: 137 Kan. 717; 22 P. (2d) 958.

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Nos. 727 and 728. SPRING CITY FOUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 5, 1934. The petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit is granted limited to the question whether a debt ascertained to be partially worthless in 1920 was deductible in that year under either § 234 (a) (4) or § 234 (a) (5) and to the question whether the debt was returnable as taxable income in that year to the extent that it was then ascertained to be worthless. *Messrs. Edgar L. Wood* and *Richard H. Tyrrell* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 67 F. (2d) 385.

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No. 742. SMITH *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. James J. Crossley* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Randolph C. Shaw,* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 412.

No. 783. LOCAL LOAN CO. *v.* HUNT. March 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. David F. Rosenthal, Richard Mayer, Orville W. Lee,* and *Frederic Burnham* for petitioner. *Messrs. Lloyd A. Faxon* and *Fred C. Dimond* for respondent. Reported below: 67 F. (2d) 998.

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Nos. 791 and 792. AVERY *v.* COMMISSIONER OF INTERNAL REVENUE. March 19, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John E. MacLeish* and *Leland K. Neeves* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 67 F. (2d) 310.

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No. 795. WOODSON, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* DEUTSCHE GOLD UND SILBER SCHEIDEANSTALT VORMALS ROESSLER. March 19, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Biggs* for petitioners. *Messrs. Richard H. Wilmer* and *Douglas L. Hatch* for respondent. Reported below: 62 App.D.C. 344; 68 F. (2d) 391.

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No. 786. BURNS MORTGAGE CO., INC. *v.* FRIED. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Sigmund H. Steinberg* and *John P. Stokes* for petitioner. *Messrs. Albert S. Lisenby, John C. Noonan,* and *Albert L. Moise* for respondent. Reported below: 67 F. (2d) 352.

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No. 820. FAIRPORT, PAINESVILLE & EASTERN RAILROAD CO. *v.* MEREDITH. March 19, 1934. Petition for writ of certiorari to the Court of Appeals, 7th Judicial District, of Ohio, granted. *Messrs. Thomas M. Kirby, Elbert F.*

*Blakely, Atlee Pomerene,* and *Harry T. Nolan* for petitioner. *Mr. David F. Anderson* for respondent. Reported below: 46 Ohio App. 457; 189 N.E. 10.

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No. 802. Lewis, Receiver, *v.* Fidelity & Deposit Co. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. F. Anderson, Samuel H. Wiley, F. G. Awalt, Wallace Miller,* and *George P. Barse* for petitioner. *Messrs. M. F. Goldstein* and *Arthur G. Powell* for respondent. Reported below: 67 F. (2d) 961.

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DECISIONS DENYING CERTIORARI, FROM JANUARY 9, 1934, TO AND INCLUDING MARCH 19, 1934.

No. 178. Norton *v.* Vesta Coal Co. See *ante,* p. 641.

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No. 674. Hackworth *v.* Aderhold, Warden. January 15, 1934. 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. Harry Hackworth, pro se.* No appearance for respondent. Reported below: 67 F. (2d) 995.

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No. 704. United States ex rel. Nerbonne *v.* Hill, Warden. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alfred R. Nerbonne, pro se.* No appearance for respondent. Reported below: 70 F. (2d) 1006.

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No. 667. Poole *v.* United States. January 15, 1934. 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. Burton Craige* for petitioner. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Will G. Beardslee, Randolph C. Shaw,* and *W. Marvin Smith* for the United States. Reported below: 65 F. (2d) 795.

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Nos. 594 and 595. HARTER, RECEIVER, *v.* WALLACE, TRUSTEE, ET AL. January 15, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elmer T. Bell* for petitioner. *Mr. Joseph J. Daniels* for respondents. Reported below: 66 F. (2d) 16.

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No. 626. MISSOURI-KANSAS-TEXAS R. CO. *v.* PLEASANT ET AL. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. W. W. Brown* and *Joseph M. Bryson* for petitioner. *Messrs. Roland Boynton* and *J. G. Somers* for respondents. Reported below: 66 F. (2d) 842.

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No. 636. TRADERS LIMITED *v.* UNITED STATES. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frederic M. P. Pearse* and *Milton R. Kroopp* for petitioner. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. J. Frank Staley, Lucian Y. Ray,* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 198.

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No. 638. CENTRAL EASTERN POWER CO. *v.* MANUFACTURERS TRUST CO. ET AL.; and

No. 639. OHIO ELECTRIC POWER CO. *v.* COLUMBUS, DELAWARE & MARION ELECTRIC CO. ET AL. January 15, 1934. Petition for writs of certiorari to the Circuit Court

of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioners. *Mr. E. J. Marshall* for respondents. Reported below: 67 F. (2d) 986.

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No. 646. COOK ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for petitioners. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold, Sewall Key,* and *Norman D. Keller* for respondent. Reported below: 66 F. (2d) 995.

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No. 647. HUSTEAD, RECEIVER, *v.* SCHOOL DISTRICT OF THE BOROUGH OF BROWNSVILLE. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry Eastman Hackney* for petitioner. *Mr. John C. Sherriff* for respondent. Reported below: 67 F. (2d) 141.

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No. 648. CASSATT ET AL. *v.* FIRST NATIONAL BANK OF WEST NEW YORK, NEW JERSEY. January 15, 1934. Petition for writ of certiorari to the Court of Errors & Appeals of New Jersey denied. *Mr. George W. C. McCarter* for petitioners. No appearance for respondent. Reported below: 111 N.J.L. 536; 168 Atl. 585.

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No. 649. GROOVER ET AL. *v.* GRUBB. January 15, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. H. Mason Welch* for petitioners. *Mr. M. J. Colbert* for respondent. Reported below: 62 App.D.C. 305; 67 F. (2d) 511.

No. 654. IRVING TRUST CO., RECEIVER, *v.* COMPANIA MEXICANA DE PETROLEO "LA LIBERTAD," S.A., ET AL. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. M. Richardson Lyeth* for petitioner. *Mr. William M. Chadbourne* for respondents. Reported below: 66 F. (2d) 390.

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No. 542. MCCLEARY *v.* UNITED STATES. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Warren E. Miller* and *John W. Mahan* for petitioner. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Will G. Beardslee* and *W. Clifton Stone* for the United States. Reported below: 64 F. (2d) 1016.

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No. 550. ALVORD *v.* UNITED STATES. January 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Warren E. Miller* for petitioner. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Will G. Beardslee* and *W. Marvin Smith* for the United States. Reported below: 66 F. (2d) 455.

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No. 710. PETERSON *v.* ALABAMA. January 22, 1934. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles H. Houston* for petitioner. No appearance for respondent. Reported below: 227 Ala. 361; 150 So. 156.

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No. 652. ST. LOUIS-SAN FRANCISCO RY. CO. *v.* MCCOMMON. January 22, 1934. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Harry*

*P. Warner, Edward T. Miller,* and *Cecil R. Warner* for petitioner. *Mr. David S. Partain* for respondent. Reported below: 187 Ark. 824; 62 S.W. (2d) 954.

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No. 653. NEW AMSTERDAM CASUALTY CO. *v.* UNITED STATES. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Joseph A. Cantrel* for petitioner. *Solicitor General Biggs* and *Mr. Amos W. W. Woodcock* for the United States. Reported below: 67 F. (2d) 488.

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No. 658. BENDER ET AL. *v.* LAMB. January 22, 1934. Petition for writ of certiorari to the District Court of Appeal, Fourth Appellate District, of California, denied. *Mr. John O. Bender* for petitioners. *Mr. Benjamin S. Crow* for respondent. Reported below: 133 Cal. App. 348; 24 P. (2d) 208.

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No. 661. DOWNEY ET AL. *v.* HALE. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel A. Shea* for petitioners. *Mr. Joseph E. Warner* for respondent. Reported below: 67 F. (2d) 208.

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No. 670. MCCORMICK *v.* UNITED STATES. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. McCormick, pro se. Assistant Attorney General Wideman, Solicitor General Biggs,* and *Messrs. Sewall Key, John H. McEvers,* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 867.

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No. 671. MUNSON INLAND WATER LINES, INC. *v.* KUNKEL. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Cir-

cuit denied. *Messrs. Corydon B. Dunham* and *James A. Gray* for petitioner. *Mr. Ezra G. B. Fox* for respondent. Reported below: 67 F. (2d) 1005.

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No. 676. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO., TRUSTEE, *v.* UNITED STATES. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wilton H. Wallace, E. F. Colladay,* and *David O. Dunbar* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *S. E. Blackham* for the United States. Reported below: 67 F. (2d) 153.

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No. 693. U.S. FIDELITY & GUARANTY CO. *v.* HOWARD, RECEIVER. January 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for petitioner. *Mr. John R. L. Smith* for respondent. Reported below: 67 F. (2d) 382.

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No. 732. SOMERMAN ET AL. *v.* UNITED STATES. February 5, 1934. 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. Robert S. Johnstone* for petitioners. No appearance for the United States. Reported below: 67 F. (2d) 1018.

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No. 681. CLEGG, ANCILLARY EXECUTOR, *v.* BOWERS, EXECUTOR; and

No. 682. CLEGG *v.* SAME. February 5, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application.

*Messrs. John W. Davis* and *William Osgood Morgan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 66 F (2d) 419.

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No. 606. HARDEN ET AL. *v.* BENGUETT CONSOLIDATED MINING CO. ET AL. February 5, 1934. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Louis Titus* and *A. D. Gibbs* for petitioners. *Messrs. James Ross, Clyde Alton DeWitt,* and *Eugene Arthur Perkins* for respondents.

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No. 616. CRAWFORD COUNTY TRUST & SAVINGS BANK, TRUSTEE, *v.* CRAWFORD COUNTY, IOWA, ET AL.;

No. 617. FARMERS STATE BANK OF DOW CITY, IOWA, ET AL. *v.* SAME; and

No. 618. CRAWFORD COUNTY TRUST & SAVINGS BANK OF DENNISON, IOWA, *v.* SAME. February 5, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Addison G. Kistle, George S. Wright,* and *L. W. Powers* for petitioners. *Mr. L. H. Salinger* for respondents. Reported below: 66 F. (2d) 971.

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No. 625. WILTSIE *v.* UNITED STATES. February 5, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Thomas H. Remington* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct. Cls. 293; 3 F.Supp. 743.

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No. 668. SHUBIN ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Theodore B. Benson* for peti-

tioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, Francis H. Horan,* and *H. Brian Holland* for respondent. Reported below: 67 F. (2d) 199.

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No. 678. LOUISVILLE TRUST CO. *v.* NATIONAL BANK OF KENTUCKY ET AL. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert G. Gordon* for petitioner. *Messrs. Frank E. Wood, Robert S. Marx, Edward P. Humphrey,* and *Harry Kasfir* for respondents. Reported below: 67 F. (2d) 97.

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No. 691. BANK OF THE UNITED STATES ET AL. *v.* CUTHBERTSON, TRUSTEE IN BANKRUPTCY. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Carl J. Austrian* for petitioners. *Mr. Wm. H. Robbitt* for respondent. Reported below: 67 F. (2d) 182.

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No. 695. PECOT *v.* NEW YORK. February 5, 1934. Petition for writ of certiorari to the Court of Special Sessions of the City of New York, State of New York, denied. *Mr. Phelan Beale* for petitioner. *Messrs. Henry Epstein* and *Harry Greenwald* for respondent. Reported below: 262 N.Y. 681; 188 N.E. 119.

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No. 673. SNYDER *v.* NATIONAL UNION INDEMNITY CO. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Lindsay R. Rogers* for petitioner. *Mr. H. A. Rich* for respondent. Reported below: 65 F. (2d) 844.

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No. 683. NORWICH UNION FIRE INSURANCE SOCIETY, LTD., ET AL. *v.* COHN. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the

Tenth Circuit denied. *Mr. F. A. Rittenhouse* for petitioners. *Mr. J. H. Everest* for respondent. Reported below: 68 F. (2d) 42.

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Nos. 684 and 685. ROCKWOOD, RECEIVER, *v.* FOSHAY ET AL. February 5, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. J. Rockwood* for petitioner. *Mr. Josiah E. Brill* for respondents. Reported below: 66 F. (2d) 625.

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No. 686. ALUMINUM COMPANY OF AMERICA *v.* UNITED STATES. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. Watson Smith, John G. Buchanan,* and *Paul G. Rodewald* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John MacC. Hudson* for the United States. Reported below: 67 F. (2d) 172.

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No. 688. MIDWAY CHEMICAL CO. *v.* O'CEDAR CORP.; and

No. 699. F. W. WOOLWORTH CO. ET AL. *v.* SAME. February 5, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry B. Floyd* for Midway Chemical Co. *Mr. Ednyfed H. Williams* for F. W. Woolworth Co. et al. *Mr. George L. Wilkinson* for respondent. Reported below: 66 F. (2d) 363.

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No. 692. MEEHAM, TRUSTEE, *v.* MASSACHUSETTS. February 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harry F. R. Dolan* for petitioner. *Messrs. Joseph E. Warner* and *Charles F. Lovejoy* for respondent. Reported below: 67 F. (2d) 638.

No. 713. UNITED STATES *v.* MANUFACTURERS AIRCRAFT ASSN., INC. February 5, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Mr. William Wallace* for respondent. Reported below: 77 Ct.Cls. 481.

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No. 753. CRAFT ET AL. *v.* HIRSH. See *ante*, p. 644.

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No. 751. BEARD *v.* ADERHOLD, WARDEN. February 12, 1934. 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. Leslie Beard, pro se.* No appearance for respondent. Reported below: 67 F. (2d) 984.

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No. 741. MILLER, EXECUTOR, ET AL. *v.* SECURITY FIRST NATIONAL BANK OF LOS ANGELES, TRUSTEE. On petition for writ of certiorari to the Supreme Court of California. February 12, 1934. The motion of petitioners to dispense with the printing of the record is granted. Upon consideration of the petition and brief, and upon examination of the certified record, the Court finds no ground upon which a writ of certiorari should be granted, and the petition therefor is accordingly denied. *Messrs. Edwin J. Miller* and *Will R. King* for petitioners. No appearance for respondent. Reported below: 219 Cal. 120; 25 P. (2d) 420.

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No. 672. NATIONAL REFINING CO. ET AL. *v.* PENNSYLVANIA PETROLEUM CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. February 12, 1934. On consideration of the motion of counsel for the petitioners, it is ordered that the passage in respondent's brief, at pages 50 to 53 thereof, of which

complaint is made, be and it is hereby stricken from the files. *National Surety Co.* v. *Jarvis,* 278 U.S. 610, 611. The petition for writ of certiorari is denied. *Messrs. I. J. Ringolsky* and *Harry L. Jacobs* for petitioners. *Mr. Floyd E. Jacobs* for respondent. Reported below: 66 F. (2d) 914.

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No. 516. Illinois Central R. Co. *v.* Rawlings, Receiver. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles N. Burch, Edward W. Smith, H. D. Minor,* and *Clinton H. McKay* for petitioner. No appearance for respondent. Reported below: 66 F. (2d) 146.

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No. 637. Schmidt, Trustee in Bankruptcy, *v.* Lloyd Investment Co. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Emil Hersh* for petitioner. *Mr. Bruno V. Bitker* for respondent. Reported below: 66 F. (2d) 371.

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No. 662. Michaud Realty Co. *v.* Heymann et al. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William D. Mitchell* and *Wm. H. Oppenheimer* for petitioner. *Mr. Walter Ewing Hope* for respondents. Reported below: 67 F. (2d) 1002.

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No. 680. Winn, Administrator, *v.* Consolidated Coach Corp. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Francis J. Mizell, Jr.,* for petitioner. *Messrs. Lee Douglas* and *R. W. Keenon* for respondent. Reported below: 65 F. (2d) 256.

No. 697. COLEMAN FURNITURE CORP. *v.* HOME INSURANCE COMPANY OF NEW YORK. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Harvey B. Apperson* for petitioner. *Mr. Alexander H. Sands* for respondent. Reported below: 67 F. (2d) 347.

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No. 700. SIRMANS *v.* BROCK ET AL. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas E. Sandidge* for petitioner. No appearance for respondents. Reported below: 65 F. (2d) 930.

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No. 701. COPPARD, TRUSTEE IN BANKRUPTCY, *v.* AMERICAN FINANCE COMPANY OF GALVESTON ET AL. February 12, 1934. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Mr. John Neethe* for petitioner. No appearance for respondents. Reported below: 59 S.W. (2d) 958.

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No. 702. TALMADGE *v.* U.S. SHIPPING BOARD MERCHANT FLEET CORP. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Ross Delafield* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 66 F. (2d) 773.

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No. 707. MASSEY *v.* UNITED STATES. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry C. Hendrickson* for petitioner. *Solicitor General Biggs*

and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 66 F. (2d) 666. See *ante*, p. 655.

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No. 708. HANSEN *v.* UNITED STATES. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 613.

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No. 714. PAN AMERICAN PETROLEUM CORP. *v.* ALABAMA. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joseph M. Jones* and *Emile Godchaux* for petitioner. *Mr. Thomas E. Knight, Jr.*, for respondent. Reported below: 67 F. (2d) 590.

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No. 716. BUFFUM, TRUSTEE IN BANKRUPTCY, *v.* GELINAS. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Robert T. Devlin, William H. Devlin, George R. Freeman,* and *Horace B. Wolff* for petitioner. *Mr. Arthur C. Huston* for respondent. Reported below: 67 F. (2d) 380.

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No. 720. MORETTI *v.* UNITED STATES. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Milton R. Kroopf* and *Louis Halle* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman*, and *Messrs. Sewall Key* and *John H. McEvers* for the United States. Reported below: 67 F. (2d) 1017.

No. 723. MINTZ *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. February 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Copal Mintz, pro se.* No appearance for respondent. Reported below: 67 F. (2d) 878.

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No. 771. WASHINGTON *v.* CARTER, AGENT. February 19, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Bernard J. Gallagher* for petitioner. No appearance for respondent.

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No. 774. HANKINS *v.* UNITED STATES. February 19, 1934. 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. G. R. Harsh* for petitioner. No appearance for the United States. Reported below: 67 F. (2d) 317.

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Nos. 640, 641, and 642. UNITED STATES *v.* U.S. LIGHT & HEAT CORP. February 19, 1934. Petition for writs of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Mr. George Maurice Morris* for respondent. Reported below: 78 Ct. Cls. 23; 3 F.Supp. 861.

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No. 643. UNITED STATES *v.* M. & M. COMPANY. February 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Mr. George M. Morris* for respondent. Reported below: 78 Ct. Cls. 59; 3 F.Supp. 886.

No. 644. UNITED STATES *v.* ENGLERT MFG. Co. February 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Mr. George M. Morris* for respondent. Reported below: 78 Ct. Cls. 48; 3 F.Supp. 873.

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No. 645. UNITED STATES *v.* UNIVERSAL BATTERY Co. February 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Mr. George M. Morris* for respondent. Reported below: 78 Ct. Cls. 1; 3 F.Supp. 878.

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No. 687. MORSE DRY DOCK & REPAIR Co. *v.* UNITED STATES. February 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Courtland Palmer* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 77 Ct. Cls. 57.

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No. 694. NORTH DAKOTA-MONTANA WHEAT GROWERS ASSN. *v.* UNITED STATES. February 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. J. Murphy* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. H. Brian Holland* for the United States. Reported below: 66 F. (2d) 573.

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No. 703. COLUMBIAN CARBON Co. ET AL. *v.* UNITED STATES. February 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Harry J. Gerrity, Henry W. Clark,* and *Reid L. Carr* for petitioners. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 77 Ct. Cls. 768; 3 F.Supp. 536.

No. 715. OWATONNA *v.* INTERSTATE POWER CO. ET AL. February 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harlan E. Leach* for petitioner. *Messrs. Leslie L. Brown* and *Samuel Lord* for respondents. Reported below: 67 F. (2d) 298.

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No. 717. STRATTON, SECRETARY OF STATE, *v.* ST. LOUIS SOUTHWESTERN RY. CO. February 19, 1934. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Bayard Lacey Catron* for petitioner. *Messrs. Josiah Whitnel, A. H. Kiskaddon,* and *B. F. Batts* for respondent. Reported below: 353 Ill. 273; 187 N.E. 498.

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No. 718. STRATTON, SECRETARY OF STATE, *v.* U. S. PIPE & FOUNDRY CO. February 19, 1934. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Bayard Lacey Catron* for petitioner. *Messrs. Paul O'Donnell* and *Mason Trowbridge* for respondent. Reported below: 353 Ill. 516; 187 N.E. 507.

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No. 719. SOUTHERN PACIFIC CO. *v.* GIBSON. February 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Maury Kemp* and *M. Nagle* for petitioner. No appearance for respondent. Reported below: 67 F. (2d) 758.

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No. 721. COMMERCIAL CREDIT CORP. *v.* CENTRAL AUTO RENTING CORP. February 19, 1934. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Duane R. Dills* for petitioner. *Mr. Samuel Meyers* for respondent. Reported below: 239 App. Div. 781; 263 N.Y.S. 952.

No. 729. APPALACHIAN ELECTRIC POWER CO. *v.* SMITH ET AL. February 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John L. Abbot, Newton D. Baker, Raymond T. Jackson,* and *A. Henry Mosle* for petitioner. *Solicitor General Biggs* and *Messrs. Huston Thompson, Harry W. Blair,* and *Willard W. Gatchell* for respondents. Reported below: 67 F. (2d) 451.

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No. 730. C. PARDEE WORKS *v.* DUFFY, FORMERLY COLLECTOR OF INTERNAL REVENUE. February 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Matthew C. Fleming,* and *James R. Sloane* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, J. P. Jackson,* and *W. Marvin Smith* for respondent. Reported below: 66 F. (2d) 1011.

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No. 726. JARVIS ET AL. *v.* CALIFORNIA. See *ante,* p. 648.

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No. 782. GILLEN *v.* AMERICAN EMPLOYERS' INSURANCE CO. March 5, 1934. 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. W. H. Fryer* for petitioner. *Messrs. Thornton Hardie* and *Ben R. Howell* for respondent. Reported below: 68 F. (2d) 159.

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No. 805. FOSHAY ET AL. *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to

proceed further *in forma pauperis,* denied. *Mr. Henry H. Henley* for petitioners. No appearance for the United States. Reported below: 68 F. (2d) 205.

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No. 809. CONNER *v.* ALABAMA GREAT SOUTHERN R. CO. ET AL. March 5, 1934. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Horace C. Wilkinson* for petitioner. No appearance for respondents. Reported below: 227 Ala. 562; 151 So. 355.

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No. 766. UNITED ENGINEERING & FOUNDRY CO. *v.* COLD METAL PROCESS CO. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Melville Church, A. Leo Weil,* and *Jo. Baily Brown* for petitioner. *Messrs. Thomas G. Haight* and *Clarence P. Byrnes* for respondent. Reported below: 68 F. (2d) 564.

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No. 711. MAHONING INVESTMENT CO. *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the Court of Claims denied. The motion to remand is also denied. *Messrs. Howe P. Cochran* and *Frederick S. Winston* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct. Cls. 231; 3 F.Supp. 622.

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No. 712. ROCHESTER & PITTSBURGH COAL & IRON CO. *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the Court of Claims denied. The motion to remand is also denied. *Messrs. Howe P. Cochran* and *Frederick S. Winston* for petitioner. *Solicitor General*

*Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct. Cls. 231; 3 F.Supp. 622.

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No. 706. ATLANTIC MILLS OF RHODE ISLAND *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Mark J. Ryan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 78 Ct. Cls. 219; 3 F.Supp. 699.

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No. 724. WHEELOCK ET AL., RECEIVERS, *v.* YOUNG, ADMINISTRATRIX. March 5, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Frank Y. Gladney, Ralph T. Finley, Silas H. Strawn, James C. Jones, F. H. Sullivan, Chas. M. Miller, Lon O. Hocker,* and *Wm. O. Reeder* for petitioners. No appearance for respondent. Reported below: 333 Mo. 992; 64 S.W. (2d) 950.

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No. 725. MUTUAL LIFE INSURANCE CO. *v.* WELLS FARGO BANK & UNION TRUST CO. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. F. Eldred Boland, John H. Riordan,* and *Leo R. Friedman* for petitioner. *Messrs. Sidney M. Ehrman* and *Arnold C. Lackenbach* for respondent. Reported below: 66 F. (2d) 890.

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No. 735. HUGART *v.* ADERHOLD, WARDEN. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for respondent. Reported below: 67 F. (2d) 247.

No. 737. WIGTON *v.* COE, COMMISSIONER OF PATENTS. March 5, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry H. Snelling* for petitioner. *Solicitor General Biggs* and *Messrs. W. Marvin Smith* and *T. A. Hostetler* for respondent. Reported below: 62 App.D.C. 367; 68 F. (2d) 414.

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No. 738. BIG LAKE OIL CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Homer L. Bruce* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 67 F. (2d) 985.

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No. 739. BOONE *v.* PHELPS. March 5, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Huston Thompson, Herbert S. Ward,* and *Ralph E. Day* for petitioner. No appearance for respondent. Reported below: 62 App. D.C. 308; 67 F. (2d) 574.

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No. 746. PREVIN *v.* TENACRE, INC. ET AL. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioner. *Mr. Conover English* for respondents. Reported below: 70 F. (2d) 389.

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No. 747. SIEFKE *v.* WICK ET AL. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Emanuel Harris* for petitioner. *Messrs. Frederick H. Wood* and *Earl F. Reed* for respondents. Reported below: 67 F. (2d) 686.

No. 750. BUFFALO DRY DOCK CO. *v.* SALKELD ET AL. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George Wm. Cottrell* and *Thomas C. Burke* for petitioner. *Messrs. Forrest E. Single* and *Horace T. Atkins* for respondents. Reported below: 67 F. (2d) 540.

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No. 756. GENERAL CHEMICAL CO. *v.* SELDEN CO. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. B. Morton* and *Clarence M. Fisher* for petitioner. *Mr. Clair W. Fairbank* for respondent. Reported below: 67 F. (2d) 133.

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No. 757. AMERICAN SURETY CO. *v.* BANKERS SAVINGS & LOAN ASSN. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Matthew A. Hall* and *Raymond G. Young* for petitioner. *Mr. Clement L. Waldron* for respondent. Reported below: 67 F. (2d) 803.

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No. 759. SOUTHERN RY. CO. *v.* WILBANKS. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sidney S. Alderman, H. O'B. Cooper, Sanders McDaniel, Alonzo C. Wheeler,* and *S. R. Prince* for petitioner. *Mr. Reuben R. Arnold* for respondent. Reported below: 67 F. (2d) 424.

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No. 760. SOUTHERN RY. CO. *v.* LAWRENCE. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sidney S. Alderman, H. O'B. Cooper, Sanders McDaniel, Alonzo C. Wheeler,* and *S. R. Prince* for petitioner. *Mr. Reuben R. Arnold* for respondent. Reported below: 67 F. (2d) 426.

No. 769. ORR ET AL. *v.* NEILLY, TRUSTEE IN BANKRUPTCY. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Horace Russell* and *D. C. Webb* for petitioners. *Mr. Marion Smith* for respondent. Reported below: 67 F. (2d) 423.

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No. 698. RUCKS-BRANDT CONSTRUCTION CO. *v.* PRICE, SHERIFF, ET AL. March 5, 1934. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Charles L. Yancey* and *Grover C. Spillers* for petitioner. *Messrs. C. B. McCrory* and *A. L. Emery* for respondents. Reported below: 165 Okla. 178; 23 P. (2d) 690.

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No. 736. UNITED STATES EX REL. DEAN *v.* REYNOLDS ET AL. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edwin W. Hunter* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondents. Reported below: 68 F. (2d) 346.

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No. 745. REVERE SUGAR REFINERY ET AL. *v.* PENNSYLVANIA TRUST CO., RECEIVER, ET AL. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Sidney J. Watts* for petitioners. *Mr. E. Lowry Humes* for respondents. Reported below: 67 F. (2d) 1008.

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No. 752. BENRUS WATCH CO. ET AL. *v.* UNITED STATES. March 5, 1934. Petition for writ of certiorari to the United States Court of Customs & Patent Appeals denied. *Messrs. Thomas M. Lane* and *Samuel Isenschmid* for petitioners. *Solicitor General Biggs, Assistant Attorney General Lawrence,* and *Mr. Ralph Folks* for the United States. Reported below: 21 C.C.P.A. (Cust.) 139.

No. 754. WALLACE, SECRETARY OF AGRICULTURE, ET AL. *v.* BOARD OF TRADE OF CHICAGO; and

No. 755. FARMERS NATIONAL GRAIN CORP. *v.* SAME. March 5, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Biggs* for petitioner in No. 754. *Messrs. Carl Meyer* and *Irving B. Goldsmith* for petitioner in No. 755. *Messrs. Weymouth Kirkland* and *Howard Ellis* for respondent. Reported below: 67 F. (2d) 402.

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No. 758. BALTIMORE & OHIO R. CO. *v.* ZAHROBSKY. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. George W. P. Whip* and *Duncan K. Brent* for petitioner. *Mr. George Forbes* for respondent. Reported below: 68 F. (2d) 454.

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No. 761. PEERLESS MOTOR CAR CORP. *v.* TAYLOR. March 5, 1934. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Robert M. Calfee* for petitioner. *Mr. Paul Lamb* for respondent. Reported below: 127 Ohio St. 413; 188 N.E. 753.

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No. 764. CENTMONT CORP. *v.* MARSCH. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Walter A. Dane* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 460.

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No. 765. UNION NATIONAL BANK OF PITTSBURGH ET AL., TRUSTEES, *v.* FIDELITY TRUST CO., ADMINISTRATOR. March 5, 1934. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Louis Titus*

and *H. Fred Mercer* for petitioners. *Messrs. William Watson Smith* and *William H. Eckert* for respondent. Reported below: 313 Pa. 467; 169 Atl. 209.

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No. 770. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* HALSBAND. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Claude R. Branch, Frederick H. Nash,* and *Eli J. Blair* for petitioner. *Mr. Horace L. Cheyney* for respondent. Reported below: 67 F. (2d) 863.

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No. 777. MILLER *v.* VAN ZANDT, RECEIVER. March 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William R. Watkins* for petitioner. No appearance for respondent. Reported below: 67 F. (2d) 901.

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No. 827. GOLDSMITH *v.* UNITED STATES. March 12, 1934. 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. H. Ely Goldsmith, pro se.* No appearance for the United States. Reported below: 68 F. (2d) 5.

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No. 388. ALLEN *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. March 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Francis A. Brogan, Alfred G. Ellick,* and *Dana B. Van Dusen* for petitioner. *Mr. J. A. C. Kennedy* for respondent. Reported below: 64 F. (2d) 840.

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No. 743. COLE *v.* VAN HORN, SHERIFF; and

No. 744. STEBBINS *v.* SAME. March 12, 1934. Petition for writs of certiorari to the Circuit Court of Appeals

for the Tenth Circuit denied. *Mr. Thomas H. Gibson* for petitioners. No appearance for respondent. Reported below: 67 F. (2d) 735.

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No. 762. LEISENRING ET AL., EXECUTORS, *v.* UNITED STATES. March 12, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Spencer Gordon, Henry S. Drinker, Jr.,* and *Frederick E. S. Morrison* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 78 Ct. Cls. 171; 3 F.Supp. 853. See also 4 F.Supp. 993.

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No. 767. ROBISON ET AL., ADMINISTRATORS, *v.* CHICAGO & EASTERN ILLINOIS RY. CO. March 12, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. John S. Marsalek* for petitioners. *Mr. Frank Y. Gladney* for respondent. Reported below: 334 Mo. —; 64 S.W. (2d) 660.

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No. 781. BOSTON & MAINE RAILROAD *v.* HOPKINS. March 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clive C. Handy* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 67 F. (2d) 997.

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No. 780. GRIFFIN *v.* MCCARTHY. See *ante,* p. 653.

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No. 666. FERGUSON, MAYOR, *v.* MISSOURI EX REL. ELLIS ET AL. March 19, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Julian Dean James* for petitioner. No appearance for respondents. Reported below: 333 Mo. 1177; 65 S.W. (2d) 97.

No. 733. AMPLUS STORAGE BATTERY CO. *v.* UNITED STATES. March 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Miller Kenyon* and *Stanley F. Brewster* for petitioner. *Solicitor General Biggs* and *Mr. W. Marvin Smith* for the United States. Reported below: 67 Ct. Cls. 711.

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No. 772. CREGIER *v.* COE, COMMISSIONER OF PATENTS. March 19, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Stauffer* for petitioner. *Solicitor General Biggs* and *Messrs. Charles Bunn* and *T. A. Hostetler* for respondent. Reported below: 62 App.D.C. 320; 67 F. (2d) 692.

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No. 773. FORD MOTOR CO. *v.* UNITED STATES. March 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Charles D. Hamel* and *Alan E. Gray* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 77 Ct. Cls. 581; 3 F.Supp. 423.

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No. 776. LUCEY, RECEIVER, *v.* UNITED STATES. March 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. A. R. Serven, Charles V. Imlay,* and *George W. Offutt* for petitioner. *Attorney General Cummings, Assistant Attorney General Wideman,* and *Mr. Erwin N. Griswold* for the United States. Reported below: 78 Ct. Cls. —; 4 F.Supp. 1000.

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No. 778. MISSOURI PACIFIC R. CO. *v.* HOMAN. March 19, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Thomas J. Cole* and *Edward J. White* for petitioner. *Mr. Albert S. Marley* for respondent. Reported below: 334 Mo. —; 64 S.W. (2d) 617.

No. 785. NORTHWEST UTILITIES SECURITIES CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John Junell* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Lucius A. Buck* for respondent. Reported below: 67 F. (2d) 619.

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No. 793. HIDALGO COUNTY DRAINAGE DISTRICT No. 1 *v.* CREATH, RECEIVER. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. D. Cox, Jr.,* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 119.

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No. 788. KENSEY, ADMINISTRATRIX, *v.* CENTRAL RAILROAD CO. OF NEW JERSEY. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas J. O'Neill* and *Charles D. Lewis* for petitioner. *Messrs. Charles E. Miller* and *DeVoe Tomlinson* for respondent. Reported below: 68 F. (2d) 562.

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No. 797. BENSON *v.* SULLIVAN, RECEIVER. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd C. Whitman* for petitioner. *Mr. Otis F. Glenn* for respondent. Reported below: 67 F. (2d) 708.

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No. 810. SPRINGFIELD FIRE & MARINE INSURANCE CO. *v.* J. T. WILSON CO. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Louis Kohe* for petitioner. *Mr. John E. Shepard* for respondent. Reported below: 67 F. (2d) 426.

No. 763. UNITED STATES *v.* FIDELITY INVESTMENT ASSN. March 19, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Messrs. Dean Acheson* and *John Marshall* for respondent. Reported below: 78 Ct. Cls. —; 5 F.Supp. 19.

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No. 784. MARYLAND CASUALTY CO. *v.* SEAY ET AL. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ernest W. Clemens* for petitioner. No appearance for respondents. Reported below: 67 F. (2d) 819.

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No. 794. DELUCA, ADMINISTRATRIX, *v.* SHEPARD STEAMSHIP CO., INC. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Joseph Lilly* for petitioner. *Mr. Arthur M. Boal* for respondent. Reported below: 65 F. (2d) 566. See also 67 F. (2d) 437.

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No. 796. ILLINOIS BANKERS LIFE ASSN. ET AL. *v.* TALLEY, ADMINISTRATOR. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Hamp P. Abney, Hamp P. Abney, Jr.,* and *Lewis A. Stebbins* for petitioners. *Mr. Spearman Webb* for respondent. Reported below: 68 F. (2d) 4.

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No. 798. GENERAL SECURITIES CORP. *v.* HOMEWOOD. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. T. Stokely* for petitioner. *Messrs. Walter Brower, John London,* and *Geo. W. Yancey* for respondent. Reported below: 67 F. (2d) 513.

No. 800. CHANNING *v.* UNITED STATES. March 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Barton Corneau* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *H. Brian Holland* for the United States. Reported below: 67 F. (2d) 986.

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## CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 9, 1934, TO AND INCLUDING MARCH 19, 1934.

No. 705. UNITED STATES EX REL. VOIGT *v.* TOOMBS, U.S. MARSHAL. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. February 5, 1934. Petition for writ of certiorari dismissed on motion of *Mr. Brantley Harris* for petitioner. Reported below: 67 F. (2d) 744.

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No. 779. UNITED STATES *v.* CAMPBELL. Appeal from the District Court of the United States for the Southern District of New York. February 12, 1934. Appeal dismissed and mandate granted on motion of *Solicitor General Biggs* for the United States. Reported below: 5 F.Supp. 156.

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No. 838. UNITED STATES *v.* BROWN ET AL. Appeal from the District Court of the United States for the Western District of Kentucky. March 5, 1934. Dismissed and mandate granted on motion of *Solicitor General Biggs* for the United States. Reported below: 6 F.Supp. 331.

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No. 18, original. PENNSYLVANIA *v.* ARKANSAS. March 5, 1934. Bill of complaint dismissed without prejudice on motion of *Mr. William A. Schnader* for the complainant.

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11. *Id. Recovery. Limitations.* Recovery on ground of illegal assessment or collection *held* barred after five years from payment. *Id.*

12. *Id.* Commissioner's certificate of overassessment, provisional and tentative, *held* not account stated. *Id.*

13. *Accounting Methods. Reflecting True Income.* Discretion of Commissioner to specify method of accounting taxpayer must use. *Brown* v. *Helvering*, 193.

14. *Estate Tax. Deductions. Bequests to Charity.* Value of remainder interest to charity was determinable at time of death of decedent; capacity of woman for childbearing; bequest in remainder contingent on life tenant's not bearing child. *U.S.* v. *Provident Trust Co.*, 272.

II. **State Taxation.**

1. *Federal Military Reservation.* State tax inoperative. *Standard Oil Co.* v. *California*, 242.

2. *Gasoline Tax. Federal Instrumentality.* Excise tax on gasoline used in performance of contract with Government for construction of levees in aid of navigation of Mississippi River, sustained. *Trinityfarm Co.* v. *Grosjean*, 466.

3. *License Taxes. Interstate Commerce.* Tax on storing and compressing cotton, though in usual course it will be exported, valid. *Federal Compress Co.* v. *McLean*, 17.

4. *Id.* Local tax on buyer of cotton locally produced but shipped ultimately in interstate commerce, valid. *Chassaniol* v. *Greenwood*, 584.

5. See *Puget Sound Power Co.* v. *Seattle*, 619; *Seattle Gas Co.* v. *Seattle*, 638.

**THALWEG.**

Doctrine of. See *New Jersey* v. *Delaware*, 361.

**TOLL BRIDGES.** See **Constitutional Law**, VI, (B), 4; **Public Utilities.**

**TOLLS.** See **Treaties**, 2.

**TRADE MARKS AND TRADE NAMES.**

Right to trade name in new territory. *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 67.

**TREATIES.** See **Navigable Waters**, 3–4.

1. *Construction.* Ambiguities may be resolved by practical construction. *Pigeon River Co.* v. *Cox Co.*, 138.

2. *Id.* Webster-Ashburton Treaty did not preclude improvement of Pigeon River and tolls for use thereof. *Id.*

3. *Id.* Act of March 3, 1901, authorizing improvement of Pigeon River, was practical construction of Webster-Ashburton Treaty, not abrogation or modification of it. *Id.*

4. *Id.* Authorization by Ontario of complementary works on Canadian side and tolls for their use was practical construction of Treaty. *Id.*

5. *Id.* Structures and uses involved here *held* such as were recognized by Treaty of January 11, 1909, with Great Britain, as "heretofore permitted." *Id.*

**TRIAL.** See **Constitutional Law**, VI, (B), 9–11; **Criminal Law**, 4–7.

1. *View in Criminal Case* was not a trial nor any part of trial in common law sense. *Snyder* v. *Massachusetts*, 97.

2. *Direction of Verdict* upon opening statement of plaintiff's counsel. *Best* v. *District of Columbia*, 411.

**TRUSTS.** See **Bankruptcy**, 1; **Taxation**, I, 2.

1. *Interest of Parties.* Beneficiaries of proceeds of mine, under circumstances here, *held* owners of entire economic interest and entitled to allowance of deduction for depletion under Revenue Acts. *Helvering* v. *Falk*, 183.

2. *Constructive Trust.* That deposit was obtained by bank on faith of *ultra vires* pledge of assets did not create constructive trust. *Texas & Pacific Ry.* v. *Pottorff*, 245.

**TWENTY-FIRST AMENDMENT.** See **Constitutional Law**, I, 1–3; **Evidence**, 2.

**ULTRA VIRES.**

Effect of *ultra vires* pledge of assets by national bank. *Texas & Pacific Ry.* v. *Pottorff*, 245; *Marion* v. *Sneeden*, 262.

**UNCERTAINTY.** See **Constitutional Law**, VI, (B), 12–14; **Statutes**, 2–3.

**UNFAIR COMPETITION.** See **Federal Trade Commission.**

1. *Elements.* Competition may be unfair though method not fraudulent. *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 67; *Federal Trade Comm'n* v. *Keppel & Bro.*, 304.

2. *Unfair Methods.* Sale of candy in "break and take" packages *held* unfair method of competition. *Federal Trade Comm'n* v. *Keppel & Bro.*, 304.

3. *Id.* Method not necessarily fair merely because others may adopt it without restricting competition. *Id.*

4. *Misrepresentation. Substitution.* Sale of Western Yellow Pine under trade name of "California White Pine" *held* unfair method of competition. *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 67.

5. *Id.* Consumer is prejudiced in being sold substitute under name of better article, though he save money by it. *Id.*

6. *Id.* Public entitled to its choice, though that be dictated by caprice, fashion, or ignorance. *Id.*

7. *Id.* Practice of marketing cheaper lumber under name of better and more expensive kind was prejudicial to honest dealers and manufacturers. *Id.*

8. *Secondary Meaning.* Evidence contradicted contention that name "California White Pine," acquired innocuous secondary meaning. *Id.*

9. *Defenses.* That deceptive trade name was adopted without fraudulent design and has long been in use is no defense. *Id.*

**UTILITY.** See **Public Utilities.**

**VAGUENESS.** See **Constitutional Law**, VI, (B), 12–14; **Statutes**, 2–3.

**VALUATION.** See **Constitutional Law**, VI, (B), 4; **Public Utilities.**

**VENUE.** See **Jurisdiction**, IV, 2.

**VIEW.** See **Constitutional Law**, V; VI, (B), 9–11; **Criminal Law**, 4–7; **Trial.**

**VISA.** See **Aliens**, 1.

**WAIVER.** See **Taxation**, I, 7–8.

**WAR DEPARTMENT.** See **Army.**

**WAREHOUSING ACT.** See **Constitutional Law**, I, 5.

**WAR RISK INSURANCE.**

*Proceeds* paid to estate of insured not exempt from claims of creditors. *Pagel* v. *Pagel*, 473.

**WASHINGTON STATE.** See **Death; Workmen's Compensation Acts.**

**WEBSTER-ASHBURTON TREATY.** See **Treaties**, 2–3.

**WHARFS.** See **Negligence**, 2.

**WIFE.** See **Evidence**, 7–9.

**WITNESSES.** See **Constitutional Law**, V; **Evidence**, 7–9.

**WORDS AND PHRASES.** See **Statutes**, 6.

**WORKMEN'S COMPENSATION ACTS.**

*Application.* Act of Congress of February 1, 1928, *held* not to have extended Compensation Act of State of Washington to place subject to exclusive jurisdiction of United States. *Murray* v. *Gerrick & Co.*, 315.

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