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UNITED STATES REPORTS

VOLUME 293

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1934

FROM OCTOBER 1, 1934 TO AND INCLUDING
(IN PART) JANUARY 7, 1935

ERNEST KNAEBEL
REPORTER



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1935

For sale by the Superintendent of Documents, Washington, D. C. - Price $2.50 (Buckram)

ERRATA

279 U. S., p. 584, line 20, change "274 U. S." to "272 U. S."

291 U. S., p. 388, line 35, and p. 390, note 4, change "69 Ct. Cls. 150; 38 F. (2d) 139;" to "77 Ct. Cls. 199."

292 U. S., p. 624, No. 811, supply "291" as page number of W. Va. citation.

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.

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, 1934.

RADIO CORPORATION OF AMERICA ET AL. *v.* RADIO ENGINEERING LABORATORIES, INC.

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

No. 619 (October Term, 1933). Argued May 2, 3, 1934.—Decided May 21, 1934. Petition for rehearing denied, and opinion amended, Oct. 8, 1934.

1. Where this Court has affirmed a decree upholding a patent in a suit presenting the issue of priority between those who were rival claimants in the patent office proceedings, upon the ground that the unsuccessful party had failed to establish his superior right by thoroughly convincing evidence, the decree is not conclusive upon a stranger to that record in a subsequent suit against him for infringement, but it is persuasive as a precedent where the issue in the second suit and the evidence concerning it are the same as before. P. 7.
2. Patents Nos. 1,507,016 and 1,507,017, to Lee De Forest, Sept. 2, 1924, for a "feed back" and an audion "oscillator," sustained upon the evidence as to priority of discovery. P. 10.
3. A patentee is entitled not only to the uses for his invention that were apparent when it was made, but also to other uses then dimly apprehended but realized later. P. 14.

66 F. (2d) 768, reversed; 1 F. Supp. 65 (D. C.), affirmed.

CERTIORARI, 290 U. S. 624, to review the reversal of a decree of the District Court sustaining patents upon the ground of priority, in a suit brought by their assignees

against an infringer. Because of the pendency of a petition for rehearing, the opinion, delivered at the last Term, was not published in vol. 292. It is now printed with the amendments that were directed by the order of October 8, 1934, denying the rehearing. See *post*, p. 522.

Messrs. Thomas G. Haight and *Samuel E. Darby, Jr.*, with whom *Messrs. James R. Sheffield, William R. Ballard,* and *Abel E. Blackmar, Jr.*, were on the brief, for petitioners.

Mr. William H. Davis for respondent.

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioners, assignees of two patents, numbers 1,507,016 and 1,507,017, granted to Lee De Forest on September 2, 1924, have sued to restrain an infringement and for other relief.

The respondent, defendant in the trial court, admits the infringement if the patents are valid, but maintains that they are void in that they were issued to a patentee who was not the first inventor.

Long before this suit the rival claimants to the invention, Armstrong and De Forest, had fought out between themselves the legal battle now renewed. The outcome of their contest was a decree whereby priority of invention was found in accordance with the patents now assailed by the respondent, a decree binding on the claimants and their several assignees. For the purpose of any controversy between Armstrong and De Forest the validity of the patents must be accepted as a datum. Even for the purpose of a controversy with strangers there is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence. The question is whether the respondent has sustained that heavy burden.

At the outset there were four claimants to priority of title. All four, acting independently, had made the same or nearly the same discovery at times not widely separate. The prize of an exclusive patent falls to the one who had the fortune to be first. *Du Bois* v. *Kirk,* 158 U.S. 58, 66; *Evans* v. *Eaton,* 3 Wheat. 454. The others gain nothing for all their toil and talents. Of the four claimants Langmuir filed an application for a patent on October 29, 1913, claiming August 1, 1913, as the date of his invention. Armstrong filed an application on October 29, 1913, and a second one on December 18, 1913, fixing the date of his invention as the fall of 1912 or the beginning of 1913. As early as October 6, 1914, he received a patent covering the subject matter of his first application (patent No. 1,113,149), but not the subject matter of his second. Meissner filed an application on March 16, 1914, fixing the date of his invention as April 9, 1913. De Forest filed an application on March 20, 1914, and another on September 23, 1915, fixing as the date of his invention August 6, 1912, the earliest date of all, which would make him the first inventor if the claim could be made good.

Interferences were declared by the Patent Office as the result of these conflicting applications. One involved the applications of De Forest and Langmuir; another the applications of De Forest, Langmuir and Meissner; a third the applications by De Forest, Langmuir and Meissner and also the second one of Armstrong's, the only one of his then pending. While these interferences were still undecided, Armstrong and his assignee brought suit for the infringement of patent No. 1,113,149, which had been issued to him in October, 1914, the defendant in that suit being the De Forest Radio Telephone & Telegraph Company. The District Court (per Mayer, J.) fixed the date of Armstrong's discovery as January 31, 1913, rejected De Forest's claim to discovery on August 6, 1912, and gave

an interlocutory decree for an injunction and an accounting. 279 Fed. 445. The Circuit Court of Appeals (per Manton, J.) affirmed. 280 Fed 584. In the meanwhile the interference proceedings went on in the Patent Office. On March 31, 1923, the Commissioner of Patents rendered a decision which gave priority to Armstrong. There was an appeal to the Court of Appeals of the District of Columbia, invested at that time with supervisory jurisdiction in the administration of the patent laws. *Butterworth* v. *Hoe,* 112 U.S. 50, 60; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693. The Court of Appeals reversed the decision of the Commissioner, and decreed priority of invention in favor of De Forest. 54 App.D.C. 391; 298 Fed. 1006. On September 2, 1924, pursuant to the mandate of that court, patents numbers 1,507,016 and 1,507,017 were issued by the Patent Office.

The fight was far from ended. Already there was pending in the District Court in Delaware a suit brought under the authority of R.S. § 4915 (35 U.S.C. § 63 [1]) to direct the issuing of a patent to Meissner or his assigns. After the decree in the District of Columbia there was a suit in Pennsylvania under R.S. § 4918 (35 U.S.C. § 66 [2]),

[1] "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Court of Appeals of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. . . ."

[2] "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in

which was brought by the assignee of the De Forest patents to set aside the Armstrong patent of October, 1914 (No. 1,113,149), all the interested parties being joined as defendants. Later on there was still another suit in Delaware, under R.S. § 4915, to establish priority for Langmuir. The suit in Pennsylvania came to a decree in July, 1926. The decision was in favor of De Forest, 13 F. (2d) 1014, the court adjudging that the holder of the Armstrong patent had failed to overcome the presumption of validity attaching to the De Forest patents under the administrative ruling in the District of Columbia, and that the earlier decision in New York (279 Fed. 445, 280 Fed. 584) did not sustain the defense of *res judicata* for the reason that the cause had never gone to final judgment. In February and March, 1927, the two suits in Delaware were decided the same way. 18 F. (2d) 338; 18 F. (2d) 345. The decrees in the three suits came up for review before the Circuit Court of Appeals for the Third Circuit. All three were affirmed with a comprehensive opinion by Woolley, J., marshalling the evidence and weighing the competing arguments. As the upshot the court held that the presumption of validity which protected the De Forest patents had not been overthrown, and that apart from any presumption De Forest had made out his title as the original inventor. 21 F. (2d) 918. Writs of certiorari brought the controversy here. 278 U.S. 562. This court affirmed the decree on the authority of *Morgan* v. *Daniels,* 153 U.S. 120, and *Victor Talking Machine Co.* v. *Brunswick-Balke-Collender Co.,* 273 U.S. 670. The first of those cases lays down the rule

part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

that "where the question decided in the Patent Office is one between the contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction." 153 U.S. at p. 125. The second case (273 U.S. 670) adds to that presumption of validity the support of the familiar principle, repeatedly applied in our decisions, that the concurrent findings of the courts below will be accepted by this court "unless clear error is shown." See, e.g., *United States* v. *State Investment Co.*, 264 U.S. 206, 211; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U.S. 548, 558; *United States* v. *Commercial Credit Co.,* 286 U.S. 63, 67.

One might have supposed that controversy would have been stilled after all these years of litigation. It proved to be not so. The petitioners, after repelling every assault from within the ranks of rival claimants, found it necessary to meet a challenge from without. The respondent, Radio Engineering Laboratories, Inc., allying itself with Armstrong, who is paying its expenses, insists that the invention is at large for the reason that De Forest, who received the patents, is not the true inventor, and that Armstrong, who *is* the inventor, is barred by a final judgment, conclusive between himself and the pretender, from obtaining the patent that is due him, and with it an exclusive right. The evidence in this suit for an infringement is a repetition, word for word, of the evidence in the earlier suits, so far as material to the conflicting claims of Armstrong and De Forest. What has been added is so nearly negligible that to all intents and purposes the records are the same. The District Court (per Campbell, J.) held upon that evidence that the respondent had not succeeded in overcoming the De Forest patents, and entered a decree for the complainants. 1 F.Supp. 65. Upon

appeal to the Court of Appeals for the Second Circuit, the decree was reversed by a divided court with instructions to dismiss the bill. 66 F. (2d) 768. A majority of the court adhered to the conclusion which it had announced eleven years before. 280 Fed. 584. A dissenting opinion enforced the view that De Forest's title as inventor, conclusively established as between himself and Armstrong, should be held, upon substantially the same record, to be good also against others. A writ of certiorari issued from this court. 290 U.S. 624.

The judgments in the suits between Armstrong and De Forest and their respective assignees are not conclusive upon the respondent, a stranger to the record. This is so by force of the accepted limitations of the doctrine of *res judicata*. It is so by force of the statute (R.S. § 4918), which provides in so many words that " no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment." But the respondent does not move very far upon the pathway to success by showing that what has been heretofore determined is without conclusive force. A patent regularly issued, and even more obviously a patent issued after a hearing of all the rival claimants, is presumed to be valid until the presumption has been overcome by convincing evidence of error. The force of that presumption has found varying expression in this and other courts. Sometimes it is said that in a suit for infringement, when the defense is a prior invention, "the burden of proof to make good this defense " is " upon the party setting it up," and " every reasonable doubt should be resolved against him." *Cantrell* v. *Wallick,* 117 U.S. 689, 695, 696; *Coffin* v. *Ogden,* 18 Wall. 120, 124; *The Barbed Wire Patent,* 143 U.S. 275, 285; *Washburn* v. *Gould,* 3 Story 122, 142; *H. J. Heinz Co.* v. *Cohn,* 207 Fed. 547, 554; *Detroit Motor Appliance Co.* v. *Burke,* 4

F. (2d) 118, 122; *Wilson & Willard Mfg. Co.* v. *Bole,* 227 Fed. 607, 609; *Stoody Co.* v. *Mills Alloys, Inc.,* 67 F. (2d) 807, 809; cf. *Morgan* v. *Daniels, supra,* p. 123. Again it is said that "the presumption of the validity of the patent is such that the defense of invention by another must be established by the clearest proof—perhaps beyond reasonable doubt." *Austin Machinery Co.* v. *Buckeye Traction Ditcher Co.,* 13 F. (2d) 697, 700. The context suggests that in these and like phrases the courts were not defining a standard in terms of scientific accuracy or literal precision, but were offering counsel and suggestion to guide the course of judgment. Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance. Cf. *Philippine Sugar E. D. Co.* v. *Philippine Islands,* 247 U.S. 385, 391. If that is true where the assailant connects himself in some way with the title of the true inventor, it is so *a fortiori* where he is a stranger to the invention, without claim of title of his own. If it is true where the assailant launches his attack with evidence different, at least in form, from any theretofore produced in opposition to the patent, it is so a bit more clearly where the evidence is even verbally the same. From all this it results that a stranger to a patent suit does not avoid altogether the consequences of a judgment rendered in his absence by establishing his privilege under the doctrine of *res judicata* to try the issues over again. If he has that opportunity and there is substantial identity of evidence, he may find that the principle of adherence to precedent will bring him out at the end where he would be if he had been barred at the beginning. Cf. *National Folding Box & Paper Co.* v. *American Paper Pail & Box Co.,* 48

Fed. 913; *Rousso* v. *First Nat. Bank,* 37 F. (2d) 281; *Cary* v. *Domestic Spring-Bed Co.,* 27 Fed. 299; 3 Robinson, Patents, § 1017.

This court in affirming the decrees in favor of De Forest did not say out and out that it would have reached the same conclusion upon the issue of priority if it had been itself the trier of the facts. It did, however, say in substance that Armstrong had failed to establish his own superior right by evidence sufficient to carry thorough conviction to the mind (*Morgan* v. *Daniels, supra*), or by evidence of manifest error in the findings of the courts below. We do not need to go into the question whether *Morgan* v. *Daniels* is applicable in all its force unless the parties to the later suit were parties also to the contest in the administrative proceeding. There are statements in the opinion (153 U.S. at pp. 124, 125) with reference to the analogy between a patent and a judgment that presuppose, perhaps, identity of parties. Cf. *Rousso* v. *Barber,* 3 F. (2d) 740; *Rousso* v. *First Nat. Bank, supra.* Be that as it may, the requirement of evidence sufficient to carry conviction to the mind is little more than another form of words for the requirement that the presumption of validity shall prevail against strangers as well as parties unless the countervailing evidence is clear and satisfactory. Nice distinctions are suggested between the application of these principles by the court that finds the facts and their application by the court that sits as a reviewing body, though we know that an appeal in equity imports a broad power of revision. Conceivably, we are told, a court might have a clear conviction that the validity of a patent had been successfully impeached, if it were passing upon the issue unhampered by the views of others, and yet the conviction might not be clear enough to overthrow a holding to the contrary approved by other

judges. Gradations of difference so subtle are not susceptible of pursuit without leading us into a land of shadows. This court held the view when these patents were last before it that the evidence was insufficient to overcome the presumption of their validity in any clear or certain way. If our estimate of probative values had been different, the invention must have gone to Armstrong, no matter though other courts or administrative officers had been persuaded to the contrary. The evidence that was insufficient at that time to evoke a clear conviction that the patents were invalid is the same in all essentials as the evidence before us now. We must pronounce a like decree unless we are prepared to say in the light of fuller argument that the first decree was wrong.

The record has been reëxamined patiently without inducing that persuasion. After all that has been written about the De Forest patents in these many years of litigation, there is no need to fill the pages of our reports with an analysis of the opposing arguments as if we were a court of first instance trying the controversy anew. For present purposes it is enough to bring out into sharp relief a few considerations of dominating significance. Patent No. 1,507,017 is for an invention known as a "feed-back circuit" and patent No. 1,507,016 for an invention known as the audion "oscillator." The two, however, are closely associated, for the oscillator can be produced only by use of the feed-back circuit, though the feed-back circuit can be used without producing an oscillator. As far back as 1908, De Forest had received a patent for a form of vacuum tube to which he gave the name of "audion." The Fleming vacuum tube in use up to that time had in it a metallic filament, which was electrically heated to incandescence through an input circuit, and a cold metallic plate to which electrons were trans-

mitted from the filament, passing from the plate to another or output circuit. De Forest's "audion" changed the Fleming tube by interposing a special wire known as the "grid" between the filament and the plate, thereby increasing its capacity as a detector of waves of radio or inaudible frequency and serving better to transform them into waves of audible frequency.

The device established itself almost at once as a revolutionary improvement in the art of transmitting sounds at great distances by wire and through the air. At the beginning, however, its potencies were not fully appreciated by electrical experts, not even by its inventor. Many experiments were made with a view to exploring its capacities and developing them. Among those interested and curious was Armstrong, then a very young man, a student in the school of electrical engineering at Columbia University. He conceived the idea about January, 1913, that through a hook-up or coupling of the output and the input circuit there would be a feed-back or regeneration of energy whereby the plate in the audion would become an independent generator of continuous oscillations. Tuning the circuit to the appropriate frequency, he found that the messages communicated through the antenna of a radio station were heard with a new clearness. Signals from distant lands were borne to him across the seas.

It was a brilliant conception, but another creative mind, working independently, had developed it before in designs and apparatus till then unknown to the art. De Forest with his assistant Van Etten had been working during the summer of 1912 along two lines of thought. One was the use of the audion as a telephone repeater to amplify weak telephone currents and thus facilitate the transmission of long distance messages. The other was its development as a generator of alternating currents for any and all uses, some perhaps indefinite, that were capable of

being served by oscillations thus produced. On August 6, 1912, a diagram showing a feed-back hook up of the input and output circuits is recorded in Van Etten's note book with a note that by the use of the coupling " a beautiful clear tone " had been developed, which means that oscillations had been produced and that the oscillations were sustained. There is also a note that the pitch, i.e., the frequency, was varied by altering the plate voltage, which means, or was understood, we are told, by De Forest to mean, that by other simple adjustments the frequency of the oscillations could be varied at will. Armstrong does not deny that all this was done just as stated by De Forest. Indeed the authenticity of the note-book entries has never been disputed through the many phases of the controversy. What Armstrong does deny is that anything done or recorded in August, 1912, is an anticipation of his own invention. He says that the sustained oscillations generated at that time were of audio and not of radio frequency, and this, it seems, is admitted. He says there was then no perception or thought that the audion plate could be made to oscillate at radio as well as audible frequencies through a coupling of the circuits. This De Forest denies. He maintains, with the backing of other witnesses, that upon discovering the effect of the feed-back in generating sustained oscillations of the plate, he understood at once that by controlling the inductance or capacity in the oscillating circuit he could also control the frequency. This, he says in substance, must have been obvious upon reflection to any competent electrician, though there would be need of a certain amount of adjustment and experiment in substituting the correct inductance or capacity, a process, it is argued, that would be well within the ability of any one skilful in the art. Beyond this he insists that having discovered the generative virtue of the feed-back, he was not confined in his invention to the uses then developed, but if his patent

claims were broad enough was entitled to the benefit of other and related uses made manifest thereafter.

We think that for all these contentions of De Forest adequate support exists in the record and the law. There is evidence that in August, 1912, he discussed with his assistants the possibility of using sustained oscillations of the audion in generating and transmitting radio waves as well as those of audio frequency. There is evidence that intermittently in 1913 he worked upon that theory, and particularly that on April 17 of that year at Palo Alto, California, he received a clear note, the true heterodyne beat note, from the radio signal station at San Francisco Beach with the aid of the coupled circuits. The entry in his note book made the same day tells us, "This day I got the long looked for beat note." This was long before he had heard of Armstrong or of like experiments by any one. There is evidence that in the early part of 1914, he renewed his investigations in that field of research, after being temporarily diverted, and finally on February 27, 1914, recorded in his note book, as the outcome of a number of experiments, that he had "full proof that the audion acts as a generator of high frequency currents."

True there are circumstances that have been thought to bear against him. Thus, in December, 1913, he read a paper before the Institute of Radio Engineers on "The Audion Detector and Amplifier." In the discussion following the paper he made answers which, it is argued, are irreconcilable with a belief that there was a regenerative feed-back of radio frequencies from the plate circuit to the grid. He denies, however, that he intended to convey the meaning now ascribed to him, and insists that to his understanding in the heat of the discussion the audio and not the radio frequencies were the subject of the questions. Much is made also of his failure to perfect his invention promptly or to apply promptly for a

patent, the delay being extraordinary, it is argued, if a conception so important in its possibilities of profit and utility was present in his mind. For this delay he gives his explanations, lack of funds, preoccupation with other uses of the audion having a cash value at the moment (its use, for illustration, as a telephone repeater), and perhaps chiefly the belief that he was a pioneer in the art without a rival in the offing. These explanations, even if not wholly convincing, are not so manifestly inadequate as to lead us to say that the conception of the oscillator as a generator of radio frequencies has been proved in any clear or certain way to have been developed and applied by Armstrong before it was born in De Forest's mind. To say this, moreover, would not be enough, even if we were willing to go so far, which, as already stated, we are not. Vacuum tube oscillators have a commercial use for other purposes besides radio. If De Forest's explanations and excuses were to be disregarded altogether, the result at most would be that the apparatus of the coupled circuits had potencies and values more important than the uses that were immediately apparent, potencies and values at least dimly apprehended, and never discarded or forgotten down to the time of their complete fruition. The benefit of all alike belonged to the inventor. *Corona Cord Tire Co.* v. *Dovan Chemical Corp.*, 276 U.S. 358, 369; *Roberts* v. *Ryer*, 91 U.S. 150, 157; *Stow* v. *Chicago*, 104 U.S. 547, 550; cf. *Lovell Manufacturing Co.* v. *Cary*, 147 U.S. 623, 634; *The Telephone Cases*, 126 U.S. 1, 536; Robinson, Patents, Vol. 1, § 81, p. 124.

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

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Counsel for Parties.

VIRGINIA *v.* IMPERIAL COAL SALES CO., INC.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 16. Argued October 12, 1934.—Decided November 5, 1934.

1. Where the highest court of a State, confronted with the two questions whether a state property tax is invalid under the state taxing statutes and whether the property is immune under the commerce clause of the Federal Constitution, prefers to rest its judgment, avoiding the assessment, explicitly and exclusively on the federal ground, the case is within the jurisdiction of this Court, under 28 U. S. C., § 344 (b). P. 16.
2. Intangible property of a corporation consisting of money on hand at the place of its principal office in the State that created it and the excess of its bills and accounts receivable there over its bills and accounts payable, has its situs for property taxation in that State. P. 19.
3. The facts that such intangible property is employed wholly in interstate commerce and that the owner has no real or tangible personal property in the State, do not exempt the intangible property from a non-discriminatory property tax by the State. P. 19.
4. Cases in which state taxes on the privilege of doing an interstate business were avoided as directly burdening interstate commerce or touching property beyond the jurisdiction of the State, are inapplicable to a non-discriminatory ad valorem tax on property used in interstate commerce within the taxing jurisdiction; for such property taxation affects interstate commerce only incidentally. P. 20.

161 Va. 718, 736; 167 S. E. 268, 172 S. E. 927, reversed.

CERTIORARI, 292 U. S. 619, to review a judgment avoiding a state tax assessment for conflict with the commerce clause of the Federal Constitution. The case arose upon the application of the taxpayer to the state court of first instance for correction of the assessment and exoneration from the tax. Judgment for the taxpayer was affirmed by the Supreme Court of Appeals on a writ of error sued out by the State.

Mr. Henry R. Miller, Jr., with whom *Mr. Abram P. Staples*, Attorney General of Virginia, and *Mr. W. W.*

Martin, Assistant Attorney General, were on the brief, for petitioner.

Messrs. James R. Caskie and *F. P. Christian, Jr.,* for respondent.

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

The Imperial Coal Sales Company, a corporation organized under the laws of Virginia, sought exoneration from taxes assessed on its capital and income by the Department of Taxation of that State. The taxes were assailed under the commerce clause and the Fourteenth Amendment of the Constitution of the United States. The judgment of the trial court, holding the taxes to be invalid, was affirmed by the Supreme Court of Appeals. 161 Va. 718, 736; 167 S. E. 268, 172 S. E. 927. This Court granted certiorari. 292 U. S. 619.

The tax on income was held to be invalid upon the non-federal ground that it was unauthorized by the state law. But in dealing with the capital tax, the state court concluded that it was "unnecessary to pass upon the construction of Section 73 of the Tax Code under which the assessment was made." While observing "a strong leaning and intent on the part of the lawmakers to exclude such corporations as the sales company from state tax action," the Court did not put its decision upon a non-federal ground but based it explicitly upon the ground that the tax was invalid under the Federal Constitution. The Court said—"We prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce and forbidden by the Constitution of the United States." As the decision was thus expressly rested, not upon the inapplicability of the state law, but upon a determination of the federal

question, by which the bar of the Federal Constitution was erected against the levy of the tax, this Court has jurisdiction. 28 U. S. C. 344 (b); *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 608, 609; *Rogers* v. *Hennepin County,* 240 U. S. 184, 188, 189; *Grayson* v. *Harris,* 267 U. S. 352, 358.

The material facts, as set forth by the state court, are as follows: Respondent, having its principal office in Lynchburg, Virginia, and maintaining a branch office in Cincinnati, Ohio, conducts a sale agency. Its sole business is that of selling coal for foreign coal mining corporations. It directs and manages the shipment and transportation of the coal, collects the proceeds of sale, and is paid a commission of eight per cent. Respondent does not own or lease coal mines and is not engaged in the business of mining. No coal of any consequence is sold in Virginia and none of the coal is located in Virginia at the time of sale. Nor does respondent own or operate warehouses or coal storage yards in Virginia. It does not retail, buy or own, coal but sells coal for its foreign principals in carload lots f. o. b. mines for a continuous journey between points outside of Virginia. When coal is sold through the Cincinnati office contracts are forwarded to the Lynchburg office for approval, and orders are sent to the mines for shipment. The record of sales and an account with the mines from which the coal is shipped are kept in the office at Lynchburg. Purchasers agree to pay monthly. Respondent collects the money and deposits it in bank in Lynchburg, and from these proceeds the mines are paid for the coal, less respondent's commissions.

The state court held that while respondent was doing business in Virginia, that business " arises out of, is inseparable from and incidental only to, the principal business of selling coal in interstate commerce." The Court said that a corporation engaged in interstate commerce

"may be taxed by a state on (1) its real estate and tangible personal property situated in the taxing state, and (2) upon its intangible personal property if in the taxing state it does intrastate business or has any appreciable real or tangible property. But if it has no real or tangible property and does no intrastate business in the taxing state, it cannot be taxed by that state."

1. The tax in question, styled a "capital tax," is an *ad valorem* property tax. It is a state tax of "seventy-five cents on every one hundred dollars of the actual value" of the capital of any trade or business except that otherwise specifically taxed or exempted from taxation. Section 73, Tax Code of Virginia. By 'capital' is meant the property described. The property which is subject to the tax consists of (1) the inventory of stock on hand, (2) the excess of all bills and accounts receivable over bills and accounts payable, (3) all money on hand and on deposit, and (4) all other taxable personal property of any kind whatever, including all choses in action, equities, demands and claims, but excluding certain property specifically mentioned in the statute. Real estate used in trade or business is not held to be capital under the statute but is to be listed and taxed as other real estate; and tangible personal property used in trades and businesses mentioned in the statute is to be listed exclusively for local taxation.

In the instant case, no property was assessed under the first and fourth categories of the statute, for respondent had none. The assessment, as the state court found, was based "on the money on hand, plus the excess of the bills and accounts receivable over the bills and accounts payable." The state court treated the tax as a property tax, saying that "it must be borne in mind that the tax sought to be imposed is one upon property which is entirely intangible and which is used wholly and exclusively in interstate commerce."

2. Respondent's ownership of the property assessed is not disputed. No question is presented on this point merely because of the conduct of its business as a sales agency. The ownership of the property was the subject of a stipulation in the trial court, and it was agreed "that the property constituting the basis of the assessment on capital was, on the dates in question, the property of the sales company."

3. The money on hand, and the bills and accounts receivable, the excess of which over bills and accounts payable was assessed, had their *situs* in Virginia. Respondent is a domestic corporation with its principal office in that State where the proceeds of its accounts receivable are collected and deposited in bank. Such credits and accounts are regarded as situated at the domicile of the creditor and that domicile establishes a basis for taxation. *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498; *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Maguire* v. *Trefry,* 253 U. S. 12, 16; *Blodgett* v. *Silberman,* 277 U. S. 1, 15; *Baldwin* v. *Missouri,* 281 U. S. 586, 591, 592; *Beidler* v. *Tax Commission,* 282 U. S. 1, 8; *Lawrence* v. *Tax Commission,* 286 U. S. 276, 279, 280.

4. Property having its situs within the taxing State is not exempt from a non-discriminatory property tax merely because the property is used in interstate commerce. Corporations engaged in interstate commerce should bear their proper share of the burdens of the government under whose protection they conduct their operations, and non-discriminatory taxation of their property although used in interstate commerce, as this Court has frequently said, affects that commerce only incidentally and is not inconsistent with the constitutional immunity from the imposition of direct burdens. *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia,* 190 U. S. 160, 163; *United*

States Express Co. v. *Minnesota,* 223 U. S. 335, 344; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 166, 167; *Eastern Air Transport* v. *Tax Commission,* 285 U. S. 147, 152.

Such taxation may embrace intangible as well as tangible property. *Adams Express Co.* v. *Ohio,* 166 U. S. 185, 218, 219; *Cudahy Packing Co.* v. *Minnesota, supra; Wells, Fargo & Co.* v. *Nevada, supra.* It is not the character of the property that makes it subject to such a tax, but the fact that the property has its situs within the State and that the owner should give appropriate support to the government that protects it. That duty is not less when the property is intangible than when it is tangible. Nor are we able to perceive any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation.

We are dealing, as we have said, with an *ad valorem* property tax, and not with a privilege tax. Respondent is not taxed upon the privilege of engaging in interstate commerce, and decisions, cited by the state court, holding such taxes to be invalid are not apposite. Thus, in *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, the tax was held to be bad as one imposed "upon the privilege or right to do business" of a corporation engaged only in interstate commerce. *Id.,* p. 562. The same principle of protection was applied in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 216. Compare *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218. Decisions holding invalid license fees or excise taxes measured in such a manner as to burden interstate commerce and to attempt to exert the taxing authority with respect to business and property beyond the jurisdiction of the State, are also inapplicable. Cf. *Air-Way Electric Corp.* v. *Day,* 266 U. S. 71, 83. Nor are we here concerned

with the question which has been discussed in cases dealing with the effect of the taxation of gross receipts derived from interstate commerce.[1] Without going into that question, it is sufficient again to point out that the tax is not laid upon gross receipts but upon the "excess of all bills and accounts receivable over bills and accounts payable." The effect upon interstate commerce, as in other instances of non-discriminatory property taxation, is at most indirect and incidental. See *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329; *Shaffer* v. *Carter,* 252 U. S. 37, 57.

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

Reversed.

DETROIT TRUST CO., TRUSTEE, *v.* THE THOMAS BARLUM ET AL.*

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

No. 13. Argued October 12, 1934.—Decided November 5, 1934.

1. A court of admiralty has no jurisdiction of a suit to foreclose a mortgage on a ship, in the absence of an Act of Congress conferring such jurisdiction. P. 32.
2. "Preferred mortgages" of ships under the Ship Mortgage Act of 1920 include deeds of trust securing bonds sold to the public and under that statute are foreclosable exclusively in admiralty, with priority of lien as therein prescribed, if indorsement upon ship's documents, recording, and other conditions expressed in the statute have been fulfilled. P. 32.

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[1] See *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453; *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 349.

* Together with No. 14, *Detroit Trust Co., Trustee,* v. *The John J. Barlum et al.,* certiorari to the Circuit Court of Appeals for the Second Circuit.

3. The status of "preferred mortgages" does not depend upon application of the borrowed money to maritime uses. This condition is not expressed in the Act and can not be implied. P. 37.

So *held* in view of the minute and explicit provisions of the Act; its legislative history, showing that the objective was to foster our merchant marine by making ship mortgages, including deeds of trust securing bonds, safe and attractive to investors; and the importance to this purpose of having the jurisdiction to foreclose—in admiralty exclusively or in state courts exclusively—determinable by precise statutory conditions rather than by extrinsic criteria raising a host of questions as to the application of the proceeds of loans.

4. Congress, under Art. III, § 2, and Art. I, § 8, par. 18 of the Constitution, has paramount power to determine the maritime law which shall prevail throughout the country; but in so doing it is necessarily restricted to the sphere of the admiralty and maritime jurisdiction, the boundaries of which are determined by the exercise of the judicial power. P. 42.

5. In order to promote investment in shipping securities and thus to advance the maritime interests of the United States, Congress has power, by amendment of the maritime law, to regulate the priorities of mortgage and other liens on ships and to provide jurisdiction in admiralty for the enforcement of such mortgages. *Bogart* v. *The John Jay*, 17 How. 399, considered. P. 48.

6. There is no ground for denying this power when the proceeds of the mortgage are used for other purposes than the direct benefit of the vessel. P. 50.

68 F. (2d) 946, reversed.

CERTIORARI, 292 U. S. 619, to review the reversal, for want of jurisdiction, of two decrees entered by the District Court, 56 F. (2d) 455, 2 F. Supp. 733, for the foreclosure of mortgages on two ships.

Mr. Ray M. Stanley, with whom *Messrs. Ellis H. Gidley, Ferris D. Stone,* and *Cleveland Thurber* were on the brief, for petitioner.

The Ship Mortgage Act is a logical development of the national policy expressed in the Merchant Marine Act. Sen. Rep., 66th Cong., No. 573.

Under the construction given it by the court below, in every suit *in rem* brought for the foreclosure of a preferred mortgage the first inquiry will necessarily be whether or not the proceeds, beyond an inconsiderable portion, were devoted to maritime uses. If not, did the mortgagee have knowledge at the time the mortgage was given that the mortgagor intended to apply a substantial part of the proceeds to non-maritime uses? If knowledge or lack of knowledge is disputed, the court must retain jurisdiction in the first instance solely for the purpose of deciding that question of fact. If advance knowledge be found, the court must order a dismissal for lack of jurisdiction. The majority opinion further leaves it to the discretion of individual judges to determine what part of the proceeds may be devoted to non-maritime uses before jurisdiction is destroyed. A mere statement demonstrates the utter fallacy of the reasoning. Jurisdiction may be defeated only by destroying the preferred status of the mortgage itself.

The language of the Act shows that there was no intention to impose any implied limitations on the use of the proceeds.

The purpose of the implied grant of power to legislate on the subject of admiralty and maritime jurisdiction was to place the entire subject matter, both substantive law and procedure, under federal control, because of its intimate relation to interstate and foreign commerce and to navigation, and it may be added—to ships, the sole instruments of navigation. *The Lottawanna,* 21 Wall. 558, 577; *The Belfast,* 7 Wall. 624; *Waring* v. *Clarke,* 5 How. 441; *Panama R. Co.* v. *Johnson,* 264 U. S. 375; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215.

The power of Congress to alter, qualify, revise or supplement the general maritime law whenever experience of changing conditions makes it desirable or necessary has

been often declared and recently reaffirmed. *Crowell* v. *Benson,* 285 U. S. 22; *United States* v. *Flores,* 289 U. S. 137.

Illustrations of the repeated exercise by Congress of its power to make substantive changes in the law maritime are found in the Judiciary Act of 1789, providing for seizure under the impost, navigation or trade laws; *The Margaret,* 9 Wheat. 421; in the Acts providing for limitation of liability; *The Main* v. *Williams,* 152 U. S. 122; *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344; *Richardson* v. *Harmon,* 222 U. S. 96; in the Act of June 23, 1910 creating an extension of maritime lien for supplies furnished in the home port; *Piedmont & G. C. Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1; in the Act of March 4, 1915, known as the Jones Act; *Lindgren* v. *United States,* 281 U. S. 38; in the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927; *Crowell* v. *Benson,* 285 U. S. 22.

In the absence of action by Congress, this Court has the power to modify the maritime law as experience or changing conditions may require, e. g., *The Genesee Chief,* 12 How. 443.

In the last analysis, the decision in the case of *The Genesee Chief, supra,* was merely an interpretation of the Constitution, not only in the light of changing conditions and the lessons of experience, but as well because of factors which were not considered when the case of *The Thomas Jefferson* was decided.

This power of the Court to overrule prior decisions has been frequently exercised (see cases Note 2, dissenting opinion of Brandeis, J., in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 407, 408). See *Funk* v. *United States,* 290 U. S. 371, wherein an ancient rule of the common law was abrogated—this though there is no national common law. The only apparent limitation on the power of the

Court in this regard is the doctrine of *stare decisis,* which can have no application in the present case.

What was said in *Bogart* v. *The John Jay,* 17 How. 399, did not mark the boundary for all time beyond which neither Court nor Congress may go. Cf. *The Oconee,* 280 Fed. 927; *The Nanking,* 292 Fed. 642; *The Lincoln Land,* 295 Fed. 358.

Cases where the validity of the Ship Mortgage Act was assumed are: *The Egeria,* 294 Fed. 791; *The Northern Star,* 7 F. (2d) 505; *National Bank* v. *Enterprise Marine Dock Co.,* 43 F. (2d) 547; *Consumer's Co.* v. *Goodrich Transit Co.,* 53 F. (2d) 972, cert. den., 286 U. S. 548; *The Owego,* 292 Fed. 403; *The Northern No. 41,* 297 Fed. 343; *The Moshulu,* 298 Fed. 348; *The Henry W. Breyer,* 17 F. (2d) 423; *The Red Lion,* 22 F. (2d) 329. Also see *Morse Drydock & Repair Co.* v. *The Northern Star,* 271 U. S. 552, and *United States* v. *Flores,* 289 U. S. 137.

The opinion in *Bogart* v. *The John Jay, supra,* shows that the Court, as then constituted, had no doubt of the power of Congress to so extend the jurisdiction, as had been done in England. See *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 386.

Mr. George E. Brand, with whom *Mr. Thomas C. Burke* was on the brief, for respondents.

Prior to the Ship Mortgage Act, it was settled law that a ship mortgage securing a personal loan to the shipowner was not, *ex proprio vigore,* foreclosable in admiralty—not because the Congress had not conferred such jurisdiction, but because, under the Constitution as interpreted by this Court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend original admiralty jurisdiction to a non-maritime contract.

That this Court was fully conscious of the desirability of making federal admiralty jurisdiction as comprehen-

sive as the needs of navigation, is attested by *New Jersey Steam Navigation Co.* v. *Merchants Bank of Boston,* 6 How. 344, and by *The Genesee Chief,* 12 How. 443, holding that the admiralty jurisdiction was not limited to tide waters. Certainly this Court accorded the constitutional provisions a broad, rather than a restricted interpretation, and in view of such a tendency this Court's refusal to uphold jurisdiction over ship mortgages, in *Bogart v. The John Jay,* 17 How. 399, is of great significance. To quote from that case:

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime."

There was no dissent from this opinion and seven of the Justices who participated in the decision of *The Genesee Chief, supra,* were still members of this Court. The rule has been consistently followed: *Schuchardt* v. *The Angelique,* 19 How. 239; *People's Ferry Co.* v. *Beers,* 20 How. 393; *Grant Smith-Porter Co.* v. *Rohda,* 257 U. S. 469; *Thames Towboat Co.* v. *The Francis McDonald,* 254 U. S. 242; *The Lottawanna,* 21 Wall. 558; *The J. E. Rumbell,* 148 U. S. 1; *The Freights of the Kate,* 63 Fed. 707.

The bonds are the primary obligations to which the mortgages are mere incidents. *Carpenter* v. *Longan,* 16 Wall. 271.

The loans herein were merely personal contracts, in no way involving navigation or the perils of the sea. The mortgages were mere security for performance of the personal contracts and in no way involved the use of the steamers in navigation.

Maritime liens encumber commerce and are *stricti juris. Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.,* 290 U. S. 117; *Piedmont & George's Creek Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1; *The Kalfarli,* 277 Fed. 391; *People's Ferry Co.* v. *Beers,* 20 How. 393.

The fact that the contracts involved were not wholly maritime would preclude original admiralty jurisdiction. *Grant* v. *Poillon,* 20 How. 162; *Piedmont & George's Creek Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1; *Pillsbury Flour Mills Co.* v. *Interlake S. S. Co.,* 40 F. (2d) 439, cert. den., 282 U. S. 845; *The Richard Winslow,* 71 Fed. 426; *The Milwaukee,* 15 F. (2d) 886; *El Oriente,* 5 F. (2d) 251.

Admiralty courts are not courts of equity. *Bogart* v. *The John Jay,* 17 How. 399; *People's Ferry Co.* v. *Beers,* 20 How. 393; *Rea* v. *The Eclipse,* 135 U. S. 599; *The Ada,* 250 Fed. 194; *Kellum* v. *Emerson,* Fed. Cas. No. 7669.

The attempted grant of admiralty jurisdiction, if applicable to the mortgages, would deprive the States of reserved jurisdiction over non-maritime contracts because federal admiralty jurisdiction is exclusive. No state statute creating a maritime lien, justiciable in admiralty and thereby waiving reserved state rights, is involved. Subsection K, if applicable, is unconstitutional. *People's Ferry Co.* v. *Beers,* 20 How. 393; *The Genesee Chief,* 12 How. 443; *New England Marine Ins. Co.* v. *Dunham,* 11 Wall. 1.

No interstate commerce is involved in the present controversy. It is significant that in Art. I, § 8 of the Constitution, defining the power of the Congress, the subject

of admiralty is not mentioned. The connection of the Congress with that subject is through Art. III, § 1, which permits the Congress to apportion the judicial power conferred by the States but which cannot sustain an arrogated increase of power.

The Congress cannot enlarge the grant of admiralty jurisdiction. *Crowell* v. *Benson,* 285 U. S. 22; *Meyer* v. *Tupper,* 1 Black 522; *The Lottawanna,* 21 Wall. 558, 588.

Federal admiralty jurisdiction to enforce a lien is exclusive. Subsection K of the Ship Mortgage Act expressly provides that jurisdiction thereunder shall be exclusive. If the Congress, by its fiat, can convert such a mortgage into a maritime lien, the jurisdiction of the State is automatically divested. This cannot be done without the approval of the State or amendment of the Constitution. Cf. *The Winnebago,* 141 Fed. 945, cert. den., 200 U. S. 616; *The Moses Taylor* v. *Hammons,* 4 Wall. 411; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *The Belfast,* 7 Wall. 624; *Leon* v. *Galceran,* 11 Wall. 185; *Norton* v. *Switzer,* 93 U. S. 355; *The J. E. Rumbell,* 148 U. S. 1; *The Roanoke,* 189 U. S. 185; *American Steamboat Co.* v. *Chace,* 16 Wall. 522; *Perry* v. *Haines,* 191 U. S. 17.

The Congress may prescribe forms, mode and rules of judicial proceedings within the defined admiralty jurisdiction of the courts, but cannot make maritime a non-maritime cause or transaction. Analysis will disclose no decision upholding congressional regulation except as to a matter unquestionably maritime. *The General Smith,* 4 Wheat. 438; *Meyer* v. *Tupper,* 1 Black 522.

In *Providence & New York S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, this Court said:

"The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the

subject matter itself is one that belongs to the department of maritime law." In that case, the underlying cause of action was unquestionably maritime. The act of Congress merely controlled the procedure relating to the enforcement of that jurisdiction and did no more than alter a rule of recoverable damages in such cases. The same is true of *Richardson* v. *Harmon,* 222 U. S. 96, on which petitioner relies, wherein the underlying cause of action was the liability of a ship which, in its navigation, damaged a bridge. *Vancouver S. S. Co.* v. *Rice,* 288 U. S. 445; *Crowell* v. *Benson,* 285 U. S. 22.

Panama R. Co. v. *Johnson,* 264 U. S. 375, upheld the Jones Act on the theory that it did not create a maritime cause of action but merely regulated procedure.

To create a lien in connection with a matter already subject to maritime jurisdiction is one thing; but to attempt thereby to create jurisdiction where none existed is another. That the existence of a lien merely has not been an accepted basis of our admiralty jurisdiction is also attested by the fact that under the civil law many liens against ships existed that were not enforceable in original proceedings *in rem* under our law because the underlying cause of action was, by our courts, held to be non-maritime.

The States have not voluntarily yielded their control over non-maritime mortgages; and until they do, Congress cannot force them to do so by conferring exclusive jurisdiction upon the federal courts. *United States* v. *Flores,* 289 U. S. 137, distinguished.

A fair construction of the Ship Mortgage Act justified the holding that it does not apply to the particular mortgages involved. The Act should be so construed.

Essential original admiralty jurisdiction cannot be conferred by consent or estoppel.

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

These are suits in admiralty to foreclose two mortgages given by the Barlum Steamship Company upon the vessels "Thomas Barlum" and "John J. Barlum," respectively. The mortgages purported to be preferred mortgages under the Ship Mortgage Act, 1920. 41 Stat. 1000–1006; 46 U. S. C., c. 25, §§ 911–984. The mortgagor, appearing as claimant, contended that the admiralty was without jurisdiction. The District Court overruled that contention and, finding that all the requirements of that Act had been met, entered decrees of foreclosure and sale. 56 F. (2d) 455; 2 F. Supp. 733. In the case of the "John J. Barlum" the decree provided for the recovery by certain seamen, intervening libelants, of amounts due for wages, as preferred maritime liens. The Circuit Court of Appeals reversed the decrees, holding that the suits should have been dismissed for the want of jurisdiction. 68 F. (2d) 946. This Court granted certiorari. 292 U. S. 619.

The mortgagor at the time the mortgages were executed, was a close corporation, about four-fifths of its shares being owned by John J. Barlum who was also interested in several non-maritime enterprises. The mortgage, in No. 13, on the "Thomas Barlum" was executed in March, 1929, to petitioner, as trustee, to secure $200,000 of bonds which were purchased by petitioner with a definite understanding as to the application of the proceeds. Approximately $50,000 were to meet obligations secured by a prior mortgage upon the same vessel; about $100,000 were to take up loans of John J. Barlum and Thomas Barlum & Sons, a concern which was engaged in a non-maritime enterprise; and the remainder, about $42,000, were to provide for repairs and for refitting the vessels "Thomas Barlum" and "John J. Barlum." The mort-

gage was executed while the "Thomas Barlum" was laid up.

The mortgage, in No. 14, on the "John J. Barlum" was executed in December, 1927, to petitioner, as trustee, to secure an issue of $200,000 of bonds purchased by petitioner with the understanding that, of the proceeds, petitioner was to retain about $82,000 to cover principal and interest on bonds of John J. Barlum secured by a mortgage on real estate, and about $10,000 to be applied on one of his notes. Most of the remaining proceeds, which were paid over to the mortgagor, was used to take up loans in connection with non-maritime enterprises, only a small part being devoted to payments relating to the operation of the vessels.

In both instances, the bonds secured by the mortgages were negotiable bonds and were purchased by petitioner for sale to the general public and were largely so sold.

There is no question as to the validity of the mortgages or of the bonds which they secure or as to the default in payment. The question is solely one of jurisdiction in admiralty of the foreclosure suits. Respondent contends that the mortgages "were so devoid of connection with maritime purposes" that the provision of the Ship Mortgage Act conferring jurisdiction in admiralty "either does not, or cannot constitutionally, apply."

The Circuit Court of Appeals was divided in opinion. The majority of the judges, without passing on the extent of congressional authority, thought that it was sufficient to point out that the mortgagor and mortgagee knew, before the mortgages were made, that the moneys advanced "were intended for and actually were used for non-maritime purposes," and they concluded that the provisions of the Ship Mortgage Act did not extend to such a case. The minority view, supporting the decision of the District Court, was that the Congress intended to encourage the investment of capital in ships; that it

might well be that this object could best be promoted by allowing vessels "to be hypothecated as readily and with the same effect as other personal property"; that a mortgage on a ship would be "a most undesirable security" if purchasers of bonds so secured must at their peril ascertain how moneys advanced upon the mortgage are to be spent; and that Congress had constitutional authority to give to a valid mortgage a preferred status, and to provide for the enforcement of the lien in admiralty, by virtue of its control over ships as essentially marine instrumentalities, a control which includes the promotion of their development and the regulation of their use.

Prior to the enactment of the Ship Mortgage Act, 1920, the admiralty had no jurisdiction of a suit to foreclose a mortgage on a ship. *Bogart* v. *The Steamboat John Jay,* 17 How. 399; *Schuchardt* v. *Ship Angelique,* 19 How. 239, 241; *People's Ferry Co.* v. *Beers,* 20 How. 393, 400; *The Lottawanna,* 21 Wall. 558, 583; *The Eclipse,* 135 U. S. 599, 608; *The J. E. Rumbell,* 148 U. S. 1, 15.[1] If jurisdiction in the admiralty of the present suits is to be maintained it must be by reason of the application and validity of the provisions of the Ship Mortgage Act.

1. *The application of the statute.* The grant of jurisdiction is found in subsection K (46 U. S. C. 951) which provides:

"A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in ad-

[1] See, also, *The William D. Rice,* 3 Ware 134, 136; *The Martha Washington,* 3 Ware 245, 251; *The Sailor Prince,* 1 Ben. 461, 466; *Morgan* v. *Tapscott,* 5 Ben. 252; *Britton* v. *The Venture,* 21 Fed. 928; *The Gordon Campbell,* 131 Fed. 963, 965; *The Clifton,* 143 Fed. 460, 463; *The Conveyor,* 147 Fed. 586, 589; *The Rupert City,* 213 Fed. 263, 266.

miralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

The grant is thus one of exclusive jurisdiction to enforce the lien of a "preferred mortgage." If the mortgage is a preferred mortgage within the definition of the Act, jurisdiction is granted; otherwise not. "Preferred mortgages" are carefully defined in the detailed provisions of subsection D.[2] 46 U. S. C. 922. The applica-

[2] Subsection D is as follows: "*Preferred Mortgages.* (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, section 953, if—

"(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this chapter;

"(2) The mortgage is recorded as provided in subsection C, section 921, together with the time and date when the mortgage is so endorsed;

"(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

"(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

"(5) The mortgagee is a citizen of the United States.

"(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a 'preferred mortgage' as to such vessel.

"(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

"(1) The names of the mortgagor and mortgagee;

"(2) The time and date the indorsement is made;

"(3) The amount and date of maturity of the mortgage; and

"(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

"(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the

tion of this term in the subsequent provisions of the Act, including the provision as to admiralty jurisdiction, is not left to inference but is explicitly stated in subdivision (b) of subsection D as follows:

"Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a 'preferred mortgage' as to such vessel."

Subdivision (a) of subsection D provides that a "valid mortgage," which "includes the whole of any vessel of the United States of 200 gross tons and upward," shall have, in addition, "in respect to such vessel and as of the date of the compliance with all the provisions of this

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collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

"(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

"(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage."

subdivision, the preferred status given by the provisions of subsection M," [3] 46 U. S. C. 953. The term "vessel of the United States" means any vessel documented under the laws of the United States; and, in the case of a mortgage "involving a trust deed and a bond issue thereunder," the term "mortgagee" means the trustee. Subsection B, 46 U. S. C. 911. The "preferred status" given by subsection M is that, on foreclosure and sale in admiralty, all preëxisting claims in the vessel are to be held terminated and thereafter are to attach to the proceeds of the sale, and the "preferred mortgage lien" is to have priority over all claims against the vessel, except "preferred maritime liens" and expenses, fees and costs allowed by the Court. "Preferred maritime liens" are those arising prior to the recording and indorsement of the mortgage as required, or "a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or

[3] Subsection M is as follows: "*Preferred Maritime Lien; Priorities; Other Liens.* (a) When used hereinafter in this chapter, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

"(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preëxisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L, section 952, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court."

agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage."

The requirements of subdivision (a) of subsection D, which must be met in order to obtain this preferred status, are that the mortgage shall be indorsed upon the vessel's documents and shall be recorded; that an affidavit shall be filed with the record "to the effect that the mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel"; that the mortgage does not stipulate for a waiver of the preferred status; and that the mortgagee is a citizen of the United States. Subdivisions (c) and (d) of subsection D set forth the nature and manner of the required indorsement upon the documents of the vessel; and subsection C (46 U. S. C. 921), to which subsection D refers, contains detailed provisions as to recording.

Subdivision (e) of subsection D provides that a mortgage which includes property other than a vessel "shall not be held a preferred mortgage" unless there is provision for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness; subdivision (f) of subsection D makes provision for the case of a mortgage covering more than one vessel. And where a mortgage covers property in addition to vessels, the Act is not to be construed as authorizing a proceeding *in rem* in admiralty to enforce the rights of the mortgagee in respect to such property. Subsection N,[4] 46 U. S. C. 954.

[4] Subdivision (b) of subsection N is as follows: "(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels."

Subsection E (46 U. S. C. 923) imposes the duty upon the mortgagor to keep on board the mortgaged vessel a certified copy of the mortgage and to cause it and the vessel's documents to be exhibited by the master to any person having business with the vessel which may give rise to a maritime lien or to a transfer or mortgage of the vessel. Subsection F (46 U. S. C. 924) requires the mortgagor to disclose to the mortgagee, upon his request, the existence of any maritime lien, prior mortgage, or other obligation or liability of the vessel, that is known to the mortgagor, and prohibits the mortgagor, after the mortgage is executed and before the mortgagee has had reasonable time to record it and to have the necessary indorsements made upon the vessel's documents, from incurring "any contractual obligation creating a lien upon the vessel," other than those liens which are made "preferred maritime liens" as above stated. Provision is also made for the record of notices of claims of lien on the mortgaged vessel, for certificates of discharge of liens, and for the inspection of records and obtaining copies. Subsections G and I, 46 U. S. C. 925, 927. Penalties are provided for failure to exhibit documents and for violation of the Act in other respects; and provision is also made for recovery, by suits in the district courts of the United States, against collectors of customs and mortgagors, or masters of vessels, of damages caused by failure to perform the duties imposed upon them. Subsection J, 46 U. S. C. 941.

An examination of the provisions of the Act leaves no room for doubt that the subject of mortgages of vessels, and, in particular, the priority which should be assigned to them in relation to other liens, was under the close scrutiny of the Congress in determining its policy. But, among all the minute requirements of the Act, we find none as to the application of the proceeds of loans which such mortgages secure. No condition is imposed

as to the purposes for which the moneys are lent. While the Congress took care to make distinct provision for cases where a mortgage covers property other than a vessel, no distinction is made as to the status of mortgages of vessels by reason of an intention to devote the borrowed moneys to uses other than maritime. We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. It is enough, so the statute says expressly, that the mortgage is upon a vessel of the United States, that it is a valid mortgage, that it is made in good faith, that it is disclosed by proper indorsements on the vessel's documents and is duly recorded, and that the other conditions, specified in detail, are met. Such a mortgage upon a vessel documented under the laws of the United States, the Congress has undertaken to regulate with respect to priority of lien. If the conditions so laid down are fulfilled, the mortgage is to be a "preferred mortgage" with all the incidents which the Act attaches to it, including the right to bring foreclosure in admiralty. To hold that a mortgage is not within the Act which the Act itself states is within it, is not to construe the Act but to amend it. The question of policy—whether different terms should have been imposed—is not for us. We may not add to the conditions set up by Congress any more than we can subtract from them. They stand, as defined, precise and complete.

We see nothing in the general purpose of the Act which can be deemed to restrict the natural meaning and effect of its language. Rather, the general purpose emphasizes that meaning and effect. The Ship Mortgage Act is a part of the Merchant Marine Act, 1920. 41 Stat. 988. Its declared purpose is "to provide for the promotion and maintenance of the American merchant marine." The Congress, in its wisdom, decided upon the means to achieve that object and set forth its conclusions in the terms of the statute. The legislative

history of the statute shows the controlling considerations. The report of the Senate Committee on Commerce pointed out that "mortgage security on ships" was "practically worthless"; that it was proposed to "make it good except as to certain demands that should be superior to everything else, such as wages"; and that it was desired to have "our people and capital interested in shipping and shipping securities." Sen. Rep. No. 573, 66th Cong., 2d sess., p. 9. The bill, with this purpose, was developed in conference. The managers on the part of the House of Representatives, in their statement accompanying the report of the Committee of Conference, observed that by the enlarged provisions of the bill "the mortgagee under a mortgage upon a vessel of the United States is made more secure in his interest in the vessel than he is under existing admiralty law," and, referring to the plan of "creating a preferred mortgage," added that "the preferred status arises upon the recording of the mortgage as a preferred mortgage and its indorsement upon vessel's documents." There is no suggestion of any requirement as to the use, intended or actual, of the moneys borrowed upon the faith of the mortgage security. H. R. No. 1102, 66th Cong., 2d sess., p. 34; H. R. No. 1107, 66th Cong., 2d sess., p. 31.[5] The measure was enacted in the terms thus proposed.

[5] In this statement, the House managers said: "This Senate amendment is an extensive provision by which the mortgagee under a mortgage upon a vessel of the United States is made more secure in his interest in the vessel than he is under existing admiralty law. The amendment supplements the existing mortgage recording provisions by creating a preferred mortgage which in foreclosure proceedings will have priority in the distribution of the proceeds from the sale of the mortgaged vessel over all maritime liens against the vessel except liens for damages arising out of tort, stevedores' and crews' wages, general average, and salvage. The preferred status arises upon the recording of the mortgage as a preferred mortgage and its indorsement upon vessel's documents. Under the Senate amend-

In placing ship mortgages upon a stronger basis as securities, the Congress had in mind, and expressly included, trust deeds securing issues of bonds to the public. Subsection B, 46 U. S. C. 911. It is plain that the fundamental purpose to promote public confidence in such securities, and their extended use as investments, would have been frustrated if purchasers of bonds had to discover at their peril the application of the proceeds of the secured loans, or if their rights depended upon such knowledge as their trustee might have, rather than upon the satisfaction of the statutory conditions and the disclosures, as required, by indorsement on the vessel's documents and recording. But, while contemplating such bond issues, with their obvious practical incidents, the Congress did not set up a special rule for them, or for purchasers of bonds without notice as to the application of proceeds. The Congress made simple, clear and definite conditions

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ment the foreclosure proceedings are brought in the Federal courts in equity with simulated admiralty procedure under which the court in equity gives a title good against the world, and terminates all pre-existing claims against the vessel. . . .

"The House recedes with an amendment which places the constitutional basis of Congress's power to legislate in respect to vessel mortgages, upon the grant of admiralty jurisdiction and the 'necessary and proper clause' of the Constitution, instead of the power to regulate interstate and foreign commerce. The amendment as agreed to further places exclusive jurisdiction in the Federal courts to foreclose vessel mortgages upon the grant of admiralty jurisdiction instead of the provisions of the Constitution relating to diversity of citizenship and cases arising under the laws of the United States. The amendment as agreed to also makes the title granted under the order of a court of admiralty in the case of the libel of a vessel covered by a preferred mortgage good against the world as under the existing admiralty law and international admiralty practice; clarifies the provisions as to fleet mortgages; provides for the reënactment and incorporation in the amendment of the existing vessel mortgage recording provisions, and prevents the repeal of section 4 of the maritime lien act of 1910 in respect to the doctrines of advances and laches."

as to all ship mortgages otherwise valid, and when these were performed the mortgages were to have the status prescribed.

Given the standing of such mortgages in admiralty, which the Congress desired to establish, an omission of a provision as to the use of the moneys borrowed cannot be regarded as anomalous. An analogous principle has been recognized in relation to bottomry and respondentia bonds. Thus, in the case of bottomry bonds, if the conditions of the bottomry attach, such bonds when given by the owner of the vessel have been held to be within the admiralty jurisdiction even if they are given to secure non-maritime outlays. That view was emphatically stated by Justice Story in *The Draco,* 2 Sumn. 157. There, jurisdiction of the District Court, sitting in admiralty, was challenged upon the ground that the bond in question was not a "fit foundation for a proceeding *in rem.*" *Id.,* p. 174. After a careful review of the historical conception of bottomry bonds, Justice Story concluded (*id.,* p. 186): "In my opinion, there is not the slightest ground to uphold the doctrine, that, in order to constitute a bottomry bond, as such, in the sense of the maritime law, it is necessary that the money should be advanced for the necessities of the ship, or for the cargo, or for the voyage. Where it is given by the master, *virtute officii,* it must, in order to have validity, be for the ship's necessities; for the implied authority of the master extends no farther. But where it is given by the owner, as *dominus navis,* he may employ the money, as he pleases. It is sufficient, if the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage." So, in the case of a respondentia loan, it is not necessary that it should be made before the departure of the ship on the voyage or that the money lent should be employed in the outfit of the vessel or invested in the goods on which the risk is run. It matters not, this Court

has said, at what time the loan is made, or upon what goods the risk is taken. "If the risk of the voyage be substantially and really taken," and the transaction be otherwise valid, "it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage." The lender is not presumed to lend "upon the faith of any particular appropriation of the money." *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 437. See *Conard* v. *Nicoll*, 4 Pet. 291, 310; 3 Kent's Com., 361; note (e); *The Draco, supra*, pp. 188, 189.

It is also to be noted that the jurisdiction granted to the admiralty by the Ship Mortgage Act is exclusive. If a mortgage is within the Act, there can be no suit to foreclose it in a state court;[6] if the mortgage is not within the Act, there can be no suit for foreclosure in the admiralty. It cannot be doubted that the Congress recognized the importance of basing the jurisdiction, as thus sought to be conferred, upon precise statutory conditions. We find no warrant for leaving it to be tested by extrinsic criteria, raising a host of questions as to the application of the proceeds of loans, in the solution of which the statute affords no aid.

We conclude that the Court had jurisdiction of the suits provided the Congress had authority to grant it.

2. *The validity of the grant of jurisdiction.* The Congress rested its authority upon the constitutional provisions extending the judicial power "to all cases of admiralty and maritime jurisdiction" and conferring upon the Congress the power to make all laws which shall be "necessary and proper" for carrying into execution all powers "vested by this Constitution in the government of the United States, or in any department or officer thereof." Art. III, § 2; Art. I, § 8, par. 18.[7] This author-

[6] See Note 5.

[7] See Note 5.

ity was not confined to the cases of admiralty and maritime jurisdiction in England when the Constitution was adopted. *Waring* v. *Clarke,* 5 How. 441, 457, 458. The limitations which had been imposed upon the high court of admiralty in the course of its controversy with the courts of common law were not read into the grant. But the grant presupposed a "general system of maritime law" which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna,* 21 Wall. 558, 574, 575. The Constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. *Id.* Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant. "No state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits." *The St. Lawrence,* 1 Black 522, 527. The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States. When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to modify or supplement it as experience or changing conditions might require." *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 385–387. The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country. *The Lottawanna, supra,* p. 577; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527, 557; *In re Garnett,* 141 U. S. 1, 13; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205,

215; *Crowell* v. *Benson,* 285 U. S. 22, 39; *United States* v. *Flores,* 289 U. S. 137, 148, 149. But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction. *The Belfast,* 7 Wall. 624, 641; *Panama Railroad Co.* v. *Johnson, supra; Crowell* v. *Benson, supra,* p. 55.

The Congress began the exertion of this authority at an early date. In the Judiciary Act of 1789, the Congress conferred upon the district courts of the United States exclusive jurisdiction of all seizures under the laws of impost, navigation, or trade of the United States, where the seizures were made on navigable waters within the respective districts. § 9, 1 Stat. 76, 77. *Waring* v. *Clarke, supra,* p. 458; *The Margaret,* 9 Wheat. 421, 427. By the Act of June 19, 1813, 3 Stat. 2, the Congress declared that a vessel employed in a fishing voyage should be answerable for the fishermen's share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is liable to be proceeded against for the wages of seamen. *Waring* v. *Clarke, supra.* Important illustrations of the exercise of congressional power are found in the Limitation of Liability Act of 1851, 9 Stat. 635, enacted for the purpose of encouraging investment in shipbuilding, by limiting the venture of shipowners to the loss of the ship itself, or her freight then pending, in cases of damage occasioned without the owner's privity or knowledge (*Norwich Co.* v. *Wright,* 13 Wall. 104; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214); the extension, by the Act of June 26, 1884, § 18, 23 Stat. 57, 58, of the admiralty jurisdiction to proceedings for the limitation of liability, so as to include damages by a vessel to a land structure (*The Plymouth,* 3 Wall. 20; *Cleveland Terminal & V. R. Co.* v. *Steamship Co.,* 208 U. S. 316; *Richardson* v. *Harmon,* 222 U. S. 96, 101, 106); the Act of 1910, 36 Stat. 604,

providing for a maritime lien for repairs or supplies furnished to a vessel in her home port, to be enforced by a proceeding *in rem* (*The General Smith,* 4 Wheat. 438, 443; *The St. Jago de Cuba,* 9 Wheat. 409, 420; *The J. E. Rumbell,* 148 U. S. 1, 12; *Piedmont & G. C. Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 11); the Act of March 30, 1920, 41 Stat. 537, providing for jurisdiction in admiralty of suits for damages from death caused by wrongful act and occurring on the high seas (*The Hamilton,* 207 U. S. 398; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 243; *Lindgren* v. *United States,* 281 U. S. 38, 48); the Seamen's Act of 1915, § 20, 38 Stat. 1185 (*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372, 384); the Merchant Marine Act of 1920, 41 Stat. 1007, amending § 20 of the Act of 1915, thus bringing, in relation to seamen, into the maritime law, rules drawn from the Federal Employers' Liability Act (*Panama Railroad Co.* v. *Johnson, supra; Engel* v. *Davenport,* 271 U. S. 33, 35; *Panama Railroad Co.* v. *Vasquez,* 271 U. S. 557, 559; *Northern Coal Co.* v. *Strand,* 278 U. S. 142, 147); and the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (*Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128; *Crowell* v. *Benson, supra*).

Of special significance, in relation to the present question, are the Acts of 1884 and 1910, *supra.* By the former, the admiralty jurisdiction in limitation proceedings was enlarged so as to embrace the liability for a non-maritime tort. Although the damaged structure was on land, the injury was due to the operation of the vessel, and it could not be said that the Congress had stepped beyond the limits of its authority to amend the law in furthering its policy to encourage investments in ships. *Richardson* v. *Harmon, supra.* Compare *The Blackheath,* 195 U. S. 361, 367, 368. The Act of 1910 created a lien to be enforced *in rem* for repairs or supplies to vessels in their home ports. The state of the law as it existed be-

fore that enactment was fully described in *The J. E. Rumbell, supra.* For repairs or supplies furnished to a vessel in a foreign port, a lien was given by the general maritime law and could be enforced in admiralty, but for repairs or supplies in the home port, no lien existed, or could be enforced in admiralty under the general law, independently of local statute. When the statute of a State gave a lien to be enforced by process *in rem* against the vessel for repairs or supplies in her home port, that lien, being similar to the lien arising in a foreign port under the general law, was deemed to be in the nature of a maritime lien and therefore could be enforced in admiralty, and, in such case the enforcement of the lien was within the exclusive jurisdiction of the courts of the United States sitting in admiralty. The result was that where necessaries were furnished to a vessel in her home port, the vessel could not be sued in the federal courts under the general maritime law, for that law was not deemed to confer a lien, and could not be sued in a state court, for that court could not enforce the lien created by the state law, but the lien so given might be enforced in admiralty.[8] The Act of 1910 abolished the artificial distinction between repairs and supplies in a home port and those in a foreign port. While it created a lien where in the absence of local provision therefor, none had theretofore existed, the change was not deemed to be inconsistent with the general principles of the maritime law and it effected a substitution of a single federal statute for the conflicting state statutes. *Piedmont & G. C. Coal Co.* v. *Seaboard Fisheries Co., supra.* The Act of 1910 also provided that it should not be necessary "to allege or prove" that credit was given to the vessel; previously, supplies furnished to the vessel at the home port, or on the owner's order, were presumed to be furnished upon his personal credit and created no lien. *Id.*

[8] See Benedict's Admiralty, 5th ed., §§ 87, 88.

Respondent, in attacking the grant of jurisdiction by the Ship Mortgage Act, relies strongly upon the reasoning of the Court in *Bogart* v. *The Steamboat John Jay, supra,* which denied, under the former law, jurisdiction in admiralty to enforce payment of a mortgage upon a vessel. The Court there said that neither in England [9] nor in the United States had the admiralty courts exercised jurisdiction in questions of property between a mortgagee and the owner; that the foundation of the rule was "that the mere mortgage of a ship, other than that of an hypothecated bottomry," was a contract "without any of the characteristics or attendants of a maritime loan" and was made "without reference to navigation or perils of the sea"; that it was a security "to make the performance of the mortgagor's undertaking more certain"; that, while the mortgagor continued in possession of the ship, the mortgagee was disconnected "from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account"; that there was nothing maritime in the contract; and that from the organization of courts of admiralty and their modes of proceeding they cannot secure to the parties to the mortgage "the remedies and protection which they have in a court of chancery."

But it did not follow, because this view was taken of the existing law, that the Congress was without power to amend the law so as to enable the admiralty courts to take cognizance of mortgages on ships, and to regulate priorities of liens, in order to promote investment in shipping securities and thus to advance the maritime interests of the United States. Indeed, in the *Bogart* case the Court seemed to recognize the existence of that constitutional authority. For the Court, in concluding its opinion, observed that the policy of commerce and its exigencies in England had given to its admiralty courts

[9] See *The Neptune,* 3 Hagg. 129 (132).

a more ample jurisdiction in respect to mortgages of ships than they had under the former rule. And the Court pointed out that this "enlarged cognizance of mortgages" had been given by statute 3 and 4 Victoria, chap. 65, and said that "until this shall be done in the United States by congress, the rule, in this particular, must continue in the admiralty courts of the United States as it has been."

The significance of this suggestion cannot be overlooked. The fact that mortgages on ships had not been considered to be maritime contracts was not conclusive as to the constitutional authority of the Congress to alter or supplement the maritime law in this respect, and thus to extend the admiralty jurisdiction, "as experience or changing conditions might require," while keeping within a proper conception of maritime concerns. The ship, documented under the laws of the United States, is the instrumentality of our maritime enterprise, the prime object of our maritime policy. The ship "from the moment her keel touches the water" becomes "a subject of admiralty jurisdiction"; she acquires personality; she becomes competent to contract, is individually liable for her obligations, and is responsible for her torts. *Tucker* v. *Alexandroff,* 183 U. S. 424, 438. The existence of the ship, the investments which make that existence possible, is the necessary postulate of maritime liens. We cannot fail to regard the encouragement of investments "in shipping and shipping securities"—the objective of the Ship Mortgage Act—as an essential prerogative of the Congress in the exercise of its wide discretion as to the appropriate development of the maritime law of the country. The regulation of the priorities of ship mortgages in relation to other liens, and the conferring of jurisdiction in admiralty in order to enforce this regulation, are appropriate means to that legitimate end.

The enlargement of the cognizance of mortgages of ships, in the admiralty courts in England, nearly one hundred years ago, to which the Court referred in the *Bogart* case, was to remedy an evil which had been found to exist. The purpose was " to enable the Court to exercise its ordinary jurisdiction to the full extent." [10] That Act applied whenever the ship was " under arrest by process issuing from the high court of admiralty " or the proceeds of a ship so arrested had been brought into the registry of the court, and the court was invested with " full jurisdiction to take cognizance of all claims and causes of action of any person in respect to any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively." 3 & 4 Vict., c. 65, §§ 3, 4. These provisions were expanded by later legislation. The admiralty court in England has jurisdiction in respect of any mortgage duly registered according to the provisions of the Merchant Marine Act, 1894, " whether or not the ship or proceeds are under the arrest of the Court, and such jurisdiction may be exercised by an action *in rem* or *in personam*." Roscoe's Admiralty Practice, 5th ed., p. 51.

This response " to the exigencies of commerce " has had its counterpart in the legislation of other European States. It may be said that the " general maritime law " takes cognizance of mortgages of ships, provides for their registration, and establishes rules with respect to priorities.[11]

[10] See statement of Dr. Lushington in *The Fortitude*, 2 Wm. Rob. 217, 222.

[11] See, e. g., The Netherlands, Maritime Law, Code of Commerce, 1838; France, Act of July 10, 1885, and Decree of June 18, 1886; Belgium, Laws of August 21, 1879, June 12, 1902, February 10, 1908, and September 4, 1908; Denmark, Maritime Law of April 1, 1892, Act 103 of April 29, 1913, also Act 57 of April 1, 1892; Italy, Maritime Law, Code of Commerce of 1883, and Mercantile Marine Code,

Prior to the Ship Mortgage Act the right of the mortgagee to intervene as a claimant of proceeds of a vessel sold by process in the admiralty was recognized and was frequently exercised. *Schuchardt* v. *Ship Angelique, supra; The Lottawanna, supra; The J. E. Rumbell, supra.* The distinction between such an intervention and an original proceeding by the mortgagee was no doubt controlling as a matter of jurisdiction and procedure under the law as it then existed, but it cannot be considered as establishing a criterion of the constitutional power of the Congress in defining jurisdiction and procedure. The Congress undoubtedly could determine the priorities that should be recognized by the admiralty court and, having that authority, the Congress could fix the conditions upon which mortgages of ships documented under the laws of the United States should have the priority specified. The grant of jurisdiction in admiralty to entertain a suit by the mortgagee, where the mortgage complies with the prescribed conditions, in order to enforce the permitted lien against the vessel, is, after all, but a provision of suitable machinery to give effect to the rights which the Congress has created.

If it be concluded, and we think it must be, that the Congress has this power in the case of the mortgage of a vessel to provide for its acquisition, or for the discharge of preëxisting liens, or for its necessities, that is, to authorize the enforcement by suits in admiralty of mortgages given to secure loans for the direct benefit of the vessel, we perceive no ground to deny to the Congress constitutional power to make similar provision as to mort-

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1866, as amended; Norway, Maritime Law of July 20, 1893, as amended by Acts of May 4, 1901, July 13, 1917, and July 9, 1920. See, Constant, "The Law Relating to the Mortgage of Ships," Appendix A; "The Progress of Continental Law in the 19th Century," Georges Ripert, Maritime Law, Continental Legal History Series, p. 399.

gages of ships, which comply with its rules, although the proceeds of the loans thereby secured are used for other purposes. The analogy of the decision by Justice Story in *The Draco* case, *supra,* as to bottomry bonds, and of the decision of this Court in the *Conard* case, *supra,* as to respondentia bonds, is apparent. If the maritime law does not require, as Justice Story held, that a bottomry bond, as such, must be given for the necessities of the ship or for the cargo or for the voyage, but that it is sufficient, when given by the owner, that the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage, and that in such case the owner is free to employ the money as he pleases; if, as this Court decided, in the case of a respondentia loan, it is no objection that it is made after the departure of the ship, or that the money lent was not employed in the outfit of the vessel, or invested in the goods on which the risk was run, or that the money was appropriated for purposes wholly unconnected with the voyage, we cannot see that an analogous provision with respect to ship mortgages is so far inconsistent with the fundamental principles of maritime law as to place such mortgages beyond the authority of the Congress in determining the admiralty jurisdiction. The contention to the contrary loses sight of the dominant purpose of the Act, a purpose which the Congress was competent to achieve. That purpose, we repeat, was to establish the worth of "shipping securities," in the interest of the merchant marine. In order to create public confidence in such securities, in obligations issued on the faith of ship mortgages, the Congress deemed it necessary, not to hamper their issue or enforcement by compelling inquiries as to the application of loans, but to give a definite and assured character to such mortgages provided they met certain simple conditions. The Congress in the exercise of its discretion was entitled to consider the methods by which securities are issued to the public and

dealt in, and the well-known usages of business in this regard amply support its judgment.

The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesee Chief,* 12 How. 443, overruling *The Thomas Jefferson,* 10 Wheat. 428.

The constitutional validity of the grant of jurisdiction by the Ship Mortgage Act has been sustained in *The Oconee,* 280 Fed. 927, in *The Nanking,* 290 Fed. 769, and in *The Lincoln Land,* 295 Fed. 358.[12] We find no reason for reaching a contrary conclusion in the instant cases.

The decrees of the Circuit Court of Appeals are reversed and the causes are remanded for further proceedings in conformity with this opinion.

Reversed.

LYNCH ET AL. *v.* NEW YORK EX REL. PIERSON.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 1. Argued October 9, 1934.—Decided November 5, 1934.

1. Jurisdiction to review a judgment of a state court can not be founded upon surmise or be sustained by reference to briefs and

[12] The validity of the Act was not questioned in *Morse Drydock & Repair Co.* v. *The Northern Star,* 271 U. S. 552, 555, 556 and its validity has been assumed in several decisions in the lower federal courts. See *The Egeria* (C. C. A. 9th), 294 Fed. 791; *The Northern No. 41* (S. D. Fla.), 297 Fed. 343; *The Red Lion* (E. D. N. Y.), 22 F. (2d) 329; *National Bank* v. *Enterprise Marine Dock Co.* (C. C. A. 4th), 43 F. (2d) 547; *Consumers Co.* v. *Goodrich Transit Co.* (C. C. A. 7th), 53 F. (2d) 972.

extrinsic statements. It must appear affirmatively from the record that a federal question was necessarily decided in determining the cause; and if it be uncertain whether the judgment was based upon a federal ground, or upon a non-federal ground sufficient to sustain it, this Court will not take jurisdiction. P. 54.

2. Where the highest court of a State affirms without opinion, and leaves in doubt what, if any, disposition it made of a federal question presented below, it is suggested that, the local practice permitting, application should be made for amendment of the remittitur. P. 55.

Dismissed.

CERTIORARI, 292 U. S. 616, to review a judgment (263 N. Y. 533; 189 N. E. 684) affirming, without opinion, a judgment of the Appellate Division (237 App. Div. 763; 263 N. Y. S. 259) annulling a tax assessment.

Mr. Joseph M. Mesnig, Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, and *Mr. Henry Epstein,* Solicitor General, were on the brief, for petitioners.

Mr. Clifton P. Williamson, with whom *Mr. L. A. Doherty* was on the brief, for respondent.

By leave of Court, *Mr. Seth T. Cole* filed a brief on behalf of the Commissioner of Corporations and Taxation of Massachusetts, as *amicus curiae.*

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

The State Tax Commission determined that rental received by the relator, a resident of the State of New York, from real property situated in the State of Ohio, should be included as a part of relator's income for the purpose of computing her income tax under the Tax Law of New York. The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth

Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the State Tax Commission. 237 App. Div. 763; 263 N. Y. S. 259. That court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion, 263 N. Y. 533; 189 N. E. 684, and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 295, 297; *Eustis* v. *Bolles,* 150 U. S. 361, 366, 367; *Whitney* v. *California,* 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil,* 275 U. S. 212, 214. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of

two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau,* 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing & Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 302, 304.

Petitioners have made no effort to obtain an amendment by the Court of Appeals of its remittitur, and although, on the oral argument in this Court, attention was directed to the practice in New York to entertain, in proper cases, an application for such an amendment in order to show appropriately the basis of the determination of the state court, no request was made for a continuance to permit such an application.

As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted.

Dismissed.

PFLUEGER ET AL. *v.* SHERMAN ET AL.

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

No. 21. Argued October 15, 16, 1934.—Decided November 5, 1934.

1. A certificate from the Circuit Court of Appeals must submit only questions of law, not mixed questions of law and fact, and not such as involve or imply conclusions or judgment by the Court upon the effect of facts adduced in the cause; and they must be distinct and definite. P. 57.
2. The Court can not by a certificate be called upon to answer questions of objectionable generality, or to review proceedings, facts and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted. Rule 37. P. 58.

Dismissed.

CERTIFICATE from the Circuit Court of Appeals, Ninth Circuit, for advice respecting its jurisdiction over an appeal from the United States District Court for Hawaii, taken by some original plaintiffs, the others not joining.

Mr. John Francis Neylan, with whom *Mr. Bartley C. Crum* was on the brief, for Pflueger et al.

Mr. W. H. Lawrence, with whom *Messrs. Alfred Sutro, Eugene M. Prince,* and *W. L. Stanley* were on the brief, for Sherman et al.

PER CURIAM.

After an extended recital of the allegations of the bill of complaint herein (a copy of which, consisting of seventy-three printed pages, is attached to the certificate) with the statement that it is not clear to the court whether this is a stockholders' suit or one on behalf of the individual complainants, and after a further recital of proceedings in the cause, of the decree rendered in the District Court, and of certain documents filed in the Circuit Court of Appeals after a motion to dismiss an appeal from that decree, the Circuit Court of Appeals has certified to this Court the following question:

"Has the United States Circuit Court of Appeals for the Ninth Judicial Circuit jurisdiction to hear and determine the questions of law and fact involved in said decree of said United States District Court for the Territory of Hawaii, from which decree said appeal was prosecuted and is now pending?

"[The answer to the foregoing question will, we assume, necessarily involve the validity and effect of the above so called 'appearances and waivers' filed by certain of the complainants in this court: the question of whether or not complainants J. D. Isenberg, Mrs. Paul Isenberg, R. M. Isenberg, Julia Barckhausen Reschke,

Paula Volkmann, Clara Sielcken Schwarz, J. F. Humburg, August Humburg, B. von Damm, F. W. Klebahn, Herman P. F. Schultze, Julie Rudolphi, formerly Julie Hegeler, and Marie Feine, formerly Marie Hackfeld, whose counsel withdrew before the entry of the joint decree against them, and who have not appealed or entered their appearance in this court, are necessary parties, and whether or not the Supreme Court will look beyond the decree to determine whether the suit is a stockholders' suit, and if it is, whether three of the stockholders of the dissolved corporation (appellants) may appeal from the decree without a summons and severance in the lower court.]"

If the decree, set forth in the certificate, be deemed to be joint, and the persons above named, in the absence of summons and severance, to be necessary parties to the appeal, the Circuit Court of Appeals would be without jurisdiction. In that aspect, there would be no occasion for the submission of the question. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169, 178, 182; *Elliot* v. *Lombard,* 292 U. S. 139, 141, 142.

The question has been certified apparently in order to obtain the decision of several underlying questions, and in the view that the various proceedings, facts and circumstances detailed in the certificate must be examined by this Court to the end that it may determine what effect shall be given to certain " appearances and waivers " filed in the Circuit Court of Appeals, and what effect shall be given to a statement and withdrawal of counsel for certain parties before the entry of the decree against them in the District Court, and that the Court may also determine the nature of the suit, and whether, in the light of these determinations, summons and severance of those not parties to the appeal were necessary.

The certificate fails to conform to the requirement that questions submitted must be questions of law and not

mixed questions of law and fact, and not such as involve or imply conclusions or judgment by the Court upon the effect of facts adduced in the cause, and must be distinct and definite. The Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted. Rule 37. *Chicago, Burlington & Quincy Ry. Co.* v. *Williams,* 205 U. S. 444, 451–453; *United States* v. *Mayer,* 235 U. S. 55, 66; *Cleveland-Cliffs Iron Co.* v. *Arctic Iron Co.,* 248 U. S. 178, 179; *United States* v. *John Barth Co.,* 276 U. S. 606; *White* v. *Johnson,* 282 U. S. 367, 371; *Wells* v. *Commissioner,* 286 U. S. 529. See, also, *Dennistoun* v. *Stewart,* 18 How. 565, 568; *California Paving Co.* v. *Molitor,* 113 U. S. 609, 616; *Jewell* v. *Knight,* 123 U. S. 426, 432.

The certificate is

Dismissed.

UNITED STATES *v.* TROY.*

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

No. 25. Argued October 16, 1934.—Decided November 5, 1934.

1. That part of par. (b) of § 146 of the Revenue Act of 1928, which provides that any person who wilfully attempts to defeat a tax shall be guilty of a felony, is applicable to an officer of a corporation who made a false return on its behalf in a wilful attempt to defeat part of its tax, even though making a return for the corporation was no part of his duty. P. 61.
2. The declaration of the same section, par. (c), that the term "person," as used in the section, shall include any officer, etc., of a cor-

* No. 26. *United States* v. *Troy.* Appeal from the District Court of the United States for the Middle District of Pennsylvania. November 5, 1934. Judgment reversed, per stipulation of counsel to abide the decision in No. 25.

poration who, as such, is under duty to perform the act in respect of which the violation occurs, is to be read with the other provisions of the same section and with § 701 defining "person" and "including." P. 61.

6 F. Supp. 315, reversed.

APPEAL under the Criminal Appeals Act from a judgment quashing an indictment.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. James W. Morris* and *John H. McEvers* were on the brief, for the United States.

Mr. Joseph F. Gunster, with whom *Mr. A. M. Lucks* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This cause is here under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, § 682) and § 238 Jud. Code (U. S. C., Title 28, § 345). It necessitates consideration of certain provisions of the Revenue Act of 1928, c. 852, 45 Stat. 791.

Section 52 of that Act commands corporations to make tax returns sworn to by designated officers. Section 146 (a) declares that any person required to make return who wilfully fails so to do shall be guilty of a misdemeanor; 146 (b) that any person who wilfully fails to collect or truthfully account for and pay over any tax, and any person who wilfully attempts to evade or defeat any tax shall be guilty of felony; and 146 (c) that "the term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Section 701 provides: "When used in this Act the term 'person' means an individual, a trust or estate, a part-

nership, or a corporation"; also "the terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."

Applicable portions of the Act are copied in the margin.*

An indictment, in the Middle District of Pennsylvania, charged appellee Troy with violating § 146 (b) in that while president of the Troy Oil Company, Incorporated, he unlawfully, wilfully and knowingly attempted to defeat and evade a large part of the tax due from that corporation for 1929, by making a return for it which

* Revenue Act of 1928, c. 852, 45 Stat. 791, 808, 835, 878.

Sec. 52. Corporation Returns.

(a) Requirement.—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. . . .

Sec. 146. Penalties.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partner-

falsely stated the gross income. The indictment was challenged because "it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred and in the absence of this averment the indictment fails to set forth facts showing prima facie, a commission of the crime charged in the indictment." The trial judge sustained the objection and quashed the indictment. In his view it was necessary that there should be allegation and proof that appellee, as president of the corporation, was under a duty to make the return.

This was error; the questioned judgment must be reversed.

Section 146 (a) penalizes any person required to make a return, who wilfully fails so to do; paragraph (b) any person under duty to collect, account for, and pay over any tax, who wilfully fails, also any person (without regard to duty) who wilfully attempts to defeat the tax; and paragraph (c) declares that the term person as used in the section shall include an officer under duty to perform, etc.

Considering these paragraphs along with the definitions of § 701, it seems sufficiently clear Congress did not intend that paragraph (c) should exclude from paragraph (b) one who actually attempted to defeat. If the charge against appellee had been failure to make return, or pay over the tax for the corporation it might have been neces-

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ship, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Sec. 701. Definitions.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

. . . . . .

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

sary to allege and show some duty in respect thereto; but when charged with wilful effort to defeat the tax by presenting a false return no allegation of duty to make the return was necessary. The alleged act sufficiently indicated appellee's criminal intent. Certainly we can find no legislative purpose to exempt from punishment one who actively endeavors to defeat a tax. And because some officers are said to be included in the term "person," all other individuals are not necessarily excluded.

Thus construed, all parts of the statute may have effect, and the manifest purpose of Congress will not be obstructed.

Reversed.

GILLIS, RECEIVER, *v.* CALIFORNIA.

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

No. 28. Argued October 8, 9, 1934.—Decided November 5, 1934.

1. Power in the District Courts to authorize their receivers in conservation proceedings to transact local business without compliance with local statutes obligatory on all others, may be withheld by Congress. P. 65.
2. Under 28 U. S. C., § 124; Jud. Code, § 65, a receiver for a corporation producing and distributing gasoline in California was under a duty to take out a license and give a bond with surety to secure payment of taxes, pursuant to state law, and could not be absolved by order of the federal court that appointed him. P. 65.
3. There is no merit in the suggestion that observance of the state law in this case would give an unlawful preference to the State over the United States in respect of gasoline taxes. P. 66.
4. Even though it be impossible in the circumstances for the receiver to furnish the bond required by the state law, this is not an excuse for operating the business in disregard of that law and hence in violation of the Act of Congress. P. 66.

69 F. (2d) 746, affirmed.

CERTIORARI, 292 U. S. 620, to review the reversal of an order of the District Court authorizing and directing the receiver of a corporation to continue operations in the production, sale and distribution of gasoline without giving security to the State for payment of gasoline taxes.

Mr. Ernest C. Carman for petitioner.

Mr. H. H. Linney, Deputy Attorney General of California, with whom *Mr. U. S. Webb*, Attorney General, was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

California laws make it unlawful for any person to act as a distributor of motor vehicle fuel without first obtaining a license from the Board of Equalization and executing bond conditioned to pay taxes and observe other requirements. Statutes 1923, 571; *Ibid.* 1931, c. 85, 105; c. 86, 119; c. 793, 1652; c. 997, 2001; c. 1082, 2288.

" Distributor " includes persons, firms and corporations refining, manufacturing or producing motor oil and distributing it within the state.

Section 65, Jud. Code, (Title 28 U. S. C., § 124; Act of March 3, 1887, c. 373, § 2, 24 Stat. 554; Aug. 13, 1888, c. 866, § 3, 25 Stat. 436; Mar. 3, 1911, c. 231, § 65, 36 Stat. 1104):—

" Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall

willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

The District Court, Southern District of California, in a cause instituted there for the purpose of conserving the assets of Western Oil and Refining Company and giving opportunity for reorganization, appointed petitioner Gillis receiver, April 4, 1931. Immediately after assuming the duties of the office, as required by local statutes, he procured license and executed bond with the Fidelity and Deposit Company of Maryland as surety. Thereafter he carried on the business of the company—manufacturing, refining, producing and distributing gasoline—and coöperated with creditors and stockholders concerning reorganization plans.

In 1933 the Fidelity and Deposit Company refused to continue upon the bond after a specified day. Petitioner endeavored to find another acceptable surety. Failing in this he reported the circumstances to the court; pointed out his inability to comply with the local statutes; and stated that unless the business could continue substantially as theretofore, the purpose of the receivership would be frustrated. He asked authority to proceed without bond or license; otherwise, he affirmed, final liquidation at material loss to all concerned would be necessary. The Attorney General, speaking for the State, objected. The court ordered and directed petitioner " to continue his operations as such Receiver (including the production, distribution and sale of gasoline or motor vehicle fuel in the State of California) after termination of the hereinbefore mentioned bond, or withdrawal therefrom of the surety thereon, for the payment of gasoline taxes . . . without any such bond or the giving of security in any other manner for the payment of such gasoline taxes and without any license . . ."

The Circuit Court of Appeals held § 65 of Judicial Code applicable and controlling, and reversed the challenged order. The result we think is correct; the judgment must be affirmed.

While the precise point now presented does not seem to have been definitely decided, the power of Congress to prescribe duties and obligations of receivers has been often recognized. *United States* v. *Harris,* 177 U. S. 305, 308; *Erb* v. *Morasch,* 177 U. S. 584, 585; *Central Trust Co.* v. *St. Louis, A. & T. Ry. Co.,* 40 Fed. 426, 427; *Hornsby* v. *Eddy,* 56 Fed. 461, 462; *Felton* v. *Ackerman,* 61 Fed. 225, 227; *Peirce* v. *Van Dusen,* 78 Fed. 693, 701; *Fidelity Title & Trust Co.* v. *Kansas Natural Gas Co.,* 219 Fed. 614, 616; *Westinghouse Elec. & Mfg. Co.* v. *Binghamton Ry. Co.,* 255 Fed. 378, 382; *Mercantile Trust Co.* v. *Tennessee Central R. Co.,* 286 Fed. 425, 428; *Crawford* v. *Duluth St. Ry. Co.,* 60 F. (2d) 212, 214.

There is no suggestion of repugnance between the State Constitution and the Motor Vehicle Fuel Statute. And the latter must be accepted as valid law of the State within the ambit of § 65, Judicial Code, unless its provisions conflict with the Constitution or laws of the United States.

Petitioner insists that there is such disagreement since the state statute diminishes the power of the U. S. District Court to direct its receiver to operate the business of the company. Also because, by requiring bond to secure taxes, the statute creates an unlawful preference of State over the United States in respect of collections. And finally because, in the circumstances here presented, it is impossible for the receiver to comply with the prescribed requirements; and, unless relieved from them, he "must cease receivership operations that are essential to the conservation of assets and the general purposes of the receivership."

Manifestly the diminution, if any, of powers possessed by District Courts prior to its enactment results from § 65, Judicial Code. The ultimate inquiry is whether Congress can withhold from District Courts the power to authorize receivers in conservation proceedings to transact local business, contrary to state statutes obligatory upon all others.

That Congress has such power we think is clear, and the language of § 65 leaves no doubt of its exercise.

The accepted doctrine is that the lower federal courts were created by the Acts of Congress and their powers and duties depend upon the acts which called them into existence, or subsequent ones which extend or limit. *Ex parte Robinson,* 19 Wall. 505, 510; *Bessette* v. *Conkey Co.,* 194 U. S. 324, 327. Whatever may be the inherent power of a court incident to a grant of jurisdiction—*Michaelson* v. *United States,* 266 U. S. 42, 66—there seems no ground whatever for saying that Congress cannot withhold or withdraw from courts of equity the right to empower receivers in conservation proceedings to disregard local statutes.

The suggestion that to require petitioner to observe local laws would give the State inequitable priority over the United States as to taxes lacks merit. If any such result should follow it would accompany permissive action of Congress.

And if the receiver cannot continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law.

The same statute which required receivers to observe the laws of the State, gave permission to sue them in state courts under stated circumstances. It was enacted more than forty years ago and seems to have been commonly regarded as within congressional authority.

We are not dealing here with the acknowledged power of courts to protect property in their custody. *In re Tyler,* 149 U. S. 164, and similar cases are not pertinent.

Affirmed.

McCANDLESS, RECEIVER, *v.* FURLAUD ET AL.

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

No. 11. Argued October 11, 1934.—Decided November 5, 1934.

1. An objection to the capacity of the receiver of a corporation, appointed by a federal court, to sue in a federal court in another State under an ancillary appointment made on his direct *ex parte* application and not as an incident to an independent bill, is an objection that might have been remedied if timely made in the court of first instance and is waived if made for the first time on appeal. P. 73.
2. The court in which the receiver sued having jurisdiction of both the subject matter and the parties, the objection to the manner of his appointment goes not to the court's jurisdiction but to his legal capacity as plaintiff. P. 74.
3. *Booth* v. *Clark,* 17 How. 322, distinguished. P. 75.

68 F. (2d) 925, reversed.

CERTIORARI, 292 U. S. 617, to review the reversal of a decree in a suit brought by McCandless as ancillary receiver. The review here was to be limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit.

Mr. Ralph Royall for petitioner.

Mr. Louis B. Eppstein, with whom *Messrs. Ira W. Hirshfield* and *Louis J. Altkrug* were on the brief, for respondents.

The order purporting to appoint McCandless ancillary receiver was absolutely void. There was nothing before

the court upon which its judicial power could act, no complainant asserting his right against anyone.

That a mere federal chancery receiver has no extra-territorial power of official action—none that exists by virtue of his appointment—none that the court appointing him has power to confer—is now the well recognized law of the land. *Booth* v. *Clark,* 17 How. 322; *Hale* v. *Allinson,* 188 U. S. 56; *Great Western M. & M. Co.* v. *Harris,* 198 U. S. 561; *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73; *Moore* v. *Mitchell,* 281 U. S. 18.

There being no parties before that court, there obviously could be no diversity of citizenship such as is required to confer jurisdiction upon that court.

Upon the identical question, see: *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.,* 39 Fed. 337; *In re Brant,* 96 Fed. 257; *Sullivan* v. *Swain,* 96 Fed. 259; *Fairview Fluor Spar & Lead Co.* v. *Ulrich,* 192 Fed. 894; *Greene* v. *Star Cash & Package Car Co.,* 99 Fed. 656; *Platt* v. *Philadelphia & Reading R. Co.,* 54 Fed. 569.

The power of a United States District Court to appoint ancillary receivers in civil cases may be exercised only in a pending suit.

Mr. Justice Brandeis delivered the opinion of the Court.

McCandless, a citizen and resident of Pennsylvania, suing as ancillary receiver of the Duquesne Gas Corporation, appointed by the federal court for southern New York, brought this suit in that court. The bill alleged that he had been appointed receiver of all the assets of the Corporation in a consolidated suit in the federal court for western Pennsylvania originally brought by Frank T. Harrington against the Duquesne Gas Corporation, and later consolidated with one brought by the Central Hanover Bank and Trust Company, as trustee under the Corporation's mortgage; that upon his petition as primary

receiver filed in the federal court for southern New York he had by an order "duly made" been appointed ancillary receiver there; that he had "duly qualified and is now acting as such ancillary receiver"; and that the "order duly authorized" him as such receiver to bring this suit. The bill then set forth at great length facts on which it charged that the defendants, or some of them, acting in a fiduciary relation to the Corporation came into the possession of funds arising from the sale of its securities and had misappropriated more than $2,500,000. An accounting and the recovery of these sums were prayed for. Furlaud, a citizen and resident of New York, and three corporations organized under the laws of states other than Pennsylvania were the defendants. Each filed an answer which denied most of the allegations of the bill.

The case was heard by the District Court on the merits, on evidence which occupied 217 pages of the original printed record. That court entered a final decree which ordered Furlaud and the Kingston Company to pay the sum of $1,834,640.08 with interest and costs. Those defendants appealed to the Circuit Court of Appeals, denying liability. McCandless cross-appealed, claiming the additional sum of $850,000; and that the other two companies, as to whom the bill had been dismissed by the decree, were also liable for the full amount.

The Court of Appeals, without passing upon the merits of the controversy, reversed the decree. 68 F. (2d) 925. It did so, solely on the ground that, under the rule of *Booth* v. *Clark,* 17 How. 322, the "appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit." Its decision was based upon the following facts which were shown by the copy of the record of the proceedings in the federal court for southern New York by which McCandless was appointed an-

cillary receiver, and which he had introduced at the hearing in this cause. The papers in the proceeding for such appointment were entitled "Frank T. Harrington, Complainant against Duquesne Gas Corporation, Defendant"; but in fact, no independent bill against the Corporation had been filed in the Southern District of New York by Harrington, or by any other person. The papers filed consisted merely of a petition by McCandless as primary receiver praying that he be appointed ancillary receiver; and the order entered thereon. Annexed to his petition was a copy of the proceedings of the federal court for western Pennsylvania by which he was appointed primary receiver. The record does not show that the Corporation was represented when the appointment of the ancillary receiver was made. So far as disclosed by the record, the order of the District Court for Southern New York appointing him, was made *ex parte*.

The Court of Appeals held that the legal sufficiency of the appointment of the plaintiff as ancillary receiver had been put in issue by the answer; and that the plaintiff had not sustained the burden of establishing its legality. It ruled that in the federal courts a foreign receiver may not "sue outside the district as a matter of comity even by obtaining permission before suit is commenced"; that "to permit a foreign receiver to obtain an ancillary appointment, on an *ex parte* application, improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction"; that the "right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver"; and that, since federal courts for the several districts are foreign to one another, an ancillary receiver may be appointed only as an incident of an independent bill.

The importance of reviewing that ruling—in view of an established practice, said to prevail in perhaps a majority of the state courts, of permitting foreign receivers

to sue,[1] and a common practice, said to obtain in federal courts, of appointing ancillary receivers on the *ex parte* application of the primary receiver—was the reason principally urged for granting the petition for certiorari. The order allowing certiorari was "limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit." In the abbreviated record prepared for use here, only those portions of the original record which were supposed to bear upon those questions were included. The rest were omitted in printing pursuant to stipulation. The briefs filed on the argument of the case in this Court were directed solely to the question whether the appointment of the ancillary receiver as made was void and open to collateral attack. But statements of counsel made at the oral argument in this Court, in answer to enquiries, and confirmed by examination of the original record, enable us to dispose of the case without passing on the specific question whether in a federal court an ancillary receiver may be appointed otherwise than as an incident of an independent bill in equity.

First. The holding of the Court of Appeals that the legal sufficiency of the appointment of the plaintiff as ancillary receiver had been put in issue by the answer rests solely upon the provision in Equity Rule 30 which declares that a statement in the answer that the defendant is without knowledge as to facts alleged in the bill "shall be treated as a denial."[2] This constructive denial did

[1] It is stated by petitioner that a foreign equity receiver is permitted to sue in 21 States; and that the highest courts of 7 other States have indicated approval of that view.

[2] Paragraph Fourth of the amended bill of complainant after reciting the proceedings appointing McCandless primary receiver in the Western District of Pennsylvania, stated: "that upon petition of the complainant as such Receiver duly filed in the United States District Court in and for the Southern District of New York, an order was

not suggest that there was a legal objection to the manner of the appointment or to its validity. The proceedings at the hearing and later show that there was no intention to deny the validity of the appointment of the ancillary receiver; [3] nor was it in fact questioned in the District Court.[4] On the appeal sixty-five alleged errors were as-

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duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said complainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is acting as such Ancillary Receiver." Defendant answered: "With respect to the allegation of paragraph 'Fourth' of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof."

[3] McCandless, after testifying without objection to his appointment in Pennsylvania, was asked: "Thereafter did you apply for and obtain authority from the Court to bring this suit?" Defendants' counsel objected, stating: "The ground of my objection is that the order itself is the best evidence of what is contained therein. I might say at this point that I intend to raise the point in the course of this trial that the trustee had no authority to bring the suit in the particular action under which he was appointed." The court directed that the order be introduced. Thereupon, McCandless was asked: "Were you thereafter appointed ancillary receiver by this District Court?" Without objection, he answered "Yes." Then he was asked: "Were you there also authorized to bring suit?" Defendants' counsel then made "the same objection" which was sustained. The plaintiff then, without objection, introduced in evidence a copy of the proceeding appointing him the ancillary receiver. That record, including a copy of the proceedings in the Pennsylvania suit occupies 35 pages of the printed record in this Court.

The nature of the objection which counsel had in mind in asserting lack of authority in the "trustee" to bring the suit is not clear. It obviously related equally to the authority conferred by the Pennsylvania court on the primary receiver.

[4] The careful opinion of the District Judge (which occupies 14 pages of the printed record of this Court) makes no mention of any such objection or defense.

signed. One of them was directed to an alleged holding that the order entered in the Southern District of New York "constituted a due and valid appointment" of McCandless as ancillary receiver. But the record does not show that the District Court did so rule; or that it was requested to rule on the subject. Moreover, the petitioner stated that the objection to the validity of the appointment had been made for the first time in the Court of Appeals; and counsel for the respondent, in his oral argument in this Court, said that the objection to the validity of the appointment was not urged by him because he desired to have a decision on the merits.

Second. Under the early practice an objection to the legal capacity of the plaintiff to sue could be taken only by plea in abatement. *Kane* v. *Paul,* 14 Pet. 33, 41; *Ventress* v. *Smith,* 10 Pet. 161, 168. Now, it may be taken by plea in bar or by answer. *Noonan* v. *Bradley,* 9 Wall. 394, 400–402. But an objection to the plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court. The rule is of general application and has been applied in the federal appellate courts to a variety of cases. To lack of capacity on the ground of infancy;[5] on the ground that plaintiff was a married woman;[6] on the ground that the husband was not entitled to sue in his own name for the death of his wife;[7] on the ground that plaintiff, a foreign corporation, had failed to comply with requirements of the local law;[8] on the ground that a suit in the name of the United States was brought without the requisite authority of the Attorney General.[9] Under like circumstances the appel-

[5] *Paauhau Sugar Plantation Co.* v. *Palapala,* 127 Fed. 920.

[6] *Buckingham* v. *Estes,* 128 Fed. 584, 585–6.

[7] *St. Louis Southwestern Ry. Co.* v. *Henson,* 58 Fed. 531.

[8] *Dahl* v. *Montana Copper Co.,* 132 U. S. 264.

[9] *McLaughlin* v. *United States,* 107 U. S. 526, 528.

late courts have refused to entertain the objection that plaintiff was not the real party in interest,[10] that the father was not entitled to sue for the death of his minor son;[11] and that the plaintiff, an executor or administrator, had not secured ancillary administration.[12] The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court.[13]

Third. The alleged invalidity of the order appointing McCandless ancillary receiver is a defect of this character. It is urged that the appointment of an ancillary receiver can be made only as an incident of an independent bill, and upon application of one properly a party thereto; that here there was nothing before the court, because no suit was then pending in the Southern District of New York; that there was neither a plaintiff nor a defendant; that no relief was prayed; that no process had issued; that the Corporation did not voluntarily appear; and, hence, that the court lacked the power to make the appointment, since there was nothing before it upon which its judicial power could act. We have no occasion to decide whether the contention is well founded. For if the validity of his appointment as ancillary receiver had been seasonably urged in the trial court, the plaintiff might have remedied the defect by causing an independent bill to be filed; the District Court might thereon have entered an order appointing him ancillary receiver; and, in this

[10] *Northwestern S. S. Co.* v. *Cochran,* 191 Fed. 146, 149; *Mayor* v. *United States ex rel. Helena Waterworks Co.,* 104 Fed. 113, 115.

[11] *Texas & Pacific Ry. Co.* v. *Lacey,* 185 Fed. 225, 227; appeal dismissed, 229 U. S. 628.

[12] Compare *McAleer* v. *Clay County,* 38 Fed. 707; *Leahy* v. *Haworth,* 141 Fed. 850.

[13] Compare *O'Reilly* v. *Campbell,* 116 U. S. 418, 420.

cause, the trial court might have permitted the appropriate amendment of the bill of complaint.[14]

The rule that a federal appellate court must, of its own motion, dismiss the suit if it appears that the trial court was without jurisdiction, *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382, is not applicable to the situation presented here. In the case at bar the District Court confessedly had jurisdiction of the subject matter and of the parties. The objection sustained goes not to the jurisdiction of the District Court in this suit, but to the legal capacity of the plaintiff as ancillary receiver.

Fourth. The objection which the Court of Appeals held fatal to the maintenance of this suit differs in essence from that sustained in *Booth* v. *Clark.* There, the foreign equity receiver suing in the federal court of another State failed because, having no title to the assets within the district, he was without a cause of action. He lacked title because the order appointing him did not, and could not, transfer to him the assets involved in the litigation. For that reason, a bill in the federal court for southern New York brought by the primary receiver, alleged to have been duly appointed in Pennsylvania and authorized to bring this suit, would have been bad on demurrer. But this bill by the ancillary receiver, which alleges that he had been duly appointed by the federal court for New York and authorized to bring the suit, would have been good on demurrer.

Great Western Mining Co. v. *Harris,* 198 U. S. 561, 576, shows that the rule of *Booth* v. *Clark* rests upon practical considerations. The foreign receiver failed in the *Great Western* case although he sued in the name of the corporation. He failed, as the Court there stated, because "every jurisdiction, in which it is sought by means of a receiver to subject property to the control of

[14] Compare *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859.

the court, has the right and power to determine for itself who the receiver shall be and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered." The nature of the rule of *Booth* v. *Clark* is shown further by the fact that, when by statute the appointment of the receiver operates to transfer title, the foreign receiver may sue in the federal court for another State. See *Bernheimer* v. *Converse,* 206 U. S. 516; compare *Converse* v. *Hamilton,* 224 U. S. 243; *Clark* v. *Williard,* 292 U. S. 112.

The judgment of the Court of Appeals is reversed and the cause is remanded to it for the determination of the questions relating to the liability of the defendants decided by the District Court and presented by the appeal and cross-appeal.

Reversed.

LONG *v.* ANSELL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 18. Argued October 15, 1934.—Decided November 5, 1934.

1. A Senator of the United States, while in the District of Columbia in attendance at a session of the Senate, is immune under Constitution, Art. I, § 6 , cl. 1, from arrest in a civil case but not from the service of a summons. P. 82.
2. This constitutional privilege must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another. P. 83.

63 App. D. C. 68; 69 F. (2d) 386, affirmed.

CERTIORARI, 292 U. S. 619, to review the affirmance of an order denying a motion to quash a summons and the service thereof in an action for libel.

Mr. Seth W. Richardson, with whom *Messrs. Joseph E. Davies, Raymond N. Beebe,* and *Adrian F. Busick* were on the brief, for petitioner.

It seems clear that, prior to the enactment of 12 and 13 W. III and 10 G. III, the privilege from arrest of members of Parliament embraced privilege from service of civil process. *Cassidy* v. *Stewart,* 2 M. & G. 437; *State* v. *District Court,* 34 Wyo. 288; *Bolton* v. *Martin,* (Pa.) 1 Dall. 296. But, in view of those enactments and the difference in jurisdictional conditions, the status of the privilege in England affords little aid in the determination of the question here submitted.

It would seem, however, that, in framing the constitutional provision, the framers must have had in mind the broad meaning of the word "arrest," which, exclusive of statute, had previously prevailed in England, because the early cases in the United States all followed this broad interpretation of the word "arrest."

Language similar to that of Constitution, Art. I, § 6, cl. 1, is found in nearly all of the constitutions of the States, and has been the subject of diverse interpretations.

That the privilege referred to in the Federal Constitution applies only to civil cases, was settled by *Williamson* v. *United States,* 207 U. S. 425. Consequently, the only question remaining is whether the word "arrest" refers only to those few remaining instances of civil arrest where actual detention of the person exists, or, more broadly construed, applies to the service of civil process upon the member of Congress, as originally in England, and as held in early cases immediately following the adoption of the Constitution.

It is, of course, freely conceded that the authorities are not now in accord. The decisions opposed are collected in the opinion below.

Applicable decisions and dicta are to be found in: *Miner* v. *Markham,* 28 Fed. 387; *Bolton* v. *Martin,* (Pa.) 1 Dall. 296; *Geyer's Lessee* v. *Irwin,* (Pa.) 4 Dall. 107, followed in *Gray* v. *Still,* 13 W. N. C. 59, and *Ross* v. *Brown,* 7 Pa. Co. Ct. 142; *Doty* v. *Strong,* 1 Pinney 84; *Anderson* v. *Roundtree,* 1 Pinney 115; *Robbins* v. *Lincoln,* 27 Fed. 342; *Welsh* v. *Mooney,* 33 Oh. Cir. Ct. 214; Note, 76 Am. St. Rep. 534. These clearly support the rule that freedom from arrest includes freedom from service of civil process. It is believed that most of the opposing decisions present various characteristic differences which should have careful consideration. Distinguishing: *United States* v. *Cooper,* 4 Dall. 341; *Case* v. *Rorabacker,* 15 Mich. 537; *Peters* v. *League,* 13 Md. 58; *Respublica* v. *Duane,* 4 Yeates 347; *People* v. *Hofstadtor,* 258 N. Y. 425; *Phillips* v. *Browne,* 270 Ill. 450.

A nonresident who is present in the jurisdiction as suitor or witness may not lawfully be served with process. This privilege is not dependent upon constitution or statute; it has grown out of public policy in the public interest. *Stewart* v. *Ramsden,* 242 U. S. 128; *Wheeler* v. *Flintoff,* 156 Va. 923; *Arnett* v. *Smith,* 165 Miss. 53; *Zimmerman* v. *Buffington,* 121 Neb. 670; *State* v. *District Court,* 34 Wyo. 288; *Murrey* v. *Murrey,* 216 Cal. 707; *Higgins* v. *California Growers,* 288 Fed. 550. It has been extended to national bank officials while attending conferences in other States upon the request of the Governor of a Federal Reserve Bank. *Filer* v. *McCormick,* 260 Fed. 309. The public nature of his service, its importance to his State, and its presumed supreme necessity to the Government, bespeak a greater need for this privilege in the case of a member of Congress than for the other classes of persons mentioned.

The defendant is only present in the District of Columbia as a member of Congress in attendance upon his official duties. His domicile and residence are in the State of Louisiana, where he abides. Courts of Louisiana stand open to the plaintiff to litigate any cause of action which he may have; and the law ought not to deny to the defendant, as a member of Congress, either under the constitutional provision, or under the principles of general law, the privilege which it so freely extends to litigants, witnesses, and even to individuals, on errands connected with the public interest.

Mr. Samuel T. Ansell submitted, *pro se.*

We rest our case upon the opinion of the Court of Appeals and Article I, § 6, of the Constitution. "Arrest" means actual detention of the person.

An examination of the cases cited by petitioner requires us to say that they are not of a character to merit serious consideration or extended discussion.

The law, as we think it has ever been applied in this jurisdiction from the earliest times, was long ago authoritatively declared in *Merrick & Durant* v. *Giddings,* 1 McArthur & Mackey 55, and *Howard* v. *Trust Co.,* 12 App. D. C. 222, in able and exhaustive opinions; and now again by the Court of Appeals in the instant case. These decisions are in entire accord with *Williamson* v. *United States,* 207 U. S. 425, in which this Court manifestly saw no "supreme necessity to the Government" for liberalizing the immunity beyond strict constitutional requirement.

Petitioner's plea made to the courts below and now to the highest of American tribunals seems, to us at least, strikingly, almost disturbingly, strange and foreign—a plea for senatorial prerogative that places the personal wrongs done by a Senator to a private citizen beyond the effective reach of the law. He contends for a judicial

enunciation of a public policy rule under which the District of Columbia would become a retreat in which Senators, Representatives, and everybody else engaged here in public service, would be free from answering for their breaches of contract obligations and their tortious acts done to the person or property of the citizen. He urges that this Court should require the courts here to adopt what he regards as more modern public policy, and, without constitutional or statutory provision, extend the fullest immunity from civil suit not only to suitors and witnesses, but to any person who comes, or is brought, into a foreign jurisdiction of which he is not a resident, on a judicial or public errand and, *a fortiori,* to a Senator of the United States. The " supreme necessity to the Government," it is said, to which private rights must yield, requires that a Senator must not be " subject to the menace of being harassed by private litigation in the District of Columbia." If a Senator, or any of the thousands engaged here in the service of the public, injure or destroy the person, property, or reputation of a citizen, or flout his obligations to merchant, tailor, butcher, baker, this honorable Court is asked to say that the injured citizen shall have no redress in the courts here where the wrong is done, and must be content to follow the wrongdoing Senator into his own bailiwick—poor right indeed.

Experience, we think, would suggest no judicial extension beyond the privileges and immunities fairly established by the specific provision of the Constitution. We are insensible to the argument that this Court should deduce out of the Constitution or its concept of public policy the remarkable immunity contended for.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On March 27, 1933, Samuel T. Ansell, a resident of the District of Columbia, brought, in the Supreme Court of

the District, an action for libel against Huey P. Long of Louisiana. The summons was served on the defendant within the District. It directed him to answer and show cause why the plaintiff should not have judgment for the cause of action stated in his declaration. The defendant, appearing specially, and solely for the purpose, filed on April 25, 1933, a motion to quash the summons and the service thereof on the following ground:

"The summons was issued on Monday, March 27, 1933, and served on the defendant on Monday, April 3, 1933, whereas the first session of the Seventy-third Congress was convened on the ninth day of March, 1933, and has remained continuously in session since that date and was in session on the dates of the issuance and service of the said summons (of which fact defendant prays the court to take judicial notice) and the defendant as alleged is a United States Senator who was in attendance upon the meetings of the first session of the Seventy-third Congress of the United States and the summons and service thereof is invalid and of no legal effect whatsoever because in violation of Article I, Section 6, Clause 1, of the Constitution of the United States, which provides that Senators and Representatives of the United States 'shall in all cases except treason, felony, and breach of the peace be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.'"

On May 9, 1933, the Supreme Court of the District denied the motion, but stayed further proceedings for twenty days pending application to the Court of Appeals of the District for a special appeal. That court allowed the appeal. On February 5, 1934, it affirmed the order denying the motion to quash. 63 App. D. C. 68; 69 F. (2d) 386. This Court granted certiorari. 292 U. S. 619.

Senator Long contends that Article I, Section 6, Clause 1 of the Constitution, confers upon every member of Con-

gress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant. In *Kimberly* v. *Butler,* Fed. Cases No. 7,777, Mr. Chief Justice Chase, sitting in the Circuit Court for the District of Maryland, held that the privilege was limited to exemption from arrest. Compare Mr. Justice Grier, sitting in the Circuit Court of the District of New Jersey in *Nones* v. *Edsall,* Fed. Cases No. 10,290. The courts of the District of Columbia, where the question has been raised from time to time since 1868, have consistently denied the immunity asserted. *Merrick* v. *Giddings,* McArthur & Mackey 55, 67; *Howard* v. *Citizens' Bank & Trust Co.,* 12 App. D. C. 222.[1] State cases passing on similar provisions so hold.[2]

History confirms the conclusion that the immunity is limited to arrest. See opinion of Mr. Justice Wylie in *Merrick* v. *Giddings.* The cases cited in support of the contrary view rest largely upon doubtful notions as to the historic privileges of members of Parliament before the enactment in 1770 of the statute of 10 George III, c. 50.[3] That act declared that members of Parliament

[1] See also *Worth* v. *Norton,* 56 S. C. 56; 33 S. E. 792; *Bartlett* v. *Blair,* 68 N. H. 232; 38 Atl. 1004.

[2] *Phillips* v. *Browne,* 270 Ill. 450; 110 N. E. 601; *Berlet* v. *Weary,* 67 Neb. 75; 93 N. W. 238; *Rhodes* v. *Walsh,* 55 Minn. 542; 57 N. W. 212; *Gentry* v. *Griffith, Hyatt & Co.,* 27 Tex. 461; *Catlett* v. *Morton,* 4 Litt. (Ky.) 122; compare *Doyle-Kidd Dry Goods Co.* v. *Munn,* 151 Ark. 629; 238 S. W. 40; *Huntington* v. *Shultz and M'Kenna,* 1 Harp. L. Rep. (S. C.) 452; *Hart and Foster* v. *Flynn's Executor,* 8 Dana (Ky.) 190.

[3] See *Bolton* v. *Martin,* 1 Dall. 296; *Gyer's Lessee* v. *Irwin,* 4 Dall. 107; *Doty* v. *Strong,* 1 Pinney (Wis.) 84; *Anderson* v. *Rountree,* 1

should be subject to civil process, provided that they were not "arrested or imprisoned." When the Constitution was adopted, arrests in civil suits were still common in America.[4] It is only to such arrests that the provision applies. *Williamson* v. *United States,* 207 U. S. 425.

The constitutional privilege here asserted must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require. See *Lamb* v. *Schmitt,* 285 U. S. 222, 225, 226.

Affirmed.

Pinney 115; *Miner* v. *Markham,* 28 Fed. 387. The first of these cases relied upon a passage in Blackstone in which it is stated that no member of either house may be "served with any process of the courts of law . . . without a breach of the privilege of parliament." The passage appears as quoted in the fourth edition of Blackstone (1771), v. 1, p. 165. In the fifth edition (1773), however, the phrase "served with any process of the courts of law" is deleted and other changes made in the same paragraph, so as to correspond with the statute of 10 George III, c. 50. In *Miner* v. *Markham,* the passage is quoted in its original form.

[4] Wyche, Practice of the Supreme Court of the State of New York (2d ed., 1794), p. 50, *et seq.;* Robinson, Practice in Courts of Law and Equity in Virginia (1832), pp. 126–130; Howe, Practice in Civil Actions and Proceedings at Law in Massachusetts (1834), pp. 55–56, 141–148, 181–187; Troubat & Haly, Practice in Civil Actions and Proceedings in Supreme Court of Pennsylvania (1837), pp. 170–189. An early Virginia statute provided that in actions against the Governor and certain other officers of the Commonwealth, a summons should issue "instead of the ordinary process," the capias ad respondendum. Collection of the Acts of the General Assembly of Virginia, Published Pursuant to the Act of 1792 (1794), c. 66, § 23, p. 83, Rev. Code (1819), c. 128, § 68, p. 506.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* STOCKHOLMS ENSKILDA BANK.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 10. Argued October 10, 11, 1934.—Decided November 5, 1934.

1. Interest received by a foreign corporation from the United States with a refund of income taxes, is interest on an "interest-bearing obligation" of a "resident," within the meaning of § 217 (a) of the Revenue Act of 1926. P. 86.
2. An obligation to refund taxes erroneously or illegally collected, upon which, by express statutory direction, interest must be paid, is an interest-bearing obligation. P. 86.
3. The presumption that identical words used in different parts of the same Act are intended to have the same meaning, yields where words susceptible of different shades of meaning are found in such dissimilar connections as to show that they were employed in different senses. P. 87.
4. Section 213 (b) (4) of the Revenue Act of 1926, providing that the term gross income shall not include interest upon "obligations of the United States," was designed to aid the borrowing power of the Government by making its interest-bearing bonds attractive to investors, and the scope of the term must there be narrowed accordingly; but § 217 (a) is for the different purpose of producing revenue and must be construed from that standpoint. P. 91.
5. The United States is a "resident" within the meaning of the phrase "residents, corporate or otherwise," in § 217 (a) of the Revenue Act of 1926. P. 91.
6. The rule that taxing acts are to be construed strictly in favor of the taxpayer can not be allowed to defeat the obvious legislative intent when ascertained from the context and purpose of the statute and other appropriate tests. P. 93.

62 App. D. C. 360; 68 F. (2d) 407, reversed.

CERTIORARI, 292 U. S. 618, to review the affirmance by the Court of Appeals of an order of the Board of Tax Appeals avoiding a deficiency assessment of income taxes.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, John H. McEvers,* and *W. Marvin Smith* were on the brief, for petitioner.

Mr. Truman Henson for respondent.

Opinion of the Court by MR. JUSTICE SUTHERLAND, announced by the CHIEF JUSTICE.

Respondent, a foreign corporation having no office or place of business within the United States, received, during the year 1927, a refund of income taxes theretofore paid, including interest thereon in the sum of $8,683.91. In 1931, the Commissioner of Internal Revenue assessed against respondent in respect of this interest a deficiency of $1,172.32 upon its tax liability for the year 1927. The Board of Tax Appeals, upon petition for a redetermination, held that there was no deficiency and that the commissioner was in error in so deciding. 25 B. T. A. 1328. Upon petition for review brought by the commissioner, the court below sustained the action of the board. 62 App. D. C. 360; 68 F. (2d) 407.

The case involves a consideration of certain provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9. Section 233 (b) of that act provides that, in the case of a foreign corporation, "gross income" means only gross income from sources within the United States, determined in the manner provided in § 217, the pertinent provisions of which follow:

"SEC. 217. (a) In the case of a nonresident alien individual . . ., the following items of gross income shall be treated as income from sources within the United States:

"(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on

the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, . . .

"(c) The following items of gross income shall be treated as income from sources without the United States:

"(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a); . . ."

The question for determination is whether the interest paid upon the amount of the tax refund falls within the classification, " interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise." The contention of respondent before the Board of Tax Appeals and in the court below was, as it is here, that such interest payment was not within the reach of the provisions of § 217 (a), because (1) it was not interest upon an interest-bearing obligation, and (2) the United States is not a " resident " within the meaning of the phrase " residents, corporate or otherwise."

First. If the words " interest-bearing obligations " stood alone, there would be no room for doubt as to their inclusive effect. Section 1111, 44 Stat. 115, Title 26, U. S. C. App. § 149, authorizes the commissioner to refund and pay back all taxes illegally or erroneously collected. The decision of the commissioner that a tax has been illegally or erroneously collected necessarily creates an obligation to make repayment. Section 1116 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 119, Title 26 U. S. C. App. § 153, provides that interest at the rate of six per centum per annum from the date of the payment of the tax to the date of the allowance of the refund shall be allowed and paid. Obviously, an obligation upon which by express statutory direction interest must be paid is an interest-bearing obligation.

The point is made, however, that the word " obligations," as it occurs in another part of the act, has been

given a narrower construction, and that this is persuasive of the restricted meaning contended for here. That much may be conceded, since " there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433. But since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent. *Idem.* The comparison sought to be made is between the words in § 213 (b) (4) of the act, and the same words in § 217 (a). The former provides that the term " gross income," among other things, does not include interest upon " obligations of the United States." It is clear from a consideration of the entire section and of the subject matter that the purpose of Congress, in thus excluding from gross income interest upon such obligations, was to aid the borrowing power of the federal government by making its interest-bearing bonds more attractive to investors. *American Viscose Corp.* v. *Comm'r of Int. Rev.,* 56 F. (2d) 1033. Compare *United States Trust Co. of New York* v. *Anderson,* 65 F. (2d) 575, 577–578. The scope of the word " obligations " as there employed must be narrowed accordingly, and not extended to include interest upon indebtedness not incurred under the borrowing power, as the court in the *Viscose* case properly held. But the use of the words " interest on . . . interest-bearing obligations " in § 217 (a) is for a different purpose, namely, to produce revenue, not to encourage loans in aid of the borrowing power. The intent of Congress, therefore, in the one case, is fulfilled by giving the phrase a construction within the narrow

purposes of § 213 (b) (4); and, in the other case, by a construction, if the phrase fairly admits of it, which will effect the obviously different statutory aim of § 217 (a).

Atlantic Cleaners & Dyers v. *United States, supra,* was a suit brought to enjoin appellants from continuing an alleged conspiracy in restraint of trade and commerce in cleaning, dyeing, and otherwise renovating clothes contrary to § 3 of the Sherman Anti-trust Act. The defense was that appellants were engaged solely in the performance of labor and service in cleaning, dyeing and renovating wearing apparel, etc., and that this did not constitute "trade" within the meaning of the act. The argument was that since the words "trade or commerce" in § 1 of the act, which dealt with interstate commerce, must be construed not to include a business such as that carried on by appellant, the identical words used in § 3 dealing with restraint of trade or commerce within the District of Columbia should be given the same interpretation. Considering the subject matter of the act, and the scope of the legislative power exercised in the one case as compared with that exercised in the other, we held otherwise. In arriving at the conclusion that the word "trade" as used in § 3 was to be given a broader interpretation than the same word as used in § 1, we considered the history leading up to and accompanying the passage of the Sherman Act, the mischief to be remedied, and other circumstances, and held that Congress intended to exercise all the power it possessed; and since the scope of its power in dealing with the District was more extensive than when dealing with interstate commerce, we gave to the word "trade" its full meaning under § 3, unaffected by the narrower meaning which it might have under § 1. The considerations invoked in that case are equally applicable here.

But it is said that the phrase in question must be restricted in accordance with the rule of *ejusdem generis.* The point is not without merit. The phrase reads "in-

terest on bonds, notes, or other interest-bearing obligations." If the rule invoked be held controlling, it would follow that the general words "other interest-bearing obligations" must be assimilated to the particular words "notes and bonds," and restricted to obligations of the same kind. But while the rule is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail.

The general object of this act is to put money into the federal treasury; and there is manifest in the reach of its many provisions an intention on the part of Congress to bring about a generous attainment of that object by imposing a tax upon pretty much every sort of income subject to the federal power. Plainly, the payment in question constitutes income derived from a source within the United States; and the natural aim of Congress would be to reach it. In *Irwin* v. *Gavit,* 268 U. S. 161, 166, this court, rejecting the contention that certain payments there involved did not constitute income, said: "If these payments properly may be called income by the common understanding of that word and the statute has failed to hit them it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent. *Eisner* v. *Macomber,* 252 U. S. 189, 203." Although Congress intended, as the court held in the *Viscose* case, *supra,* to include interest

on a tax refund made to a *domestic* corporation, we are asked to deny such intention in respect of a competing *foreign* corporation. But we see nothing in the relationship of a foreign corporation to the United States, or in any other circumstance called to our attention, which fairly shows that such a discrimination was within the contemplation of Congress. On the contrary, the natural conclusion is that if any discrimination had been intended it would have been made in favor of, and not against, the domestic corporation, which contributes in a much more substantial degree to the support of the people and government of the United States.

The foregoing views are put beyond all fair doubt, if otherwise any would remain, by the consideration of a qualification contained in the section itself. After declaring that interest on bonds, notes, or other interest-bearing obligations shall be treated as income from sources within the United States, the section immediately proceeds to exclude from that language " interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States . . ." It is apparent from this exception that Congress understood that unless the exception were made, the interest on such deposits would fall within the term " interest-bearing obligations," and to prevent that result it was necessary to specifically create the exception. The conclusion fairly results that the clause was intended to include all interest-bearing obligations not specifically excepted. The opinion delivered by Lord Tenterden in *The King* v. *The Trustees for paving Shrewsbury,* 3 Barnewall & Adolphus 216, is directly in point. There a statute imposed certain charges and expenses, in connection with the operations of a gas light company, upon tenants or occupants of houses, shops, malt-houses, granaries, etc., and *hereditaments* within Shrewsbury,

" meadow and pasture ground excepted." The contention was that the word " hereditaments " must be confined to hereditaments *ejusdem generis* with those enumerated. The court, holding otherwise, said (p. 220):

" Now it is certain that meadows and pastures would have fallen within the meaning of the word ' hereditament,' if they had not been excepted; it was argued, therefore, that this special exemption of meadows and pastures shewed that the other word had been previously used in its larger sense. On the other hand it was contended, that these words had been introduced merely *ex majori cautelâ*. Upon the best consideration we have been able to give this case, we are of opinion, that we ought not to consider the exception of meadow and pasture ground as made only for greater caution, but are bound to look upon it as introduced by way of special exception, and so to construe the clause: and, consequently, every thing not so specifically excepted must be understood to fall within the general liability."

Interest on deposits is no more akin to notes and bonds than is interest on tax refunds; and the fact that the former was expressly excepted from the operation of the substantive provision quite clearly justifies the conclusion that the lawmakers attached to the general clause a larger meaning than it would have if limited to things *ejusdem generis* with those specifically enumerated. Certainly, if it was necessary to save interest on deposits from the embrace of the general clause by an exception, it was equally necessary to save interest on tax refunds by a like exception.

Second. Is the United States a resident within the meaning of the words " residents, corporate or otherwise "? We think it is. It many times has been held that the United States or a state is a " person " within the meaning of statutory provisions applying only to per-

sons. See *Ohio* v. *Helvering,* 292 U. S. 360, 370, and cases cited. In *Martin* v. *State,* 24 Tex. 61, 68, this was held in respect of a criminal statute, notwithstanding the general rule that such statutes are to be construed strictly. The statute there penalized the false making or fraudulent alteration of a public record when done " with intent that any person be defrauded." The state supreme court held that the state was to be taken as a " person " within the meaning of the statute, and one who made the entry with intent to defraud the state violated the statute. The Texas decision was expressly followed by this court in *Stanley* v. *Schwalby,* 147 U. S. 508, 517, where it was held that the word " person " used in the statute there under consideration would include the United States " as a body politic and corporate." Blackstone, writing on the rights of persons (1 Bl. 123) says:

" Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."

While it cannot be said that the United States, in its corporate capacity as an artificial person, has a bodily presence in any place, it is not unreasonable to hold that in the eye of the law, it has a residence, and especially so when a contrary holding would defeat the evident purpose of a statute. This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice. Thus, intangible personal property has been held to have a situs at the domicile of the owner, although intangibles ordinarily have no actual situs and the paper evidence of their existence may be elsewhere. *First National Bank* v. *Maine,* 284

U. S. 312, 328–329. If to carry out the purposes of a statute it be admissible to construe the word "person" as including the United States, it is hard to see why, in like circumstances, it is inadmissible to construe the word "resident" as likewise including the United States.

And, finally, if the United States be not a "resident" in respect of interest upon "other interest-bearing obligations," it is, of course, not a "resident" in respect of interest upon its bonds held by nonresident aliens and corporations. The interest upon many of these bonds is subject to a super-income tax and to certain other taxes. If it had been intended to make an exemption in respect of such taxes in favor of nonresidents, it is reasonable to suppose that Congress would have said so in explicit terms * instead of leaving the fate of taxes upon the large sums thus involved to depend upon the way in which a court might happen to construe the word "resident"—a most unsatisfactory substitute, as the conflicting decisions in this and the next succeeding case bear witness. We cannot assent to the view that Congress has written into the law an exception of such importance in a manner so indirect and casual.

In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts "are not to be extended by implication beyond the clear import of the language used," and that doubts are to be resolved against the government and in favor of the taxpayer. The rule is a salutary one, but it does not apply here. The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in con-

* As, for example, it did in the Act of March 3, 1919, § 4, c. 100, 40 Stat. 1309, 1311.

nection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein* v. *Lane,* L. R. 2 Q. B. Cases 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

"The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. *United States* v. *Hartwell,* 6 Wall. 385, 396; *United States* v. *Corbett,* 215 U. S. 233, 242." *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 329. The rule of strict construction applies to penal laws, but such laws are not to be construed so strictly as to defeat the obvious intention of the legislature; or so applied as to narrow the words of the statute to the exclusion of cases which those words, in the sense that the legislature has obviously used them, would comprehend. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. That view, expressed by Chief Justice Marshall, has since been frequently followed by this court. See, for example, *American Fur Co.* v. *United States,* 2 Pet. 358, 367; *United States* v. *Morris,* 14 Pet. 464, 475; *United States* v. *Hartwell, supra,* 395–6; *Donnelley* v. *United States,* 276 U. S. 505, 512.

Judgment reversed.

BRITISH-AMERICAN TOBACCO CO., LTD., *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 24. Argued October 11, 1934.—Decided November 5, 1934.

Decided upon the authority of *Helvering* v. *Stockholms Enskilda Bank, ante,* p. 84.
69 F. (2d) 528, affirmed.

CERTIORARI, 292 U. S. 619, to review a judgment reversing a decision of the Board of Tax Appeals and sustaining the action of the Commissioner in assessing a deficiency of income tax.

Mr. John H. Jackson, with whom *Messrs. H. H. Shelton* and *Haig H. Davidian* were on the brief, for petitioner.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, John H. McEvers,* and *W. Marvin Smith* were on the brief, for respondent.

Opinion of the Court by MR. JUSTICE SUTHERLAND, announced by the CHIEF JUSTICE.

This is a companion case to No. 10, just decided. The facts, although differing in detail, are in substance the same. The same questions are involved. The court below reversed the Board of Tax Appeals for reasons substantially similar to those we have just expressed in No. 10. 69 F. (2d) 528. Upon the authority of No. 10, *ante,* p. 84, the judgment below is

Affirmed.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* PINKSTON.

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

No. 32. Argued October 16, 17, 1934.—Decided November 5, 1934.

1. In a suit in equity brought by a widow for the purpose of preserving and protecting her right to future participation in a fund from which she is entitled to receive a pension of so much per month during her lifetime as long as she shall remain unmarried, the amount in controversy, determining the federal court's jurisdiction, is the present value of her interest, calculable from the amount of the monthly payment and her life expectancy. P. 99.
2. The fact that the further payments will cease if the pensioner remarry does not render them contingent or speculative. *Thompson* v *Thompson*, 226 U. S. 551. P. 100.
3. The evidence discloses that the pensioner's "expectancy of remarriage" and its effect upon the value of her interest in the fund were subject to actuarial measurement in this case. P. 101.

69 F. (2d) 600, affirmed.

CERTIORARI, 292 U. S. 621, to review the reversal of a decree dismissing the bill, for lack of jurisdiction, in a suit by a widow on behalf of herself and of other beneficiaries similarly situated, for an accounting and other equitable relief in respect of a fund established by a labor association for the pensioning of widows of their deceased members.

Mr. Thomas Stevenson for petitioners.

Future payments depend entirely upon the volition of the beneficiary. The probability of remarriage can not even be conjectured. It is impossible to estimate the present value of such contingent payments.

The court below carefully excluded from consideration either the accumulated Pension Fund or the combined claims of all matured certificate holders. Jurisdiction

rested solely upon the respondent's right under the certificate which she holds. *Eberhard* v. *Northwestern Mutual Life Ins. Co.,* 241 Fed. 353; *Lyon Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77.

In *Thompson* v. *Thompson,* 226 U. S. 551, jurisdiction depended entirely upon whether the monthly payments for maintenance of the wife and child provided for under the order of the court were contingent. That case is an exception from a well established rule.

If, as conclusively shown in *Dunbar* v. *Dunbar,* 190 U. S. 340, it is impossible to value future payments, subject to the contingency of remarriage, for the purposes of a discharge under the Bankruptcy Act, how can this be done for the purpose of acquiring federal jurisdiction, in the face of the strict rule of construction and counter presumption governing that subject?

The doctrine of the *Dunbar* case has frequently been followed: *Shanley* v. *Herold,* 141 Fed. 423; *Herold* v. *Shanley,* 146 Fed. 20; *In re Westmoreland,* 4 F. (2d) 602.

In the *Thompson* case no condition was stated in the court order which would of its own force defeat the future payments. The payments were as "fixed" as humanly possible. An independent authority must act to effect any change.

The ruling below is at variance with the decisions of other federal courts and also state courts of last resort, in denying federal jurisdiction in analogous cases, namely, those based upon insurance policies and allegations of total and permanent disability. *LaVecchia* v. *Connecticut Mutual Life Ins. Co.,* 1 F. Supp. 588; *Wyll* v. *Pacific Mutual Life Ins. Co.,* 3 F. Supp. 483; *Kithcart* v. *Metropolitan Life Ins. Co.,* 1 F. Supp. 719; *Reliance Life Ins. Co.* v. *Capital Nat. Bank,* 38 Ga. App. 349; *Guardian Life Ins. Co.* v. *Johnson,* 186 Ark. 1019; *Fields* v. *Equitable Life Ins. Co.,* 199 N. C. 454.

Mr. W. L. Bryan, with whom *Mr. James R. Garfield* was on the brief, for respondent.

In support of the ruling below, they cited: *Thompson* v. *Thompson,* 226 U. S. 551; *Western & Atlantic R. Co.* v. *Railroad Commission,* 261 U. S. 264; *Berryman* v. *Board of Trustees,* 222 U. S. 334; *Mutual Life Ins. Co.* v. *Rose,* 294 Fed. 122; *Wright* v. *Mutual Life Ins. Co.,* 19 F. (2d) 117; *New York Life Ins. Co.* v. *Swift,* 38 F. (2d) 175; *Smith* v. *Whitney,* 116 U. S. 167; *Bitterman* v. *Louisville & N. R. Co.,* 207 U. S. 205; *Hunt* v. *N. Y. Cotton Exchange,* 205 U. S. 322; and *Wisconsin Electric Co.* v. *Dunmore Co.,* 35 F. (2d) 555.

Respondent asks that a trust be declared in and of the Widows Pension Fund and that such fund, now admittedly insolvent, be administered under order of the court. The fund so referred to approximates $300,000.00 in value. This also is a proper basis for determining the question of jurisdiction. *Handley* v. *Stutz,* 137 U. S. 366; *Jones* v. *Mutual Fidelity Co.,* 123 Fed. 506; *Putnam* v. *Timothy Dry Goods Co.,* 79 Fed. 454; *Kelly* v. *Graphite Co.,* 34 F. (2d) 791; *Conway* v. *Bank & Trust Co.,* 185 Fed. 950; *Hotel Co.* v. *Wade,* 97 U. S. 20; *Towle* v. *American Building Loan Investment Society,* 60 Fed. 131; *King* v. *Kansas City Police Relief Assn.,* 60 F. (2d) 547; *Local No. 7* v. *Bowen,* 278 Fed. 271.

Opinion of the Court by Mr. Justice Sutherland, announced by the Chief Justice.

The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association with headquarters in Ohio. It has a department known as the Widows' Pension Department, created in order to provide a monthly income for the widows or widowed mothers of deceased members. The widow of a member, upon his death, is to receive a pension of $35 per month during her lifetime. In the event of her remarriage, the

pension is to cease. The respondent, widow of a deceased member, became entitled to this pension. Thereafter, the association, following an investigation of the financial condition of the department and upon an actuarial report, determined to abolish the department and distribute the assets after making a lump-sum settlement not to exceed $1,500 with each widow then on the pension roll. Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly instalments on pensions was discontinued, beginning September 1st, 1931.

Complainant thereupon brought suit in a federal district court, on behalf of herself and other beneficiaries similarly situated, for an accounting, determination of priorities, and a proper liquidation and administration of the funds of the department. The federal jurisdiction was invoked on the ground of diversity of citizenship. The district court, after a hearing, dismissed the bill on the ground that the requisite amount to confer jurisdiction (over $3,000) was not involved. The court of appeals reversed, 69 F. (2d) 600, upon the authority of *Thompson* v. *Thompson*, 226 U. S. 551. Whether that court rightly held that the jurisdictional amount was involved is the only question for consideration.

The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If

the value of that right exceeds $3,000, the district court has jurisdiction.

In the *Thompson* case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the instalments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560)—"The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension instalments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thomp-*

son case the payments were subject to be cut off entirely, not only by death but, the court said, "in the event of a change in the circumstances of the parties." The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other.

Moreover, the evidence discloses that the expectancy of remarriage and its effect upon the value of the pension are capable of actuarial determination. The law of averages applies in respect of that event, as it does in respect of death and of other events. Mr. Pipe, an actuary called as a witness by petitioners, testified that the value of respondent's right to receive $35 a month so long as she remained unmarried was, in round figures, $6,000 as of August 1, 1931. A report made to the Brotherhood, filed June 2, 1932, by its Committee on Constitution, which seems to have been made after careful study, contains the statement:

"The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40, is the present value of a pension of $420 per annum on the life of a woman aged 36, taking into account the chances of remarriage. The benefit has a definite 'lump sum' value on the death of the member, . . ."

Counsel upon both sides have cited and discussed decisions of this and other courts bearing upon the general subject. We have examined these decisions, but find it unnecessary to review or distinguish them. We agree with the court below that the question of jurisdiction here

under consideration is the same in substance as that involved in the *Thompson* case; and, that being so, the decree of the court below must be

Affirmed.

ROWLEY, TREASURER OF CONVERSE COUNTY, WYOMING, ET AL. *v.* CHICAGO & NORTHWESTERN RAILWAY CO.

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

No. 9. Argued October 10, 1934.—Decided November 5, 1934.

1. The Court is reluctant to place constructions upon state statutes of doubtful meaning, or to decide other questions of state law as to which there may be substantial controversy, in advance of decision by the state courts of last resort. P. 104.
2. The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. P. 109.
3. An apportionment of system value of a railroad for taxation in one of several States traversed by its lines can not be adjudged arbitrary merely because the mileage basis was used, although the average value per mile in that State was much less than for the system as a whole, where the mileage ratio was applied not singly but combined with others, such as the ratios of the traffic units, use of rolling stock and average of gross and net operating revenue in that State to the system totals; where the computation was tested by other criteria, such as the relations between cost of reproduction less depreciation of the local property and system value and between operating net revenues derived from that property and those earned by the system; and where there is nothing to show that the assessment was excessive. P. 110.

4. Overvaluation by state tax officials resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. P. 111.
5. Upon finding in an injunction suit that a state tax violates the equal protection clause of the Fourteenth Amendment because of discrimination in assessment, the federal court should leave the State free to reassess; it is without jurisdiction to fix the base and amount of the tax that may be lawfully exacted. P. 112.

68 F. (2d) 527, reversed.

CERTIORARI, 292 U. S. 618, to review the affirmance of a decree of the District Court holding state taxes on the Railway Company's property in Wyoming arbitrary and excessive and enjoining collection upon the condition that the Company pay taxes on a reduced valuation made by the court.

Mr. Ray E. Lee, Attorney General of Wyoming, and *Mr. James A. Greenwood,* with whom *Mr. George A. Weedell* was on the brief, for petitioners.

Mr. Robert R. Rose, with whom *Messrs. Samuel H. Cady, William T. Faricy,* and *Vincent Mulvaney* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought in the district court for Wyoming by the company against the treasurers of four counties to enjoin collection of a part of the taxes for 1931 levied upon its railroad property therein. The laws of that State required all taxable property to be assessed on the basis of its actual value. See State Constitution, Art. XV, § 11. Wyoming Compiled Statutes, 1931, §§ 115–119, 115–511, 115–1804. The complaint rests upon the

claim that for a number of years, including the one here involved, the State acting through its board of equalization and other taxing authorities systematically and intentionally discriminated against respondent's railroad and in favor of all other property, in violation of the equal protection clause of the Fourteenth Amendment, in that it regularly taxed the railroad at about 133⅓% while taxing all other property at about 60% of actual value. Respondent tendered and paid to the treasurer of each county the amount it claimed would have been levied against it if all taxable property had been assessed upon the same basis of valuation. The total claimed by the four counties was $168,606.12; respondent paid $101,163.67, leaving in controversy $67,442.45.

Petitioners' answer denied discrimination. There was a trial at which much evidence was introduced. The district court upon specific findings of fact concluded that respondent's railroad property in Wyoming had been substantially and arbitrarily overvalued. It found that, with exceptions that are here immaterial, all other property had been assessed at its actual value. It entered a decree requiring respondent to pay additional taxes amounting in all to $33,519.46 and enjoining collection of any part of the balance.

Petitioners seek reversal upon the ground that respondent failed to exhaust an administrative remedy open to it by appeal from the determination of the state board of equalization to the district court under § 115–512, Wyoming Compiled Statutes, 1931. They also maintain that under § 115–311 respondent had an adequate remedy at law and therefore was not entitled to relief in equity. These contentions depend upon serious questions of Wyoming law which have not been decided by its highest court. This court is reluctant, in advance of decision thereon by the state courts of last resort, to construe state

statutes of doubtful meaning or to decide other questions of state law as to which there may be substantial controversy.

In this case it is not necessary, for, upon an analysis of the grounds of the decision below, it is clear that respondent was not entitled to an injunction. Respondent does not challenge the finding that other property was assessed at actual value, and so there remains only the claim that its railroad was intentionally and arbitrarily overvalued by about 33⅓%.

The company had 278.35 miles of main line track in Wyoming and that constituted 3.29% of the main line track included in its system extending into nine States. Neither it nor the board dealt with that in Wyoming as a separate line; both appraised it as a part of the system. They took the value of the whole, attributed to Wyoming a portion and divided it among the four counties. The only matter in controversy is the amount to be assigned to that State.

To ascertain system value, respondent made calculations based on a five year period ending with 1930. It found the average market value of its stocks and bonds, deducted non-operating property locally taxed, added the remainder ($385,800,085) to an amount produced by capitalizing at 6% average net operating income ($364,771,720). The sum divided by two produced $375,285,902 which the board accepted for the purposes of its calculation, though one of its members testified "there are certain flaws in it."

To ascertain the value to be taxed in Wyoming respondent found for each year and also the average for the five-year period the percentages that Wyoming traffic units (ton miles and passenger miles) bore to the system total, the corresponding relation of use of rolling stock (car miles and engine miles) and of gross operating rev-

enues, and by the calculations printed in the margin,[1] arrived at $5,849,570.

In pursuance of § 115–1803, respondent filed a return showing "grand total valuation $8,281,950." It attached a statement which includes the following:

"The valuations shown in this return are based upon the estimated cost of reproduction new of the physical properties . . . less depreciation, and without further

[1]

	Year	Value of entire line as represented by market values of stocks and bonds (1)	Assigned to State of Wyoming on basis of: Traffic units (2)	Operating revenues (3)	Use of rolling stock (4)	Average of 3 bases (5)
1	1926	$ 342,767,737	$ 5,827,052	$ 5,038,686	$ 5,929,882	$ 5,598,540
2	1927	398,490,108	7,212,671	6,057,050	7,372,067	6,880,596
3	1928	397,772,006	6,085,912	5,847,248	6,284,798	6,072,653
4	1929	398,555,050	5,699,337	5,579,771	6,018,181	5,765,763
5	1930	391,415,526	5,558,100	5,714,667	6,027,799	5,766,855
6	Aggregate	$1,929,000,427	$30,383,072	$28,237,422	$31,632,727	$30,084,407
7	Aver. 5 Yrs	$ 385,800,085	$ 6,076,614	$ 5,647,484	$ 6,326,545	$ 6,016,881

	Year	Value of entire line as represented by income capitalized at 6%	Assigned to State of Wyoming on basis of: Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
8	1926	$ 371,585,653	$ 6,316,956	$ 5,462,309	$ 6,428,432	$ 6,069,232
9	1927	337,628,225	6,111,071	5,131,949	6,246,122	5,829,714
10	1928	387,094,715	5,922,549	5,690,293	6,116,096	5,009,646
11	1929	437,002,491	6,249,136	6,118,035	6,598,738	6,321,970
12	1930	290,547,517	4,125,775	4,241,994	4,474,432	4,280,734
13	Aggregate	$1,823,858,601	$28,725,487	$26,644,580	$29,863,820	$28,411,296
14	Aver. 5 Yrs	$ 364,771,720	$ 5,745,097	$ 5,328,916	$ 5,972,764	$ 5,682,259

	Ratio used	Entire line	State of Wyoming: Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
15	1926	100.00%	1.70%	1.47%	1.73%	
16	1927	100.00%	1.81%	1.52%	1.85%	
17	1928	100.00%	1.53%	1.47%	1.58%	
18	1929	100.00%	1.43%	1.40%	1.51%	
19	1930	100.00%	1.42%	1.46%	1.54%	
				Miles of road	Per mile of road	
20	Average for 1930 only			278.35	$18,085	$5,023,795
21	Average for Five Years			278.35	$21,015	$5,849,570

reference to the market value of such properties, or . . . of the stocks and bonds . . . or the present earnings . . . or the present or future earning capacity or possibilities of such properties. It is claimed that the valuations stated in this return do not represent the fair cash value of the property for purposes of taxation. The value as to the system . . . and as to the part in . . . Wyoming is clearly and fairly set [forth] by the figures contained in the exhibits attached to this return . . . and which . . . show that the total true value . . . in . . . Wyoming, or properly allocated to the State does not exceed $5,849,570."

After receiving the return, the board found cost of reproduction new less depreciation of respondent's railroad properties in Wyoming on the basis of an appraisal by the Interstate Commerce Commission as of 1917 plus later betterments to be $11,724,126, depreciated that at the annual rate of 2.5% for 13 years and so produced $8,436,076; ascertained the Wyoming 1930 net operating income to be 2.23% of the total for that year, applied that ratio to system value ($375,285,902) and produced $8,368,876. Each of the two last mentioned indications of value is substantially more than the reproduction cost less depreciation given by respondent in its return. The board, in order to equalize the valuation of respondent's property with other Wyoming railroad properties, made the assessment $7,989,587 which is 2.13% of system value. This is considerably less than the cost figures stated in the return. After notice of the assessment there was a hearing at which respondent presented the theory and bases of its appraisal. It appears that upon further consideration the board took into account the facts that for the five-year period Wyoming net revenue was 2.114% of the system total; respondent's estimated cost of reproduction less depreciation of the Wyoming property was 2.21% of the system value, and that one-half the sum of these

percentages is 2.162%. Of the percentages used by the respondent, the board accepted those based on traffic units and use of rolling stock, rejected that based on gross operating revenues, substituted for it one-half of the sum of the gross operating revenue percentage plus the net operating revenue percentage, introduced the percentage that Wyoming mileage is of system mileage and divided the total by four, producing 2.1%. Its ascertainment of the ratio used follows:

Traffic Units	1.58%
Use of Rolling Stock	1.65%
Average between gross and net operating revenues	1.89%
Main track mileage	3.29%
Divided by 4	8.41%
Percentage to be allocated to Wyoming	2.10%

The board applied this percentage to system value and so established the final assessment, $7,881,003.94, which is less than the earlier one by more than $100,000. This is about 63% of the mileage proportion of agreed system value.

The district court rejected as without support respondent's use of the gross operating revenue percentage. It found that the board used the mileage basis, 3.29%, without taking into account the fact that respondent's property in Wyoming measured on a mileage basis, was greatly less in quantity, quality, cost and value than the portion of its operating system located outside that State. It was upon that ground that the court concluded that respondent's property "was substantially and arbitrarily overassessed." And it condemned as unreasonable and arbitrary the board's use of the mileage percentage. Then proceeding to correct what it held to be the error of the board, the court found one-third of the sum of the percentages based on Wyoming and system traffic units, roll-

ing stock and the average between gross and net operating revenue to be 1.673%.[2] It applied that ratio to the admitted system value and so produced $6,278,534.14—being a reduction of the assessment by $1,602,468.90—directed respondent to pay taxes on that basis and enjoined petitioners from collecting more.

The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. *Boom Co.* v. *Patterson,* 98 U. S. 403, 407 *et seq. Cleveland, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439, 445. *Adams Express Co.* v. *Ohio,* 166 U. S. 185, 220. *Brooklyn City R. Co.* v. *New York,* 199 U. S. 48, 52. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202–203. *Minnesota Rate Cases,* 230 U. S. 352, 434, 454. *Branson* v. *Bush,* 251 U. S. 182, 185–188. *Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm'n,* 262 U. S. 276, 287. *United States* v. *New River Collieries,* 262 U. S. 341. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123–126. *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 155 *et seq. McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 410, 414. *Olson* v. *United States,* 292 U. S. 246, 255 *et seq.* The apportionment of system value between Wyoming and the rest of the system involves the finding of the value of the portion of the railroad that is located in that State. The problem is quite like the ascertainment of the value of the whole. The determina-

[2] The court also corrected an admitted error of the board, by substituting 1.79% for 1.89%, average between gross and net operating revenues.

tion is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property.

Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary. *Fargo* v. *Hart,* 193 U. S. 490, 500. *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282–283. *Wallace* v. *Hines,* 253 U. S. 66, 69. Cf. *Chicago & N. W. Ry. Co.* v. *Eveland,* 13 F. (2d) 442, 447. In arriving at the relation between value in Wyoming and system value, the State board did not confine its calculation to relative mileage. That percentage combined with the other ratios used in the calculation produced 2.1% finally adopted. Nor did it limit its consideration of the problem to the elements employed to make that computation. Among other things it took into account the cost of reproduction less depreciation of the Wyoming property; the relations between that figure and the agreed system value, and between operating net revenues derived from the Wyoming property and those earned by the system for the five-year period and for 1930. Each of these is an indication that the value of the Wyoming property is substantially more than the assessment in question.

The record shows that the board considered respondent's calculation. Refusal to accept that formula as the measure was not arbitrary. Respondent's use of the average of three ratios indicates that it realized that there were substantial objections against each as the sole test. It is obvious, even when results of operation over a substantial

period are considered, that as a matter of fact the value of respondent's Wyoming line does not rise and fall with decline and increase of ton miles, passenger miles, car miles, engine miles or gross revenue in any other State or upon the balance of the system. Moreover, by the use of its formula respondent failed to take into account facts that justly may be considered to have significant bearing upon the relation between Wyoming value and system value. Such, for example, are the length of line to be assessed and the net operating revenues. The other factors that are shown to have been considered by the board give substantial support to the percentage finally adopted as the basis of the assessment.

There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350. *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441. *Chicago G. W. Ry. Co.* v. *Kendall,* 266 U. S. 94. *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 28. There was no discrimination against respondent by undervaluation of the property of others. We find no substantial support in the findings of the district court or in the evidence for the conclusion that the use that the state board made of relative mileage to ascertain the value of respondent's Wyoming railroad property was arbitrary or unreasonable or indeed erroneous, or for its conclusion that the property was substantially or arbitrarily overvalued. Respondent was not entitled to an injunction.

The trial court was not called upon, and it was no part of the judicial function, to determine the base or amount

of the tax that in its view might legally be exacted as a result of the assessment in question. *State Railroad Tax Cases,* 92 U. S. 575, 614–615. *Thompson* v. *Allen County,* 115 U. S. 550. Cf. *Central Kentucky Gas Co.* v. *Railroad Comm'n,* 290 U. S. 264, 271, *et seq.* If that assessment were illegal, the State, notwithstanding any adjudication against its validity as repugnant to the Federal Constitution, should have been left free again to value the property. *Norwood* v. *Baker,* 172 U. S. 269, 293. And see *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 344.

The district court may cause to be corrected the error in calculation referred to in marginal note 2.*

Decree reversed.

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

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

No. 30. Argued Ocober 15, 1934.—Decided November 5, 1934.

1. The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner. P. 118.
2. A resident of New York owning paintings there lent them for exhibition in Pennsylvania where they remained for a number of years, until his death. During the interval they were subject to be returned at any time upon his request, but it did not appear that he ever intended to have them returned, and he was willing to sell them to any purchaser who would donate them to the museum in Pennsylvania or any similar institution. *Held:* That the paintings acquired a situs in Pennsylvania and their transfer by law was consequently subject to the Pennsylvania inheritance tax. P. 119.

Affirmed.

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* The final sentence was added by order of December 3, 1934.—REPORTER.

APPEAL from a decree of the District Court of three judges dismissing a bill to enjoin the assessment and collection of an inheritance tax. For an earlier phase of the case see 291 U. S. 24.

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

The transmission from the dead to the living of a particular thing is an event which can take place in and be made the basis of inheritance tax by but one State.

The personal property of Mr. Clarke, including the paintings in question, passed to the legatees named in his will by virtue of the laws of New York and not of Pennsylvania. *First National Bank* v. *Maine,* 284 U. S. 312, 327, 329.

The will was admitted to probate in New York, the State of Mr. Clarke's domicile. It derived all its authenticity as a will and all its capacity to transmit property, from the judicial proceeding in New York. Pennsylvania added nothing to the validity of the will or probate. *Beaumont's Estate,* 216 Pa. 350, 354; *Dammert* v. *Osborn,* 140 N. Y. 30, 39; *Jones* v. *Habersham,* 107 U. S. 174, 179.

"The validity and effect of a will of movables are determined by the law of the State in which the deceased died domiciled." § 328, Am. L. Inst., Restatement of Conflict of Laws.

Ancillary administration was not actually raised in Pennsylvania and, even if it could have been insisted upon for the benefit of local creditors, was no more than could be required had the property in question remained in Pennsylvania for but a single day, or had the *res* been stock of a Pennsylvania corporation, which under the decisions would clearly not have been subject to inheritance

tax, in spite of the fact that in the case of stock something would have to be done in Pennsylvania, subject to Pennsylvania law, to complete the transfer.

The devolution by will or by intestacy of real property has, on the contrary, always been governed not by the law of the owner's domicile, but by that of the situs of the property. The State, being vitally interested, as a matter of essential public policy, in the personnel of the owners of its soil, has consistently refused to recognize any law other than its own as governing the right to transmit real property, and this Court has recognized this in sustaining the right of the State of the situs of realty to impose inheritance tax on the real estate of a foreign decedent and in denying that right to the State of the owner's domicile.

Under the decisions of this Court, the situs for inheritance taxation was New York and not Pennsylvania. *Frick* v. *Pennsylvania,* 268 U. S. 473; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *First National Bank* v. *Maine,* 284 U. S. 312.

Blodgett v. *Silberman,* 277 U. S. 1, is to be distinguished. It did not there appear that the coin and bank notes had ever been in Connecticut or that they were ever to be taken or kept or used by the decedent there. From the fact that they were kept in the safe deposit box in New York, it would appear that they were for use in connection with the decedent's New York business. This Court considered that this cash had been so definitely fixed and separated in its actual situs from the person of the owner that it belonged permanently in New York, as did the paintings and furniture in the *Frick* case.

Johnson Oil Refining Co. v. *Oklahoma,* 290 U. S. 158, involved the habitual employment of property away from the domicile.

Assuming that, since the decision in the *Maine* case, tangible personalty, not part of an established local busi-

ness or, as in the *Frick* case, intimately connected with real estate, can acquire a situs away from the owner's domicile sufficient to support inheritance taxation by the State of the situs, still the Clarke pictures would fall far short either of the test of the habitual employment of property within the foreign State, or that of the place where the property was kept and used.

Cf. *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341, from which it is clear that, even in cases involving property taxes, a State other than that of the owner's domicile can constitutionally levy the tax only on property permanently located within its borders and is powerless to tax personalty which the owner has taken or sent there but temporarily and with the intention of bringing it back home when the object for which it was sent has been accomplished. *A fortiori* such other State is powerless to impose an inheritance tax on such property merely because its owner happens to die during the interim.

The presumption would be against a change in situs, on the analogy of those cases which hold that an original domicile is not lost until a new legal residence is clearly acquired. *New York Central R. Co.* v. *Miller,* 202 U. S. 584; *Sun Printing & Publishing Assn.* v. *Edwards,* 194 U. S. 377, 383.

Gromer v. *Standard Dredging Co.,* 224 U. S. 362, distinguished.

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

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 BUTLER delivered the opinion of the Court.

The Pennsylvania inheritance tax law imposes a tax upon the transfer by will or intestate laws of personal property within the Commonwealth when the decedent is a nonresident at the time of his death.* Thomas B. Clarke, a resident of New York, loaned paintings to a museum in Pennsylvania and died testate while they were on exhibition there. His will was admitted to probate in New York, and letters testamentary issued to appellant to which, as trustee, the residuary clause transferred the pictures. The appellees, acting respectively as attorney general and secretary of revenue of Pennsylvania, proceeded to appraise and assess the pictures for the purpose of collecting the inheritance tax.

Appellant, maintaining that when the owner died the paintings had no actual situs within Pennsylvania because only temporarily there, brought this suit to enjoin enforcement on the ground that, if the statute be construed to tax the transfer by the death of the nonresident owner, it is repugnant to the due process clause of the Fourteenth Amendment. As the transfer cannot be subjected to taxes imposed by more than one state (*Frick* v.

* Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, provides in part as follows:

"Section 1. Be it enacted, etc., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

. . . . . .

"(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Pennsylvania, 268 U. S. 473, 488–492. *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83, 93. *Farmers Loan & T. Co.* v. *Minnesota,* 280 U. S. 204, 210. *First National Bank* v. *Maine,* 284 U. S. 312, 326–327.) appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. The New York Tax Commission as *amicus curiae,* filed briefs below and also in this court supporting the claim that the transfer is subject to the New York tax.

The district court, consisting of three judges, § 266, Jud. Code, dismissed the suit on the ground that appellant had an adequate remedy at law. This court reversed and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24. Then the case was submitted and tried on the facts alleged in the bill and answer and additional ones that were stipulated by the parties. Upon the circumstances detailed in its findings the court concluded that 79 portraits belonging to Clarke that were included in the collection on exhibition in the Pennsylvania museum at the time of his death then had an actual situs in that State, and held the transfer subject to the Pennsylvania inheritance tax.

The material substance of the findings follows:

In March, 1928, Clarke at the request of the director of the Pennsylvania museum, loaned to it the 79 pictures, together with 85 others owned by a corporation of which he was sole stockholder. At the time of the loan, they were, and long had been, kept in New York City. Five were at his residence, ten were on exhibition, and the remaining 64 were in storage. When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space and thereafter did nothing to secure another place in which to put them. But suitable space was always readily available in New York.

The arrangement with the museum was oral; no consideration was to be paid, and it was understood that at any time on Clarke's request the pictures would be returned to him. In the spring of 1929, Clarke wrote the director, at the latter's solicitation, that he would sell the entire collection at a stated price to anyone who would present it to the museum, it being understood that he would allow the pictures to remain at the museum for a reasonable time for the director to find such a donor. In May, 1930, he stated that this arrangement would terminate June 17, 1930. But at the director's request he permitted the pictures to remain, upon the understanding that, whenever he so requested, they would be returned to him in New York. Thereafter, he was willing to sell the collection as a whole for presentation to the Pennsylvania museum or to a substantially similar institution.

Clarke made no definite plans or request for the return to New York of the paintings. None was ever removed from the museum except four which, at his request, were sent to Virginia in April, 1929, for exhibition, and were returned in May. When he died, January 18, 1931, all the paintings were at the museum.

The museum was not conducted for profit. It secured through voluntary loans from nonresidents a substantial portion of the works of art which it displayed. None of these was regarded or intended as a permanent loan. It is customary for public museums to secure pictures for exhibition in this manner. The period elapsing until Clarke's death was shorter than the usual period of such loans.

The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner. If at the time of his death the actual situs of Clarke's pictures was in Pennsylvania, they were wholly under the jurisdiction

of that State. The fact that being a resident of New York he, by will probated in that State, disposed of the pictures detracted nothing from the exclusive jurisdiction of Pennsylvania to tax the transfer effected by his death. New York laws had no bearing other than that attributable to their implied adoption by Pennsylvania. Assuming actual situs in Pennsylvania, the paintings there on exhibition when the owner died are not to be distinguished, so far as concerns the imposition of the inheritance tax, from land located within that State. *Frick* v. *Pennsylvania, supra,* 489–493.

We regard as unimportant and negligible Clarke's suggestions that the pictures be returned, because on each occasion he acceded to opposing suggestions of the director and continued his consent that they remain temporarily at the museum subject to his orders. Mere floating intention that sometime in the future the pictures would be returned to New York was not sufficient to retain them within the jurisdiction of that State and to keep them without the jurisdiction of Pennsylvania. Cf. Story, Conflict of Laws, 8th ed., § 46. And obviously without weight are the facts that Clarke made the loan without pay, gave up the warehouse in which he had kept some of the pictures, and died without providing a place for them in New York.

The significant features of the transaction are these: Prior to the loan the pictures that went to make up the collection had an actual situs in New York. The loan was not made for a short and definite period and it was subject to the right of the owner to have the pictures returned to New York at any time. He did not call for their return but with his consent they were kept in Pennsylvania and there exhibited until he died two years and ten months after the loan. With the exception of the four pictures temporarily sent to Virginia, none was taken from Pennsylvania. For nearly two years next preced-

ing his death Clarke was willing—indeed, he authorized the director—to sell the collection to anyone who would buy at the specified price and donate them to the Pennsylvania museum. And during the last six months of his life he was willing to sell to any purchaser that would give them to any institution similar to the Pennsylvania museum. It does not appear that Clarke ever intended to have the pictures returned to New York at any definite date or upon the happening of any event or at all. Until his death he permitted the pictures to be kept and used in the Pennsylvania museum merely subject to his right at any time to order them taken to New York or elsewhere.

In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose for which they are created move from place to place and into different States. Cf. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596, 599. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 23. *Johnson Oil Co.* v. *Oklahoma,* 290 U. S. 158, 161. Before the loan was made the pictures had an actual situs in New York, so as to be within the taxing power of that State, though it cannot be said that they were there permanently located in the sense of that phrase when used in respect of land, buildings or other items of fixed real property. The location of the portraits in Pennsylvania was not merely transient, transitory or temporary but it was fixed in an established abiding place in which they remained for a long time. Undoubtedly, they became subject to the taxing power of the State. Cf. *Brown* v. *Houston,* 114 U. S. 622, 632–633. *Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577, 589. *Kelley* v. *Rhoads,* 188 U. S. 1, 7. *General Oil Co.* v. *Crain,* 209 U. S. 211, 230. By sending them into Pennsylvania and by his omission to have them returned to New York, and his lack of definite intention ever so to do, Clarke failed to

maintain an actual situs in New York and created one for them in Pennsylvania. The principle applied in *Frick* v. *Pennsylvania, supra,* 490–494, and in *Blodgett* v. *Silberman,* 277 U. S. 1, 18, governs this case.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MORGAN'S, INC. ET AL.

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

No. 12. Argued October 11, 12, 1934.—Decided November 5, 1934.

1. Where a corporation, without change of its accounting year, filed a separate return for the part of the year 1925 which preceded its affiliation with another corporation, and filed a consolidated return for the remainder of the year, the periods covered by the two returns are not separate "taxable years" but are each a part of the taxable year as previously constituted, within the meaning of § 206 (b) of the Revenue Act of 1926, which permits a taxpayer to carry over and to deduct during the next two "taxable years" a net loss sustained "for any taxable year." P. 124 *et seq.*
2. Section 200 (a) of the same Act, in providing that "the term 'taxable year' includes, in the case of a fractional part of a year, the period for which such return is made," does not compel a different result. Pp. 124–126.
3. While the term "includes" may sometimes be taken as synonymous with "means," it may be used also as the equivalent of "comprehends" or "embraces." Therefore, under § 200 (a), the phrase "taxable year" may, where the context requires it, be taken to embrace all fractional parts of the taxable year; thus, "loss sustained for any taxable year," which § 206 permits to be carried forward and deducted from gross income for two successive years, includes a loss shown in a fractional part of the first preceding taxable year for which separate returns are filed. Pp. 124–126.
4. In view of the extent to which the practice of fixing the tax with reference to the twelve months' accounting periods of the taxpayer has been recognized and carried into the structure of the revenue acts, only clear and compelling language added to § 200 (a) to define the phrase "taxable year" would justify application of that phrase in the remedial § 206 to periods of less than twelve months,

in such manner as to restrict the benefits which like sections in earlier revenue acts had extended to taxpayers entitled to enjoy them. P. 128.

5. Contemporary Treasury practice and Congressional Committee Reports make it clear that in enacting § 206 (b) the intention was that a taxpayer filing a return for a part of his taxable year should stand on the same footing, with respect to carrying over a loss shown by his return, as the taxpayer who filed a return for the entire twelve months. Pp. 129–130.

68 F. (2d) 325, affirmed.

CERTIORARI, 292 U. S. 618, to review a judgment reversing a decision of the Board of Tax Appeals which sustained the action of the Commissioner in assessing a deficiency in income tax.

Mr. H. Brian Holland, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John H. McEvers* were on the brief, for petitioner.

Mr. Lawrence E. Green, with whom *Mr. Haskell Cohn* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This petition for certiorari, 292 U. S. 618, presents for determination the single question, whether the two separate periods in 1925, for which the taxpayer made separate income tax returns, constitute two "taxable years" within the meaning of § 206 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 17, which permits the taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

On June 1, 1925, respondent, Morgan's, Incorporated, acquired all the voting stock of respondent Haines Furniture Company. Later, and in due course, in compliance with § 240 (a) and Article 634 of Treasury Regulations 69, the Haines Company filed its separate income tax return for the first five months of 1925 preceding the affiliation,

and the two affiliated corporations filed a consolidated return for the last seven months of the year and for the calendar years 1926 and 1927. During the seven months' period of 1925, and in 1926 and 1927, Morgan's, Incorporated, reported net income. In the first five and the last seven months of 1925, and in 1926, the Haines Company suffered net losses. In 1927 it made a net profit. Its net loss in the first five months of 1925, before affiliation, was shown in its separate return for that period. Its net losses for the last seven months of 1925 and for the year 1926 were shown in the consolidated returns of the two corporations for those periods and were deducted from the net income of Morgan's, Incorporated, in the returns for each of these periods. In the consolidated return for 1927, the Haines Company brought forward its loss for the first five months of 1925 and deducted it from its net income for 1927, under the provisions of § 206 (b). The Commissioner disallowed this deduction, and determined a corresponding deficiency for the taxable year 1927. The order of the Board of Tax Appeals sustaining his action was set aside by the Court of Appeals for the first circuit. 68 F. (2d) 325. Like rulings have been made by the Courts of Appeals in other circuits. *Arnold Constable Corporation* v. *Commissioner,* 69 F. (2d) 788 (C. C. A. 2d); *Crossett Western Co.* v. *Commissioner,* 73 F. (2d) 307 (C. C. A. 3rd); *Joseph & Feiss Co.* v. *Commissioner,* 70 F. (2d) 804 (C. C. A. 6th). A different conclusion was reached in *Wishnich-Tumpeer, Inc.* v. *Commissioner,* App. D. C., Mar. 12, 1934, under the Revenue Act of 1928, applied in circumstances and under regulations not involved in the present case.

Section 206 (b) permits the taxpayer to carry forward a net loss sustained " for any taxable year " and to deduct it from " net income of the taxpayer for the succeeding taxable year." If the net loss to be deducted is in excess of the net income for that year, he is permitted to deduct the excess " from the net income of the next succeed-

ing taxable year," referred to in the section as the " third year." In all cases the deduction is to be made under regulations made by the Commissioner.

It is plain that under this section the Haines Company, had it not taken advantage of the statutory provision authorizing consolidated returns, would have been permitted to carry over its net loss of 1925 for the next two succeeding years, and as it made no profit in 1926 its entire net loss for 1925 could have been deducted from its profit in 1927. But the government contends that the taxpayer has forfeited that privilege by making a return for the first five months of 1925, as it was required to do in order to avail itself of the privilege of making consolidated returns after the date of affiliation. It is said that the two periods in 1925, for which separate returns were made, are two separate taxable years within the meaning of the tax act, so that the " third year " within which § 206 permits the deduction is, in this case, the year 1926. This construction is required, it is urged, by the definition of " taxable year " in § 200 (a), which reads:

"(a) The term ' taxable year ' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term ' fiscal year ' means an accounting period of twelve months ending on the last day of any month other than December. The term ' taxable year ' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925." U. S. C. App., Title 26, § 931.

The provision that the term " taxable year " " includes " the period of less than twelve months for which a separate return is made, when read only with its imme-

diate context, is not free from ambiguity. It may be admitted that the term " includes " may sometimes be taken as synonymous with " means," and that the subsection may be taken to require, as the Government contends, that a fractional part of a normal taxable year of twelve months for which a return is made shall be treated, for all purposes, as a separate taxable year.

But the phraseology is also open to the construction that the word " includes " is used as the equivalent of " comprehends " or " embraces," and that by it the section merely adopts a familiar device in aid of statutory construction, by providing that wherever other sections refer to a " taxable year " that phrase may, if the context requires, be taken also to refer to or to " include " a fractional part of that taxable year, for which a separate return is made.[1] If the language is so construed and ap-

[1] The terms " means " and " includes " are not necessarily synonymous. The distinction in their use is aptly pointed by §§ 2, 200 of the Act itself. Section 2 (a) gives general definitions of ten terms; of these, three are stated to " include " designated particular instances, the other seven are stated to " mean " the definitions subsequently given. § 200, in addition to the definitions contained in subsection (a), gives four of which two use the verb " include " and two the verb " means." That the draftsman used these words in a different sense seems clear. The natural distinction would be that where " means " is employed, the term and its definition are to be interchangeable equivalents, and that the verb " includes " imports a general class, some of whose particular instances are those specified in the definition. This view finds support in § 2 (b), which reads: " The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined." This indicates that the particular is not necessarily a substitute for the general term, excluding more general meanings included within its scope. " Taxable year " is defined in § 200(a) as " meaning " a calendar or fiscal year of twelve months, and " including " a fractional part of a year; it hardly can be said that the words plainly and without ambiguity import that in § 206 (b) the term must be taken to mean only a fractional part of the year, to the exclusion of the alternative definitions of a calendar or fiscal year.

plied here, " the loss sustained for any taxable year," which § 206 permits to be carried forward, would include the loss sustained for the first five months of the taxable year for which the separate return was made, and that loss, as well as any other loss separately reported for the remaining part of the taxable year, not otherwise absorbed, could be carried forward to the taxpayer's next two succeeding taxable years, here the calendar years of 1926 and 1927. This construction finds support in the final sentence of the subsection which declares that the " first taxable year," which by definition " includes " a fractional part of the year, " shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925." Obviously the first five months of 1925 could not be the calendar year 1925. But a return made for those months, a fractional part of the year, might be treated, within the meaning of the section, as a return for the calendar year of which they are a part. It plainly is not contemplated that the five months are to be treated as a taxable year different from the calendar year.

But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part. See *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 464. The revenue acts since the Sixteenth Amendment have consistently assessed income taxes on the basis of annual accounting periods, either the calendar year or the different fiscal year which the taxpayer may adopt. From the beginning these periods have been known as taxable years and the provisions of the taxing statutes have been drafted and enacted with primary reference to such normal accounting periods. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 363; *Woolford Realty Co.* v. *Rose,* 286 U. S. 319,

326. The statutes since 1917, and related regulations, have uniformly required the taxpayer's returns to be made on the basis of the twelve months' accounting period shown by the taxpayer's books, whether it be the calendar year or a different fiscal year. The change of this period by the taxpayer from the calendar to a different fiscal year or the reverse, has been permitted only on consent of the Commissioner and upon compliance with appropriate regulations. These dominating features of income tax legislation were incorporated in the 1926 Act by §§ 212, 232, to which § 200 (a) expressly refers.

The definition of " taxable year " in § 200 (a) is therefore incomplete unless it be understood that the period for which a return is made, whether it be for a year or a fractional part of it, is to be related to the twelve months' accounting period of the taxpayer. Where the return is for a period of less than twelve months, the year of which it is a fractional part is the annual accounting period of the taxpayer, which is his taxable year. Here the taxpayers' taxable year, both before and after the year of affiliation, was the calendar year. After affiliation, as before, the affiliated corporations, although filing consolidated returns, continued to be separate taxable units. The consolidated returns operated only to unite them for the purpose of tax computation and the equitable apportionment between them of the tax thus computed. See *Woolford Realty Co.* v. *Rose, supra,* 328. During 1925, the year of affiliation, the accounting year of the taxpayers remained the calendar year and was their taxable year in the sense that it was the twelve months' accounting period for which they were bound to report income and pay taxes, although permitted to make separate returns for fractional parts of the year in order that the income for the seven months following affiliation might be reported in a consolidated return. The filing of separate returns for fractional parts of the year did not involve any change of the

taxpayer's accounting year, and had no effect upon the actual net income of the taxpayer for that year, or on the amount of tax payable except insofar as the provisions for a consolidated return were availed of.

Section 206 (b) appeared in the revenue acts prior to the addition, in § 200 (b), of the provision that the term taxable year includes fractions of a year. See §§ 204 (b) of the Revenue Acts of 1918, c. 18, 40 Stat. 1057, 1061, and 1921, c. 136, 42 Stat. 227, 231. In the 1921 Act it allowed to the taxpayer entitled to its benefits two full accounting periods of twelve months each within which he might carry over and deduct losses of an earlier taxable period. In view of the extent to which the practice of fixing the tax with reference to the twelve months' accounting periods of the taxpayer has been recognized and carried into the structure of the revenue acts, only clear and compelling language added to § 200 (a) to define the phrase "taxable year" would justify application of that phrase in the remedial section 206 to periods of less than twelve months, in such manner as to restrict the benefits which like sections had previously extended to taxpayers entitled to enjoy them.

It is no answer to the arguments of respondent to say, as the Government does, that the meaning of the phrase "taxable year" must be the same throughout the section. The same meaning need not always be attributed to a phrase which, by hypothesis, has more than one meaning for purposes of statutory construction. By the Government's own construction, taxable year as used in § 206 is taken to mean the first five months of 1925, the last seven months of that year, and the entire calendar year 1926. The question which we have to decide is whether the two taxable years, within which the taxpayer is permitted to deduct his loss, are to be taken as the two taxable years of the taxpayer, here the calendar years 1926 and 1927, even though the statute includes in the

loss to be deducted that incurred in the first five months of the calendar year 1925.

The provision of § 200 (a), that the term taxable year includes fractions of a year for which a return is required, first appeared in the like section 200 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 254. The corresponding sections 200 of the 1918 and the 1921 Acts made no reference to fractions of a year for which a return is made. They defined the taxable year as the twelve months of the calendar year or of the fiscal year on the basis of which the net income was computed, although §§ 226 and 240 of each act and related regulations provided in special circumstances for returns for a fractional part of a year. Before the 1924 Act the Commissioner had ruled that a fractional part of a taxable year for which a tax return was made was not a taxable year, and that in consequence the privilege granted to taxpayers by § 204 (b) of those acts of carrying over a loss sustained "for any taxable year" to the next or the two succeeding taxable years did not extend to losses shown by a return for a fraction of a year. This ruling was sustained by numerous decisions of the Board of Tax Appeals. See Takoma Grocery Co. *v.* Commissioner, 1 B. T. A. 1062; Arthur Walker & Co. *v.* Commissioner, 4 B. T. A. 151; Dorsey Drug Co. *v.* Commissioner, 7 B. T. A. 229; Turners Falls Power & Electric Co. *v.* Commissioner, 9 B. T. A. 435; General Box Corp. *v.* Commissioner, 22 B. T. A. 725, 729. The House Ways and Means Committee, in reporting the bill which became the Revenue Act of 1924 explained the amendment to § 200 as follows: "In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the re-

sult that the benefits of such section are denied to taxpayers who are required by law to make a return for a fractional part of a year." Report 179, Ways and Means Committee, 68th Cong., 1st Sess., p. 10. The report of the Senate Finance Committee uses identical language. Report 398, Finance Committee, 68th Cong., 1st Sess., p. 10.

The 1918 Act had permitted the carrying over of the loss for a single taxable year. The 1921 Act had extended the privilege for a period of two full years. There is no suggestion in the committee reports that by the 1924 amendment of § 200, in order to extend the benefits, conferred by § 204 in earlier acts, to the taxpayer who makes a return for a fractional part of his taxable year, there was the purpose to withhold from him any of these benefits. The implication is clear that there was not, and that the intention was that a taxpayer filing a return for a part of his taxable year should stand on the same footing, with respect to carrying over a loss shown by his return, as the taxpayer who had filed a return for the entire twelve months of the same taxable year. This intention was made effective by the addition to § 200 of words which, in terms, made the phrase "taxable year" as used in § 206 include "in the case of a return for a fractional part of a year," that part of the taxable year for which the return is made. Thus, under § 206 the loss for a taxable year which may be carried over includes the loss for the fractional part of the taxable year of the taxpayer, for which a separate return is required. The next succeeding taxable years to which the loss may be carried are likewise the taxable years of the taxpayer, here the calendar years 1926 and 1927.

It is of some significance that Article 634 of Treasury Regulations 69, which in case a consolidated return is made requires a separate return for the fractional part of a year not included in the consolidated return, uses the

phrase "taxable year" as referring to the taxable year of the taxpayer, and speaks of the fraction of a year for which a separate return is made as "the portion of the taxable year" during which the taxpayers were not affiliated. It does not refer to the return as the return for a taxable year, but only as a return for a fractional part of the taxable year, and such returns are required to be made and the tax is required to be paid at the same time as in the case of a return for the entire taxable year.

It is unnecessary to consider the effect to be given to returns required for a fractional part of the year, where the taxpayer changes his taxable year from a calendar year to a different fiscal year, or vice versa, with respect to which different considerations may enter. See *Wishnich-Tumpeer, Inc.* v. *Commissioner, supra.*

Affirmed.

McNALLY *v.* HILL, WARDEN.

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

No. 15. Argued October 12, 1934.—Decided November 5, 1934.

1. A prisoner who had been convicted and sentenced on three counts of an indictment, the sentence on the first count running concurrently with that on the second, and the sentence on the second and third counts running consecutively, petitioned for a writ of habeas corpus, asserting the invalidity of the conviction and sentence on the third count, and assigning as reason for the granting of the writ that consideration by the Parole Board of any application for a parole was precluded as a result of the void sentence. It was conceded that the sentence on the second count, the validity of which was not challenged, had not expired and that service of sentence on the third had not yet begun. *Held* that, as the detention under the sentence on the second count was lawful, the writ of habeas corpus could not be used to inquire into the validity of the conviction under the third count. P. 135.
2. The meaning of the term habeas corpus and the appropriate use of the writ in the federal courts must be ascertained by reference to

the common law and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute. P. 136.

3. The Habeas Corpus Act of 1679, 31 Car. II, c. 2, and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts. P. 136.
4. The writ of habeas corpus may not be used in the federal courts as a means of securing the judicial decision of a question which, even if determined in the prisoner's favor, could not result in his immedate release. P. 136.
5. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes subject to judicial inquiry. P. 137.
6. This Court has consistently refused, wherever the issue has been presented, to review upon habeas corpus questions which do not concern the lawfulness of the detention. P. 139.

69 F. (2d) 38, affirmed.

CERTIORARI, 292 U. S. 619, to review a judgment affirming a judgment dismissing a petition for a writ of habeas corpus.

Mr. John S. Wise, Jr., submitted for petitioner.

The indictment charges no crime under the laws of the United States.

The omission of allegation that the automobile was in interstate commerce when sold is fatal to the indictment; conviction under it gave the court no jurisdiction to impose sentence; and the question did not have to be raised *in limine.*

The District Court of the United States for the Eastern District of New York had no jurisdiction to try or sentence the petitioner for the sale of an automobile in New Jersey.

The argument that the subject can not be brought up on habeas corpus is specious for it involves the liberty of a citizen which can not be disposed of by refinements of procedure.

Mr. Justin Miller, with whom *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for respondent.

The count in controversy sufficiently discloses an offense within federal cognizance to render it immune from successful attack on habeas corpus.

The application for the writ of habeas corpus is premature.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari, 292 U. S. 619, brings this case here for review of a judgment of the Circuit Court of Appeals directing dismissal, on the merits, of a petition for a writ of *habeas corpus.* Petitioner was convicted and sentenced to be imprisoned upon two indictments framed under the Conspiracy Act of May 17, 1879, c. 8, 21 Stat. 4, as amended by Act of March 4, 1909, c. 321, § 37, 35 Stat. 1088, 1096, U. S. C., Title 18, § 88, and the National Motor Vehicle Theft Act of October 29, 1919, c. 89, 41 Stat. 324, 325, U. S. C., Title 18, § 408. The indictment, which alone need be considered here, was in three counts: the first charged petitioner and others with conspiracy to violate the provisions of the Motor Vehicle Theft Act; the second, the interstate transportation of a stolen motor vehicle; and the third, which is assailed here, the violation of § 4 of the Motor Vehicle Theft Act, by the sale in New Jersey of a motor vehicle which had been stolen in New York, "knowing that the vehicle had been so stolen and transported in interstate commerce." Petitioner was sentenced for a term of two years on the first count and for terms of four years each on the second and third counts, the sentence on the first to run concurrently with that on the second, the sentence on the second and third to run consecutively. Service of sentence was begun on November 30, 1931. It is conceded that the

sentence on the second count, less allowances for good behavior, has not expired and that service of sentence on the third has not yet begun.

On April 6, 1933, the petitioner filed his petition for writ of *habeas corpus* in the district court for the middle district of Pennsylvania. He assailed the conviction and sentence on the third count as void. No attack was made on the conviction and sentence on the other counts, but the petition advanced as reasons for granting the writ that under the Parole Act of June 25, 1910, c. 387, § 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650; U. S. C., Tit. 18, § 714, petitioner was eligible to apply for parole, to be granted, in the discretion of the Parole Board, after serving one-third of his sentence; that he had served one-third or more of the valid sentence on the first and second counts, but less than one-third of the total period of imprisonment to which he had been sentenced on the three counts; and that consideration by the Parole Board of any application for his parole was precluded by reason of the outstanding, but void, sentence on the third count.

Numerous objections to the validity of the conviction and sentence under the third count were urged either in the district court or the Court of Appeals. The only one considered by the Court of Appeals was that the third count was void because it failed to charge the petitioner, in conformity to the words of § 4 of the statute, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate or foreign commerce," but had charged him, instead, with knowingly selling a stolen motor vehicle which "had theretofore been transported in interstate commerce"; that it had thus failed to charge an offense against the United States since it appeared that the motor vehicle, at the time of the sale, had ceased to be the subject of interstate commerce.

The Court of Appeals did not consider whether the writ of *habeas corpus* could rightly be used to test the validity of the sentence on the third count, while the petitioner was in lawful custody under the sentence on the second, or whether the writ was improperly used as an attempted substitute for an appeal from the judgment of conviction. It contented itself with passing upon the sufficiency of the indictment and held that the act of sale charged was so closely related to the interstate transportation of the motor vehicle as to constitute the federal offense defined by the statute. It accordingly treated the alleged defects in the indictment as no more than formal and affirmed the order of the district court dismissing the petition. 69 F. (2d) 38.

We find it unnecessary to consider the questions raised or decided below, which the petitioner presses here. We conclude that, as it appears from the petition that the detention of petitioner is lawful under the sentence on the second count, there is no occasion, in a *habeas corpus* proceeding, for inquiry into the validity of his conviction under the third.

The use of the writ of *habeas corpus* as an incident of the federal judicial power is implicitly recognized by Article I, § 9, Clause 2 of the Constitution, which provides: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The justices of this Court and judges of the district courts were expressly given power to issue the writ by § 14 of the Judiciary Act of September 24, 1789, 1 Stat. 73, 81, 82, now embodied, with additions, in Chapter 14, Title 28, U. S. C. Under the statute in its present form the writ may issue "for the purpose of inquiry into the cause of restraint of liberty," but with the proviso that it "shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States,

. . . or is in custody for an act done or omitted in pursuance of a law of the United States . . . or is in custody in violation of the Constitution or of a law or treaty of the United States;" §§ 451, 452, 453, Title 28, U. S. C.

The statute does not define the term *habeas corpus.* To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute. *Ex parte Bollman,* 4 Cranch 75, 93, 94; *Ex parte Kearney,* 7 Wheat. 38; *Ex parte Watkins,* 3 Pet. 193, 201, 202; *Ex parte Yerger,* 8 Wall. 85, 95; *Ex parte Parks,* 93 U. S. 18, 21, 22; *Ex parte Siebold,* 100 U. S. 371, 375; *Crowley* v. *Christensen,* 137 U. S. 86, 94; see *Whitney* v. *Dick,* 202 U. S. 132; *Craig* v. *Hecht,* 263 U. S. 255.

Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of *habeas corpus ad subjiciendum,* by which the legality of the detention of one in the custody of another could be tested judicially. See Holdsworth, History of the English Law, Vol. 9, 108–125. Its use was defined and regulated by the Habeas Corpus Act of 1679, 31 Car. II, c. 2. This legislation and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts. See *Ex parte Watkins, supra,* 202; *Ex parte Yerger, supra,* 95; *Ex parte Parks, supra,* 21, 22.

The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his

detention were found to be unlawful.[1] In this, the statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law.[2] There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law.[3] Diligent search of the English author-

[1] The Habeas Corpus Act appears from its preamble to have been especially, although not exclusively, directed at cases in which the King's subjects were detained in custody upon a criminal charge where by law they were entitled to bail. It authorized the writ to issue, directed to any sheriff or gaoler, or other person "for any person in his or their custody." It commanded the production of the prisoner before the judicial officer to whom the writ was to be returned and directed that such officer "shall discharge" the "prisoner from his imprisonment" with provision for taking bail in his discretion, "unless it shall appear" to him that the petitioner "is detained upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters" or upon warrant for an offense "for which by law the prisoner is not bailable." 31 Car. II, § II (2), § III (6) (7).

[2] The writ, in its historic form, like that now in use in the federal courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to "have the body" of him "detained in our prison under your custody," "together with the day and cause of his being taken and detained," before the judge at a specified time and place "to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf." Richardson, The Attorney's Practice in the Court of Kings Bench, vol. 1, p. 369. Numerous writs, in substantially the same form, used between 5 Edw. IV and James II, are collected in Tremaine, Pleas of the Crown, 351–435. The earliest of these is reprinted in Coke's Second Institutes, 53. And see Hurd, Habeas Corpus, 232–233.

[3] Bacon, in his Abridgement, 425, declared the writ "is the most usual remedy by which a man is restored to his liberty if he hath by law been deprived of it." And Hale said that it was designed "to remove or avoid the imprisonment." Analysis of the Law, 78; see

ities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.[4]

Such use of the writ in the federal courts is without the support of history or of any language in the statutes which would indicate a purpose to enlarge its traditional function. Section 14 of the Judiciary Act, by the language already quoted, was at pains to declare that the writ might issue for the purpose of inquiring into the cause of restraint of liberty. Without restraint of liberty, the writ will not issue. *Wales* v. *Whitney,* 114 U. S. 564; *Stallings* v. *Splain,* 253 U. S. 339, 343. Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.

Considerations which have led this Court to hold that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it, *Ex parte Watkins, supra,* 203; *Knewel* v. *Egan,* 268 U. S. 442, 445, 447, lead to the like conclusion where the prisoner is

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also Pleas of the Crown, 143. And see Coke, Second Institutes, 52, 53; Comyns, Digest of the Laws of England, 454; Blackstone, Commentaries, vol. 1, 129–137.

[4] The Court of Kings Bench, in *Rex* v. *Clarkson,* 1 Stra. 444, in refusing to order the release of a woman content to remain with her guardian, said: "We have nothing to do . . . but only to see that she is under no illegal restraint." See *Brass Crosby's Case,* 3 Wils. 189, 198. "This is a writ by which the subject has a right of remedy to be discharged out of custody, if he hath been committed and is detained contrary to law."

lawfully detained under a sentence which is invalid in part. *Habeas corpus* may not be used to modify or revise the judgment of conviction. *Harlan* v. *McGourin,* 218 U. S. 442; *United States* v. *Pridgeon,* 153 U. S. 48, 63. Even when void, its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. That authority cannot be exercised where the custody is lawful.

Wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus,* questions which do not concern the lawfulness of the detention.[5] *In re Graham,* 138 U. S. 461; *In re Swan,* 150 U. S. 637, 653; *Harlan* v. *McGourin, supra; United States* v. *Pridgeon, supra; Nishimura Ekiu* v. *United States,* 142 U. S. 651; *Iasigi* v. *Van der Carr,* 166 U. S. 391; *Hale* v. *Henkel,* 201 U. S. 43, 77; *Ex parte Wilson,* 114 U. S. 417, 421. The lower federal courts have generally denied petitions for the writ where the prisoner was at the time serving a part of his sentence not assailed as invalid.[6]

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[5] In *Morgan* v. *Devine,* 237 U. S. 632, 637, the writ was denied on the merits and in *Ex parte Spencer,* 228 U. S. 652, petition for the writ was denied because sought to be used as a substitute for a writ of error, although in each case the petitioner had not served an admittedly valid part of his sentence. In neither case did the opinion discuss the question whether the application was premature.

[6] The Courts of Appeals in circuits other than the 8th have uniformly denied petitions for writs of *habeas corpus* when the prisoner was not at the time serving the part of the sentence said to be invalid. *Carter* v. *Snook,* 28 F. (2d) 609 (C. C. A. 5th); *Eori* v. *Aderhold,* 53 F. (2d) 840, 841 (C. C. A. 5th); *De Bara* v. *United States,* 99 Fed. 942 (C. C. A. 6th); *United States* v. *Carpenter,* 151 Fed. 214 (C. C. A. 9th); *Mabry* v. *Beaumont,* 290 Fed. 205, 206 (C. C. A. 9th; *Dodd* v. *Peak,* 60 App. D. C. 68; 47 F. (2d) 430, 431. And to the like effect, see *Woodward* v. *Bridges,* 144 Fed. 156 (D. C.); *Ex parte Davis,* 112 Fed. 139 (C. C.). This was the view of the Court of Appeals for the Eighth Circuit in *Connella* v. *Haskell,* 158 Fed. 285, 289. But in *O'Brien* v. *McClaughry,*

The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. The ruling sought is such as might be obtained in a proceeding brought to mandamus the Parole Board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it. This use of *habeas corpus* is unauthorized by the statutes of the United States, and for that reason the judgment must be

Affirmed.

WACO *v.* UNITED STATES FIDELITY & GUARANTY CO. ET. AL.

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

No. 5. Argued October 9, 1934.—Decided November 5, 1934.

In a suit brought in a state court of Texas against public contractors and a municipality for damages alleged to have been caused by a street obstruction, the city by a cross-action vouched in a surety company, which removed the cause to the federal district court. That court dismissed the cross-action and then remanded the case to the state court. *Held:*

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209 Fed. 816, 820, 821, that court, in order that the prisoner might apply for parole for the valid part of his sentence, remanded the prisoner with directions to the District Court to discharge the prisoner from custody with respect to the invalid sentence, but to remand him to custody upon the valid sentence. This procedure was followed by the same court in *Cahill* v. *Biddle*, 13 F. (2d) 827, 828, 829. But see *Morgan* v. *Sylvester*, 231 Fed. 886, 887; *Hostetter* v. *United States*, 16 F. (2d) 921, 923; and *Schultz* v. *Biddle*, 19 F. (2d) 478, 480, in the same court.

In *Colson* v. *Aderhold*, 5 F. Supp. 111, the district court for northern Georgia entertained a writ for *habeas corpus*, reduced the sentence from fifty to thirty-five years, and remanded him for custody to serve the valid part of his sentence.

1. The order dismissing the cross-action, if not reversed or set aside, was conclusive against the city and was appealable. P. 143.

2. While a reversal can not affect the order of remand, it will at least remit the entire controversy to the state court. P. 143.

67 F. (2d) 785, reversed.

CERTIORARI, 292 U. S. 618, to review a judgment dismissing an appeal from a judgment of the District Court.

Mr. John McGlasson, with whom *Mr. J. Walter Cocke* was on the brief, for petitioner.

Mr. G. B. Rogers, with whom *Mr. Tom P. Scott* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Curtis Boggs, a citizen of Texas, brought suit in a state court against Combs & Glade, contractors, citizens of Texas, and the City of Waco, Texas, for damages asserted to have been caused by collision with a street obstruction. The City by cross-action vouched in the Fidelity Company, respondent, a citizen of Maryland, surety on a bond of Combs & Glade, alleging that company was liable under the bond to pay whatever amount might be adjudged due by the City by reason of the fault of the contractors. The City prayed that if, upon the trial, the plaintiff should recover against it, judgment over should be rendered against the company for a like amount. The company removed the cause to the federal court on the ground that as to it a separable controversy existed.

The plaintiff, after removal, presented a motion in the District Court in which he asserted that no separable controversy existed, since the Fidelity Company was not an original party, but was brought into the case by cross-complaint; that the company was improperly joined under state law and such joinder could not give the fed-

eral court jurisdiction; that the cross-action and the removal proceeding were collusively filed to deprive the state court of jurisdiction; that no separable controversy was presented, as the cause of action set up by the cross-complaint could not proceed to trial separately from the main action, but was ancillary thereto, judgment against Combs & Glade being a prerequisite to any judgment against the company. The prayer was " that this entire cause be remanded to the said State Court of the State of Texas, and in the alternative that the suit of this plaintiff against the defendants Combs and Glade and the City of Waco be remanded to said court, and also in the alternative that the suit as against the United States Fidelity and Guaranty Company by the City of Waco, as evidenced by the cross complaint of the City of Waco, be dismissed and the balance of this action be remanded to the said State Court."

The District Court entered a single decree embodying three separate orders. First, being of the opinion that the record presented a separable controversy between the City and the Fidelity Company, it overruled the motion to remand. Secondly, reciting that the motion to dismiss the cross-complaint had come on to be heard, it found that as to the plaintiff's cause of action the Fidelity Company was an unnecessary and improper party, and granted the motion. Thirdly, since, upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held it lacked jurisdiction, and remanded the cause to the state court.

The City appealed, not from the order of remand, but from that dismissing its action against the Fidelity Company, alleging this was contrary to the law of Texas. The Circuit Court of Appeals dismissed the appeal, holding that, as no appeal lies from an order of remand, the cause was irrevocably out of the District Court, the action of that court in dismissing the city's cross-action was

moot, and its propriety could not be reviewed. The petitioner complains that this action leaves it in an anomalous position, for, whereas the Circuit Court in its opinion states, "the City by cross action, as permitted by the Texas practice," vouched in the Fidelity Company, the order of dismissal of the cross-action is outstanding, with the result that in the further proceedings in the state court, the District Court's order will be treated as conclusive upon the question of the City's right to maintain its cross-action. Evidently this result was not intended by the Circuit Court of Appeals. In its opinion it says: "all matters concerning the entire controversy, both those presented by the cross bill, and those presented by the main suit are now, because of the remand, pending in the State court and for its action, unaffected by the attempt of the Federal court to dismiss the City's cross action . . ."

The record contradicts this statement. If the District Court's order stands, the cross-action will be no part of the case which is remanded to the state court. Indeed, if the District Court was right, the cause could not have been remanded except for the exclusion of the Fidelity Company as a party. True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

We are of opinion that the petitioner was entitled to have the Circuit Court of Appeals determine whether the dismissal of its cross-action against the Fidelity Company was proper. If the District Court erred on this point, which we do not decide, its action should be reversed. A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy, with the Fidelity

Company still a party, to the state court for such further proceedings as may be in accordance with law.

The judgment of the Circuit Court is reversed and the cause remanded to that court with instructions to reinstate the appeal and to proceed therein in conformity with law.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BLISS.*

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

No. 6. Argued October 9, 10, 1934.—Decided November 5, 1934.

1. The base for computing the 15 per cent. deduction allowable for charitable contributions under § 23 (n) of the Revenue Act of 1928 is the "net income" defined by § 21 and includes capital net gain, even though the taxpayer elect to be taxed on capital net gain at the reduced rate prescribed by § 101 (a). P. 150.
2. This construction of the Act is required by its language and legislative history. P. 147.
3. The right of the taxpayer in computing net income to make deductions for charitable contributions, as expressly provided by § 23 (n) of the Act, is not modified by § 101, which merely prescribes a method for taxing a portion of the net income (capital net gain) at a special rate. P. 150.
4. The allowance of deductions on account of charitable contributions and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, based upon considerations of public policy, and are not to be narrowly construed. Pp. 150–151.

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* Together with No. 7, *Helvering, Commissioner of Internal Revenue,* v. *Harbison,* certiorari to the Circuit Court of Appeals for the Second Circuit.

No. 8. *Helvering, Commissioner of Internal Revenue,* v. *Colgate.* Certiorari to the Circuit Court of Appeals for the Second Circuit. November 5, 1934. Judgment affirmed, per stipulation of counsel to abide the decision in No. 7.

5. The reduction in the rate of tax upon capital gains should not be held to circumscribe the privilege granted in earlier acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used. P. 151.
6. The reënactment in Acts subsequent to the 1921 Act of the sections permitting the deduction for charitable contributions, indicates congressional approval of the uniform administrative interpretation through the years from 1923 to 1932. P. 151.

68 F. (2d) 890; *id.*, 1004, affirmed.

CERTIORARI, 292 U. S. 617, to review judgments reversing decisions of the Board of Tax Appeals, 27 B. T. A. 205, which sustained the Commissioner and redetermined deficiencies in income taxes.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. James W. Morris* and *J. P. Jackson* were on the brief, for petitioner.

Mr. R. L. von Bernuth, with whom *Mr. James McKinley Rose* was on the brief, for respondent in No. 6.

Mr. Hugh Satterlee, with whom *Mr. James E. MacCloskey, Jr.,* was on the brief, for respondent in No. 7.

By leave of Court, briefs were filed on behalf of certain individuals by *Messrs. Frederick Schwertner, Phillips Ketchum,* and *John E. McClure,* as *amici curiae.*

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases present the question whether deductions on account of charitable contributions are to be taken from net income as defined by § 21, or from ordinary net income as defined by § 101 (c) (7), of the Revenue Act of 1928.[1] Though the deductions claimed and disallowed in the two cases differ in amount, the principle involved

[1] 45 Stat. 797, 811; U. S. C. Tit. 26, §§ 2021, 2101.

is the same in both, and statement of the facts in No. 6 will suffice.

In 1928 respondent had a net income (before any deduction for contributions to charity) of approximately $500,000. Some $211,000 of this was gain from the sale of capital assets, upon which she elected to be taxed at the rate of 12½ per cent. pursuant to § 101 of the Act. During the year she made charitable contributions, as defined in the statute, to the amount of approximately $44,000. In her return she deducted the amount of the contributions from her total net income. She paid tax on $211,000 of the net income, after the deduction, at the rate of 12½ per cent. and on the balance at normal and surtax rates. The Commissioner of Internal Revenue ruled the respondent could not use the $500,000 of net income as a base on which to calculate the 15 per cent. deduction for charitable contributions, but must first subtract the $211,000 of net gain on sale of capital assets and use only the balance of $289,000 of ordinary net income. A reduction of the allowable deduction for charitable contributions to about $40,000, and a deficiency in tax paid of about $1,000, resulted. The Board of Tax Appeals sustained the Commissioner, but the Circuit Court of Appeals, by a divided court, reversed the Board.[2] We granted certiorari.

For "net income," the base specified in § 23 (n) upon which the 15 per cent. deduction of charitable contribu-

[2] 68 F. (2d) 890. The opinion of the Circuit Court of Appeals in the *Harbison* case is reported 68 F. (2d) 1004. The same result was reached in *White* v. *Atkins*, 69 F. (2d) 960 (C. C. A. 1), and in *Blow* v. *United States*, 5 F. Supp. 737 (D. C. N .D. Ill.). The rulings of the Board of Tax Appeals were at first in accordance with the petitioner's contention: Elkins *v.* Commissioner, 24 B. T. A. 572; Livingood *v.* Commissioner, 25 B. T. A. 585; and the instant cases, 26 B. T. A. 896; 27 B. T. A. 205 and 506. Subsequently the full Board reached an opposite result in Straus *v.* Commissioner, 27 B. T. A. 1116. See also Robinette *v.* Commissioner, 27 B. T. A. 1426.

tions is to be calculated, the petitioner would substitute "ordinary net income" as defined in § 101. So to read the Act would violate its plain terms and run counter to the history of the legislation.

The scheme of all the Revenue Acts since that of 1916 has been to sweep all income of every sort, including capital gains, into what is denominated gross income and to authorize certain deductions therefrom in order to arrive at net income,—the base for calculation of the tax. In the Act of October 3, 1917,[3] Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income, but limited the total deduction to 15 per cent. of the taxpayer's net income, calculated in the first instance without reference to the amount of such contributions. All of the later Acts have contained a like provision. The Acts provide that the taxpayer shall first deduct from gross income the total of all permissible deductions save that for contributions, thus arriving at a provisional net income, and then deduct therefrom his contributions, but in no event to an amount greater than fifteen per cent. of the provisional net income. By the last mentioned operation the final net income—the base for calculation of the tax—is ascertained. The relevant sections of the Act of 1928 are typical. They are copied in the margin.[4]

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[3] § 1201, 40 Stat. 330.

[4] Part II.—Computation of Net Income.

Sec. 21. Net Income.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

Sec. 22. Gross Income.

(a) General definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership

Commencing with the Revenue Act of 1921 Congress, in order to encourage realization of profits on capital assets, saw fit to relieve gain thus derived of the heavy surtaxes then applicable, and to permit the payment of tax at a flat rate of 12½ per cent. on so much of the taxpayer's income as represented the net gain from capital transactions.[5]

The accomplishment of this purpose of applying two rates to two different kinds of net income, required new provisions as to the base for each rate. Section 101 of the Revenue Act of 1928 prescribes the method to be followed. So far as material it is set forth in the margin.[6]

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or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

. . . . . .

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

. . . . . .

(n) Charitable and other contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

. . . . . .

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

. . . . . .

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. . . . (45 Stat. 797, 799, 801.)

[5] Revenue Act of 1921, § 206, 42 Stat. 232; Revenue Act of 1924, § 208, 43 Stat. 262; Revenue Act of 1926, § 208, 44 Stat. 19.

[6] Subtitle C—Supplemental Provisions.

Supplement A—Rates of Tax.

Sec. 101. Capital Net Gains and Losses.

(a) Tax in case of capital net gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all

In extending this relief to taxpayers, Congress might have modified the privilege theretofore existing with respect to charitable contributions, by directing that they should

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other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) Tax in case of capital net loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) Definitions.—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions. (45 Stat. 811; U. S. C. Tit. 26, § 2101.)

be deducted solely from capital net gain or should be apportioned and deducted ratably from ordinary net income and from capital net gain. The Acts, however, evince no such purpose. In the Act of 1928, as will be seen by reference to §§ 21, 22 and 23 (*supra*, note 4), the statutory concept of net income is preserved. These sections are found in Part II of Title I, which deals with "Computation of Net Income." Section 101, on the other hand, is found under "Supplemental Provisions," and is captioned "Supplement A—Rates of Tax." It is obviously directed to the matter of computation of tax on a portion of net income as defined in § 21. There is nothing novel in such a division of the statutory net income into parts for the purpose of applying different rates of tax, as witness the provisions fixing the rates on those portions of the entire net income attributable to dividends, earned income, interest on United States obligations, and gains from the sale of mines, and allowing credits for dependents.[7]

The plain requirements of § 101 are that in ascertaining ordinary net income there shall be excluded from the computation only items of capital gain, capital loss, and capital deductions. Charitable contributions covered by § 23 (n) obviously are not capital deductions as defined by § 101 (c) (3), but on the contrary are "ordinary deductions" within the meaning of § 101 (c) (4).

By the express words of § 23 (n) charitable contributions are to be deducted to ascertain net income as defined in § 21; and nothing in § 101, which prescribes merely a method for segregating a portion of that net income for taxation at a special rate, in any wise alters the right of the taxpayer to take the deduction in accordance with § 23 (n).

If the meaning of the Act were doubtful, we should still reach the same conclusion. The exemption of in-

[7] See §§ 25, 31, and 102 of the Revenue Act of 1928, 45 Stat. 802, 804, 812.

come devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed. Nor should the reduction in the rate of tax on capital gain, first granted in the Revenue Act of 1921, be held to circumscribe the privilege granted in the earlier Acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used. As has been shown the statutes if read as written lead to a contrary result. Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and hence in whole from ordinary net income.[8] The reënactment in later Acts of the sections permitting the deduction indicate Congressional approval of this administrative interpretation.

The judgments are

Affirmed.

MATTSON v. DEPARTMENT OF LABOR AND INDUSTRIES OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 29. Argued October 18, 1934.—Decided November 5, 1934.

1. The amendment of March 15, 1927, to the compulsory Workmen's Compensation Act of the State of Washington, limiting to three years the time within which a case may be reopened for the readjustment of compensation on account of the aggravation, diminution, or termination of the disability, does not deny due process of law to one who sustained a compensable injury while the pre-existing statute was in effect, though the latter contained no limitation as to the time within which such right might be asserted. P. 154.

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[8] See Corp. Trust Co., Fed. Inc. Tax Service, 1924, Par. 2033; I. T. 2104, Cum. Bull. III–2, p. 152; Mim. 3931, XI–1, C. B. 33.

2. The amendment did not deprive the claimant in this case of any vested right, but affected the remedy only, and that in a manner not unreasonable, arbitrary, or oppressive. P. 155.
3. A State may impose reasonable conditions upon the assertion of rights which are purely statutory. P. 154.

176 Wash. 345; 29 P. (2d) 675, affirmed.

APPEAL from a judgment affirming a judgment which dismissed an appeal from an order of the state administrative board.

Mr. Harry E. Foster for appellant.

Mr. Daniel Baker and *Mr. Miles H. McKey,* Assistant Attorney General of Oregon, with whom *Mr. G. W. Hamilton,* Attorney General of Washington, and *Miss Dorothee Scarbrough* were on the brief, for appellee.

By leave of Court, *Mr. I. H. Van Winkle,* Attorney General, *Mr. Miles H. McKey* and *Mr. Victor R. Griggs,* Assistant Attorneys General, filed a brief on behalf of the Industrial Accident Commission of Oregon, as *amicus curiae.*

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Since 1911 the State of Washington has had a workmen's compensation act applicable to extrahazardous employments. Until March 15, 1927, the statute contained a section providing:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation

in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."[1]

On February 7, 1927, while the quoted section was in force, the appellant injured his arm while doing extra-hazardous work. March 15, 1927 the law was amended and the section in question was altered to provide:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, *made within three years after the establishment or termination of such compensation,* or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment." [2] (Italics supplied.)

Pursuant to a claim duly presented to the appellee, the appellant was paid from the State workmen's insurance fund on January 17, 1928, the sum of $240 in final settlement for permanent partial disability and the case was closed. May 10, 1933 he filed with the appellee a petition for reopening of his claim on the ground that his condition had become aggravated due to the injury. The appellee dismissed the petition for the reason that the

[1] Session Laws, 1911, c. 74, § 5 (h), p. 360; Session Laws, 1923, c. 136, § 2 (h), p. 397. The only change made in the quoted paragraph by the Act of 1923 was the substitution of the word "further" for the word "future."

[2] Session Laws, 1927, c. 310, § 4 (h), p. 844; Rem. Rev. Stat. § 7679 (h).

three year statute of limitations barred the claim. An appeal to the Supreme Court of Thurston County was dismissed, and the Supreme Court of the State affirmed the judgment. The case is here on appeal.

The appellant insists that at the date of his injury the statute conferred upon him not only a right to make his original claim and receive compensation, but a further right to file an additional claim, without limit as to time, and to receive readjusted compensation for aggravation of his condition due to his injury. This, he says, is a vested right, is property, and its enforcement may not be abolished or limited, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution.[3] The claim cannot be sustained.

The Washington Workmen's Compensation Act is compulsory. In the exercise of the State's police power it abolishes common law actions for negligence, imposes upon industry a levy calculated in accordance with the risk of injury to workmen, places the money collected in a state-administered fund, and substitutes for the employee's common law right of action a purely statutory right to payment from the fund of a sum adjusted to the character and extent of the injury.[4]

That the State may impose reasonable conditions upon the assertion of the claim does not admit of argument. Considerations justifying a reasonable limitation of time within which further increase of compensation due to aggravation of condition may be claimed are so obvious as hardly to require statement. Appellant does not urge that the prescription of a period of three years for presenting such a claim is unreasonable, but that it is beyond the

[3] Below and in his assignments of error here the appellant asserted the section offends Article I, § 10, but, at the bar, he abandoned this contention, and we need not consider it.

[4] See *State ex rel. Davis-Smith Co.* v. *Clausen,* 65 Wash. 156; 117 Pac. 1101; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

State's power. The section under attack merely limits the time for the assertion of the right, affects the remedy only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process.

The judgment is

Affirmed.

WARNER, ADMINISTRATRIX, *v.* GOLTRA.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 4. Submitted October 8, 1934.—Decided November 5, 1934.

1. In § 33 of the Merchant Marine Act of 1920, giving to "any seaman" injured in the course of his employment a cause of action for damages similar to that given by the statutes of the United States to railway employees, the term "any seaman" includes the master of the vessel. P. 156.
2. This provision should be construed liberally; "seaman" in this particular context should be interpreted in its broad sense, not in the narrower sense distinguishing the crew from the master, found in other statutes; and this accords with the purpose of the Act as revealed by its history and by other legislation *in pari materia*. Pp. 157–159.
3. Section 713, c. 18, of Title 46 of the U. S. Code, purporting to define master and seaman, must be confined to the sections in chapter 18 which were derived from the same earlier legislation as § 713; it is inapplicable to § 33 of the Merchant Marine Act of 1920, placed in the same chapter 18 by the compilers of the Code. P. 160.
4. The compilers of the U. S. Code were not authorized by Congress to amend existing law. P. 161.

334 Mo. 396; 67 S. W. (2d) 47, reversed.

CERTIORARI, 292 U. S. 617, to review the affirmance of a judgment dismissing the complaint in an action for damages for the death of the master of a vessel. The action was brought by the administratrix of the master against the owner of the vessel.

Messrs. Walter P. Armstrong, Samuel W. Fordyce, Henry J. Richardson, and *C. Powell Fordyce* submitted for petitioner.

Mr. Joseph T. Davis submitted for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The master of a tug-boat met his death on the waters of the Ohio River through the negligence of a pilot employed to navigate the tug. The personal representative brought suit against the owner under the Merchant Marine Act of 1920, § 33 (41 Stat. 1007; 46 U. S. C. § 688) for the recovery of damages. The trial court sustained a demurrer to the complaint on the ground that a "master" is not a "seaman" within the meaning of the statute. The Supreme Court of Missouri affirmed the judgment for the owner. 334 Mo. 396; 67 S. W. (2d) 47. The case is here on certiorari. 292 U. S. 617.

The statute is set forth at large in opinions of this Court. *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 383; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371. It gives to "any seaman" injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees. In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.'" *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52. None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. "Words," we said, "are

flexible." *International Stevedoring Co.* v. *Haverty, supra,* at p. 52. Later decisions of this Court have been conceived in a like spirit (*Jamison* v. *Encarnacion,* 281 U. S. 635; *Uravic* v. *F. Jarka Co.,* 282 U. S. 234; *Cortes* v. *Baltimore Insular Line, supra,* at p. 375), and other courts have followed suit.[1]

The problem for solution here stands out upon this background.

There are contexts in which the word seaman is held to exclude the master or even any officer. See, e. g., R. S. § 4530, as amended by § 31 of the Merchant Marine Act of 1920 (46 U. S. C. § 597); also 46 U. S. C. §§ 564, 568, 570, 592, 594, 597, 658, reënacting R. S. §§ 4511, 4515, 4517, 4525, 4527, 4530, 4561 as from time to time amended. There are other contexts in which it takes them in. 28 U. S. C. § 837; also R. S. § 2174; *In re Scott,* 250 Fed. 647, 648; *The Balsa,* 10 F. (2d) 408; *The Burns Bros., No. 31,* 29 F. (2d) 855. The respondent points to statutes that develop the antithesis between a seaman and those over him. See citations, *supra.* They do not carry us very far, any more than the contrast that exists for many purposes between a seaman and a stevedore. In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects "the operation and welfare of the ship when she is upon a voyage." *The Buena Ventura,* 243 Fed. 797, 799, where a wireless operator was brought within the term. In a narrow sense the term is

[1] See *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619; *The Sea Lark,* 14 F. (2d) 201; *Kuhlman* v. *W. & A. Fletcher Co.,* 20 F. (2d) 465; *Rogosich* v. *Union Dry Dock & Repair Co.,* 67 F. (2d) 377; and cf. *The Buena Ventura,* 243 Fed. 797, 799: "The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer,' a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning."

limited to one who is an ordinary seaman and nothing more, a seaman as opposed to the master or an officer. One can find a like range of variation in the use of the word "crew." "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." *United States* v. *Winn*, 3 Sumn. 209, 213, 214, Fed. Cas. No. 16740 (Story, J.); cf. *The Buena Ventura, supra,* 799 (Hough, J.); *The Bound Brook,* 146 Fed. 160, 164; *United States* v. *Huff,* 13 Fed. 630. What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Cortes* v. *Baltimore Insular Line, supra.* This restriction upon remedies was applicable to ordinary seamen, but applicable also to officers and even to the master. *The George,* 1 Sumn. 151, Fed. Cas. No. 5,329 (Story, J.); *The Balsa, supra.* "It is said, that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. . . . No authority is cited for this position; and I am not aware that any exists." Story, J., in *The George, supra,* at p. 155. Cf. the rule in Great Britain under the Merchant Shipping Act, 1906 (6 Edw. 7, No. 48, § 34). The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We

stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibres still clinging to the soil.

The purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the setting of its history. Section 33 of the Merchant Marine Act of 1920 is derived from § 20 of the Act of 1915. 38 Stat. 1185. The parent section was aimed at the fellow-servant rule in its application to torts upon navigable waters. *Chelentis* v. *Luckenbach S. S. Co., supra.* It provided that " in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." Masters were thus recognized as within the genus seamen, though they were seamen having command. The decision of this Court in the *Chelentis* case gave warning that the change, if any, thus effected, did not avail to increase the damages beyond the cost of cure and maintenance. Thus warned, the lawmakers amended § 20 of the Act of 1915 by substituting § 33 of the Act of 1920. We cannot believe that in this process of amendment the word seamen lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species of seamen, i. e., seamen having command. The change is too sudden to be accepted as intended unless unmistakably declared.

The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act *in pari materia,* the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*) adopted in 1927. This act expressly excludes from its " coverage " a " master or member of a

crew of any vessel." § 903. The exclusion was at the request of seamen who notified the committee in charge that they preferred the remedy for damages under the act of 1920 to the benefits that would be theirs under a system of workmen's compensation. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., on S. 3170, at p. 17; Cong. Rec., 69th Cong., 2d Sess., vol. 68, part 5 p. 5908; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 134, 136. The bill was accordingly amended in its progress through the House by declaring the exception. There can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike were already adequately protected in case of injury or death. The belief had a sound foundation in the act of 1920. Cf. *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at p. 134.

In reaching the opposite conclusion, the Supreme Court of Missouri rested its opinion on § 713 of Title 46, c. 18 of the U. S. Code, which for the purpose of construction defines a master and a seaman as well as other terms.[2] With a few verbal changes § 713 is a reënactment of § 65 [3] of the Act of June 7, 1872 (17 Stat. 277), which was

[2] " In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

[3] " That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this

then known as § 4612 of the Revised Statutes. In the compilation of the Code some of the provisions for the protection of seamen contained in the Act of 1872 were placed in Title 46, which relates to shipping, and particularly in Chapter 18 of that title, which relates to "Merchant Seamen." They had previously been reenacted, as parts of the Revised Statutes, along with § 65. The Acts of 1915 and 1920 were placed in the same chapter and title, and were thus brought into contiguity with the sections carried over from the Act of 1872. Very clearly the change of location did not work a change of meaning. The rule of construction laid down in § 713 must be confined to those sections of the chapter which were contained in the Act of 1872, or in the equivalent provisions of the Revised Statutes, before the Code had rearranged them. The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread. 44 Stat. Part I, 1.[4] To this it must be added that § 713, even in its relation to the sections fairly within its range, is "directed to extension not to restriction." *Uravic* v. *Jarka Co., supra,* at

act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' within the meaning and for the purposes of this act. . . ."

[4] "The matter set forth in the Code, . . . shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments."

p. 239. It means that "for the purposes of the chapter 'seamen' shall include persons who otherwise might be deemed not to be seamen." It puts into the class some that might otherwise be excluded; it does not take any one out who would otherwise be there.

The case for the respondent reduces itself to this, that by express or implied antithesis the word seaman is used in many statutes to designate a class of mariners exclusive of the master. It is also true, however, that in these same statutes a seaman excludes a stevedore. A goodly number of the statutes where the antithesis is sharpest lay a duty upon the master to be performed for the seamen under him. In laws so framed, there is no room for construction. A goodly number in addition give a remedy to seamen for wages wrongfully withheld, or define terms of payment that agreement may not vary. In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others. The master, on the other hand, is able in most instances to drive a bargain for himself, and then when the bargain is made, to stand upon his rights. Discrimination may thus be rational in respect of remedies for wages. *The Bethulia,* 200 Fed. 876; *The Putnick,* 291 Fed. 902. It is neither rational nor just if extended to remedies for bodily wounds. At such times master and seaman are approximately equal. Congress did not mean that the master, any more than the seaman, should be left without a remedy if wounded in his body, or that his dependents were to be helpless if the wounds resulted in his death.

The judgment is reversed, and the cause remanded to the Supreme Court of Missouri for further proceedings not inconsistent with this opinion.

Reversed.

HEGEMAN FARMS CORP. *v.* BALDWIN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 27. Argued October 8, 9, 1934.—Decided November 5, 1934.

1. By orders issued under the New York Milk Control Statute dealers were required to pay producers of milk a minimum price per quart and were subject to higher minimum resale prices. Competition made it impossible for the dealer in this case to sell for more than the resale minimum, and the "spread" or difference between that and the minimum purchase price was not enough to cover the cost of its operations. *Held* that upon these facts only, with nothing to show the degree of efficiency with which its business was conducted, there is no ground to conclude that the price limits are arbitrary and therefore in violation of the due process clause of the Fourteenth Amendment. P. 170.
2. The Fourteenth Amendment does not protect a business against the hazards of competition. *Public Service Comm'n* v. *Great Northern Utilities Co.*, 289 U. S. 130. P. 170.
3. One who complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, should seek relief by resisting the regulations before that board or by applying to the board to modify them, before bringing suit. *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570. P. 172.

6 F. Supp. 297, affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing the bill in a suit attacking an order fixing minimum prices under the New York Milk Control Act.

Mr. Leonard Acker, with whom *Mr. Samuel Rubinton* was on the brief, for appellant.

The orders are unconstitutional, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

The operating costs of plaintiff are very reasonable and indicate a well managed and efficient business unit.

Theoretically plaintiff could sell its milk at any price, but actually competition fixed the designated "minimum" as the highest selling price. The "spread" between the purchase price fixed by defendants and the selling price which economic forces fixed at the minimum selling price designated by defendants is insufficient, as the District Court found, to afford to plaintiff a fair return. This, in principle, is exactly the situation in every "rate" case in which a rate is held unconstitutional.

The District Court took the view that this suit presented no more than the case of a milk dealer faced with competition, unable to sell its milk above the price fixed by that competition, and thus unable to earn a fair return. This view overlooks that the statute and defendants' orders took from plaintiff the power it previously possessed to bargain with milk producers as to the purchase price of milk.

It is the ordinary business risk for a vendor to be unable to make a fair return by reason of competition alone and to be forced out of business; but it is an altogether different proposition for the State to intervene and by means of price regulation prevent the vendor from making a fair return and to destroy his business.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

A State may not properly impose confiscatory rates merely because they will not destroy the entire industry, but will eventually lead to a monopolistic control of the market and a higher price to the ultimate consumer.

The primary purpose of the statute, under which defendants issued their orders, is the protection of the dairy farmers of New York. The resultant monopoly of dis-

tribution in the hands of a few large companies will tend to destroy large numbers of milk producers.

A statute is valid only if " the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U. S. 502; *Adair* v. *United States,* 208 U. S. 161. This rule should apply equally to administrative orders issued under a statute.

No fair analogy is presented between health measures and defendants' confiscatory price-fixing orders.

In testing the validity of a measure which regulates the use of private property, it is the degree of regulation which is the important consideration and not the solitary factor that the law is a regulatory one. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415. Even the usual zoning law has been treated as invalid in its application to a particular owner when its operation is such as to deprive such owner of all beneficial use of his property. *Eaton* v. *Sweeney,* 257 N. Y. 176; *Dowsey* v. *Kensington,* 257 N. Y. 221.

In every case in which a State is allowed to fix the rates which may be charged for a commodity or a service, the underlying theory is that such fixation of rates is a part of the police power of the State. *Union Dry Goods Co.* v. *Public Service Comm'n,* 248 U. S. 372, 375; *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389.

Defendants' orders do not, in fact, tend to promote the public welfare, and their effect is to contravene the purpose of the Milk Control Law. But even though they were beneficial to the public instead of detrimental, such fact would not validate them, in view of their confiscatory nature. *Vide* Holmes, J., in *Pennsylvania Coal Co.* v. *Mahon, supra,* at p. 416; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267, 272.

The purpose and effect of the statute are to deprive the milk producers of other States of the competitive advantage over New York producers possessed by them.

The law therefore discriminates against the products of other States and is unconstitutional.

Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

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 appellees.

The orders are not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained appellant from asking a greater price.

At what point should the minimum price be established? Clearly it should not be fixed high enough to yield a fair return on the operations of the least efficient dealers. That is the highest tolerable point for fixing a maximum price.

Should the minimum be high enough to yield a fair return to dealers of average efficiency? There is something to be said for and against that conclusion. Perhaps the minimum now involved was that high. There is no finding that the appellant is of average efficiency, although there is some material in the moving papers which probably is intended to yield that inference.

Fixing the minimum price at the point where only the most efficient dealers can earn a fair return would seem to be the course most in the public interest. The pressure of competition will then compel efficiency as a necessary condition for survival. We submit that there is no constitutional objection to a minimum price fixed so low. Indeed, we believe that the very nature of a minimum price is such that the failure to fix any minimum price whatever is no constitutional grievance.

Difficulties lie in the way of fixing a minimum resale price high enough to enable appellant to operate profitably, without at the same time compelling other dealers to operate at an outrageous profit.

Essentially, appellant's grievance is against the order fixing a minimum price which it must pay producers for milk. But the power to fix this can scarcely be questioned since *Nebbia* v. *New York,* 291 U. S. 502. The attack must be upon the reasonableness of the minimum price fixed. Appellant does not support such an attack otherwise than by the inference derived from its own failure to make a profit. We submit that a constitutional case is not made out so easily. Why does appellant infer that its loss is a direct result of only one factor in its costs? Apparently because it is a novelty to have that cost fixed. Appellant does not allege its labor costs or taxes or freight rates as a constitutional grievance.

The statute is not unconstitutional in any matter of which appellant can complain.

We respectfully submit that the appellant should have pursued its administrative remedies provided by statute before seeking the aid of a federal court of equity (*Gorham Mfg. Co.* v. *Tax Comm'n,* 266 U. S. 265; *Chicago, M., St. P. & P. Ry. Co.* v. *Risty,* 276 U. S. 567), and that it should not have pretended to be obeying the orders while really disobeying them; its conduct should disentitle it to relief on constitutional grounds in a court of equity.

Mr. Justice Cardozo delivered the opinion of the Court.

In this suit for an injunction, the appellant, a wholesale milk dealer, contests the validity under the Fourteenth Amendment of orders of the New York Milk Control Board limiting the price of milk. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), has denied a motion by the complainant for an interlocutory injunction, and granted a motion by the defendants to dismiss the bill. 6 F. Supp. 297. No testimony was taken, but for the purposes of the two motions certain facts were stipulated and

embodied in findings. Nothing important is there added to what is stated in the complaint. From the final decree there has been an appeal to this court. 28 U. S. C. § 380.

The attempt is made in the bill to state two causes of action, pleaded in separate counts. The first cause of action assails the Milk Control Act (N. Y. Laws 1933, c. 158) as a whole, and was dismissed on the authority of *Nebbia* v. *New York*, 291 U. S. 502. It has not been pressed in this Court, and must be treated as abandoned.[1] The second cause of action, the only one contested here, assumes provisionally the validity of the statute and assails the orders made under it in their application to appellant. On that head the bill recounts the orders of the Board prescribing a minimum selling price to be charged by dealers to their customers and also a minimum buying price to be paid by dealers to producers. The milk sold by the appellant is known as Grade B. At the time of the trial the minimum wholesale price for milk of that grade in the City of New York was nine cents per quart, except that dealers such as the appellant marketing their product without a well established trade name might sell one cent a quart below the minimum for others. By the same orders the minimum price for fluid milk to be paid to producers was fixed at five cents a quart. A separate schedule of the orders gives the rates for fluid cream. The complainant's license was revoked by the Board after notice and a hearing because of underpayments to producers. The license was, however, to be reinstated upon payment of the difference ($23,000). The bill prays a decree cancelling the revocation with exemption for the future.

The question on this appeal is whether the allegations of the bill, admitted in the stipulation, but not substan-

[1] The Act of 1933 has been amended and continued by Laws of 1934, Chap. 126.

tially enlarged, make out a cause of action. For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been no attempt by the Board to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant is able to charge. The "spread" between what must be paid to the producers and what can be collected from the customers is so small that it "is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation." This the bill and findings state. They tell us also that the properties have a value of more than $450,000. They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling. They do not even tell us whether it was earning a fair return on its investment before the orders were adopted. The omission is the more significant because, according to official records, the "spread" has been increased, instead of being diminished, through the operation of control. Report of the Milk Control Board, March 1934, pp. 17, 18.[2] For all that appears upon this record, a change of the minimum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its competitors. It might still be driven to the wall without the aid of a differential that would neutral-

[2] "If allowances are made for the additional milk which, because of the tightening-up of the classification for Class 1 milk occurring on February 16, 1934, must be included in Class 1, the milk dealers' spread at this time is approximately 0.12 cents per quart greater than it was just before the Board was created."

This statement in the report is followed by schedules which contain supporting data.

ize inequalities of capacity or power. If different minima would help, the pleading leaves us in the dark as to what those minima should be. There is no statement that a different selling price could be fixed with fairness to consumers, or a different purchasing price with fairness to producers. The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit.

A bill of complaint so uncertain in aim and so meagre in particulars falls short of the standard of candor and precision set up by our decisions. *Public Service Comm'n* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136; *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440, 447. True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the Board. To make the selling level higher might be unfair to the consumers; to make the purchasing level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition.

Public Service Comm'n v. *Great Northern Utilities Co., supra,* at p. 135. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

Much is made of a supposed analogy between the plight in which the appellant finds itself and that of public utilities subjected to maximum rates that do not yield a fair return. But the analogy, when scrutinized, is seen to be unreal. A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent. True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction. Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose

of its framers. *Nebbia* v. *New York, supra,* pp. 515, 516. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favoritism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof.

The statute (N. Y. Laws 1933, c. 158, § 312 [d] [f]) contains provisions whereby a dealer dissatisfied with any administrative order may be heard in opposition, or may apply to the Board afterwards to modify its ruling. This is an administrative remedy which in the one form or the other the appellant should have utilized before resorting to a suit. *P. F. Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575. There is no statement that it did so.

The decree should be

Affirmed.

MR. JUSTICE SUTHERLAND concurs in the result.

ZELLERBACH PAPER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.*

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

Nos. 37 and 38. Argued October 17, 1934.—Decided November 5, 1934.

1. The Revenue Act of 1921, approved November 23, but effective January 1 of that year, did not nullify a return by a corporation for its fiscal year ending April 30, 1921, filed in July 1921; in effect, it adopted and renewed the return retroactively from January 1, and the time within which the Commissioner might make a de-

* Together with No. 39, *National Paper Products Co.* v. *Helvering, Commissioner of Internal Revenue,* certiorari to the Circuit Court of Appeals for the Ninth Circuit.

ficiency assessment was limited by § 250 (d) to four years from the filing of such return. P. 176.

So *held* where the increase of tax liability under the 1921 Act was ascertainable by simple computation from returns already filed, and where the deficiency assessments, in large amounts, were based mainly on grounds unrelated to any changes in the law.

2. Under the Act of 1921, *supra,* a second return, reporting an additional tax for the period covered retroactively, would be an amendment or supplement of the return already on file, and being effective by relation, would not toll a limitation which had once begun to run. P. 180.
3. Review by certiorari will not extend to a point not considered by the court below nor mentioned in the petition for certiorari and response thereto. P. 182.

69 F. (2d) 852, reversed.

CERTIORARI, 292 U. S. 621, to review judgments of the court below affirming the Board of Tax Appeals, 26 B. T. A. 96, sustaining deficiency assessments of income and profits taxes.

Mr. John Francis Neylan, with whom *Mr. J. Paul Miller* was on the brief, for petitioners.

Assistant to the Attorney General Stanley, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy in these cases hinges upon the date when the statute of limitations began to run against deficiency assessments by the Commissioner of Internal Revenue.

On July 16, 1921, Zellerbach Paper Company filed a consolidated income and profits tax return in behalf of itself and a subsidiary, National Paper Products Com-

pany, for the fiscal year beginning May 1, 1920, and ending April 30, 1921.

On March 15, 1921, it filed an income and profits tax return for the calendar year 1920 in behalf of A. S. Hopkins Company, a dissolved subsidiary, including in its own consolidated return the income of the A. S. Hopkins Company between January 1, 1921 and the date of dissolution.

At the filing of these returns the income and profits tax statute applicable to the taxpayers was the Revenue Act of 1918 (40 Stat. 1057). Later (on November 23, 1921) another tax statute, the Revenue Act of 1921 (42 Stat. 227), became a law, with a provision (§ 263) that it should take effect retroactively as of January 1, 1921.

By the Act of 1921 (§ 239a) every corporation subject to taxation thereunder was required to "make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title." Treasury Decisions issued by the Commissioner in March, 1922 (T. D. 3305, March 16, 1922, amended by T. D. 3310, March 28, 1922 [1]) gave notice in substance that taxpayers who had filed returns under the Act of 1918 and who were subject to an additional tax for the same period under the Act of 1921, should file a new or supplemental return covering such additional tax. By implication this was a ruling that an additional return was not required of taxpayers whose taxes were not increased by the new law.

[1] The text of the amended decision is as follows:

"If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the revenue act of 1918, and is subject to additional tax for the same period under the revenue act of 1921, a return covering such additional tax shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and regulations, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. . . ."

By implication also the new return was to be limited to a statement of the facts or figures necessary to exhibit the additions, without repetition of facts or figures that had been well returned already.

The Act of 1921 in its application to the petitioners made one change and one only. If the net income of the taxpayer was more than $25,000, there was to be a denial of the credit or exemption of $2,000 otherwise allowable. § 236b. The fiscal year of the petitioners ran, as we have seen, from May 1, 1920, to April 30, 1921, and of this period one-third was in the calendar year 1921. The net income being largely in excess of $25,000, the effect of the new law was to cut down the permissible credit by one-third of $2,000, thus increasing the tax by little more than a nominal amount. What that amount was could be ascertained by a simple computation, dependent upon data fully supplied by the return already filed, and calling only for the application of the statutory rule.

The petitioners did not make a new or supplemental return correcting the computation in the one on file. The change was so trivial and so obvious as perhaps to lead them to believe that no amendment was expected. Be that as it may, they heard nothing more from the Bureau of Internal Revenue with reference to their taxes till May 11, 1928, an interval of nearly seven years, when they received from the Commissioner notices of deficiency assessments in large amounts upon grounds unrelated (except for the deduction already mentioned) to any changes in the law. The Revenue Act of 1921 provides (§ 250d) that income and profits taxes shall be determined and assessed by the Commissioner within four years after a return is filed. If the return filed by the petitioners or in their behalf in July, 1921, served to set in motion the term of limitation, the assessments were too late. The Board of Tax Appeals, however, upheld the action of the Commissioner, and ruled (two members dissenting) that

the return on file was a nullity, and hence that the statute of limitations had never been set running. 26 B. T. A. 96. The Court of Appeals for the Ninth Circuit affirmed. 69 F. (2d) 852. In so doing, it refused to follow decisions directly to the contrary by courts of coördinate jurisdiction. *Myles Salt Co., Ltd.* v. *Commissioner,* 49 F. (2d) 232 (Fifth Circuit); *Isaac Goldmann Co.* v. *Commissioner,* 60 App. D. C. 265; 51 F. (2d) 427 (Court of Appeals, District of Columbia); *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346 (Eighth Circuit). Because of that conflict writs of certiorari were granted by this Court. 292 U. S. 621.

The opinion of the court below rests heavily upon the argument that what is required by the statute is a return under the act, and that this excludes by implication a return by the taxpayer before the act became a law. Various sections are cited as enforcing that conclusion. See, e. g., §§ 205a, 239a, 250d, which so far as material are quoted in the margin.[2] But the Act of 1921 was retro-

[2] § 205a: "That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920, which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

§ 239a: "That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

§ 250d: "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, . . ."

active (§§ 263, 1400), taking effect, as we have seen, as of the beginning of the year. Being law by relation, to the disadvantage of the taxpayer, in respect of the burden of his tax, it may well have been law by relation to his benefit in respect of the form and time of his return. There is no anomaly, to say the least, in such a rule of reciprocity. Indeed, there are special reasons why this very result must have been thought of in the framing of the statute. If a new return was required, when was it to be due? The statute tells us (§§ 227a, 241a) that when a taxpayer makes his return on the basis of a fiscal year, the time for filing shall be the fifteenth day of the third month following the close of such year, which for these petitioners was the fifteenth of July. Thus the date fixed for filing was far in advance of the date when the statute was enacted. From this the inference is a fair one that returns already filed were continued in effect, being treated as if made under the new act, which thus adopted and renewed them. Otherwise the taxpayer was placed in default before the duty was imposed. Nor is there anything unworkable in thus applying the doctrine of relation to keep returns alive. To the extent that gross income or deductions were to be computed differently thereafter, the Commissioner could make the necessary adjustment in connection with his audit. Moreover by virtue of his general power to make "all needful rules and regulations" with the approval of the Secretary (§ 1303), he might require of taxpayers whatever supplementary information would be necessary to enable him to act correctly. This, as we have seen, he did, designating a new date selected by himself and wholly unrelated to the fiscal year covered. The validity of such a regulation will be assumed and indeed is not contested. None the less, the return exacted by the statute, the one that in the absence of fraud is to start the term of

limitation (§ 250d), is the return filed by the taxpayer at the close of the fiscal year, though supplementary information may modify or add to it. Cf. *Florsheim Bros. Drygoods Co., Ltd.* v. *United States,* 280 U. S. 453, 462.

A different conclusion would lead in practice to complications and injustice. Many taxpayers filing returns under the Act of 1918 were unaffected by the changes wrought by the Act of 1921. Their returns, if made over again, would have been an exact reproduction of those they had made already. A statute would have to be very plain to justify a holding in such circumstances that there was an obligation to report anew. Certainly the average man would be slow to suspect that he was subject to such a duty. If he looked into the Treasury Decisions, he would learn that the Commissioner agreed with him. In these he was told by the plainest implication that unless he had an additional tax to pay, his return would stand as filed, without supplement or correction. Now, the Commissioner of Internal Revenue is without dispensing power. If a return under the old act is not good under the new one, but, instead, is an utter nullity, he may not relieve the taxpayer of making a return over again. To this the Government assents, and on it builds the argument that the first returns are to be disregarded altogether, whether more is due or nothing. In that view, hundreds of taxpayers, perhaps thousands, though innocent of wilful wrong, have been deprived of the protection of any rule of limitation, not to speak of other penalties unwittingly incurred. A statute of uncertain meaning will not readily be made an instrument for so much of hardship and confusion.

Administrative construction, confirmed by acts of Congress, brings reinforcement to the argument. Reference has been made already to the Treasury Decisions issued in March, 1922. The pertinent administrative history,

however, does not begin at that point. It goes back to earlier statutes presenting a like problem. In the transit from the Revenue Act of 1917 to the Act of 1918 (40 Stat. 1057), there was the same gap to be filled, the same necessity for determining the standing of returns made on a fiscal year basis before the new act became law. Treasury Decision 2797, issued by the Commissioner March 11, 1919, was designed to guide the taxpayer in that predicament. It is quoted in the margin.[3] It calls for an additional return when an additional tax is due, but not at other times. It treats the whole tax, computed under both returns, as made up of separate parts, one the part due under what is styled "the original return," and the other the additional part due "under the amended return." This regulation was in substance re-adopted in the regulations already referred to under the Act of 1921. There are verbal variations, but not of such a nature as to suggest a change of meaning. The like is true of a Treasury Decision issued under the Revenue Act of 1926 (44 Stat. 9; T. D. 3843). All these regulations have had the tacit assent and confirmation of the lawmakers. Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the

[3] "If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the revenue act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under the amended return will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918."

Treasury and with the interpretation of its own meaning implicit in them. *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492, 493; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315.

From this administrative history the inference is compelling that a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation does not toll a limitation which has once begun to run. *Florsheim Bros. Drygoods Co., Ltd.* v. *United States, supra.* Cf. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67; *N. Y. Central & H. R. R. Co.* v. *Kinney,* 260 U. S. 340, 346. Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such (*Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245), and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary. Even more clearly is it so when the return is full and accurate in the beginning under the statutes then in force, but is made inaccurate or incomplete by supervening changes of the law, unforeseen and unforeseeable. Supplement and correction in such circumstances will not take from a taxpayer, free from personal fault, the protection of a term of limitation already running for his benefit. Cf. *Myles Salt Co., Ltd.* v. *Commissioner, supra,* at p. 233; *Valentine-Clark Co.* v. *Commissioner, supra,* at p. 349. At the very least the statutes are sufficiently ambiguous to be susceptible of that construction without strain upon their meaning. So in effect the Commissioner has construed them by relieving taxpayers of the duty of filing a new return except for additional taxes and by treating such new return as an

amendment or a supplement. So this Court construes them now.

In the argument for the Government much is made of the point that in giving effect for any purpose to the original return we cut down the period available to the Bureau for audit and assessment. The reduction, however, is not serious. In the first place, it applies only to that part of the taxable year as to which the two statutes overlap. In the second place, the return in its first form was subject to immediate audit in respect of everything embraced within it. Indeed, at that time the examiners could not know whether a new statute would be passed before the end of the calendar year, or whether the changes would be great or small. Whatever shortening of time there has been is limited to those matters as to which the statutes differ from each other. Even for that purpose, however, the time available was ample. Almost three years and eight months were left for carrying the audit to completion. The curtailment is too slight, the inconvenience too nearly negligible, to affect the process of construction.

A middle ground has been suggested, a path of compromise between the position of the petitioners at one extreme and that of the Government at the other. Some such compromise is indicated, it seems, in decisions of the Board of Tax Appeals, though the rulings of the Board in that respect are involved in some obscurity. At all events, the suggestion is that the term of limitation shall run from the new return when it appears on the face of the original return that because of the changes in the law a tax will be due beyond the liability reported,[4] and that

[4] See, e. g., Isaac Goldmann Co. *v.* Commissioner, 17 B. T. A. 1103 (reversed, 60 App. D. C. 265; 51 F. (2d) 427); Myles Salt Co., Ltd. *v.* Commissioner, 18 B. T. A. 742, 744 (reversed, 49 F. (2d) 232); G. Corrado Coal & Coke Interests, Inc. *v.* Commissioner, 19 B. T. A. 691; Lorie *v.* Commissioner, 21 B. T. A. 612.

the limitation shall run from the original return when there is nothing on the face of that return to indicate that the liability reported is less than is owing.[5] The statute supplies no basis for such a principle of division. An examiner needs more time for an audit when errors are latent, to be discovered only by digging into books and vouchers, than when errors are apparent upon a bare inspection of the record. It would be a strange rule of limitation that would vary his opportunity inversely to his needs.

One other contention of the Government is stated merely to exclude it from the scope of our decision. The Government makes the point that the petitioners' return, even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent and subsidiary, with that of another company, the A. S. Hopkins Company, previously dissolved. No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto. Review by this Court will be limited accordingly. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91.

The decrees should be reversed and the causes remanded for further proceedings in accordance with this opinion.

Reversed.

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[5] See, e. g., Fred T. Ley & Co. *v.* Commissioner, 9 B. T. A. 749, 751; Palmetto Coal Co. *v.* Commissioner, 11 B. T. A. 154; Denholm & McKay Co. *v.* Commissioner, 15 B. T. A. 225.

Counsel for Parties.

NATIONAL PAPER PRODUCTS CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.*

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

No. 35. Argued October 17, 1934.—Decided November 5, 1934.

Corporations which had filed a consolidated return for a fiscal year ending April 30, 1925, were subjected to an increased rate for the four months following January 1, 1925, by the Revenue Act of 1926, operating retroactively. They filed an additional return merely referring to the net income previously reported and applying the new rate to the part of the income attributable to those four months. *Held* that the period of limitation against deficiency assessments prescribed by § 277 (a) (1) of the 1926 Act began to run from the filing of the first return, and that the second return was an amendment or supplement which did not toll the statute. *Zellerbach Paper Co.* v. *Helvering, ante,* p. 172. P. 185.
69 F. (2d) 857, reversed.

CERTIORARI, 292 U. S. 621, to review judgments of the court below affirming decisions of the Board of Tax Appeals, 26 B. T. A. 92, sustaining deficiency assessments of income and profits taxes.

Mr. John Francis Neylan, with whom *Mr. J. Paul Miller* was on the brief, for petitioners.

Assistant to the Attorney General Stanley, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* were on the brief, for respondent.

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* Together with No. 36, *Zellerbach Paper Co.* v. *Helvering, Commissioner of Internal Revenue,* certiorari to the Circuit Court of Appeals for the Ninth Circuit.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

These cases present in slightly different circumstances a question substantially the same as the one considered in Nos. 37 to 39, decided herewith. [*Zellerbach Paper Co.* v. *Helvering, ante,* p. 172.]

Here, on July 15, 1925, the Zellerbach Paper Company filed for itself and its subsidiary, National Paper Products Company, a consolidated return under the Revenue Act of 1924 (43 Stat. 253) for the fiscal year ending April 30, 1925.

On February 26, 1926, the Revenue Act of 1926 (44 Stat. 9) was enacted effective retroactively in respect of income taxes (with exceptions not now important) as of January 1, 1925. §§ 286, 1200.

The tax payable by the petitioners for the preceding fiscal year was changed by the new act in one respect only. For the four months of that year following January 1, 1925, the 12½ per cent. tax fixed by the Act of 1924 was increased to 13 per cent, § 230 (a) (1), an amount ascertainable through a simple computation when once the data had been supplied for separating income attributable to 1925 from income attributable to an earlier time. For other taxpayers differently situated the changes might be different or greater. So far as the new act affected the petitioners it changed the rate and nothing else.

In accordance with Treasury Decision 3843 * which

* "Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the revenue act of 1924, and is subject to additional tax for the same period under the revenue act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926."

called for an additional return whenever there was an additional tax, the Zellerbach Paper Company for itself and its subsidiary filed a document which amounted to an "amended return" and was so stamped by a representative of the Commissioner of Internal Revenue. The new return did not repeat what had been stated in the return of July, 1925, then upon the files. All that it did was to refer to the net income as previously reported, and then apply the new rate to that part of the income stated to be attributable to 1925.

On October 10, 1928, the Commissioner of Internal Revenue gave notice of deficiency assessments against the two petitioners. The period of limitation prescribed by the Act of 1926 is three years after the filing of the return. § 277 (a) (1). If the three years began to run upon the filing of the original return in July, 1925, the assessments were too late. If the term began to run when the additional return was filed (May 14, 1926), the assessments were in time.

The Court of Appeals for the Ninth Circuit affirmed the determination of the Board of Tax Appeals, 26 B. T. A. 92, upholding the action of the Commissioner, 69 F. (2d) 857, and again, as in Nos. 37 to 39, refused to adhere to a contrary ruling in courts of coördinate jurisdiction. *Myles Salt Co., Ltd.* v. *Commissioner,* 49 F. (2d) 232; *Isaac Goldmann Co.* v. *Commissioner,* 60 App. D. C. 265; 51 F (2d) 427; *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346. Writs of certiorari followed. 292 U. S. 621.

The points of difference between these cases and Nos. 37 to 39 are these: Here the new statute was the Revenue Act of 1926, superseding as of January 1, 1925, the Act of 1924; there the new statute was the Act of 1921, superseding as of January 1, 1921, the Act of 1918. Here the change applicable to the petitioners was an increase of the rate; there the applicable change was the disallow-

ance of a credit. Here the taxpayers filed an additional return, supplementing the original one by a statement of the additional taxes due; there the taxpayer stood upon the original return, and omitted to file another.

The conclusion is unaffected by any of these points of difference.

For reasons stated in our opinion in Nos. 37 to 39, the period of limitation began to run on the filing of the first return, and a return for additional taxes, even if filed afterwards, was an amendment or supplement which did not toll the statute.

The decrees should be

Reversed.

CLIFTON MANUFACTURING CO. *v.* UNITED STATES.

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

No. 146. Argued October 17, 1934.—Decided November 5, 1934.

The time for making deficiency assessment, prescribed by § 250 (d) of the Revenue Act of 1918, began to run in this case, not from the filing of an additional return covering taxes added retroactively by that Act, but from the filing of the original return under the prior law. On the authority of: *Zellerbach Paper Co.* v. *Helvering, ante,* p. 172; and *National Paper Products Co.* v. *Helvering, ante,* p. 183. P. 188.

70 F. (2d) 102, reversed.

CERTIORARI * to review the affirmance of a judgment against the Clifton Company in its action for money exacted of it as income and profits taxes.

Mr. Wm. A. Sutherland, with whom *Messrs. Joseph B. Brennan* and *Samuel Nesbitt Evins* were on the brief, for petitioner.

* See Table of Cases Reported in this volume.

Assistant to the Attorney General Stanley, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. Louis Monarch* were on the brief, for the United States.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A question of limitation, similar to the one considered in our opinions in Nos. 37 and 39, and in Nos. 35 and 36, comes up for decision here. [*Zellerbach Paper Co.* v. *Helvering, ante,* p. 172, and *National Paper Products Co.* v. *Helvering, ante,* p. 183.]

The petitioner filed a return on May 28, 1918 under the Revenue Act of 1917 for the fiscal year ending March 31, 1918. The Revenue Act of 1918 (40 Stat. 1057) became a law on February 24, 1919, with retroactive provisions as of January 1, 1918. Thereafter the petitioner filed an additional return in accordance with Treasury Decision 2797 (approved March 11, 1919 and quoted in our opinion in Nos. 37 to 39), showing an additional tax of $50,638.75. The Act of 1918 provides (§ 250d) that except in the case of fraud, "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made." See also § 250d, Revenue Act of 1921. A deficiency assessment was imposed in May, 1921, which is admitted to have been timely, and another on May 26, 1926, which is contested as too late. There is also a contest in respect of both deficiencies growing out of delay in the collection. True, written waivers were in existence, adequate in form, which extended the date for assessment and collection until December 31, 1926. The taxpayer asserts, however, that they were procured by misrepresentation and signed without authority, and must therefore be ignored.

In an action to recover the tax paid by the petitioner under the two assessments in controversy, the District Court held (1) that irrespective of any waiver the term of limitation ran from the date of the additional return, and (2) that the waivers were valid and binding. 3 F. Supp. 508. On the authority of decisions in the Ninth Circuit (*Zellerbach Paper Co.* and *National Paper Products Co.* v. *Commissioner,* 69 F. (2d) 852, 857), the Court of Appeals for the Fourth Circuit affirmed ruling No. 1 and did not pass upon the correctness of ruling No. 2. 70 F. (2d) 102.

For the reasons stated in our opinions in Nos. 37 to 39, and in Nos. 35 and 36, the first ruling is erroneous. The second ruling we do not consider, the question of the validity of the waivers being still open for determination in the court below.

The decree should be reversed, and the cause remanded to the Court of Appeals for the Fourth Circuit for further proceedings in accordance with this opinion.

Reversed.

ABRAMS ET AL. *v.* VAN SCHAICK, SUPERINTENDENT OF INSURANCE, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 186. Argued November 12, 1934.—Decided November 19, 1934.

A judgment of a state court refusing to enjoin proceedings under a state statute alleged to be unconstitutional does not present a substantial federal question when the outcome of those proceedings, if pursued, and its effect upon the federal rights asserted by the complainant, are matters of conjecture.

Appeal from 264 N. Y. 475, dismissed.

APPEAL from a judgment, entered on remittitur, which reversed an injunction order of the Supreme Court of New York (150 Misc. 467) and denied the injunction.

Messrs. Samuel Untermyer, James M. Beck, and *Edward Endelman* submitted for appellants.

Mr. Morris L. Ernst, with whom *Messrs. Lawrence S. Greenbaum* and *Benjamin Kaplan* were on the brief, for Van Schaick, appellee.

Mr. Samuel Kramer for Silverberg, appellee-intervener.

By leave of Court, *Mr. John J. Bennett, Jr.,* Attorney General, and *Mr. Henry Epstein,* Solicitor General, filed a brief on behalf of the State of New York, as *amicus curiae.*

PER CURIAM.

The Court of Appeals of the State of New York reversed an order of the Special Term of the Supreme Court which enjoined the Superintendent of Insurance from making any payments for expenditures incurred in connection with plans of reorganization promulgated under Chapter 745 of the Laws of 1933 relating to guaranteed participating certificates sold by the New York Title and Mortgage Company. The motion for injunction, denied by the Court of Appeals, was made in advance of the promulgation of a plan by the Superintendent of Insurance applicable to the interests of the appellants. Whether, if a plan of reorganization is promulgated by the Superintendent of Insurance it will be approved by the Court as required by the statute, or whether, if so approved, it will be opposed by certificate holders, or will receive the assent of the present appellants, or will operate to deprive them of any asserted constitutional right, are matters of conjecture.

The appeal is dismissed for the want of a substantial federal question. *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *California* v.

San Pablo & Tulare R. Co., 149 U. S. 308, 314; *Stearns* v. *Wood*, 236 U. S. 75, 78; *Cincinnati* v. *Vester*, 281 U. S. 439, 449.

Dismissed.

E. R. SQUIBB & SONS *v.* MALLINCKRODT CHEMICAL WORKS.

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

No. 42. Argued November 7, 1934.—Decided November 19, 1934.

Where an appeal is properly before the Circuit Court of Appeals and, upon hearing it, the court determines that such assignments of error as have been duly filed have been abandoned, the court may affirm the decree.

QUESTIONS certified by the court below after it had affirmed an interlocutory decree enjoining infringement of the plaintiff's patent, see 69 F. (2d) 685, and after a petition for rehearing had been filed.

Mr. Frederick H. Wood for E. R. Squibb & Sons.

Mr. Frank Y. Gladney, with whom *Mr. Lawrence C. Kingsland* was on the brief, for Mallinckrodt Chemical Works.

PER CURIAM.

The Circuit Court of Appeals has certified the following questions:

"Question 1. Where, on an appeal properly in this court, the appellee contends that one of the assignments of errors has been abandoned and all others are not presentable because defective either as assignments of errors or as specifications of errors and urges affirmance of the decree appealed from and this court determines that such contention is well founded in all respects and that no issue on the merits is, for such reasons, presentable to it, is it proper to affirm the decree appealed from?

"Question 2. If question 1 should be answered in the negative, should the order of this court be a dismissal without prejudice?"

Where an appellant fails to file assignments of error as required by the applicable rule (28 U. S. C. 862, 880; Rule No. 11 of the Rules of the Circuit Court of Appeals for the Eighth Circuit), the appeal may be dismissed. Compare Rules of this Court No. 9 and No. 27, pars. 4, 5. But where an appeal is properly before the Court and, upon hearing the appeal, the Court determines that such assignments of error as have been duly filed have been abandoned, the Court may affirm the decree from which the appeal is taken.

Question No. 1 is answered in the affirmative.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHERN COAL CO.*

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

No. 18 (October Term, 1933). Petition for Rehearing Argued October 8, 1934.—Decided October 22, 1934.

Under § 1005 (a) of the Revenue Act of 1926, a petition for the rehearing of a case in which this Court has affirmed a judgment sustaining a decision of the Board of Tax Appeals can not be entertained if filed more than 30 days after the issuance of this Court's mandate.

Petition for rehearing denied.

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* Together with No. 19 (October Term, 1933), *Helvering* v. *C. H. Sprague & Son Co.*, certiorari to the Circuit Court of Appeals for the First Circuit; No. 20 (October Term, 1933), *Helvering* v. *U. S. Refractories Corp.*, certiorari to the Circuit Court of Appeals for the Third Circuit; and No. 21 (October Term, 1933), *Helvering* v. *Oswego & Syracuse R. Co.*, certiorari to the Circuit Court of Appeals for the Second Circuit.

These cases came up by certiorari, 289 U. S. 718, 719, 720, to review judgments sustaining decisions of the Board of Tax Appeals overruling deficiency assessments of income and profits taxes. 24 B. T. A. 307, 62 F. (2d) 742; 23 B. T. A. 872, 64 F. (2d) 69; 24 B. T. A. 1346, 62 F. (2d) 518. The judgments below were affirmed by an equally divided Court October 23, 1933, 290 U. S. 591. Petitions for rehearing in three of them were denied in November, 1933, and the mandates in all four were issued in that month. On May 21, 1934, the Term not having ended, the Government asked leave to file the present petition. By order of May 28, 1934, the petition was entertained and attention was directed to § 1005 of the Revenue Act of 1926. 292 U. S. 612.

Mr. Justin Miller, with whom *Solicitor General Biggs* and *Mr. Erwin N. Griswold* were on the brief, for petitioner.

The Government advanced as ground for rehearing that on March 5, 1934, in *Helvering* v. *Newport Co.,* 291 U. S. 485, the Court had decided in the Government's favor the precise question presented by the cases sought to be reargued, viz., that tax assessment waivers, executed after the statutory period for assessment had expired and while the Revenue Act of 1926 was in effect, were valid. And it contended that, apart from the provisions of § 1005 of that Act, there could be no question of the power of this Court to set aside or modify its judgments upon application made at the Term in which they were entered. This is an inherent power vested in the Court by the Constitution. Congress can not eliminate such essential judicial characteristics of federal courts, even of those created by its own Acts; and its Acts should not be construed as so intending. See *United States* v. *Hudson,* 7 Cranch 31, 34; *Gordon* v. *United States,* 117 U. S. 697, 701–702, 704; *In re Debs,* 158 U. S. 564, 594; *Kansas* v. *Colorado,* 206 U. S. 46, 82; *United States* v. *Evans,* 213 U. S. 297;

United States v. *Klein,* 13 Wall. 128, 146–147; *Ross* v. *United States,* 8 App. D. C. 32, 37, 40; *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 478; *Muskrat* v. *United States,* 219 U.S. 346, 362; *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428, 444; *Kilbourn* v. *Thompson,* 103 U.S. 168, 190–191.

But, properly interpreted, neither the purpose nor the effect of § 1005 was to limit this Court in its control of its own judgments during the Term.

Mr. Paul F. Myers, with whom *Mr. Edmund B. Quiggle* was on the brief, for respondents in Nos. 18 and 19.

Mr. W. W. Montgomery, with whom *Mr. Robert P. Smith* was on the brief, for respondent in No. 20.

Mr. Douglas Swift for respondent in No. 21.

PER CURIAM.

In these cases, the judgments were severally affirmed on October 23, 1933, by an equally divided Court. 290 U. S. 591. Petitions for rehearing in Nos. 18, 19, and 21 were denied on November 20, 1933. The mandates of the Court were severally issued in the four cases on November 29, 1933. The present petitions for rehearing were filed on May 21, 1934.

Section 1005 (a) (4) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, 111, U.S.C., Tit. 26, § 640, with respect to decisions of the Board of Tax Appeals, provides:

"Sec. 1005 (a). The decision of the Board shall become final— . . .

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied.

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BORDEN'S FARM PRODUCTS CO., INC. *v.* BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 296. Argued November 6, 7, 1934.—Decided December 3, 1934.

1. The presumption attaching to legislative action is a presumption of fact,—a presumption of the existence of factual conditions supporting the legislation; it is a rebuttable presumption. P. 209.
2. When a classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and he who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. P. 209.
3. That a classification made by a statute is arbitrary may appear on the face of the statute or by facts admitted or proved. P. 210.
4. Where legislative action is suitably challenged and a rational basis for it is predicated of the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, those facts are properly the subject of evidence and of findings. P. 210.
5. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support. P. 210.
6. That provision of the New York Milk Control legislation which permits dealers not having a "well advertised trade name" to sell milk at a minimum price lower than the minimum imposed on dealers having such a name, and which is limited in its operation to sales in the City of New York, does not appear to have been enacted as a precaution against monopoly, nor in support of a policy to increase the sales of milk. P. 205.
7. Whether this discriminatory price differential may be justified, (1) as a means of protecting a selling advantage which dealers not

having a "well advertised trade name" may have enjoyed before the State's scheme of fixing minimum prices to producers and consumers was adopted, and (2) as a means of insuring a return to old competitive conditions should that scheme be abandoned, can not be determined without knowledge of the particular trade conditions in the City of New York. Those conditions lie largely beyond the range of judicial notice; and, in a case disposed of below without evidence or findings, by sustaining a motion to dismiss the bill for failure to state a cause of action, this Court can not undertake to glean the factual basis of the provision from tables and statements in legislative reports not addressed to the subject, or from affidavits submitted to the court below on a motion for a preliminary injunction, which fell with the dismissal of the bill. P. 207.

8. A New York statute and administrative regulations, fixing minimum prices for milk sold in New York City, established a differential to the disadvantage of dealers having "a well advertised trade name," requiring in effect that the milk they dealt in be priced at one cent more per quart than milk dealt in by competitors. One of the four dealers classed within the quoted designation sued to enjoin enforcement of the differential, alleging among other things that it deprived the plaintiff of a large part of the market for its milk and seriously impaired the value of its property and good will, and that it was arbitrary, oppressive and discriminatory, without any relation to public health or public welfare or to any of the objects for which the statute was enacted. Upon this ground the bill charged that the statutory provision violated the due process and equal protection clauses of the Fourteenth Amendment. *Held:*

(1) That it was error to dismiss the bill as insufficient on its face to state a cause of action. Pp. 203, 213.

(2) That the plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided; there should be a final hearing on pleadings and proofs; and the facts should be found and conclusions of law stated as required by Equity Rule 70½. P. 213.

7 F. Supp. 352, reversed.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed, on a motion equivalent to a demurrer, a bill brought by the Borden Company against Baldwin, Commissioner of Agriculture and Mar-

kets of the State of New York, the Attorney General of the State and five district attorneys, to enjoin enforcement of a provision of the New York Agriculture and Markets Law added by c. 126, Laws of 1934, § 258 (q).

Mr. Walter E. Hope, with whom *Mr. Timothy N. Pfeiffer* was on the brief, for appellant.

The provision for the one-cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws.

That the provision is discriminatory is immediately self-evident.

The appellant and its predecessor have been selling milk for 75 years. During part of that time, at least, it has advertised its product. It has built up a good name for quality, purity and cleanliness. But if the appellant for one week should distribute an impure milk, a diseased milk, or a milk injurious to health, its business would disappear overnight. The fact of advertising does not, in reality, constitute the criterion upon which this penalty is imposed. It is the good reputation which the appellant has built up over the years. The "well advertised trade name" is merely the symbol and not the substance. By this provision the State elects to say to competing dealers: "You who have not built up and maintained a reputation and a well-known name may sell your milk at a certain price, but you who have spent years in building up a reputation and a well-known name may not sell your milk at that price and meet that competition. You must sell at a higher price." And this when the State, by other statutory provisions, has decreed that the milk of both competitors must meet identical standards.

The vice lies not in fixing the price at which milk may be sold, but in prohibiting the appellant from meeting the price of competitors in fair and open competition. That is the essence of this case.

Certainly the element of advertising, or the possession of a "well advertised trade name," constitutes a wholly artificial and inadequate distinction upon which to base a discrimination so far-reaching in its effect.

The reasonableness of the classification established by the one-cent differential is to be judged in the light of the following considerations:

It has not been advocated by any of the impartial investigating agencies. It has no relation to cost, quality or service. It is not an expression of policy against appellant's advertising. Nor is it aimed at unfair practices or monopoly. It results in no benefit to the farmers. It is economically indefensible. It has no relation to the emergency giving rise to the Milk Control Law.

The provision for the one-cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences.

The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

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 appellees.

The "unadvertised differential" provision is intended, not without reason, as a safeguard against monopoly.

The wisdom of a statute is not a factor for determining its constitutionality except where the Court regards the statute as grossly unwise. Classification is valid unless it is "without any reasonable basis"; it need not be done with "mathematical nicety"; one who assails the classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

That the provision now in question is limited to New York City does not condemn it. Clearly it was directed to conditions peculiar to that city, just as many other laws have been.

That the provision describes a class by reference to advertising is not necessarily a final description of all the differences involved, and it might not be fatal if it were. *Tanner* v. *Little,* 240 U. S. 369, 383; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342.

Size and tendency to monopolize the market are incidents which accompany the " well advertised trade name " of milk in the New York City market. There is as good reason to justify a one-cent differential between advertised dealers and others as there is to justify the one-cent differential between dealers and grocers; each is a recognition of a differential which existed under conditions of free competition and which could not in fairness be summarily discontinued. Like non-conforming buildings existing before a zoning law becomes effective, the differential is a nuisance, but to abate it would be a confiscation.

The National Government has experienced some difficulty with its program of price regulation under NRA because of such preëxisting differentials. Various sorts of sectional differentials have been worked out, and even racial ones, mostly without any basis except the recognition of an existing difference which could not readily be eliminated. The interposition of the President early in 1934 was necessary to settle that southern mines and factories preserve the lower wage without which they could not co-exist with mines and factories nearer the population centers of the North. Manufacturers of cloth caps and hats in the East, where the minimum wage was fixed by code at 55 cents per hour, were displeased because the West was allowed a lower minimum of 37½ cents. The National Association for the Advancement of Colored People charged that the codes provided a wage 20 to 40

per cent. less to the Negro worker than to the white man doing the same work. Apparently the fixing of prices by Government discovered as many troubles as were loosed from Pandora's box.

One of the most obvious and notable of the troubles introduced by price-fixing is the one now involved. Under ordinary competitive conditions it is an effective device for a dealer to confer upon the goods he handles an individuality and reputation for quality which tends to lift his particular brand above mere price competition. Advertising is the art most employed for achieving that result. There is plenty of evidence that the device is effective. The device is effective in New York City, where a recent study has shown that 64 per cent. of Manhattan consumers ask for particular brands when purchasing groceries. Such a situation tends to give a prestige monopoly to the brand owner, favoring his goods even when his unadvertised competitors are free to sell for less. The use of "fear" advertising, suggesting perils in using any goods except those well advertised, further submerges the unadvertised competitors.

If prices in any line of goods are fixed at a uniform level, and some of the goods are advertised brands, it requires no foresight to see that the ordinary advantage of the advertised brands will be greatly increased.

Under the circumstances the small producer has only one real chance for survival. To advertise and seek to overtake the reputation of his well advertised competitor is illusory; he will engage in an expensive race which at best may result in all competing goods being equally well advertised, and that condition is equivalent to having all nations of the world thoroughly armed, with none safer than as though all were completely unarmed. The one real chance for survival is to procure a favorable price differential.

Such is the problem to which is addressed the statutory provision now involved. We make no argument that this statutory provision is the wisest solution of the problem, but we submit that the choice was for the Legislature.

By leave of Court, *Messrs. Gabriel Kotcher* and *Ezra B. Kotcher* filed a brief on behalf of the Independent Milk Dealers of Brooklyn and New York and the Independent Producers of the State of New York, as *amici curiae*.

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

The New York Milk Control Law of April 10, 1933,[1] in authorizing the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than one million inhabitants, established a differential of one cent a quart in favor of dealers not having a "well advertised trade name."[2] The Milk Control Board determined that the phrase "well advertised trade name" referred to four dealers, of which the complainant, Borden's Farm Products Company, Inc., is one.[3] The authority of the Board terminated on March 31, 1934. An amended act was passed to take effect April 1, 1934,[4] which placed the milk control in a division of the Department of Agriculture and Markets. This Act continues the differential of one cent a quart in sales of fluid milk in bottles by dealers to stores, in favor of dealers not hav-

[1] Laws of 1933 (N. Y.), chap. 158; see *Nebbia* v. *New York*, 291 U. S. 502.

[2] *Id.*, § 317 (c) . .

[3] Order of May 5, 1933. The four dealers thus designated were: "Borden's Farm Products Co., Inc., 'Borden'; Sheffield Farms Co., Inc., 'Sealect'; Dairymen's League Co., 'Dairylea'; and M. H. Renken Dairy Co., 'Renken.'"

[4] Laws of 1934 (N. Y.), chap. 126.

ing a well advertised trade name, and provides that the lower price shall also apply on sales from stores to consumers.[5]

Complaining that the fixing of this differential, in respect to sales of the same commodity, was an invasion of rights guaranteed by the Fourteenth Amendment, plaintiff brought this suit to enjoin enforcement. An interlocutory injunction was sought and a court of three judges was convened. Defendants moved to dismiss the complaint upon the grounds that it failed to state a cause of action in equity and that the provision of the statute was constitutional. Affidavits were presented on both sides and the case was heard on the motion for injunction and the motion to dismiss. In view of the cumulative penalties provided, the court had no doubt of its jurisdiction to pass upon the question of constitutionality. Dealing with the case in that aspect, the court held that the complaint did not state a cause of suit and dismissed it for that reason. The court regarded the application for an interlocutory injunction as necessarily falling with the complaint and hence made no findings of fact. 7 F. Supp. 352, 354. The plaintiff appeals.

We turn to the allegations of the complaint. Plaintiff sets forth the full text of the acts of 1933 and 1934 and of the applicable orders. By the order of the Commissioner

[5] *Id.*, § 258–q. The provision is as follows: "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

of Agriculture and Markets the minimum prices for the sale of fluid milk in bottles by dealers to consumers and to stores, and by stores to consumers, are fixed for the city of New York. The order determining the four dealers who have a "well advertised trade name" is continued in effect. Plaintiff alleges that for many years it has been continuously engaged in purchasing and selling milk in bottles in the city of New York and has built up a large business under its trade name "Borden's" for sales both to consumers and to the stores described in the statute; [6] that it operates nine retail stores in the city at which it has an extensive business in the sale of bottled milk to consumers under its trade name; that it has obtained from the Board of Health of the city all the necessary licenses and permits and has observed all the regulations of the Sanitary Code; that it has expended large sums in advertising its trade name and has thus created a valuable good will. Plaintiff alleges that it is in direct and active competition with numerous individuals, corporations and associations which are selling bottled milk to stores in the city but are not within the official determination of those having a "well advertised trade name"; that these competitors are permitted to sell to stores bottled milk at a price one cent per quart below the minimum price at which plaintiff is permitted to sell its bottled milk to stores under its trade name; and that stores are permitted to sell to consumers the bottled milk of these competitors with the same differential as compared with the minimum price at which plaintiff's milk may be sold by stores, and thus plaintiff is deprived of a large part of the market for its milk and the value of its property and good will are seriously impaired. Plaintiff

[6] The act of 1934, like the preceding act, defines "store" as meaning "a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment." § 253.

states that the loss in trade it thus suffers amounts to not less than 25,000 quarts of bottled milk daily.

Plaintiff alleges that the maintenance of this differential, with the consequent privilege to its competitors and restraint upon itself, is "arbitrary, oppressive and discriminatory" and has "no relation to the protection of the public health or the public welfare or to any of the objects or purposes" for which the statute was enacted, and upon this ground plaintiff charges that the statutory provision violates the due process and equal protection clauses of the Fourteenth Amendment. Inability to obtain a license, unless plaintiff agrees in writing to comply with the statute and orders, and the prohibitive character of the penalties prescribed, are assigned as affording the basis of equitable jurisdiction.

We have frequently said, especially in confiscation cases, that a mere general allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order. See *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447; *Public Service Comm'n* v. *Great Northern Utilities Co.,* 289 U. S. 130, 136, 137; *Hegeman Farms Corp.* v. *Baldwin, ante,* p. 163. But in determining the sufficiency of the allegations of the complaint we cannot fail to take note of the nature and effect of the legislative action which is assailed. Both nature and effect are apparent. We have here a novel, if not a unique, provision. The legislature does not purport to exercise an authority merely to fix prices, or minimum prices, or to make different prices for different grades of milk, but attempts to establish for the respective dealers different minimum prices for the same grade of milk, bought and sold at the same time and place and under precisely the same conditions aside from the use of a well advertised trade name. There is no uncertainty as to the effect of

the discrimination. As the court below said, the statute seeks to take away from dealers who have well advertised trade names, "economic advantages which were not only theretofore lawful, but which have generally been commended and fostered." It strikes at the advantage acquired by dealers through the reputation of their brands and the consequent disposition of the public to buy them. In view of the peculiar nature and effect of this provision, and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right. Accordingly, we pass to the consideration of the various grounds that are suggested as adequate support for the legislative action.

In this inquiry, we again observe the limited operation of the provision. It is restricted to the city of New York, and to sales of bottled milk to and by stores. It does not apply to retail delivery direct to consumers and not through stores. It relates solely to minimum prices. It is not addressed to any practice in the industry, or trade in relation to production, handling or selling, apart from the trade name employed. As to all such matters, a dealer with a well advertised trade name is subject to the same strict requirements as are all other dealers. The price to the producer, the farmer, is not affected by the differential. He receives the same price for his milk whether it is sold by dealers with well advertised trade names or otherwise. We have had occasion to note that "Save the conduct of railroads, no business has been so

thoroughly regimented and regulated by the State of New York as the milk industry." For many years, it has been "progressively subjected to a larger measure of control." *Nebbia* v. *New York, supra,* pp. 521, 522. This control has been in the interest of sanitary precautions and proper methods of production and trade. But because of the serious condition of the industry by reason of decline in prices and demoralizing practices, as reported by a legislative committee after an elaborate examination, and upon the committee's recommendations, the legislature has now proceeded to price control. The legislative committee did not, however, recommend the fixing of the differential here in question, and hence did not state grounds in support of such a discrimination.[7] But in considering possible grounds, we are aided by the suggestions which the Attorney General of the State and the counsel for the Department of Agriculture and Markets, with their special experience, have been able to bring forward.

The ground chiefly urged is that the provision is intended as a precaution against monopoly. We turn to the expressed criterion of the statute. That criterion does not refer to restraint of trade in any of its connotations, or to any coercive action or unfair practice, or to any combination or concert. The provision for the differential is silent as to the use of any monopolizing methods or as to any monopolistic achievement. While dealers having well advertised trade names are grouped for the purpose of the differential, the statute is directed not at concerted action, but at the individual members of the group which are not shown to be, or, for the application

[7] It appears that in the case of both the acts of 1933 and 1934, the provision in question was added in the course of legislative consideration of proposed measures and at the instance of dealers described as independents. 7 F. Supp., p. 353.

of the differential, need not be, in any sort of combination or acting otherwise than in lawful competition with each other as well as with other dealers. The differential hits each dealer having a well advertised trade name regardless of the extent of that dealer's trade. That may be large or small. The court below said in its opinion that the four distributors determined by the department to have well advertised trade names sell about 35 per cent. of the bottled milk that is sold to stores in the city of New York and this is also stated in appellant's brief. That appears to be the amount of the described trade of the entire group, which are united only by the common characteristic that each member has a well advertised trade name. How much of the trade each of the four distributors may have, does not appear.[8] So far as the criterion of the statute is concerned, that makes no difference. If the statutory provision is sustained as to Borden's, on the simple showing of a well advertised trade name, without more, it must also be sustained as to every other dealer with a well advertised trade name—those now on the list and those which the state authority may hereafter place there—no matter how small a part of the trade the dealer may have, or how independent of any connection with anyone else, or how free from any improper trade practice or lacking in monopolistic opportunity, such a dealer may be.

The suggestion has been made that the provision for the differential may find support in a supposed policy to increase the sales of milk,—that more milk may be sold than if the price were uniformly maintained. This suggestion does not appear to be sponsored by the Attorney

[8] Thus it does not appear how much of the "store" trade in bottled milk is that of the Borden Company or of the Sheffield Company or of the Dairymen's League Company or of the Renken Dairy Company, the four distributors found to have well advertised trade names.

General and the counsel for the Department of Agriculture and Markets. The answer is made that whatever opportunity there may be for increased sales lies in the lower price and not in the differential. If it be assumed that the lower price is a reasonable minimum and that it favors sales, the maintenance of the differential prevents the plaintiff and others in like case from resort to it.

Putting aside fanciful considerations, the argument at the bar has presented the case in its essential features. It is shown that the legislature was inspired by the fear that in a competitive market, under strict regulation and with a scheme of minimum prices, dealers without well advertised brands, the so-called independent dealers, would be at a disadvantage. The aim was not at advertising but at its natural result. "Well advertised" means well known. In setting up the differential, the legislature did not deal with monopoly in the ordinary sense of the term, but with an aggregate of economic advantages, lawfully and severally acquired, and possessed in varying degrees by the separate concerns having well known brands. The legislature put all these in one class and placed it under a handicap. For this discrimination, a special justification is urged. Respondent's counsel contend that the fixing of the differential was an effort to continue a condition which had obtained before the Milk Control law was enacted; that, previously, milk of the independent dealers had sold at lower prices than the milk of the well known brands; that in establishing price control, the legislature sought to preserve opportunities in competition which in actual practice the independent dealers had thus enjoyed and to prevent their trade from being destroyed by the operation of a scheme of uniform prices. The argument is that the legislature was confronted with a "practical situation"; that "the independents were to be deprived

of their buying advantage by compelling all dealers to buy from producers at prices fixed according to utilization of the milk"; that this regulation involved "a stern readjustment of former competitive conditions," and the question was whether the independents should also be deprived of their selling advantage. The point is also made that the Milk Control law purports to be an emergency measure and that the legislature was entitled to protect existing opportunities of the independent dealers so that, if the emergency ceased and price control were abandoned, there could be a return to competitive conditions without such an elimination of dealers as might be caused by a temporary period of compulsory minimum prices on a uniform scale.

The factual basis of this contention is disputed and there are no findings disclosing it. Appellant asserts that there was not at any time any customary or accepted difference in price between the milk sold by it under its trade name and the milk of its competitors who are now favored by the fixed differential. And reference is made to the disturbed state of the trade, preceding the enactment of the Milk Control law, and to the effect of the ban imposed by local ordinance upon the sale of "loose milk," which led to changes in methods of distribution and to price adjustments from time to time in order to meet competition.

For the present purpose, it is sufficient to say that these arguments are addressed to particular trade conditions in the city of New York, which largely lie outside the range of judicial notice. Counsel refer to the affidavits submitted on the motion for injunction. And we are asked to extract from various tables and statements in the reports of the legislative committee, which were not addressed to the fixing of the differential here in question, sufficient data upon which to predicate a judgment. But

the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court.[9]

Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–80; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 170–172; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 256–258. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley* v. *Natural Carbonic Gas Co., supra; Clarke* v. *Deckebach*, 274 U. S. 392, 397; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 283. The

[9] How hazardous it is to assume that particular trade facts are of common knowledge is shown by the various estimates of the number of "stores" at which milk is sold in the city of New York, these estimates apparently varying from 25,000 to 60,000.

principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (*Smith* v. *Cahoon,* 283 U. S. 553, 567) or that may appear by facts admitted or proved. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Air-Way Electric Corp.* v. *Day,* 266 U. S. 71, 85; *Concordia Insurance Co.* v. *Illinois,* 292 U. S. 535, 549. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. *Lindsley* v. *Natural Carbonic Gas Co., supra; Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Radice* v. *New York,* 264 U. S. 292; *Clarke* v. *Deckebach, supra; Ohio Oil Co.* v. *Conway,* 281 U. S. 146; *Tax Commissioners* v. *Jackson,* 283 U. S. 527. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

Respondents' counsel, referring to the difficulties of price regulation, say that "Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box." This complexity of problems, however, makes it the more imperative that the Court in discharging its duty, in sustaining governmental

authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions.

As the court below said, no precedents come very close to the instant case. In *Rast* v. *Van Deman & Lewis Co., supra,* the facts were fully disclosed (pp. 345–347), and it was held that the use of profit-sharing coupons and trading stamps constituted a distinct method of doing business justifying license taxes (p. 357). The Court pointed out that the complainants' schemes did not rest with mere advertising, with "identification and description, apprising of quality and place," where the "acquisition of the article to be sold constitutes the only inducement to its purchase" according to the "practice of old and familiar transactions," but that those schemes tempted by a promise of a value greater than the article sold and hence might be thought to be a "lure to improvidence" (p. 365). See, also, *Tanner* v. *Little,* 240 U. S. 369. In *Tax Commissioners* v. *Jackson, supra,* where a license tax with respect to chain store operation was upheld, evidence had been received and considered by the District Court, but that court did not go beyond a partial summary of the facts and general conclusions of law. We said that had Equity Rule 70½ been in force at the time of the trial, we should feel constrained to remand the case with directions to make findings of fact (p. 533); but in the circumstances the Court proceeded to summarize the proofs, and, on a full examination of the factual differences between chain stores and individually owned units, reached the conclusion that these differences afforded a basis for the tax assailed (pp. 534–536, 541). See, also, *Liggett Co.* v. *Lee,* 288 U. S. 517, 532.

The importance of adequate findings of fact in relation to controlling economic conditions was emphasized in *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543. The suit had

been brought to restrain the enforcement of an order of the Rent Commission of the District of Columbia cutting down rents for apartments. Plaintiff alleged that the emergency which had been held to justify the rent measures (sustained in *Block* v. *Hirsh,* 256 U. S. 135), had ceased. We said that the plaintiff's allegations could not "be declared offhand to be unmaintainable" and that it was not impossible "that a full development of the facts" would show them to be true, and in that case the operation of the statute would be at an end (p. 548). Before deciding the question, we found that it was "material to know the condition of Washington at different dates in the past" and that "obviously the facts should be accurately ascertained and carefully weighed." We said that this could be done more conveniently in the Supreme Court of the District than here, and, for this reason, the judgment below, dismissing the bill, was reversed and the cause was remanded for appropriate ascertainment of the facts (p. 549).

Another illustration is found in *Hammond* v. *Schappi Bus Line, supra,* involving the validity of a city ordinance regulating motor traffic in designated parts of the city's streets. The lower courts had not made findings upon crucial questions of fact. There were affidavits below, which, we said, "are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive." We held that before the questions of constitutional law, both novel and of far-reaching importance, were passed upon by this Court, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence." (pp. 171, 172.) Concluding that the case had not been appropriately prepared for final disposition, we remanded it for proceedings in the District Court, "with liberty, among other things, to allow amendment of the pleadings." This procedure was in accordance

with well-established precedents. See *Estho* v. *Lear,* 7 Pet. 130; *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167, 179; *United States* v. *Rio Grande Irrigation Co.,* 184 U. S. 416, 423; *Lincoln Gas Co.* v. *Lincoln,* 223 U. S. 349, 364.

A similar course should be taken here. While the complaint is lacking in the specific and definite allegations as to trade conditions which would be appropriate to the plaintiff's assertions in supporting its attack on the statute, we think that the plaintiff should not be refused standing in court upon the allegations made. As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½.

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

Reversed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result in the following memorandum:

We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer.

Since our brethren find that likelihood to be present in this case, and are content to postpone an adjudication of the merits, we refrain from any discussion of the validity of the statute on the basis of facts within the range of judicial notice, and assent to the judgment recommended in the opinion of the court.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* POWERS, EXECUTOR, ET AL.

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

No. 17. Argued October 12, 15, 1934.—Decided December 3, 1934.

1. The provision of the Revenue Acts of 1926, §§ 212 (a), 213 (a), and 1928, §§ 21, 22 (a), for taxing income derived "from compensation for personal service . . . of whatever kind and in whatever form paid," is broad enough to embrace the compensation of state officers if not constitutionally immune. P. 224.
2. A Treasury Regulation cannot limit this statutory provision or define the boundaries of its constitutional application. *Id.*
3. Constitutional immunity of the compensation of a state officer from federal taxation is not a necessary result of his being a state officer; it depends upon the nature of the political activities assigned to him and upon whether they come within the fundamental reason for denying federal authority to tax, viz., necessary protection of the independence of national and state governments in their respective spheres in our constitutional system. P. 224.
4. One of the limitations of the principle of tax immunity as between the state and national governments is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which go beyond usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. P. 225.
5. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. Id.
6. In operating a street railway, whether permanently or for a limited time, the State is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. P. 227.
7. If a business undertaken by a State is not immune from a federal excise tax upon its operations, the compensation of those who conduct it for the State is not exempt from a federal income tax. P. 227.

8. A street railway company and its properties, including a reserve fund, are taken over by the State, to be publicly operated and managed for a limited period of time, pursuant to a special Act of the Legislature agreed to by the company. The operations during that period are to be under the exclusive control of a board of trustees, who are officers of the State specially appointed for the purpose, and the management is to be such that the cost of the venture, including operating expenditures, upkeep and other charges against income and surplus, with dividends agreed to be paid on the company's stock, shall be met by the income; but if there are deficits, these are to be paid by the State and assessed against the towns and cities along the railway. At the end of the period, the properties are to be restored to the company in good condition and the fund undiminished. The salaries of the trustees, fixed by the statute, are payable by the company,—part of the costs of operation. As incidents of the main purpose, the trustees have exclusive authority to regulate and fix the fares and to ascertain any losses incurred, which are to be borne by the State.

Held that the salaries of the trustees are not constitutionally immune from income tax under the Federal Revenue Acts of 1926 and 1928.

68 F. (2d) 634, reversed.

CERTIORARI, 292 U. S. 620, to review a judgment reversing a decision of the Board of Tax Appeals sustaining a deficiency assessment of income tax.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Erwin N. Griswold, James W. Morris,* and *John MacC. Hudson* were on the brief, for petitioner.

The statute imposes a tax upon the income of every individual derived from compensation for service and from all sources whatsoever.

The doctrine of implied constitutional immunity from taxation is limited to the agencies and instrumentalities exercising strictly governmental functions. The reason for the rule must control. Exemption must depend upon the effect of the tax upon the exercise by the State of its essential functions of Government, although consideration

should also be given to the inherent nature of the agency taxed, and its relation to Government.

The trustees were appointed solely for the purpose of managing and operating the railway and, to the end that adequate transportation service might be maintained, were authorized to fix rates of fare sufficient to meet the cost of service.

It is no part of the essential governmental functions of a State to furnish means of transportation to its people. When a State departs from those functions and engages in a business of a purely private nature, the business and the instrumentalities employed therein are subject to a non-discriminatory tax imposed by the Federal Government.

The provisions of the Treasury regulations as to the compensation of " officers " are valid and applicable. The court below held that the trustees were officers of the State and that there is no basis for the requirement of the regulations that the compensation must be received for services rendered in the exercise of governmental functions. In so holding, the court either ignored or overlooked explicit and well-known decisions of this Court. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360.

The fact that the respondents had the power to fix rates, and to declare deficits, which were used as a basis of taxation, is not sufficient to exempt from taxation the salaries which they received for managing the railroad. The respondents had no discretion in fixing rates, and they had no power to levy taxes. Their authority with respect to each was merely ministerial.

Moreover, the compensation received by the respondents was not paid for the exercise of these powers. The salaries were paid to the trustees by the company and not by the Commonwealth; and they were paid for their services as managers of the company. If the respondents exercised any essential governmental powers, they re-

ceived no compensation on that account; and their compensation received for other services is not exempt.

Even if the salary paid by the company could be regarded as paid in part as compensation for essentially governmental service on behalf of the State, the entire amount would not be exempt. And there can be no allocation, for they have produced no evidence of the proper basis of allocation.

Mr. Melville Fuller Weston, with whom *Mr. J. Colby Bassett* was on the brief, for respondents.

It is of the very essence of a Government to be able to personify itself in public officers, and through them to manifest in action the policies, within its lawful powers, upon which it has determined through its legislative branch. Hence a public officer, and especially a primary officer, is an essential instrumentality of Government, and to have such officers is in itself an essential function of Government.

This Court has on frequent occasions discussed the scope of the constitutional principle of exemption and has on no occasion failed to place public officers, as such, among those instrumentalities of Government, which are "essential." It has never been intimated that public officers were to be classified according to the nature of the subject matter to which their duties pertained, as essentially governmental officers, officers not essentially governmental, and officers having duties partly governmental and partly not. *Willcuts* v. *Bunn,* 282 U. S. 216, 225–6; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 577; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360; *Georgia* v. *Chattanooga,* 264 U. S. 472; *Bank of United States* v. *Planters Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257; *Curran* v. *Arkansas,* 15

How. 304; *North Dakota* v. *Olson,* 33 F. (2d) 848, dismissed for want of jurisdiction, 280 U. S. 528; *United States* v. *Baltimore & Ohio R. Co.,* 17 Wall. 322.

The compensation of a public officer is the means of obtaining his services. It has never been suggested that it is any less the means because paid by fees or from some source other than public funds which the State was competent to command. Still less has it ever been suggested that it is subject to an artificial "allocation" upon the basis of a classification of duties. It is wholly exempt. The Treasury Department itself has long recognized that, in the case of a public officer, the source of the emolument fixed by law was not material. See, for example, 5 C. B. 106 (fees of deputy sheriffs); II–1 C. B. 71 (compensation of state employees under Sheppard-Towner Act); II–1 C. B. 72 (fees of public administrators paid out of the estates); IV–2 C. B. 46 (receivers of insolvent state banks paid out of bank assets).

Once it is established that the constitutional principle applies, "It is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute." *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575.

The respondents were public officers and were, moreover, primary officers. The State spoke through the legislature, but when it came to act, it acted first through them. Their compensation fell within the constitutional principle, notwithstanding the State procured it to be paid in the first instance out of a private fund, the integrity of which fund, however, the State had agreed to underwrite.

Upon the basis of decisions dealing solely with excise taxes levied upon business activities, and not with direct taxes levied upon public offices or their emoluments, the petitioner seeks to exclude the respondents from the scope of the exemption. It is submitted that the cases are wholly distinguishable. A State cannot raise a private

business to its own level; but, at its own level, it is competent to develop a public policy even with respect to its relations to a private business, and it has a constitutional right to have public officers through whom to act in respect of a public policy coming within its lawful powers.

Even if the respondents' duties be scrutinized as to their subject matter, there appears no sufficient ground for making of them an exception to the heretofore absolute rule exempting from federal taxation the compensation of public officers of a State.

On the question whether providing means of transportation is a genuine and long established subject matter of Government, the weight of the later cases, despite the dictum in *Flint* v. *Stone Tracy Co.*, seems to be in the affirmative. *Jamestown & Newport Ferry Co.* v. *Commissioner,* 41 F. (2d) 920; *United States* v. *King County,* 281 Fed. 686; *Frey* v. *Woodworth,* 2 F. (2d) 725; Moisseiff *v.* Commissioner, 21 B. T. A. 515; *Seattle* v. *Poe,* 4 F. (2d) 276; *Lyons* v. *Reinecke,* 10 F. (2d) 3; *Blair* v. *Byers,* 35 F. (2d) 326; *Cleveland Ry. Co.* v. *Commissioner,* 36 F. (2d) 347.

Governments have concerned themselves for centuries, and not by regulation alone, with the means of transportation. The respondents, while very likely not in the exercise of the "police power," dealt extensively with a common subject matter of public regulation, and acted in the identical interest in which public regulation is exerted, and to the same substantial ends. They were, moreover, charged with the apportionment of a heavy burden of state taxation.

There is undoubted force to the argument that indefinite expansion of the functions of one Government cannot be allowed to withdraw all activities within its borders from the taxing power of the other. See *South Carolina* v. *United States,* 199 U. S. 437, 454. But we are not discussing the taxability of the railroad property, or of

the railroad income, or of the compensation of employees of the railroad company. We are asserting that there is nothing so violently nongovernmental about the subject matter of providing means of transportation as to require the modification of the absolute rule with respect to the exemption of public officers' compensation, as repeatedly stated by this Court.

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

The question presented is whether the compensation of the members of the Board of Trustees of the Boston Elevated Railway Company is constitutionally exempt from the imposition of a federal income tax. Immunity is sought upon the ground that the trustees are officers of the Commonwealth of Massachusetts and instrumentalities of its government. The Circuit Court of Appeals, reversing the decision of the Board of Tax Appeals, held in favor of the exemption. 26 B. T. A. 1381; 68 F. (2d) 634. We granted a writ of certiorari. 292 U. S. 620.

Chapter 159 of the Massachusetts Special Acts, 1918, provides for the public operation of the Boston Elevated Railway Company. The Act creates a board of five trustees, to be appointed by the Governor, with the advice and consent of the Council, for the term of ten years. The Act provides that the trustees shall be sworn before entering upon their duties; they shall own no stock or other securities of the Company and shall each receive from the Company $5,000 annually as compensation for his services. They are subject to removal by the Governor with the advice and consent of the Council.

The trustees are charged with the duty of managing and operating the Company and its properties for the period, as stated or extended, of public operation, and to that end are to have "possession of said properties in be-

half of the Commonwealth." Except as otherwise stated, they are to exercise all the powers of the Company, being empowered in their discretion to appoint and remove the president and other officers of the Company, except the directors. The trustees are authorized "to regulate and fix fares" and "to determine the character and extent of the service and facilities to be furnished." Their authority for this purpose is made "exclusive" and is not "subject to the approval, control or direction of any other state board or commission." The Act provides that the trustees and their employees shall be deemed to be acting as agents of the Company and not of the Commonwealth, and that the Company shall be liable for their acts and negligence to the same extent as if they were in the immediate employ of the Company, but that the trustees shall not be personally liable.

The Company was required, on or before its acceptance of the Act, to raise a stated amount by the issue of preferred stock in order to provide for the improvement of the property of the Company and the establishment of a reserve fund. The trustees are to fix such rates of fare as will reasonably insure sufficient income to meet the cost of service, as defined, which, in addition to operating expenditures, outlays for the required upkeep of the properties, and other amounts chargeable against income and surplus, includes fixed dividends on the preferred stock and dividends on the common stock at specified rates. Surplus income is to be transferred to the reserve fund and that fund is to be used to meet deficiencies. If it is insufficient for that purpose, the trustees are required to notify the treasurer and receiver general of the Commonwealth, and the Commonwealth is to pay the amount of the deficit ascertained according to the Act. Amounts thus paid are to be assessed upon the several cities and towns in which the Company operates. Provision is

made for reimbursement out of subsequent surplus income. The Act contemplates the maintenance of the property in good operating condition and the restoration of the reserve fund, if depleted, to its original amount on the expiration of the period of public management. At that time the control of the property is to revert to the Company. It may then collect such reasonable fares as will produce an income sufficient to pay the reasonable cost of the service as defined in the Act, including specified dividends on the common stock, and the Company is then to be subject to public regulation in such manner as may be determined by the General Court, but not so as to reduce the income below the cost of the service as stated.

The tax in question was on the compensation received by the trustees for the years 1926 to 1929. It appears that in 1919 the Commonwealth paid to the Company nearly $4,000,000 as a deficiency resulting from the public operation, and that in subsequent years, up to and including 1929, the income received was not sufficient for full reimbursement.

The validity of the statute has been sustained as one enacted for a public purpose and providing for the management of the enterprise by the Commonwealth. *Boston* v. *Treasurer & Receiver General,* 237 Mass. 403, 413, 420; 130 N. E. 390; *Boston* v. *Jackson,* 260 U. S. 309, 314, 316. The Supreme Judicial Court of Massachusetts has characterized the " public operation " as " undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare." *Boston* v. *Treasurer & Receiver General, supra.* The trustees are the administrative agents of the Commonwealth in this enterprise, and we may assume, as the Circuit Court of Appeals has held, that the trustees come within the general category of " public officers " by virtue of their appointment by the

Governor, with the advice and consent of the Council, and their tenure and duties fixed by law.[1] *United States* v. *Hartwell,* 6 Wall. 385, 393; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 520. See *Opinion of the Justices,* 261 Mass., pp. 542, 543, 550; 159 N. E. 55.

While the undertaking is for the public benefit, it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly. The property remains in private ownership. The Act, accepted by the Company, constitutes in substance an agreement between the Company and the Commonwealth that the latter shall temporarily take over the management and operation and pay specified amounts by way of compensation. While the Commonwealth may be called upon to bear losses that may occur, if the fares as fixed prove to be insufficient, the operation by the trustees is intended to be self-sustaining. The transportation service is to be rendered, as respondents' counsel say, "under such a flexible system of rate-making as would allow the fixing of fares equal, as nearly as might be, to the cost of service." The compensation of the trustees is undoubtedly a part of that cost. "The main design of the Act," as stated by the Supreme Judicial Court, "is public operation of the railway company at such rates of fare to be fixed by the trustees from time to time as shall afford revenue sufficient to defray all charges and the dividends established by the act." *Boston* v. *Treasurer & Receiver General, supra.* The authority given to the trustees "to regulate and fix fares," and

[1] The provision of § 1 of Chapter 159 of the Massachusetts Special Acts of 1918 that the trustees shall not be considered public officers within the meaning of § 25 of Chapter 514 of the Acts of 1909, and that § 1 of Chapter 7 of the Revised Laws shall not apply to the trustees, creates special limitations of such a nature as not to derogate from their general status. See *Opinion of the Justices,* 261 Mass., p. 543; 159 N. E. 55.

the further authority to ascertain such losses as may be incurred, which are to be borne by the Commonwealth, are both incident to that main purpose.

The immunity sought by the trustees from payment of the federal income tax has not been granted by the Congress. The definitions of income in the federal income tax acts cover income derived "from compensation for personal service . . . of whatever kind and in whatever form paid." Revenue Acts of 1926, §§ 212 (a), 213 (a); 1928, §§ 21, 22 (a). This language is certainly broad enough to embrace the compensation of the trustees, and the immunity, if it exists, must rest upon constitutional limitation. The Treasury Regulations, manifestly in an effort to interpret and apply that limitation, provide for exemption from taxation of compensation paid by a State or political subdivision to its officers and employees only in case their services are rendered "in connection with the exercise of an essential governmental function." Treas. Reg. No. 69, Art. 88; No. 74, Art. 643; No. 77, Art. 643. But the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application.

We come then to the question whether the Congress has the constitutional power to impose an income tax upon the compensation of public officers of the character here involved. We do not regard that question as answered by mere terminology. The roots of the constitutional restriction strike deeper than that. The term "public office" undoubtedly implies a definite assignment of public activity, fixed by appointment, tenure and duties. But whether that field of activity, in relation to a State, carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying

federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. *Collector* v. *Day,* 11 Wall. 113, 125, 127; *Ambrosini* v. *United States,* 187 U. S. 1, 7; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575. The principle of immunity thus has inherent limitations. *Metcalf & Eddy* v. *Mitchell, supra,* pp. 522–524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Indian Motocycle Co.* v. *United States, supra,* p. 576; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Board of Trustees* v. *United States,* 289 U. S. 48, 59. And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. *South Carolina* v. *United States,* 199 U. S. 437; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172; *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 173; *Metcalf & Eddy* v. *Mitchell, supra; Indian Motocycle Co.* v. *United States, supra; Ohio* v. *Helvering,* 292 U. S. 360, 368, 369. The necessary protection of the independence of the state government is not deemed to go so far.

In *South Carolina* v. *United States, supra,* the State undertook to establish a monopoly of the sale of intoxicating liquors and prohibited the sale except by dispensaries to be operated by the State. The dispensers had no interest in the sales and received no profit from them. The question was whether the dispensers were relieved from liability for the internal revenue tax prescribed by the Congress for dealers in intoxicating liquors because the

dispensers were agents of the State, which in the exercise of its sovereign power had taken charge of the business. While the court recognized the power of the State to undertake the enterprise, the exemption was denied, as the State could not, by engaging in a business of that sort, withdraw it from the taxing power which the Constitution vested in the national government. *Murray* v. *Wilson Distilling Co., supra.*

The Court reached a similar conclusion in the recent case of *Ohio* v. *Helvering, supra,* where the State had established a department of liquor control and sought an injunction to restrain the enforcement of federal statutes imposing taxes upon dealers in intoxicating liquors. The State sought to distinguish the case of South Carolina because, in Ohio, " the state-owned stores " were operated by civil service employees of the state government, and hence the question was said to concern the taxation of the State itself. The argument was unavailing and the Court rested its ruling upon the broad ground that when the State becomes a dealer in intoxicating liquors it falls within the reach of the tax as one validly imposed by the federal statute.

The method which the State may adopt in organizing such an activity cannot be regarded as determinative. If the dealers in South Carolina, or those employed to operate the state stores in Ohio, had been denominated public officers, and as such had been assigned definite tenure and duties, the same result would have been reached, as the principle involved would be equally applicable. Nor, in such a case, would the fact that the officers were entrusted with the authority to fix prices for the sales under their charge in a manner appropriately to secure the revenue needed for the enterprise, or were charged with the duty of ascertaining the losses which, if they occurred, were to be borne by general taxation, establish a material distinction.

The nature of the enterprise, and not the particular incidents of its management, would control.

We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. If, in the instant case, the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the State has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity.

If the business itself, by reason of its character, is not immune, although undertaken by the State, from a federal excise tax upon its operations, upon what ground can it be said that the compensation of those who conduct the enterprise for the State is exempt from a federal income tax? Their compensation, whether paid out of the returns from the business or otherwise, can have no quality, so far as the federal taxing power is concerned, superior to that of the enterprise in which the compensated service is rendered.

We conclude that the Congress had the constitutional authority to lay the tax.

Decree reversed.

McCULLOUGH, EXECUTRIX, *v.* SMITH, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 72. Argued November 9, 1934.—Decided December 3, 1934.

1. Unpaid instalments which accrued under a war risk insurance policy to the father and mother of the insured as successive beneficiaries after his death, belonged, when they had both died, to the respective estates of the parents. P. 231.
2. Upon the death of the insured followed by the deaths of the beneficiaries, the commuted value of the war risk insurance, deducting instalments that accrued to the beneficaries while living, is payable to the estate of the insured. P. 231.

206 N. C. 102; 173 S. E. 49, reversed.

CERTIORARI * to review a judgment rendered on the petition of the administrator of a deceased soldier to be directed how war risk insurance funds, awarded to the soldier's estate, should be distributed as between the estates of his parents.

Mr. J. Howard McLain, with whom *Mr. John M. Robinson* was on the brief, for petitioner.

No appearance for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

While in the military service of the United States, Moses Reid took out a War Risk Insurance policy for $10,000 and designated his father and mother as beneficiaries. He died intestate August 23, 1920, leaving no wife, child or descendant. The father died November 22, 1926, intestate; the mother February 22, 1932. Her will designated an executrix.

* See Table of Cases Reported in this volume.

No payment of any kind was made under the policy prior to the mother's death. Thereafter the Bureau of War Risk Insurance determined that during his life the insured became entitled to monthly disability payments aggregating $862.50, and caused this sum to be paid to his administrator. Also that while alive the father, as beneficiary, became entited to installments aggregating $2,127.50, which was paid to his administrator. Further that during her life the mother, as beneficiary, became entitled to payments aggregating $3,938.75. This sum was paid to her executrix. Finally it ruled that the commuted value of unpaid monthly installments under the policy payable after the mother's death amounted to $5,768; and the assured's administrator collected this. The only funds received by him were from payments under the policy as above stated.

This proceeding, with proper parties, was duly begun by the assured's administrator in the Superior Court of Mecklenburg County, North Carolina. It sought binding direction concerning distribution of funds on hand and presented no other question.

The trial court ruled that at the soldier's death his father and mother became sole distributees of his estate; "that as to the $862.50 which was due the insured prior to his death, it belongs to the estate of the father and the estate of the mother equally; that as to the $5,768 received by him [the administrator] as the commuted value of the unpaid portion of the policy after the death of the beneficiaries, it should be paid to the estate of the father and the estate of the mother respectively in such sums as are required to bring the said estates to an equal sum after the sums paid into each by the Bureau of War Risk Insurance, and the half of the $862.50 has been added together; the intention of this finding being to make the estate of the father and the estate of the mother exactly equal finally."

Upon appeal the Supreme Court of North Carolina affirmed. It said [206 N. C. 102; 173 S. E. 49]:

"When Moses Reid died, his distributees were his father, Adolphus Reid, and his mother, Ida Reid. Both were living. The statute cast upon each one-half of the personal property of deceased. Thereupon the right of property to such one-half immediately vested. C. S., § 137, subd. 6.

"Neither received as beneficiary in the war risk insurance policy any installment from the government during his or her life. Therefore the whole fund in contemplation of law is now assets of the estate of the dead soldier, to be distributed immediately to the estates of his father and mother. The fact that one beneficiary lived longer than the other, and hence entitled to receive more money in installments from the government, has nothing to do with the right of property as distributee. The intestate law of this State pegged that right at the death of the soldier."

In *Singleton* v. *Cheek,* 284 U. S. 493, where the circumstances were similar to those presented here, nothing was paid under the policy until after the death of the wife, the designated beneficiary. We considered the applicable provisions of § 303, World War Veterans' Act of 1924 as amended March 4, 1925, c. 553, 43 Stat. 1302, 1310 (38 U. S. C., § 514), declared them retroactive to October 6, 1917, and held that installments which accrued before the death of the insured, and the commuted value of those accruing subsequent to the beneficiary's death, belonged to the insured's estate for distribution as of the moment of his death. Benefits accrued in favor of but not received by the widow during her life had been paid to her administrator. No suggestion was made that other disposition would have been proper. At page 497 the opinion says:

"By that amendment, [March 4, 1925*] the rule, which, upon the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, and 'the estate of the insured' was wholly substituted as the payee. All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, became assets of the estate of the insured as of the instant of his death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of his residence, such heirs to be determined as of the date of his death, and not as of the date of the death of the beneficiary."

Considering what was said in *United States* v. *Worley,* 281 U. S. 339, 341, and in *Singleton* v. *Cheek, supra,* together with the language and evident purpose of the Act of 1924 as amended, we think it clear enough that installments which accrued in favor of the father and mother of Reid as beneficiaries during their lives became the property of their respective estates. Also that installments which accrued to the assured during his lifetime, and the commuted value of the installments payable subsequent to the mother's death, became the property of his estate.

The court below erred in directing that the installments which accrued to the beneficiaries—father and mother—

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* "If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all 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, said value to be computed as of date of last payment made under any existing award." 43 Stat. 1310.

during their lives should be treated as parts of the estate of the insured. See *Reivich* v. *United States*, 25 F. (2d) 670, 672; *United States* v. *Woolen*, 25 F. (2d) 673, 676.

Reversed.

UNITED STATES MORTGAGE CO. ET AL. *v.* MATTHEWS ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 441. Argued November 12, 1934.—Decided December 3, 1934.

A Maryland mortgage contained the assent of the mortgagor to the passing of a decree for a sale of the property in accordance with designated statutory provisions "or any amendments or additions thereto." The effect would have been to permit the mortgagee, or any owner of any fraction of the mortgage interest, to obtain a decree in a summary proceeding for a sale of the property in the event of default or forfeiture, through the medium of a trustee to be appointed by such decree. Before such proceedings were attempted, a new law was passed so amending the statute as to suspend the summary remedy during a period of declared emergency unless the application for the decree were made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt.

As applied to a holder of less than this percentage, *held:*

1. The amendment does not offend the equal protection clause of the Fourteenth Amendment. P. 236.

2. Where the contract clause is invoked, this Court must determine for itself the nature and effect of the alleged agreement and whether this has been impaired. P. 236.

3. The assent in the mortgage contract embraced not only the statutory provisions therein designated and such amendments or additions as might have been made prior to the execution of the mortgage (of which in fact there were none) but also future amendments or additions, including that which suspended the summary remedy. P. 237.

4. Therefore, the amendatory Act did not impair the obligation of the contract. P. 237.

167 Md. 383; 173 Atl. 903, reversed.

CERTIORARI * to review the affirmance of a decree for the sale of mortgaged property in summary proceedings brought by holders, by assignment, of an undivided 500/2950 share of the mortgage and debt. The owner of the equity of redemption and the holder or representative of approximately 83% of the unpaid debt defended by intervention and brought the case to this Court.

Messrs. James Thomas and *William L. Marbury, Jr.*, with whom *Mr. Clarence A. Tucker* was on the brief, for petitioners.

Messrs. Charles F. Stein, Jr., and *Frederick H. Hennighausen*, with whom *Mr. J. Calvin Carney* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

July 30, 1925, one Warner gave petitioner, Mortgage Guarantee Company, a mortgage upon certain real estate in Baltimore, Maryland, to secure $3,000 loaned to him by that company. The mortgage instrument contained ordinary covenants concerning interest, insurance, taxes, &c. Also the following provision:

"And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto."

In July, 1932, the mortgagee assigned to respondents, Mary and John Matthews, an undivided 500/2950 interest in the unpaid portion of the debt—$2,950.

* See Table of Cases Reported in this volume.

When the mortgage was executed § 720, Chapter 123, Maryland laws 1898, was in force. It provided:

"In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in said City, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises." Art. 4, Code Public Local Laws of Maryland (1930 edition), Entitled "Baltimore City," sub-title "Mortgages," § 720.

The Maryland Court of Appeals in *Richardson* v. *Owings,* (1898) 86 Md. 663; 39 Atl. 100, construed the provisions of § 720 and ruled that one who owned part of a mortgage upon property in Baltimore, by proceeding under provisions of that section might obtain the decree there provided for.

There was no amendment or addition to § 720, until the passage of Ch. 56, Acts of 1933 [Special Session], approved December 15, 1933. That chapter provides:

"Section 1. *Be it enacted by the General Assembly of Maryland,* That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title 'Baltimore City,' subtitle 'Mortgages,' said new section to be known as 720A

and to follow immediately after Section 720 and to read as follows:

"720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and ex parte remedies given under Section 720."

December 22, 1933, respondents—the Matthews—presented a petition to Circuit Court No. 2, Baltimore City, wherein they alleged execution of the mortgage by Warner, his assent to the passing of a decree for sale, the assignment of part of the mortgage debt to them, also default. They asked a decree directing sale as permitted by § 720.

Thereupon the United States Mortgage Company, owner of the equity of redemption, and the Mortgage Guarantee Company, holder or duly authorized representative of approximately 83% of the unpaid mortgage debt, intervened. Answering, they relied upon Ch. 56, Acts of 1933, and opposed the prayed for decree. The Matthews then filed an amended petition challenging the validity of Chapter 56, because of conflict with § 10, Art. 1, Federal Constitution, and the 14th Amendment; also because it violated the State Constitution.

The trial judge held the chapter unconstitutional "both as impairing the obligation of contract, and as class legislation of an arbitrary and illegal character." Final decree ordered the sale of the mortgaged property and designated a trustee to make it.

Upon appeal the Court of Appeals held:

That the clause in the mortgage by which the mortgagor gave assent to decree for sale of the property as provided by §§ 720–732 " or any amendments or additions thereto " when properly construed did not amount to an agreement that the proceeding should be " governed by any future amendments or additions to those sections which should become effective before the application for the consent decree," but that " the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage."

Also that Chapter 56 impairs the obligation of the contract between the parties and therefore conflicts with Art. 1, § 10 of the Federal Constitution, but is not subject to objection " on the ground that it is special legislation and denies the appellees the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States and to similar provisions of the Constitution and Bill of Rights of Maryland."

We agree that Chapter 56 does not offend the 14th Amendment by denying equal protection of the laws, and accept the reasons given to support that view—" The classification thus made would seem clearly to have direct relation to the purpose which the Legislature had in mind, and which we cannot say was arbitrary or fanciful."

It is well established doctrine that where the contract clause is invoked this Court must determine for itself the nature and effect of the alleged agreement and whether this has been impaired. *Funkhouser* v. *Preston Co.*, 290 U. S. 163. Accordingly we must here decide what agreement resulted from the language employed by the parties to the mortgage.

We cannot sanction the conclusion of the Court of Appeals on this point. The assent set forth in the mortgage was " to the passing of a decree . . . for a sale of

the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto." Prior to the mortgage there had been no such amendment or addition, and it cannot, we think, be correctly said that " the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage." On the contrary, the words employed seem to us sufficient to embrace the amendments and additions thereafter made by Chapter 56. A contrary holding would deprive the words employed of their customary meaning. And we find nothing which requires us to accept any other meaning.

It follows that the challenged Act cannot properly be said to impair the obligation of the agreement between the parties within the meaning of the Federal Constitution.

The judgment under review must be reversed and the cause remanded to the Court of Appeals for further action not in conflict with this opinion.

Reversed.

MITCHELL, INSURANCE COMMISSIONER OF CALIFORNIA, *v.* MAURER ET AL.

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

No. 54. Argued November 7, 8, 1934.—Decided December 3, 1934.

1. Where receivers of a corporation, appointed by a state court, file a suit against it in the federal court in another State in which they seek an ancillary receivership and are the only actors, there is no federal jurisdiction on the ground of diversity of citizenship if one of them and the corporation are citizens of the same State; and in this regard it is immaterial that the bill in its caption names as

sole plaintiff the plaintiff in the original suit, and that diversity of citizenship existed between him and the corporation. P. 242.

2. A suit by primary receivers, appointed by a state court, for an ancillary receivership in a federal court, is an original, independent bill, which can not be entertained by the federal court in the absence of diversity of citizenship or other independent ground of federal jurisdiction. P. 243.

3. Lack of federal jurisdiction can not be waived or overcome by agreement of the parties. P. 244.

69 F. (2d) 233, reversed.

CERTIORARI * to review an interlocutory decree sustaining an order appointing ancillary receivers.

Mr. Frank L. Guerena for petitioner.

Messrs. Edward D. Lyman and *P. B. Plumb* submitted for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

International Re-Insurance Corporation is organized under the laws of Delaware. It had a place of business and real and personal property in California. On April 19, 1933, the Court of Chancery of Delaware appointed Arthur G. Logan of that State, Carl M. Hansen of Pennsylvania, and George deB. Keim of New Jersey, primary receivers of all its property. The statutes of Delaware purport to vest in receivers so appointed title, as quasi-assignees, to all property, wherever located, except real estate not situated within the State. R. S. Del. § 3884. The order appointing the primary receivers authorized them to apply in other jurisdictions for the appointment of ancillary receivers. On the day of their appointment, they filed, in the federal court for southern California, a petition, or bill, praying that ancillary receivers be ap-

* See Table of Cases Reported in this volume.

pointed of property there located. The prayer was granted *ex parte*. W. H. Comstock of California and deB. Keim were appointed ancillary receivers. And an order issued enjoining all persons from interfering with their possession and control.

On the same day, E. Forrest Mitchell, the Insurance Commissioner of California, filed, in the Superior Court of that State, a petition praying that he be placed in the possession of the property and business of the Corporation. That court entered immediately an order temporarily enjoining the Corporation from disposing of its property in California; and ordered the Insurance Commissioner to take possession thereof. Its license to transact the business of workmen's compensation insurance in California had been revoked by the Commissioner prior to the appointment of the primary receivers.

Service was promptly made of the orders issued by the two courts. A dispute arose as to the exact times of the filing of the several proceedings; of the entry of the orders; of the service thereof; and of taking possession. To resolve the controversy, the Insurance Commissioner filed in the federal court, on May 2, 1933, a motion to vacate its order appointing the ancillary receivers; to dissolve the restraining order; and to dismiss the petition of the primary receivers. The motion alleged that, before the federal court assumed to act, the California court had acquired jurisdiction and the Insurance Commissioner had actually taken possession of the Corporation's property. It charged, among other things, that the petition of the primary receivers on which the appointment of the ancillary receivers had been made, did not state facts sufficient to give the court jurisdiction of the subject matter or of the parties; and that both the order of appointment and the restraining order were, therefore, invalid.

At the hearing of the motion, it was admitted that " the situation presented is within the California statute providing for proceedings against delinquent insurance companies "; that the California assets of the Corporation " were in the possession of the Insurance Commissioner at the time of the appointment and qualification of the receivers appointed by the district court "; and that the proceeding brought by the primary receivers had been filed a few minutes before the Insurance Commissioner made his application to the state court. On these facts, the District Court held, that since the proceeding brought by the primary receivers was " first filed in this court, jurisdiction of the *res* is in the district court." Upon a rehearing had on additional affidavits, the court reaffirmed its denial of the motion to vacate the order appointing the ancillary receivers.

From this judgment, the Insurance Commissioner appealed to the Court of Appeals. There he contended that the original proceeding, in which the primary receivers petitioned for the appointment of ancillary receivers, was not a bill of complaint and was insufficient to confer jurisdiction upon the District Court; cf. *McCandless* v. *Furlaud,* 68 F. (2d) 925; [1] that the subsequent amendments, purporting to state a cause of action against the Corporation, were inoperative to sustain the jurisdiction of the federal court because they were not filed until after the state court had acquired possession of the property; and that the bill, even as amended, did not state a cause of action in which a valid order appointing ancillary receivers could be made.

The Court of Appeals, in an elaborate opinion, affirmed the judgment of the District Court, 69 F. (2d) 233. It did not pass upon the Commissioner's contention that the

[1] For disposition of the case by this Court, see *ante,* p. 67.

ancillary appointment could not be made upon the bill as it was originally filed, because it held that the subsequent amendments related back to the commencement of the proceedings. It overruled his objection that the bill failed to allege that the Corporation was insolvent or that the complainant in the primary suit was a judgment creditor, on the ground that any such defects were cured by the amendments or waived by the Corporation's answer. It held that the rule of *Booth* v. *Clark,* 17 How. 322, did not prevent the appointment of ancillary receivers, because here the primary receivers did not ask that they themselves be appointed ancillary receivers, and did ask specifically that the " rights of creditors in the foreign jurisdiction be safeguarded." It concluded that the state and federal courts had concurrent jurisdiction of the subject matter; and that the federal court was entitled to exercise its jurisdiction, because of the prior filing in it of the proceedings for the appointment of ancillary receivers.

Although the Court of Appeals discussed, also, questions of federal jurisdiction and venue, it did not refer specifically to the fact that a lack of diversity of citizenship appeared affirmatively, on the amended pleadings, one of the primary receivers as well as the Corporation being a citizen of Delaware. Nor was this fact relied upon by the Insurance Commissioner in his petition for certiorari or in oral argument here. He prayed for the writ solely on the ground that the Court of Appeals should have decided that " the original bill filed in the District Court was insufficient to state a cause of action or to confer jurisdiction "; and that the amendments thereto filed after the commencement of the suit in the state court could not operate to cure the defects of the original bill. But, as the lack of diversity of citizenship appears upon examination of the record, we have no occasion to pass upon the contentions made. The order appointing the

ancillary receivers must be set aside because the District Court lacked federal jurisdiction of the cause.

First. If the jurisdiction of the District Court must rest on diversity of citizenship, it fails because one of the plaintiffs is a citizen of the same state as the defendant. *Hooe* v. *Jamieson,* 166 U. S. 395. The proceeding in the District Court was entitled " Bertha E. Maurer v. International Re-insurance Corporation "; and that title has been used in all later proceedings in that court, in the Court of Appeals and in this Court. If Bertha E. Maurer had actually been the plaintiff, there would have been diversity of citizenship; for she is a citizen of New Jersey. But, in fact, Bertha E. Maurer was not a party to the application for the appointment of the ancillary receivers; was not later made a party to the suit; and has not appeared at any stage of the proceedings. Her name was used, doubtless, because she was the plaintiff in the suit against the Corporation brought in the Court of Chancery of Delaware in which the primary receivers were appointed.[2] The application in the case at bar for the appointment of ancillary receivers was made by, and in the name of, the primary receivers. They sue as quasi-assignees claiming to be entitled to the possession of the balance of the California property after its administration by the District Court of California. In the original application filed April 19, 1933 they called themselves petitioners. In the amendments filed six days later, the application is called a " bill of complaint." It is so designated in the answer of the Corporation, filed at the same time. We necessarily treat the primary receivers as the plaintiffs.

[2] Similarly, in *McCandless* v. *Furlaud, ante,* p. 67, the petition for the appointment of ancillary receivers filed by the primary receivers in the federal court for southern New York, bore the title of the suit in the federal court for western Pennsylvania which appointed them.

Second. Apparently this lack of diversity jurisdiction was regarded as immaterial by the Court of Appeals, on the ground that the suit was an ancillary one. For the opinion states: " Finally it has been held that an ancillary suit in a Federal court does not depend on diverse citizenship." This position is adopted in the brief of the primary receivers, but the contention is unsound. Where the jurisdiction of a federal district court is based upon diversity of citizenship, proceedings therein in intervention being ancillary, the jurisdiction rests upon that of the main cause. *Cincinnati, I. & W. R. Co.* v. *Indianapolis Union Ry. Co.,* 270 U. S. 107. The same rule is applicable to sustain jurisdiction of independent suits which are ancillary to an original suit in the same court. *White* v. *Ewing,* 159 U. S. 36. Whether the rule may ever be applied to a suit brought in a federal court of another district; and whether a suit for the appointment of ancillary receivers in another federal district is an ancillary suit within the meaning of the rule does not appear to have been decided by this Court.[3] We need not decide either question now. For the rule can have no application where primary receivers appointed by a state court bring a suit for the appointment of ancillary receivers in the federal court for another State. Obviously such an application is not ancillary to any proceedings in any federal court. It is an independent original bill. Being such, it cannot be sustained when diversity of citizenship

[3] In *Raphael* v. *Trask,* 194 U. S. 272, 278, it is intimated that the jurisdiction of a federal court cannot be based upon an original suit in another federal court. Some of the lower courts have so held. *Winter* v. *Swinburne,* 8 Fed. 49, where the subject was fully discussed. Compare *United States* v. *Pedarre,* 262 Fed. 839; *Sullivan* v. *Swain,* 96 Fed. 259. But see *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, 587. Compare *Trustees System Co.* v. *Payne,* 65 F. (2d) 103, and *Walker* v. *United States Light & Heating Co.,* 220 Fed. 393, which concern requisites of equity, rather than federal, jurisdiction.

does not exist and no other ground of federal jurisdiction is shown.

Third. Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.[4] *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382. Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention of this Court the lack of diversity of citizenship are immaterial. The Court of Appeals pointed out [p. 238] that under Judicial Code § 274 (c), where " jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought . . . though defectively alleged, either party may amend at any stage of the proceedings *and in the appellate court* upon such terms as the court may impose." But, in the case at bar, the admitted facts preclude such an amendment. Diversity of citizenship confessedly did not exist.

The judgment is reversed and the cause is remanded to the District Court with directions to dismiss the bill for want of federal jurisdiction.

Reversed.

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[4] The order appointing ancillary receivers attacked in *McCandless* v. *Furlaud, ante,* p. 67, on the ground that the court was without federal jurisdiction, had been entered, not in the suit there under review, but in a separate proceeding in the same court.

HAMILTON ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 55. Argued October 17, 18, 1934.—Decided December 3, 1934.

1. An order of the Regents of the University of California requiring every abled-bodied male student who, at the time of his matriculation, is under the age of twenty-four years, and who has not attained full academic standing as a junior student, to enroll in and complete a course in military science and tactics, *held* a statute of a State, within the meaning of Jud. Code, § 237 (a), in view of the relation of the University to the state government and the legislative powers conferred upon the Regents by the state constitution in respect of the organization and government of the University. P. 257.
2. An appeal will not be dismissed for want of a substantial federal question unless the federal questions presented are clearly not debatable and utterly lacking in merit. P. 258.
3. A State, by accepting the benefits of the Act of July 2, 1862, for the endowment, maintenance and support of a "land grant" college, becomes bound, as one of the conditions of the grant, to offer the students at such college instruction in military tactics, but remains free to determine the branches of military training to be offered, the content of the instruction, and the objects to be attained; whether the State becomes bound to require the students to take the training is a question not involved in the present case. P. 258.
4. Judicial notice is taken of the long-established voluntary coöperation between federal and state authorities in respect of the military instruction given in the land grant colleges. P. 259.
5. The War Department has not been empowered to prescribe the military instruction in these institutions. P. 259.
6. Each State has authority to train its able-bodied male citizens of suitable age to fit them, if called upon, for service in the United States Army, the state militia, or the local constabulary or police; and for these purposes it may, with the permission of the National Government, avail itself of the services of officers and the use of equipment belonging to the military establishment of the United States. P. 260.

7. And while so acting within its retained powers, and consistently with exertion of national power and with rights of individuals safeguarded by the National Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted. P. 260.
8. The "privileges and immunities" protected by the Fourteenth Amendment are those that belong to the citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. P. 261.
9. If the refusal by a State to allow its citizen to exercise the privilege of attending the State's university, except upon condition that he take military training, to which he objects on religious and conscientious grounds, is not repugnant to the due process clause of the Fourteenth Amendment as an undue deprivation of liberty, it does not violate the privileges and immunities clause. P. 261.
10. The liberty guaranteed by the Fourteenth Amendment does not confer upon a conscientious and religious objector to war and military training the right to attend a state university without taking a course in military training required by the State as part of the curriculum. P. 262.
11. There is no conflict between the Regents' order involved in this case and the Briand-Kellogg Peace Pact, 46 Stat. 2343. P. 265.

219 Cal. 663; 28 P. (2d) 355, affirmed.

APPEAL from a judgment denying a writ of mandate sought as a means of compelling the Regents of the University of California to permit Hamilton and Reynolds, Jr., two minors, to study at the University without taking the required course in military training.

Mr. John Beardsley for appellants.

Compulsory membership and service in the Reserve Officers Training Corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the Fourteenth Amendment.

The Reserve Officers Training Corps is a part of the military forces of the United States, and is no part of the military establishment of the State. The membership, control, courses of study, etc., are under the War Department. The commanding officers, uniforms and weapons

are supplied by the Federal Government. The primary object of establishing units of the R. O. T. C. at the University is to qualify students for appointments in the Reserve Officers Corps of the United States Army. It is not necessary for us to contend here that compulsory training in a state military unit, for state purposes, would constitute an abridgment of the privileges and immunities of citizens of the United States.

Without authorization by Act of Congress, there is no power even in the Federal Government to compel service in any branch of the federal military establishment in time of peace.

The University of California is a Land Grant College, enjoying federal subsidy under the Morrill Land Grant College Act, approved July 2, 1862. Undoubtedly many such institutions have made military training compulsory in the sincere belief that the Morrill Act required that it be compulsory. It does not. See 36 Op. Atty. Gen. 297.

Since Congress has not required that military training in that branch of the federal military establishment known as the Reserve Officers Training Corps shall be compulsory, certainly the States and the Universities are without power to compel service in that military organization, not of the State, but of the Federal Government.

Freedom from compulsory service in a branch of the federal military establishment in time of peace is a privilege and immunity of citizens of the United States. The privileges and immunities guaranteed against state abridgment by the Fourteenth Amendment are those arising out of the essential nature and character of the National Government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank,* 92 U. S. 542.

The Morrill Act affords immunity from enforced service in time of peace by not making military training in the Land Grant Colleges compulsory. Similarly the Act establishing the R. O. T. C. refrains from making training

compulsory and from authorizing it to be made compulsory in the Land Grant Colleges and other state educational institutions. It does, however, authorize the requirement of compulsory military training in other institutions wherein R. O. T. C. units are established, thus bringing into relief the intention of Congress not to authorize compulsion in the state colleges.

If it is said that the privileges and immunities of appellants are not abridged because they are not actually being compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and no State may impose, as a condition upon which it will extend a privilege which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States. *Home Insurance Co.* v. *Morse,* 20 Wall. 445, 456; *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

Compulsory military training imposed upon religious and conscientious objectors violates religious freedom, and deprives appellants of their freedom of religion without due process of law.

Just as the freedom of speech and press are protected against state abridgment by the due process clause of the Fourteenth Amendment; *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697; so must freedom of religion in like manner be protected.

The older cases held that the guaranties of civil liberties in the First Amendment afforded no protection against abridgment by the States, since the Amendment is a limitation confined to the National Government. All that is changed by the *Stromberg* and *Near* decisions, which remove all doubt that the liberties guaranteed by the First Amendment are a part of the liberty safeguarded by the due process clause of the Fourteenth Amendment.

Depriving students of their right to education at their State University because of their refusal to engage in

military training in violation of the religious teachings of their Church and their own deepest convictions of religion and conscience, amounts to a prohibition of the free exercise of religion, in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment. Certainly freedom of religion means something more than the right to worship according to the dictates of one's own conscience. No law or constitutional guaranty is necessary to protect that right. The principle must afford protection to outward manifestations of religious belief. This court has sustained such manifestations in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535. See also *Hardwich* v. *Board of School Trustees,* 54 Cal. App. 696.

Compulsory military training violates the Kellogg Pact, outlawing war. California, and the University of California, are bound by that treaty. The Federal Government, perhaps, may violate it. The States may not. We submit that compulsory training for war violates the spirit, if not the letter, of the Kellogg Pact.

Mr. John U. Calkins, Jr., with whom *Mr. Frederic W. Hall* was on the brief, for appellees.

By leave of Court, *Mr. Sveinbjorn Johnson* filed a brief, as *amicus curiae,* on behalf of numerous Land Grant Colleges,* in which he went largely into the history of the

* The Land Grant Colleges on whose behalf this brief was filed are as follows:

Purdue University
University of Arizona
Rhode Island State College
Texas A. & M. College
Montana State College
South Dakota State College
University of Maryland
University of Minnesota
Kansas State College
University of Florida
Connecticut State College
Michigan State College
University of Arkansas
University of Wyoming
Virginia Polytechnic Institute

Land Grant Act of 1862 and of the acceptance and interpretation by numerous States of the trusts created. He argued strongly in support of the view that under these trusts, military training must not only be offered but must be required at the beneficiary institutions, and he subjected the opinion of the Attorney General of June 20, 1930, 36 Op. Atty. Gen. 297, to a critical analysis.

Mr. Justice Butler delivered the opinion of the Court.

This is an appeal under § 237 (a), Judicial Code, 28 U. S. C., § 344 (a), from a judgment of the highest court of California sustaining a state law that requires students at its university to take a course in military science and tactics, the validity of which was by the appellants challenged as repugnant to the Constitution and laws of the United States.

The appellants are the above-named minors, and the fathers of each as his guardian *ad litem* and individually. They are taxpayers and citizens of the United States and of California. Appellees are the regents constituting a corporation created by the State to administer the university, its president, and its provost. Appellants applied to the state supreme court for a writ of mandate compelling appellees to admit the minors into the university as students. So far as they are material to the questions presented here, the allegations of the petition are:

In October, 1933, each of these minors registered, became a student in the university and fully conformed to all its requirements other than that compelling him to take the course in military science and tactics in the Reserve Officers Training Corps, which they assert to be an integral part of the military establishment of the United States and not connected in any way with the militia or military establishment of the State. The primary object of there establishing units of the training corps is to qualify students for appointment in the Officers Reserve

Corps. The courses in military training are those prescribed by the War Department. The regents require enrollment and participation of able-bodied male students who are citizens of the United States. These courses include instruction in rifle marksmanship, scouting and patrolling, drill and command, musketry, combat principles, and use of automatic rifles. Arms, equipment and uniforms for use of students in such courses are furnished by the War Department of the United States Government.

These minors are members of the Methodist Episcopal Church and of the Epworth League and connected religious societies and organizations. For many years their fathers have been ordained ministers of that church. The Southern California Conference at its 1931 session adopted a resolution:

"With full appreciation of the heroic sacrifices of all those who have conscientiously and unselfishly served their country in times of war, but with the belief that the time has come in the unfolding light of the new day for the settlement of human conflicts by pacific means, and because we as Christians owe our first and supreme allegiance to Jesus Christ. Because the Methodist Episcopal Church in her General Conference of 1928 has declared: 'We renounce war as an instrument of national policy.' Because our nation led the nations of the world in signing the Paris Peace Pact, and the Constitution of the United States, Article 6, Section 2, provides that: 'This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made under authority of the United States shall be the Supreme Law of the Land.' Thus making the Paris Pact the supreme law of the land which declares: 'The high contracting parties agree that the settlement of all disputes or conflict—shall never be sought except by pacific means.'

"Therefore we, the Southern California Conference, memorialize the General Conference which convenes in Atlantic City in May, 1932; to petition the United States Government to grant exemption from military service to such citizens who are members of the Methodist Episcopal Church, as conscientiously believe that participation in war is a denial of their supreme allegiance to Jesus Christ."

And in 1932 the General Conference of that Church adopted as a part of its tenets and discipline:

"We hold that our country is benefited by having as citizens those who unswervingly follow the dictates of their consciences . . . Furthermore, we believe it to be the duty of the churches to give moral support to those individuals who hold conscientious scruples against participation in military training or military service. We petition the government of the United States to grant to members of the Methodist Episcopal Church who may be conscientious objectors to war the same exemption from military service as has long been granted to members of the Society of Friends and other similar religious organizations. Similarly we petition all educational institutions which require military training to excuse from such training any student belonging to the Methodist Episcopal Church who has conscientious scruples against it. We earnestly petition the government of the United States to cease to support financially all military training in civil educational institutions."

And the Southern California Conference at its 1933 session adopted the following:

"Reserve Officers' Training Corps—Recalling the action of the General Conference asking for exemption from military service for those members of our church to whom war and preparation for war is a violation of conscience, we request the authorities of our State Universities at Berkeley, Los Angeles and Tucson, to exempt Methodist students from the R. O. T. C. on the grounds of conscien-

tious objection, and we hereby pledge the moral and official backing of this Conference, seeking such exemption, provided that it be understood that no conscientious objector shall participate in the financial profits of war. The Secretary of the Conference is asked to send copies of this paragraph to the governing boards of these institutions."

Appellants, as members of that church, accept and feel themselves morally, religiously and conscientiously bound by its tenets and discipline as expressed in the quoted conference resolutions; each is a follower of the teachings of Jesus Christ; each accepts as a guide His teachings and those of the Bible and holds as a part of his religious and conscientious belief that war, training for war, and military training are immoral, wrong and contrary to the letter and spirit of His teaching and the precepts of the Christian religion.

Therefore these students, at the beginning of the fall term in 1933, petitioned the university for exemption from military training and participation in the activities of the training corps, upon the ground of their religious and conscientious objection to war and to military training. Their petition was denied. Thereupon, through that church's bishop in California, they and their fathers petitioned the regents that military training be made optional in order that conscientious and religious objectors to war, training for war and military training might not be confronted with the necessity of violating and foreswearing their beliefs or being denied the right of education in the state university to which these minors are entitled under the constitution and laws of the State of California and of the United States.

The regents refused to make military training optional or to exempt these students. Then, because of their religious and conscientious objections, they declined to take the prescribed course, and solely upon that ground the regents by formal notification suspended them from the

university, but with leave to apply for readmission at any time, conditioned upon their ability and willingness to comply with all applicable regulations of the university governing the matriculation and attendance of students. The university affords opportunity for education such as may not be had at any other institution in California, except at a greater cost which these minors are not able to pay. And they, as appellees at the time of their suspension well knew, are willing to take as a substitute for military training such other courses as may be prescribed by the university.

Other allegations of the petition need not be stated as they merely go to show the grounds upon which appellants under the state practice sought the writ of mandate.

The university is a land grant college. An act of Congress (Morrill Act approved July 2, 1862, 12 Stat. 503; 7 U. S. C., §§ 301–308) donated public lands to the several States in order that upon the conditions specified all moneys derived from the sale of such lands or from the sale of land scrip issued under the act should be invested and constitute a perpetual fund the interest of which should be inviolably appropriated by each State accepting the benefits of the act "to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." [1]

[1] The quoted language, § 4, has been twice reënacted. See Act of March 3, 1883, 22 Stat. 484. Act of April 13, 1926, 44 Stat. 247.

Morrill Act land grant colleges have been given federal aid under the following acts: March 2, 1887, 24 Stat. 440; August 30, 1890, 26 Stat. 417; March 16, 1906, 34 Stat. 63; March 4, 1907, 34 Stat. 1256,

March 23, 1868, the legislature of California passed an act creating the university "in order to devote to the largest purposes of education the benefaction made to the State" by the Morrill Act. Stats. 1867–8, p. 248. This law of the State, called the organic act, provides that "any resident of California, of the age of fourteen years or upwards, of approved moral character, shall have the right to enter himself in the University as a student at large, and receive tuition in any branch or branches of instruction at the time when the same are given in their regular course, on such terms as the Board of Regents may prescribe." § 3. It declared that the college of agriculture should be first established, § 4; that the college of mechanic arts should be next established, § 5, "and in order to fulfill the requirements of the said Act of Congress, all able-bodied male students of the University, whether pursuing full or partial courses in any college, or as students at large, shall receive instruction and discipline in military tactics in such manner and to such extent as the Regents shall prescribe, the requisite arms for which shall be furnished by the State." § 6. Article IX, § 9, of the state constitution as amended November 5, 1918, declares: "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds . . . *provided,* that all moneys derived from the sale of public lands donated to this State by act of Congress approved July 2, 1862 (and the several acts amenda-

1281; May 8, 1914, 38 Stat. 372; February 24, 1925, 43 Stat. 970; May 22, 1928, 45 Stat. 711. And see Acts of February 23, 1917, 39 Stat. 929; June 7, 1924, 43 Stat. 653; February 9, 1927, 44 Stat. 1065.

tory thereof), shall be invested as provided by said acts of Congress and the income from said moneys shall be inviolably appropriated to the endowment, support and maintenance of at least one college of agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and mechanic arts, in accordance with the requirements and conditions of said acts of Congress." September 15, 1931, pursuant to the provisions of the organic act and constitution, the regents promulgated the following order:

"Every able-bodied student of the University of California who, at the time of his matriculation at the University, is under the age of twenty-four years and a citizen of the United States and who has not attained full academic standing as a junior student in the University and has not completed the course in military science and tactics offered to freshmen and sophomore students at the University shall be and is hereby required as a condition to his attendance as a student to enroll in and complete a course of not less than one and one-half units of instruction in military science and tactics each semester of his attendance until such time as he shall have received a total of six units of such instruction or shall have attained full academic standing as a junior student."

In the court below appellants assailed the laws and order above referred to as repugnant to specified provisions of the California constitution, and political code. And they adequately challenged the validity of the state constitution, organic act and regents' order, in so far as they were by the regents construed to require these students to take the prescribed course in military science and tactics, as repugnant to the Constitution and laws of the United States.

The state court, without announcing an opinion, denied the petition for a writ of mandate. Appellants applied for a rehearing. The court, denying the application, handed down an opinion in which it held that Art. IX, § 9, reposes in the regents full powers of organization and government of the university subject to legislative control in respect of its endowments and funds; that by § 6 of the organic act and Art. IX, § 9, military tactics is expressly required to be included among the subjects which shall be taught at the university and that it is the duty of the regents to prescribe the nature and extent of the courses to be given and to determine what students shall be required to pursue them, and that the suspension of the petitioning students because of their refusal to pursue the compulsory courses in military training involved no violation of their rights under the Constitution of the United States.

By their assignment of errors, appellants call upon this court to decide whether the challenged provisions of the state constitution, organic act and regents' order, in so far as they impose compulsory military training, are repugnant to the privileges and immunities clause of the Fourteenth Amendment, the due process clause of that amendment or the treaty that is generally called the Briand-Kellogg Peace Pact. 46 Stat. 2343.

Appellees contend that this court has no jurisdiction because, as they say, the regents' order is not a " statute of any state " within the meaning of § 237 (a), Judicial Code. But by the California constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university, which, as it has been held, is a constitutional department or function of the state government. *Williams* v. *Wheeler* (1913) 23 Cal. App. 619, 623; 138 Pac. 937. *Wallace* v. *Regents* (1925) 75 Cal. App. 274,

277; 242 Pac. 892. The assailed order prescribes a rule of conduct and applies to all students belonging to the defined class. And it was because of its violation that the regents by resolution suspended these students. The meaning of "statute of any state" is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power. *King Mfg. Co.* v. *Augusta,* 277 U. S. 100. *Sultan Ry. Co.* v. *Dept. of Labor,* 277 U. S. 135. It follows that the order making military instruction compulsory is a statute of the State within the meaning of § 237 (a).

And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention cannot be sustained; for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance.[2]

The allegations of the petition do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university. While, by acceptance of the benefits of the Morrill Act of 1862 and the creation of the university in order appropriately to comply with the terms of the grant, the State became bound to offer students in that university instruction in military tactics, it remains untrammeled by federal enactment and is entirely free

[2] *Micas* v. *Williams,* 104 U. S. 556. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 38. *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 105, 107. *Erie R. Co.* v. *Solomon,* 237 U. S. 427. *Chicago, R. I. & P. Ry. Co.* v. *Devine,* 239 U. S. 52, 54. *Sugarman* v. *United States,* 249 U. S. 182. *Quong Ham Wah Co.* v. *Industrial Comm'n.,* 255 U. S. 445, 448–449. *Zucht* v. *King,* 260 U. S. 174, 176. *Roe* v. *Kansas,* 278 U. S. 191. *Seaboard Air Line Ry.* v. *Watson,* 287 U. S. 86, 92.

to determine for itself the branches of military training to be provided, the content of the instruction to be given and the objectives to be attained. That State—as did each of the other States of the Union—for the proper discharge of its obligations as beneficiary of the grant made the course in military instruction compulsory upon students. Recently Wisconsin and Minnesota have made it elective.[3] The question whether the State has bound itself to require students to take the training is not here involved. The validity of the challenged order does not depend upon the terms of the land grant.

The petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States. Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary cooperation between federal and state authorities in respect of the military instruction given in the land grant colleges.[4] The War Department has not been empowered

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[3] Each State has a land grant college; Massachusetts has two. In 1923 Wisconsin made the course elective. Wis. Laws, 1923, c. 226. On the argument of this case appellants' counsel stated that Minnesota has recently made the course elective. Circular 126, Preliminary Report, Land-Grant Colleges and Universities, 1933, Department of Interior, Office of Education.

[4] §§ 40–47 of National Defense Act of June 3, 1916, 39 Stat. 166, 191–2, as amended by §§ 33 and 34 of Act of June 4, 1920, 41 Stat. 759, 776, 777, Act of June 5, 1920, 41 Stat. 948, 967, and Act of May 12, 1928, 45 Stat. 501. 10 U. S. C., §§ 381–390. Army Regulations No. 145–10, § II, pars. 10 and 11.

Cf. Acts of July 28, 1866, 14 Stat. 332, 336, and of May 4, 1870, 16 Stat. 373; R. S. § 1225, as amended July 5, 1884, 23 Stat. 107, 108; September 26, 1888, 25 Stat. 491; January 13, 1891, 26 Stat. 716; November 3, 1893, 28 Stat. 7; February 26, 1901, 31 Stat. 810; April 21, 1904, 33 Stat. 225; June 3, 1916, 39 Stat. 166, 197; June 4, 1920, 41 Stat. 759, 780.

to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State. The States are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war and against every attack of public enemies. *Gilbert* v. *Minnesota,* 254 U. S. 325, 328–9. *State* v. *Holm,* 139 Minn. 267, 273. Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion, Constitution, Art. I, § 8, cls. 12, 15 and 16; *Selective Draft Law Cases,* 245 U. S. 366, 380–383; *State* v. *Industrial Comm'n,* 1925, 186 Wis. 1; 202 N. W. 191) or as members of local constabulary forces, or as officers needed effectively to police the State. And, when made possible by the national government, the State in order more effectively to teach and train its citizens for these and like purposes, may avail itself of the services of officers and equipment belonging to the military establishment of the United States. So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment. *Houston* v. *Moore,* 5 Wheat. 1, 16–17. *Dunne* v.

People, (1879) 94 Ill. 120, 129. 1 Kent's Commentaries 265, 389. Cf. *Presser* v. *Illinois,* 116 U. S. 252.

The clauses of the Fourteenth Amendment invoked by appellants declare: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law." Appellants' contentions are that the enforcement of the order prescribing instruction in military science and tactics abridges some privilege or immunity covered by the first clause and deprives of liberty safeguarded by the second. The "privileges and immunities" protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. *Slaughter-House Cases,* 16 Wall. 36, 72–74, 77–80. *McPherson* v. *Blacker,* 146 U. S. 1, 38. *Duncan* v. *Missouri,* 152 U. S. 377, 382. *Twining* v. *New Jersey,* 211 U. S. 78, 97. *Maxwell* v. *Bugbee,* 250 U. S. 525, 538. *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 539. Appellants assert—unquestionably in good faith—that all war, preparation for war, and the training required by the university, are repugnant to the tenets and discipline of their church, to their religion and to their consciences. The "privilege" of attending the university as a student comes not from federal sources but is given by the State. It is not within the asserted protection. The only "immunity" claimed by these students is freedom from obligation to comply with the rule prescribing military training. But that "immunity" cannot be regarded as not within, or as distinguishable from, the "liberty" of which they claim to have been deprived by the enforcement of the regents' order. If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities

clause. Therefore we need only decide whether by state action the "liberty" of these students has been infringed.

There need be no attempt to enumerate or comprehensively to define what is included in the "liberty" protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. *Meyer* v. *Nebraska,* 262 U. S. 390, 399. *Pierce* v. *Society of Sisters,* 268 U. S. 510. *Stromberg* v. *California,* 283 U. S. 359, 368–369. *Near* v. *Minnesota,* 283 U. S. 697, 707. The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of "liberty" confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance.

Viewed in the light of our decisions that proposition must at once be put aside as untenable.

Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all

enemies. *Selective Draft Law Cases, supra,* p. 378. *Minor* v. *Happersett,* 21 Wall. 162, 166.

United States v. *Schwimmer,* 279 U. S. 644, involved a petition for naturalization by one opposed to bearing arms in defense of country. Holding the applicant not entitled to citizenship, we said (p. 650): "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. . . . Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government."

In *United States* v. *Macintosh,* 283 U. S. 605, a later naturalization case, the applicant was unwilling, because of the conscientious objections, to take unqualifiedly the statutory oath of allegiance which contains this statement: "That he will support and defend the Constitution and laws of the United States against all enemies, foreign or domestic, and bear true faith and allegiance to the same." 8 U. S. C., § 381. His petition stated that he was willing if necessary to take up arms in defense of this country, "but I should want to be free to judge of the necessity." In amplification he said: "I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the government of the day." The opinion of this Court quotes from petitioner's brief a statement to the effect that it is a "fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so." And, referring to that part of the

argument in behalf of the applicant, this Court said (p. 623): "This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . . The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29, this Court [upholding a state compulsory vaccination law] speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said: '. . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.' "

And see *University of Maryland* v. *Coale,* 165 Md. 224, 167 Atl. 54, a case, similar to that now before us, decided against the contention of a student in the University of Maryland who on conscientious grounds objected to military training there required. His appeal to this Court was dismissed for the want of a substantial federal question. 290 U. S. 597.

Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants.

The contention that the regents' order is repugnant to the Briand-Kellogg Peace Pact requires little consideration. In that instrument the United States and the other high contracting parties declare that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another and agree that the settlement or solution of all disputes or conflicts which may arise among them shall never be sought except by pacific means. Clearly there is no conflict between the regents' order and the provisions of this treaty.

Affirmed.

MR. JUSTICE CARDOZO.

Concurring in the opinion I wish to say an extra word.

I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states.

Accepting that premise, I cannot find in the respondents' ordinance an obstruction by the state to "the free exercise" of religion as the phrase was understood by the founders of the nation, and by the generations that have followed. *Davis* v. *Beason,* 133 U. S. 333, 342.

There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace.* The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have

*As to the duty of the able-bodied citizen to aid in suppressing crime, see *Babington* v. *Yellow Taxi Corp.,* 250 N. Y. 14, 16; 164 N. E. 726, and the authorities there assembled.

not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare. This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law. The First Amendment, if it be read into the Fourteenth, makes invalid any state law "respecting an establishment of religion or prohibiting the free exercise thereof." Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war.

The meaning of those liberties has striking illustration in statutes that were enacted in colonial times and later. They will be found collected in the opinion of the lower court in *United States* v. *Macintosh,* 42 F. (2d) 845, 847, 848; 283 U. S. 605, 632, and more fully in the briefs of counsel. From the beginnings of our history Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one. This

was done in Virginia in 1738 and 1782 (5 Hening 16; 11 *id.* 18; cf. 8 *id.* 242, 243; 10 *id.* 261, 262; 334, 335); in Massachusetts, (Acts and Resolves, 1758, vol. 4, p. 159; 1759, 4 *id.* 193); in North Carolina (1781, 24 State Records 156); and in New York (Colonial Laws, 1755, vol. 3, pp. 1068, 1069). A like practice has been continued in the constitutions of many of the states. See, e. g., Constitution of Alabama, 1819, 1865, 1867 (F. N. Thorpe, Federal and State Constitutions, Colonial Charters and Other Organic Laws, vol. 1, pp. 105, 119, 147); Arkansas, 1868 (Thorpe, vol. 1, p. 325); Colorado, 1876 (Thorpe, vol. 1, p. 507); Idaho, 1889 (Thorpe, vol. 2, p. 943); Illinois, 1819, 1870 (Thorpe, vol. 2, pp. 980, 1044); Indiana, 1816 (Thorpe, vol. 2, p. 1067); Iowa, 1846, 1857 (Thorpe, vol. 2, pp. 1132, 1148); Kansas, 1855, 1857, 1859 (Thorpe, vol. 2, pp. 1190, 1214, 1253); Kentucky, 1792, 1799, 1850, 1890 (Thorpe, vol. 3, pp. 1271, 1283, 1307, 1350); Louisiana, 1879, 1898 (Thorpe, vol. 3, pp. 1501, 1587); Michigan, 1850 (Thorpe, vol. 4, p. 1966); Mississippi, 1817 (Thorpe, vol. 4, p. 2041); Missouri, 1820, 1875 (Thorpe, vol. 4, pp. 2164, 2268; New Hampshire, 1794, 1902 (Thorpe, vol. 4, pp. 2472, 2495); New York, 1821, 1846 (Thorpe, vol. 5, pp. 2648, 2671); Pennsylvania, 1790, 1838 (Thorpe, vol. 5, pp. 3099, 3111); Vermont, 1793 (Thorpe, vol. 6, p. 3763). For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service. Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. On the contrary, the very lawmakers who were willing to give release from warlike acts had no thought that they were doing any-

thing inconsistent with the moral claims of an objector, still less with his constitutional immunities, in coupling the exemption with these collateral conditions.

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

I am authorized to state that MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

INDIANA FARMER'S GUIDE PUBLISHING CO. *v.* PRAIRIE FARMER PUBLISHING CO. ET AL.

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

No. 60. Argued November 8, 1934.—Decided December 3, 1934.

1. A business of publishing and circulating farm journals, which involves shipment of substantial quantities of the papers to other States, and also the obtaining of advertising essential to the business from customers in other States and the transportation between customers and publishers over state lines of electrotypes used in setting up the advertisements, involves interstate commerce. *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, distinguished. P. 274.
2. To constitute a combination to restrain or monopolize a business in interstate commerce, within the meaning of §§ 1 and 2 of the Sherman Act, it is not necessary that the restraint or monopoly

should affect all of the business of the kind throughout the country; it may relate to such part of it as is carried on in a particular section of the country. Pp. 277, 278.

3. The Court will not search the record for grounds to sustain a judgment where the ground upon which it was based proves untenable and none other is suggested by respondent. P. 281.

70 F. (2d) 3, reversed.

CERTIORARI * to review the affirmance of a judgment directing a verdict against the plaintiff in an action for triple damages under § 7 of the Sherman Act.

Messrs. Eben Lesh and *U. S. Lesh* for petitioner.

The petitioner is engaged in interstate commerce. Its business of disseminating advertising to the several States through the medium of its magazine constitutes interstate trade or commerce, within the meaning of the Sherman Act; and the District Court erred in holding that it was without jurisdiction over the subject matter. *Preston* v. *Finley,* 72 Fed. 850, 857; *United States* v. *Swift & Co.,* 122 Fed. 529, 531–532; modified, 196 U. S. 375; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.,* 156 Fed. 1, 17; *Furst* v. *Brewster,* 282 U. S. 493, 497; *Station WBT* v. *Poulnot,* 46 F. (2d) 671, 675; *Ramsay* v. *Bill Poster Assn.,* 260 U. S. 501, 511; *Pensacola Telegraph Co.* v. *Western Union,* 96 U. S. 1, 9.

The petitioner proved that as a result of the concerted activities of the respondents in combining and offering the Midwest Unit Rate, it lost advertising revenues in the approximate amount of $145,000. The opinion of the Court of Appeals concedes this point. The damages were properly proved. *Eastman Kodak Co.* v. *Southern Co.,* 295 Fed. 98, 102; *American Can Co.* v. *Ladoga Canning Co.,* 44 F. (2d) 763, 768–769; *Rankin* v. *Bill Poster Assn.,* 42 F. (2d) 152, 155–156.

* See Table of Cases Reported in this volume.

It was not necessary for petitioner to prove that the respondents' activities monopolized, or tended to monopolize, the farm paper business of the entire country, as coming within the provisions of § 2 of the Act. *United States* v. *Knight & Co.*, 156 U. S. 1, 17; *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.*, 60 W. Va. 508, 525; *Eastman Kodak Co.* v. *Southern Co.*, 273 U. S. 359; *Commonwealth* v. *Dyer*, 243 Mass. 472, 499–503; *Stewart* v. *Stearns*, 56 Fla. 570, 588–594; Thornton, A Treatise on the Sherman Anti-Trust Act, p. 105.

It was not necessary for petitioner to prove that respondents' activities were such as restrained interstate commerce so as to affect the entire industry throughout the country, within the provisions of § 1 of the Act. *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502, 518; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 42–43.

A directed verdict was improper; neither of the courts below was entitled to weigh the evidence as to whether the facts proved at the trial showed such a restraint of commerce as violated the provisions of the Act. *Gasco* v. *Tracas*, 85 Ind. App. 591, 594; *Shadoan* v. *Cincinnati Ry. Co.*, 220 Fed. 68, 73; Conformity Act, 28 U. S. C. 724; Rev. Stats., § 914.

The opinion of the Court of Appeals was based upon a misconception of the two cases, *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 343, and *Standard Oil Co.* v. *United States*, 283 U. S. 163.

Mr. Maxwell V. Beghtol, with whom *Messrs. Thomas E. Murphy, Burke G. Slaymaker*, and *Clarence F. Merrell* were on the brief, for respondents.

To justify recovery under the treble damage section of the Sherman Act, injury must result from something forbidden or made unlawful by §§ 1 or 2 of the Act. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 24.

The primary purpose of the Act is to foster competition. *Whitwell* v. *Continental Tobacco Co.,* 125 Fed. 454, 461; *Board of Trade* v. *United States,* 246 U. S. 231, 238.

Restraint of trade must be direct and not incidental or indirect. *Hopkins* v. *United States,* 171 U. S. 578, 592; *Anderson* v. *United States,* 171 U. S. 604, 615; *United States* v. *American Linseed Oil Co.,* 262 U. S. 371, 388.

Agreements concerning advertising rates are not interstate commerce. *Blumenstock Bros.* v. *Curtis Publishing Co.,* 252 U. S. 436, 438.

A combination to sell a product by joint effort of owners at agreed prices is not violative of the Sherman Act if the members do not control a major part of the product. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 175; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 343.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner brought this action against respondents alleging facts upon which it claimed they violated §§ 1 and 2 of the Sherman Act and thereby caused injury to its property and business for which it prayed recovery of three-fold damages under § 7. The respondents answered separately by general denial. At the close of all the evidence they submitted a written motion that the court direct a verdict in their favor. The court granted the motion and entered judgment. The Circuit Court of Appeals affirmed. 70 F. (2d) 3.

Section 1 of the Sherman Act denounces "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C., § 1. Section 2 declares: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed

guilty of a misdemeanor." 15 U. S. C., § 2. Section 7 provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210.

For a number of years, 1928 to 1932 inclusive, next prior to the commencement of this action, the petitioner and each respondent other than the Midwest Farm Paper Unit, Inc., was a publisher of one or more farm papers. Each is a general, and not a vocational, paper; the larger part of its circulation is in the State where printed; it does not circulate in any substantial number throughout the country as a whole and is called a state or sectional paper in order to distinguish it from publications having a wider and what is referred to as a national circulation. Petitioner publishes weekly "The Indiana Farmer's Guide" at Huntington, Indiana. Its circulation is about 160,000, of which over two-thirds is in Indiana and approximately 50,000 in other States. The respondent Prairie Company publishes in Illinois "The Prairie Farmer" and the "Indiana Edition" of the same, which has a large circulation in Indiana. The Wallace Company publishes in Iowa "Wallace's Farmer and Iowa Homestead." The Wisconsin Company publishes in Wisconsin the "Wisconsin Agriculturist and Farmer." The McKelvie Company publishes in Nebraska "The Nebraska Farmer." The Webb Company publishes in Minnesota "The Farmer and Farm, Stock and Home" and the "Dakota Edition" of the same. Advertising matter carried by each of these publishers includes classified and display or commercial advertisements. The latter only is involved in this case. Each is largely dependent for financial success upon revenue derived from

these advertisements. Most of the advertisers are located in States other than those in which the papers are published. About ninety per cent. of petitioner's advertisements comes from points outside Indiana and is obtained by correspondence, traveling solicitors and representatives located in different parts of the country. Advertisers, in order to enable petitioner to print their advertisements as desired, send to it from outside Indiana electrotypes which, after being used, are returned to the advertiser or held subject to his order.

The Midwest Unit is an agency incorporated in 1931 and the successor of an organization formed in 1928. Its officers and directors are representatives of the other respondents, which make use of that agency, as similarly use was made of its predecessor, to procure at combination rates identical advertisements to be published in their seven farm papers. The gist of the complaint is that respondents entered into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business, including the publication, circulation and distribution of advertisements of peculiar interest to farmers " within the territory covered " by their publications; that in furtherance of this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy " competition with other farm publications within said territory "; and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each.

There was evidence tending to show: That the combination rate for advertisements in respondents' seven papers was much less than the total of the separate charges for the same advertisements in any six; that respondents acting separately and in concert sought and obtained ad-

vertisements for all seven papers at rates much less than the charges would have been for identical advertisements if, omitting the "Indiana Edition" of "The Prairie Farmer," they were published in the other six and in petitioner's "Indiana Farmer's Guide." Thus, at least according to petitioner's contention, it appears that by means of the combination rate, respondents, acting together pursuant to agreement to that end, gave a substantial financial advantage to advertisers choosing the "Indiana Edition" instead of the Farmer's Guide.

Petitioner contends that the ground upon which the district court directed the verdict was that its activities were not shown by the evidence to constitute interstate commerce. The record is ambiguous. Respondents' motion did not specify any grounds upon which they claimed to be entitled to the peremptory instruction. There is nothing to indicate the arguments submitted or authorities cited by either party. The court orally instructed the jury: "There has been, in my opinion, a failure on the part of the plaintiff in this case to show that there has been any restraint of trade as between the different states . . . That being true, this court would not have jurisdiction to entertain the case at all, and your finding, under that state of facts, should be for the defendants."

Respondents take no issue with the petitioner's assertion of fact. But, impliedly assuming its correctness, they argue that, while petitioner and respondents are engaged in interstate commerce in the circulation of their papers, the subject matter of the suit is not that business but the making of contracts by respondents for the insertion of advertising matter in their papers and that therefore the case is ruled by *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 438. And they say the trial court did not err in holding that "there can be no restraint

or monopoly of interstate commerce when the subject matter of the complaint does not relate to interstate commerce at all." Thus, by a construction of the complaint that is utterly untenable, they support the very basis upon which petitioner maintains the district court rested its decision. Inferentially their contentions go far to show—and in the light of all the circumstance we find—that the trial court's direction of verdict and its judgment rest solely upon the ground that petitioner failed to introduce evidence that its business or that of respondents included interstate commerce.

Blumenstock Bros. v. *Curtis Publishing Co., supra,* gives no support to that ruling. There, an advertising agency sued a publishing company under § 7 of the Sherman Act for damages alleged to have been caused to the agency by the publisher's violation of § 2. Defendant moved to dismiss on the ground that the complaint did not allege a cause of action within the provisions of the Act. The district court granted the motion and entered judgment dismissing the suit for want of jurisdiction over the defendant or the action, and included in the record, a certificate in accordance with § 238 of the Act of March 3, 1911, 36 Stat. 1157, that the question involved was whether the facts alleged constituted a cause of action under the Act.

We said (p. 442): "In the present case . . . the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the

declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce. This case is wholly unlike *International Textbook Co.* v. *Pigg,* 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation." And after reviewing earlier decisions the opinion continued (p. 444): "Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce."

The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes, sent respectively to petitioner and respondents by their customers to be used in setting up advertisements, and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in *Blumenstock Bros.* v. *Curtis Publishing Co., supra,* assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 106–107. *Pensacola Tel. Co.* v. *Western Union,* 96 U. S. 1, 9–10. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290–291. *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 36. *Eastman Co.* v. *Southern Photo Co.,* 273 U. S. 359, 370, 374. *Furst* v. *Brewster,* 282 U. S. 493, 497. Cf.

N. Y. Life Ins. Co. v. *Deer Lodge County,* 231 U. S. 495, 510, *et seq.*

The Circuit Court of Appeals did not consider the ground upon which the district court put the judgment. It impliedly assumed that petitioner's business does include interstate commerce. It accepted the assertion that, due to the combination rate of respondents, petitioner lost commercial advertisers. In decision of the case, the court said (p. 5): "We are, however, not satisfied that appellant has established a fact which rested upon it to prove; viz., that through this combination there was effected such a restraint of interstate commerce as would materially affect the entire farm journal advertising business. Such is the requirement laid down in *Standard Oil Co.* v. *United States,* 283 U. S. 163. The facts in that case indicated a much greater control of the gasoline production industry than is present in the case before us. . . . Likewise, it seems the facts in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, presented a case of much stronger domination by the combinations that had formed than the one before us . . . we cannot escape the force of appellees' statement—'. . . If, as held in *Standard Oil Co.* v. *United States* . . . the owners of 55 per cent. of the gasoline in the United States could not by combination obtain a monopoly in violation of the Sherman Act, and if, as held in *Appalachian Coals, Inc.* v. *United States,* . . . the owners of 74 per cent. of the coal mined in a certain territory could not obtain a monopoly in violation of the Sherman Act, then how can it be held that 5 out of approximately 300 newspapers can obtain a monopoly of advertising, and how can it be held that newspapers which do only approximately 15 per cent. of the advertising in the farm journal field can obtain a monopoly?' In the face of these two decisions we agree with Judge Baltzell that a proper case for the application of sections

1, 2, and 7 of the Sherman Anti-Trust Act was not established."

The Circuit Court of Appeals makes the relation between the amount of farm journal advertising controlled by respondents to the total in the entire country a basis of its judgment affirming that of the district court. But the complaint charges restraint and attempt to monopolize only in the territory served by respondents' publications, being five—or seven if the Indiana and Dakota editions are separately counted—out of a total of 23 papers in that territory.[1] Petitioner claims that during the five-year period respondents' advertisements ranged from 44.37 per cent. to 66.92 per cent. of the total in the territory properly to be taken into account.[2] The record

[1] The petition contains the following computation to show the number and type of farm papers published in the eight states in which petitioner's and respondents' papers principally circulate:

	Total Number of Papers	General	Vocational or Technical
Illinois	36	5	31
Indiana	10	4	6
Iowa	10	5	5
Minnesota	8	2	6
Nebraska	3	1	2
North Dakota	1	0	1
South Dakota	1	1	0
Wisconsin	8	5	3
Total	77	23	54

[2] Petitioner's computation follows:

	Total Lineage Carried by all Papers	Total Lineage Carried by Respondents' Papers	Per Cent of Respondents' Lineage to Total
1928	7, 490, 806	3, 323, 256	44. 37
1929	6, 844, 629	3, 235, 364	47. 26
1930	5, 172, 535	2, 980, 963	57. 63
1931	3, 562, 695	2, 207, 650	61. 97
1932	2, 151, 376	1, 439, 753	66. 92

contains no suggestion by respondents or by either court that petitioner's allegations are not sufficient to charge a violation of §§ 1 and 2. Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 61.

Our decision in *Standard Oil Co.* v. *United States,* 283 U. S. 163, has little if any bearing upon the question whether the facts alleged in the complaint and supported by the evidence in this case reasonably may be held to constitute a violation of § 1 or § 2. That was a suit for injunction, § 4, to prevent an alleged combination from creating a monopoly or restraining interstate commerce by control of the part of gasoline produced by cracking. The district court granted some of the relief sought. The case came here on defendants' appeal. Slight notice of the principal features of the case is sufficient to distinguish it from the one now before us. Three producers, owning patents for cracking by which the yield of gasoline is greatly increased, joined with the owner of similar patents in agreements for the exchange of patent rights and division of royalties, which were challenged by the Government as a violation of the Act, chiefly upon the ground that they enabled the parties to the agreement to maintain existing royalties. Cracked gasoline is not distinguishable from the straight run. They are mixed or sold interchangeably. The output of cracked gasoline was about 26 per cent. of the total. The record did not show

the production of cracked by licensees. It was not shown that by agreeing on royalties defendants could control price or supply. We held that the United States was not entitled to any relief and reversed the decree of the district court.

Appalachian Coals, Inc. v. *United States,* 288 U. S. 344, was brought here on appeal from a decree of the district court granting an injunction against a combination of producers of bituminous coal, in a suit by the United States under the Sherman Act. It may be taken for present purposes that the defendants' production was 74.4 per cent. of the total in the territory in which they operated. But this was only about 12 per cent. of the production east of the Mississippi. It was shown that relatively little bituminous coal is consumed in the district in which the defendants operate mines. They marketed most of their coal in highly competitive territory. We held, in view of the conditions disclosed by the record, that there was no basis for concluding that competition anywhere would be injuriously affected by the coöperative plan adopted by the combination, and reversed the decree.

The Circuit Court of Appeals, while recognizing that "there are essential fact differences which make comparisons of different industries of little value," rested its judgment upon respondents' arguments based upon these cases. But the abridged statements of issues there involved and decided are sufficient to show that respondents' contention reflected inadequate ascertainment and appreciation of the facts and considerations there held controlling, and that these decisions turned upon the Government's failure to prove restraint of competition, and that they are not in point here. It results, therefore, that the ground on which the Circuit Court of Appeals rested its judgment cannot be sustained.

Petitioner sought this writ upon the ground that the Circuit Court of Appeals held it bound to prove that respondents effected such a restraint of interstate commerce as would materially affect the farm journal advertising business in the entire country and misapplied our decisions in the *Standard Oil Company* case and the *Appalachian Coals* case. Respondents had opportunity here to show that, although given on untenable grounds, the judgment below is right and should be affirmed. And, if by the record they could so demonstrate, this court, if satisfied beyond doubt that it could do so without prejudice to petitioner, properly might refrain from reversal. *Deery* v. *Cray,* 5 Wall. 795, 807. *Vicksburg & Meridian Railroad* v. *O'Brien,* 119 U. S. 99, 103. *Peck* v. *Heurich,* 167 U. S. 624, 629. But respondents suggest nothing to justify the direction of verdict and judgment in their favor. Certainly, in the absence of a claim on their part that, conceding the errors exposed by this opinion, the judgment is right, we will not examine the record to discover grounds to sustain it. Cf. *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167, 179. *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 170 *et seq.* We intimate no opinion whether, upon the question of restraint or monopoly, or upon the question of injury to petitioner or its business, the evidence is sufficient to warrant a verdict in its favor.

The judgment of the Circuit Court of Appeals should be reversed and the case remanded to the district court with directions that petitioner be granted a new trial.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* UNION PACIFIC RAILROAD CO.

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

No. 51. Argued November 7, 1934.—Decided December 3, 1934.

1. A corporation which sold an issue of bonds at a discount and paid commissions for marketing them, and which keeps its accounts and makes its returns on the accrual basis, may amortize the commissions as well as the discount over the life of the bonds; and the amount so allocated to each year may be deducted from gross income as a loss or expense of that year. P. 284.
2. So *held* where the commissions had been paid or allowed before the year 1913. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, distinguished. P. 287.

69 F. (2d) 67, affirmed.

CERTIORARI * to review the reversal of a decision of the Board of Tax Appeals, 26 B. T. A. 1126, upholding in part a deficiency assessment made by the Commissioner.

Mr. H. Brian Holland, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. J. Louis Monarch* and *Morton K. Rothschild* were on the brief, for petitioner.

Mr. Henry W. Clark for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Prior to 1913 respondent, directly or through a subsidiary corporation, sold three issues of bonds, all maturing at dates subsequent to 1923. All were sold at a discount and petitioner paid or allowed to bankers an additional amount as commissions for marketing the bonds. The commissions and discounts, amortized over the periods

* See Table of Cases Reported in this volume.

from the dates of issue to maturity of the bonds, exceeded $300,000 in each of its taxable years 1918 to 1923 inclusive. Respondent kept its books and made its tax returns on the accrual basis. Deduction from gross income, in its tax returns, of the amortized amount of the commissions and discount was disallowed by the Commissioner, who found a corresponding deficiency under the applicable Revenue Acts of 1918, c. 18, 40 Stat. 1057, and 1921, c. 136, 42 Stat. 227.

The Board of Tax Appeals ruled that the petitioner was entitled to the deduction for the discount but not commissions. 26 B. T. A. 1126. On the appeal of the taxpayer alone the Court of Appeals for the Second Circuit reversed the Board, holding that the commissions should be treated in the same manner as the discount and that the deductions were rightly made. 69 F. (2d) 67. This Court granted certiorari on the petition of the Commissioner, which set up that the decision below conflicted with that of the Court of Appeals in the Seventh Circuit, in *Chicago, R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. (2d) 990, see also *Bonded Mortgage Co.* v. *Commissioner,* 70 F. (2d) 341, and is inconsistent with the decision of this Court in *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, which held that premiums received by the taxpayer upon the sale of its bonds before 1913 could not be subjected to income tax in later years by the expedient of prorating them over the period between the date of issue of the bonds and their maturity.

In support of the petition the Government contends that the commissions are not, as the court below held, losses incurred in the taxable year which are deductible under § 234 (a) (4) of the Revenue Acts of 1918 and 1921, although not to be realized until payment of the bonds at maturity. It insists instead that the commissions are expenses incurred and paid at the date of the

bond issue which cannot, on any theory, be deducted in later years. Further, it contends that the amortization of the commissions paid before 1913 and their deduction as amortized in tax returns in later years is inconsistent with the decision of this Court in *Old Colony R. Co.* v. *Commissioner, supra.*

1. There is no provision in either the 1918 or 1921 Revenue Acts specifically authorizing the deduction from gross income of commissions or discount paid or allowed by the taxpayer upon an issue of bonds. Section 234 of the 1918 and 1921 Acts, like the corresponding provisions of the Acts before and since, allow deduction of expenses paid or incurred, interest paid or accrued, and losses sustained during the taxable year. Sections 212 (b) and 213 (a) of the 1918 and 1921 Acts, like § 13 (d) of the 1916 Act, c. 463, 39 Stat. 756, 771, authorize the taxpayer to make his income tax returns on the accrual basis where his books are kept on that basis and reflect true income; they require it if he fails or is unable to make his return on a cash receipts and disbursements basis. The taxpayer is thus enabled to charge against income of the taxable period expenses incurred in and properly attributable to the process of earning income during that period, although payable in a later one. See *United States* v. *Anderson,* 269 U. S. 422, 440; *Aluminum Castings Co.* v. *Routzhan,* 282 U. S. 92; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357. It follows that when the return is made on the accrual basis, expenses or obligations incurred by the taxpayer in connection with a bond issue, which are not discharged until the payment of the bonds at maturity, may properly be accrued or amortized over the period of the life of the bonds and allowed as annual deductions from gross income.

By Article 150, Treasury Regulations 33, as revised, relating to the 1916 Revenue Act, both commissions and discount upon bond issues of the taxpayer were classified

as losses sustained on payment of the bonds at maturity, and taxpayers were permitted to amortize them over the life of the bonds and deduct them as amortized from gross income in each year. These regulations were continued under the 1918 and 1921 Acts, but the reference to commissions was omitted.[1] Art. 544 of T. R. 45; Art. 545 of T. R. 62. The Board of Tax Appeals has consistently applied the regulations as to bond discount allowed before 1913 and in each case, as in the present, the Government, by failing to seek review of the ruling, has acquiesced in it.[2]

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[1] Notwithstanding this change in the regulations, the Commissioner appears to have continued to permit taxpayers to amortize and deduct commissions paid on bond issues prior to 1913, as the regulations under the 1916 Act had expressly permitted. A change of practice was sanctioned in Chicago, Rock Island & Pacific Ry. Co. *v.* Commissioner, 13 B. T. A. 988, 1034, affirmed by the Court of Appeals of the Seventh Circuit, 47 F. (2d) 990, 991, where the taxpayer, while allowed to deduct bond discount, was not allowed to deduct from gross income the amortized expenses of a bond issue incurred before 1913. This refusal to allow amortization of commissions was confined to the case of bonds issued before 1913.

Treasury regulations have also been silent as to commissions on bonds issued after that date. Art. 544 of T. R. 45; Art. 545 of T. R. 62, 65, 69; Art 68 of T. R. 75, 77. But there are a number of Treasury rulings which permit the amortization of commissions on bonds issued after 1913. O. D. 936, 4 Cum. Bul. 276; O. D. 959, 4 Cum. Bul. 129; I. T. 1412, I–2 Cum. Bul. 91; I. T. 1962, III–1 Cum. Bul. 291; S. M. 3691, IV–1 Cum. Bul. 145.

[2] Chicago, Rock Island & Pacific Co. *v.* Commissioner, 13 B. T. A. 988, 1027–1034; Kansas City Southern Ry. Co. *v.* Commissioner, 16 B. T. A. 665, 686; Terminal Railroad Assn. of St. Louis *v.* Commissioner, 17 B. T. A. 1135, 1169; Chicago & Northwestern Ry. Co. *v.* Commissioner, 22 B. T. A. 1407, 1435. In one case the Board refused to allow the amortization, on the theory that the bonds were issued not by the taxpayer but by a predecessor corporation. Western Maryland Ry. Co. *v.* Commissioner, 12 B. T. A. 889, 907. On appeal by the taxpayer the Board was reversed. 33 F. (2d) 695, 697 (C. C. A. 4th). The Government did not seek review.

Both commissions and discount, as the Government concedes, are factors in arriving at the actual amount of interest paid for the use of capital procured by a bond issue. The difference between the capital realized by the issue and par value, which is to be paid at maturity, must be added to the aggregate coupon payments in order to arrive at the total interest paid. Both discount and commissions are included in this difference. If the difference be viewed as a loss resulting from the funding operation, it is one which is realized only upon the payment of the bonds at maturity.

But even if the commissions, unlike discount, may, as the Government insists, be regarded as a contemporary expense of procuring capital, it is one properly chargeable to capital account. In practice it is taken out of the proceeds of the bonds by the banker. But in any case it must be deducted from the selling price to arrive at the capital realized by the taxpayer from the sale of the bonds, in return for which he must, at maturity, pay the face value of the bonds. The effect of the transaction in reducing the capital realized, whether through the payment of commissions or the allowance of discount, is the same. In this respect the commissions do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax.[3]

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[3] Art. 8 of T. R. 33, revised; Art. 293 of T. R. 45, 62; Art. 292 of T. R. 65, 69; Art. 282 of T. R. 74, 77; Hutton *v.* Commissioner, 12 B. T. A. 265, 266. Commissions paid to a banker for selling the taxpayer's corporate stock have not been allowed to be deducted as a current business expense, but have been treated as a capital expenditure. *Simmons Co.* v. *Commissioner,* 33 F. (2d) 75, 76 (C. C. A. 1st); Appeal of Charles H. Lilly Co., 2 B. T. A. 1058; Appeal of Emerson Electric Manufacturing Co., 3 B. T. A. 932, 935; Harrisburg

Here the commissions, when paid, were properly chargeable against capital, and reduced by their amount the capital realized by the taxpayer from the bond issue. They come out of the pocket of the taxpayer only on payment of the bonds at maturity. But, unlike the purchase and sale of property, the transaction contemplated from the beginning a fixed date, the due date of the bonds, at which the difference between the net amount of capital realized upon the issue and the par value of the bonds must be paid to bondholders by the taxpayer. We think that the revenue acts, as they have been interpreted by this Court and the treasury regulations upon this and related subjects, require that this difference between receipts and disbursements of the taxpayer should, in some form, enter into the computation of his taxable income. It is a loss to the taxpayer, definite as to its date and amount, and represents a part of the cost of the borrowed capital during each year of the life of the bond issue. Cf. *United States* v. *Anderson, supra.* At least where the taxpayer's books are kept upon the accrual basis, its final disbursement may be anticipated by amortization and the amortized amount deducted annually from his gross income.

Hospital, Inc. *v.* Commissioner, 15 B. T. A. 1014, 1017; Frischkorn Real Estate Co. *v.* Commissioner, 21 B. T. A. 965, 969, 970. Compare the requirement that commissions and expenses paid by a lessor in order to secure a tenant be prorated over the term of the lease. Bonwit Teller & Co. *v.* Commissioner, 17 B. T. A. 1019, 1024; Howard *v.* Commissioner, 19 B. T. A. 865, 866; Clawson *v.* Commissioner, 19 B. T. A. 1253; Roby Realty Co. *v.* Commissioner, 19 B. T. A. 696, 698; Butler *v.* Commissioner, 19 B. T. A. 718, 729, 730; Central Bank Block Assn. *v.* Commissioner, 19 B. T. A. 1183, 1185; Webb *v.* Commissioner, 20 B. T. A. 274; Spinks Realty Co. *v.* Commissioner, 21 B. T. A. 674, 677; Young *v.* Commissioner, 20 B. T. A. 692, 695. Compare also the compulsory proration of fees and commissions paid by a borrower in order to obtain a loan. Lovejoy *v.* Commissioner, 18 B. T. A. 1179, 1182, 1183; S. & L. Building Corp. *v.* Commissioner, 19 B. T. A. 788, 794.

2. Our decision in *Old Colony R. Co.* v. *Commissioner, supra,* does not require a different conclusion because the commissions in the present case were allowed before 1913. It was recognized in that case that premiums on a bond issue received after the Sixteenth Amendment might be prorated over the period of the life of the bonds and taxed annually as income during this period. In refusing to allow premiums received before 1913 to be thus prorated and taxed, the Court was moved by the consideration that the premiums, which were received as income and had become a part of the taxpayer's capital before the Sixteenth Amendment, could not be taxed as income by virtue of that amendment and legislation under it.

No such consideration is presented here, where the question is only of the deduction of an expense incurred before the amendment. Hence, the decision in the *Old Colony* case can militate against our conclusion here only if returns, prepared in conformity to it, would fail to reflect true income if the rule announced in the *Old Colony* case were also complied with. Plainly such is not the case. There can be no question of receipt of a premium where the bonds are sold at a discount. When sold at a premium, as in any other case, commissions must be deducted from gross proceeds in arriving at the capital realized upon the bond issue. There is no occasion for deduction of commissions from gross income at a later time unless the total amount realized by the sale of the bonds is less than their par value. In that case the difference alone is the amount to be amortized and deducted from gross income in the annual returns of the taxpayer. This would reflect his true income, where, as in the present case, his accounts are kept on the accrual basis.

Affirmed.

Counsel for Parties.

OLD MISSION PORTLAND CEMENT CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 107. Argued November 13, 1934.—Decided December 3, 1934.

1. In consolidated income tax returns made by two affiliated corporations under § 240 of the Revenue Acts of 1921, 1924 and 1926, and supplementary Treasury Regulations, there cannot be deductions of amortized discount on bonds which were issued by one of the affiliates and were purchased and are held by the other, since the anticipated payment of the face of the bonds at maturity, which alone gives occasion for amortizing the discount, is an intercompany transaction. P. 290.
2. A Treasury Regulation construing § 234 (a)(1) of the Revenue Act of 1921 as permitting a corporation to deduct charitable donations from gross income, as an "ordinary and necessary expense," when made to an institution conducted for the benefit of the donor's employees or when it is a consideration for a benefit flowing directly to the corporation as an incident of its business,—*held* to have the force of law, in view of subsequent reënactments of the same statutory provision, the regulation continuing unchanged. P. 293.
3. The question whether in the particular case a contribution by a corporation to a Community Chest represented a consideration for a benefit flowing directly to the corporation as an incident of its business, is a question of fact, as to which a ruling by the Commissioner disallowing deductions of such contributions from gross income is presumably correct. P. 294.
4. Review by this Court of determinations of the Board of Tax Appeals is limited to questions of law raised by its findings or its failure to make findings required by the statute. P. 294.

69 F. (2d) 676, affirmed.

CERTIORARI * to review a judgment affirming an order of the Board of Tax Appeals, 25 B. T. A. 305, which sustained deficiency assessments of income taxes.

Mr. George E. H. Goodner for petitioner.

* See Table of Cases Reported in this volume.

Mr. Robert N. Anderson, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Sewall Key,* and *A. F. Prescott* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted, "limited to the question of the right of the taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest."

During each of the years 1923 to 1926, inclusive, petitioner and two corporations affiliated with it filed consolidated income tax returns on the accrual basis. In each year one of the affiliated corporations deducted, from gross income, amortized discount allowed upon an issue of its bonds in 1912. In computing the taxable income to be assessed to petitioner, the parent corporation, under the applicable Revenue Acts of 1921 (c. 136, 42 Stat. 227), 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9), the Commissioner refused to allow the deduction of so much of the amortized discount as was applicable to bonds, issued by its affiliate, which petitioner had acquired by purchase. He also refused to allow credit for the contributions to the Community Chest as not an ordinary and necessary expense, deduction of which the statute permits. His action was sustained both by the Board of Tax Appeals, 25 B. T. A. 305, and the Court of Appeals for the Ninth Circuit, 69 F. (2d) 676.

1. It is no longer open to question that amortized bond discount may be deducted in the separate return of a single taxpayer. See No. 51, *Helvering* v. *Union Pacific R. Co.,* decided this day, *ante,* p. 282. But the Government insists that the deduction by one affiliate, in a consolidated return, of amortized discount upon its bonds,

which are owned by another affiliate, involves an "intercompany transaction" which, under the applicable statutes and regulations, must be eliminated from the computation of the tax in order to arrive at the true taxable income.

Section 240 of the Revenue Acts of 1921, 1924 and 1926 extends to affiliated corporate taxpayers the privilege of making a consolidated tax return, subject to such restrictions as may be imposed by treasury regulations. The purpose of the section was to provide a method of computing the tax upon the true net income of what is in practical effect a single business enterprise, with substantially common ownership, as though it were that of a single taxpayer, despite the fact that it is carried on by separate corporations whose tax would otherwise be independently computed. See *Burnet* v. *Aluminum Goods Mfg. Co.,* 287 U. S. 544, 547; *Handy & Harman* v. *Burnet,* 284 U. S. 136, 140; *Atlantic City Electric Co.* v. *Commissioner,* 288 U. S. 152, 154; *Woolford Realty Co.* v. *Rose,* 286 U. S. 319; Appeal of Gould Coupler Co., 5 B. T. A. 499, 514–516; cf. Treasury Regulations 62, Art. 636, under the 1921 Act; T. R. 65, Art. 636, under the 1924 Act; T. R. 69, Art. 635, under the 1926 Act.

Each of the regulations controlling consolidated returns, under the applicable Revenue Acts, directs that only one specific credit of $2,000, which § 236 (b) allows to each individual taxpayer, shall be allowed to the consolidated group, and provides that "subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated." It is by the elimination of intercompany trans-

actions from the computation, in order to ascertain " the combined net income of the several corporations consolidated," that the purpose of the statute is effected. See *Burnet* v. *Aluminum Goods Mfg. Co., supra,* 549, 550. The Government, having thus conferred upon groups of affiliated taxpayers the privilege of computing their tax as though they were a single taxpaying entity, it would require plain language in statute and regulations to support the conclusion that it was also intended that they should retain the advantages which, before affiliation, attached peculiarly to their status as independent tax computing entities. The regulations are aimed at the prevention of a double advantage, to be secured only if affiliated taxpayers are allowed to treat themselves, at the same moment, as one or many, according to their convenience for purposes of tax computation.

Amortized bond discount is deductible from the taxpayer's gross income only by way of anticipation of payment of the bonds at maturity. It is then that the taxpayer pays the difference, between the amount realized upon the sale of the bonds and their par value, which is the subject of the amortization. *Helvering* v. *Union Pacific R. Co., supra.* Here the payment anticipated is from one affiliate to another, an intercompany transaction. If we eliminate it from the computation of income upon the consolidated return, as the regulation directs, there is no anticipated payment of the discount to be amortized and no basis for the deduction.

A single taxpayer who had purchased his own bonds before maturity could not afterwards deduct, from gross income, the amortized discount on the bonds, in anticipation of their payment at maturity. This is equally the case where the obligor and obligee are affiliated corporations claiming the benefit of a statute which permits them to compute their tax as though they were one. It is true

that in either case the bondholder may sell his bonds before maturity, and thus renew his obligation to pay them. But in neither is the taxpayer in a position to require the Government to anticipate an event which may never occur, by conferring upon him the benefit of a deduction to which, without its occurrence, he would not be entitled. Having elected to take the benefit of affiliation, the taxpayer cannot complain of a burden which is inseparable from the benefit and which finds its source in the very method of computing the tax from which the benefit is derived.

2. The privilege of deducting charitable donations from gross income, conferred on individual taxpayers by § 214 (a) of the Revenue Acts of 1921, 1924 and 1926, has not been extended to corporations. A proposal to extend it to them was rejected by Congress pending the passage of the Revenue Act of 1918. Cong. Rec., House, Vol. 56, Part 10, 10426–10428. Section 234 (a) (1) of the Revenue Acts of 1921, 1924 and 1926 authorizes corporations to deduct from gross income "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Article 562 of Treasury Regulations 62, interpretative of the 1921 Act, declared that corporations were not entitled to deduct charitable donations. But it recognized the right to deduct donations "made by a corporation for purposes connected with the operation of its business . . . when limited to charitable institutions, hospitals or educational institutions conducted for the benefit of its employees," and also donations "which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business." These provisions were retained, without substantial change, in the regulations promulgated under the 1924, 1926 and 1928 Acts. Art. 562 of T. R. 65, 69; Art. 262 of T. R. 74. As § 234 (a)

(1) to which they pertain has been reënacted in several revenue acts, the regulation now has the force of law. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273.

It is a question of fact in each case whether a donation is made to an institution conducted for the benefit of the donor's employees or is consideration for a benefit flowing directly to the donor as an incident of its business. Here the ruling of the Commissioner, that the deduction was not permissible under the statute and regulations, presumably rests upon a correct determination of the facts. *Welch* v. *Helvering*, 290 U. S. 111, 115. The Board of Tax Appeals found that the gifts to the San Francisco Community Chest were apportioned among the charitable organizations of the City and that the gifts of petitioner were made in the belief that " they resulted in good will toward the petitioner and increased its business." But the Board made no finding of any direct benefit to petitioner's employees or business which the regulations contemplate. Nor was there evidence before it to support such a finding. Our review of determinations by the Board is limited to questions of law raised by its findings or its failure to make findings required by the statute. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 728; *Phillips* v. *Commissioner*, 283 U. S. 589, 599, 600. Compare *Kendrick Coal & Dock Co.* v. *Commissioner*, 29 F. (2d) 559, 564 (C. C. A. 8th); *Commissioner* v. *Langwell Real Estate Corp.*, 47 F. (2d) 841, 842 (C. C. A. 7th).

Affirmed.

MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS think that so much of the judgment as sanctions the Commissioner's refusal to deduct the bond discount should be reversed.

GULF, MOBILE & NORTHERN RAILROAD CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 413. Argued November 13, 1934.—Decided December 3, 1934.

Amortized discount on bonds of one corporation held by another cannot be deducted from gross income in their consolidated tax return. *Old Mission Portland Cement Co.* v. *Helvering, ante,* p. 289.
63 App. D. C. 244; 71 F. (2d) 953, affirmed.

CERTIORARI * to review the affirmance of an order of the Board of Tax Appeals, 22 B. T. A. 233, sustaining a deficiency assessment.

Mr. George E. H. Goodner for petitioner.

Mr. Robert N. Anderson, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key* and *A. F. Prescott* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari was granted in this case " limited to the question of the right of the taxpayer to deductions on account of amortization of bond discount." At various dates between 1913 and 1916, Meridian & Memphis Railway Company sold its thirty-year 5% gold bonds at a discount. During the years 1924 to 1926, inclusive, while petitioner was the owner and holder of the entire bond issue, it joined with the Meridian & Memphis in filing consolidated income tax returns as affiliated corporations. In each year the latter deducted from gross income the amortized bond discount. The deductions were disallowed by the Commissioner. His action was sustained by the Board of Tax

* See Table of Cases Reported in this volume.

Appeals, 22 B. T. A. 233, and by the Court of Appeals for the District of Columbia. 71 F. (2d) 953. The question presented is the same as that decided this day in No. 107, *Old Mission Portland Cement Co.* v. *Helvering, ante,* p. 289. The judgment of the court below was therefore right and is

Affirmed.

MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS think the judgment should be reversed.

SCHNELL ET AL. *v.* THE VALLESCURA.

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

No. 134. Argued November 14, 1934.—Decided December 3, 1934.

1. The provision of § 3 of the Harter Act, relieving vessels and their owners from the consequences of "fault or error in navigation or management" of the vessels, does not relate to damage caused to cargo by failure to care for it properly on the voyage, e. g., failure to give proper ventilation to a shipment of onions, causing decay. P. 303.
2. It is the general rule that a carrier by sea who delivers in bad condition cargo that he received for shipment in good condition must bear the loss unless he can bring himself within some common law or stipulated exception to his general liability. P. 303.
3. To such exceptions the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it; and this is recognized and continued in the first section of the Harter Act, which makes it unlawful to insert any clause in a bill of lading whereby the carrier shall be relieved of liability for negligence. P. 304.
4. A stipulation in a bill of lading excepting liability for damage to perishable cargo by "decay" relates to decay due to inherent defects in the cargo or caused by excepted perils of the sea; it leaves the carrier liable for decay resulting from negligent stowage of the cargo or failure to care for it properly during the voyage. P. 305.

5. It appeared by the evidence that decay of a cargo of onions was the result of poor ventilation caused by closure of hatches and ventilators for many hours during the voyage, and that for a specified part of this time the closure was proper because of bad weather, but for the rest of the time it was improper. *Held* that the burden was on the carrier to show how much of the damage was due to the sea peril (excepted in the bill of lading); and that, failing in this, the ship was liable for the entire loss. P. 306.

70 F. (2d) 261, reversed.

CERTIORARI * to review the reversal of a decree in admiralty finding a ship liable for damage to a cargo of onions.

Mr. Joseph Joffe, with whom *Mr. Louis Joffe* was on the brief, for petitioners.

An exception in a bill of lading does not exempt the ship from liability for loss or damage from an excepted peril to which its negligence contributed.

Where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it seems impossible to distinguish between the consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the entire loss, or make the separation himself. *Hamilton Shoe Co.* v. *Wolf Bros.,* 240 U. S. 251, 260–262; *Westinghouse Co.* v. *Wagner Mfg. Co.,* 225 U. S. 604, 622; *Jenkins* v. *Pennsylvania R. Co.,* 67 N. J. L. 331, 336; *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 563–565; *Speyer* v. *The Mary Belle Roberts,* 22 Fed. Cas., No. 13240; *The Atlas,* 93 U. S. 302, 317.

Mr. Homer L. Loomis for respondent.

The damage having been decay, the risks of which were expressly assumed by the shipper, the petitioners were entitled to recover only on showing that the carrier could

* See Table of Cases Reported in this volume.

by the exercise of due skill and care have averted the decay.

Damage due to inherent vice, defect or disease of the thing carried, independent of the act of man, is included within damage resulting from Act of God, from liability for which the carrier is exempted at common law. *Warden* v. *Greer,* 6 Watts (Pa.) 424; *Nugent* v. *Smith,* 1 C. P. D. 19, 423, 441; *Clark* v. *Barnwell,* 12 How. 272, 282.

Special contracts relieving the carrier from liability for damage that generally happens, or as often as not may happen, without negligence on his part or on the part of any other human actor, are deemed reasonable and liberally construed. *York Co.* v. *Central Railroad,* 3 Wall. 107; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427. And particularly is that true of damage developing from within the goods themselves, such as decay. *Clark* v. *Barnwell, supra,* at p. 282; *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 380; *The Florinda,* 31 F. (2d) 262, 264; *The Toyohashi Maru,* 13 F. (2d) 871.

In such case there is no room for the presumption of the common law that the particular kind of damage complained of happened by reason of the negligence of the carrier, or that because he or his servants had the goods in their exclusive possession at the time the decay set in, they were in any better position than the shipper himself to explain the cause of such decay. It was particularly appropriate, therefore, in the carriage on long ocean voyages of goods particularly susceptible to decay, that the parties should by agreement substitute their own more rational presumption for that of the common law.

In view of the Spanish onion's high susceptibility to decay, in view of the fact that such decay can only develop from infection by, and rapid multiplication of, bacteria and spores operating in mysterious and uncertain fashion upon the inner tissues of the onion, and in view of the fact

that there is no way of determining whether the onion is so infected or diseased by examining it from the outside, until the decay is well advanced, all as shown by the uncontradicted proofs herein, it becomes at once obvious that, for the carrier to have attempted their transportation across the Atlantic under any other sort of an arrangement, would have been most unreasonable. And certainly it was at the very least fitting and proper that the carrier's common-law insurer risk of decay should be assumed by the shipper, and by him placed, if he felt so advised, with an insurance company especially organized and equipped to bear such risks.

Once the damage has been shown to fall *prima facie* within the exception, the burden is upon the goods' owner to show, not merely negligence on the part of the carrier, even though concurring negligence, but, in addition, that such negligence was the efficient cause of the loss; that the loss could have been avoided or prevented by the exercise of due skill and care on the part of the carrier. *Clark* v. *Barnwell,* 12 How. 272, 280; *Transportation Co.* v. *Downer,* 11 Wall. 129, 133; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 432; *The Isla de Panay,* 292 Fed. 723, aff'd, 267 U. S. 260; *United States* v. *M. Levy's Sons,* 288 Fed. 544, 545; *Wertheimer* v. *Pennsylvania R. Co.,* 1 Fed. 232, 234; *Wolff* v. *The Vaderland,* 18 Fed. 733, 739.

The rule that, where damage has certainly resulted from a given wrong but is uncertain in amount, he that has caused the damage must be content with an approximation thereof, or, if that be impossible, bear the whole loss (*Hamilton Shoe Co.* v. *Wolf Bros.,* 240 U. S. 251), applies only where the damages are "definitely attributable to the wrong"; it has no application to "such as are not the certain result of the wrong." *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 562–563.

The fault of the carrier here complained of was at worst a fault in management of ship from responsibility

for which the carrier was relieved under § 3 of the Harter Act. This Court has held that the improper use at sea of permanent appliances almost identical with hatch and ventilator covers, constituted a fault in management of ship, not in care of cargo. *The Silvia,* 171 U. S. 462, 466. *The Hudson,* 172 Fed. 1005, 1007–1008; *Rowson* v. *Atlantic Transport Co.,* [1903] 1 K. B. 114, aff'd, [1903] 2 K. B. 666; *The Rodney,* [1900] P. 112, 117; *Spang Chalfant & Co.* v. *Dimon S. S. Corp.,* 57 F. (2d) 965, 967. Cf. *Andean Trading Co.* v. *Pacific Steam Navigation Co.,* 263 Fed. 559; *The Jean Bart,* 197 Fed. 1002, 1005–1006; *Knott* v. *Botany Mills,* 179 U. S. 69; *The Germanic,* 124 Fed. 1, aff'd, 196 U. S. 589.

In the light of the legislative history of the Harter Act, it would appear that the care of cargo for which the owner was to be held in all events, was care relating particularly to the three sorts of cargo-handling specifically named in § 1, viz., "loading," "stowage" and "delivery"; and that such want of care as might occur at sea in the prosecution of the voyage and in the actual transporting of the cargo was not to be included. See *May* v. *Hamburg Gesellschaft,* 290 U. S. 333, 345–346.

The distinction sought to be made by the Harter Act in §§ 1 and 3 is a distinction between the owner management and servant management. The question is "when management begins and ends" rather than the question, once the servants' management has begun and the ship is plowing the seas, whether the want of care is in respect to the cargo or the "transport" of the cargo or the ship.

Counsel also discussed: *The Edith,* 10 F. (2d) 684; *Barr* v. *International Mercantile Marine Co.,* 29 F. (2d) 26; *W. T. Lockett Co.* v. *Cunard S. S. Co.,* 21 F. (2d) 191; *The Skipton Castle,* 223 Fed. 839; *The Milwaukee Bridge,* 26 F. (2d) 327; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61; *The Merida,* 107 Fed. 146; *The British King,* 89 Fed. 872.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioners brought suit in admiralty in the district court for Southern New York, to recover damages for injury to a shipment of onions on respondent's S. S. "Vallescura" from Spain to New York City. The onions, receipt of which in apparent good condition was acknowledged by the bill of lading, were delivered in New York damaged by decay. The vessel pleaded as a defense an exception, in the bill of lading, from liability for damage by "decay" and "perils of the seas," and that the damage "was not due to any cause or event arising through any negligence on the part of the vessel, her master, owner or agents."

On the trial there was evidence that the decay was caused by improper ventilation of the cargo during the voyage, and that the failure to ventilate was due in part to closing of the hatches and ventilators made necessary by heavy weather, and in part to the neglect of the master and crew in failing to keep them open at night in fair weather. The district court entered an interlocutory decree, adjudging that the libellants recover the amount of the damage sustained by them, caused by closing the hatches and ventilators during good weather, and appointing a special commissioner to ascertain and compute the amount of damage.

The commissioner, after hearing evidence, found that it was impossible to ascertain how much of the damage was due to want of ventilation in fair weather and how much to want of it in bad. But, after comparing the periods during which the ventilators were negligently closed with those during which they were open or properly closed,[1] he stated: "It would seem, therefore, that the

[1] The voyage lasted twenty-three days. The commissioner found that during the voyage, day and night together, the hatches and ventilators were kept open only 170 hours, that they were properly closed 144 hours, and improperly closed for 238 hours.

greater part of the damage must have been due to improper shutting of the hatches and ventilators." He concluded that as the vessel had failed to show what part of the damage was due to bad weather, the petitioner should recover the full amount of the damage. The district court, accepting the report of the commissioner as presumably correct, as required by Admiralty Rule No. 43½, 286 U. S. 572, found no basis for rejecting its conclusions and gave judgment to libellants accordingly. The Court of Appeals for the Second Circuit reversed, 70 F. (2d) 261, holding that as the damage was within the clause of the bill of lading exempting the vessel from liability for decay, the burden was on petitioner to show what part of the damage was taken out of the exception, because due to respondent's negligence.

Although certiorari was granted to review this ruling of the court below, most of respondent's argument before us was given over to the contention that the record discloses no finding, by either court below, that any part of the damage was caused by respondent's negligence. The decision of the District Court was made before the promulgation of Rule 46½ in Admiralty, 281 U. S. 773, requiring the trial court to make special findings of fact. No formal findings were made, but in directing entry of the interlocutory decree, and after reviewing the evidence and commenting on the fact that the hatches and ventilators had been kept closed at night in fair weather, a circumstance which the trial judge declared established negligence in the care and custody of the cargo, he stated: "Thus it appears that this notoriously perishable cargo of Spanish Onions (The Buckleigh, 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous and must have caused substantial damage." We have no doubt that this was intended to

be a finding that negligence in failing to provide proper ventilation was the cause of some of the damage and that, as such, it was adequately supported by evidence. The commissioner and the court below assumed it to be such and we so accept it.

The failure to ventilate the cargo was not a "fault or error in navigation or management" of the vessel, from the consequences of which it may be relieved by § 3 of the Harter Act of February 13, 1893, § 3, c. 105, 27 Stat. 445; § 192, Tit. 46, U. S. C. The management was of the cargo, within the meaning of §§ 1 and 2 of the Act, and not of the vessel, to which § 3 relates. *The Germanic,* 196 U. S. 589, 597; *Knott* v. *Botany Mills,* 179 U. S. 69, 73, 74; *The Jean Bart,* 197 Fed. 1002, 1006 (D. C.). Hence, we pass to the decisive question whether, in view of the presumptions which aid the shipper in establishing the vessel's liability under a contract for carriage by sea, it was necessary for the petitioners to offer further evidence in order to recover the damage which they have suffered. If, in the state of the proof which the record exhibits, recovery depends upon their ability to produce evidence which would enable the court to separate the amount of damage attributable to respondent's negligence from that attributable to the unavoidable failure to ventilate in bad weather, they have failed to do so and judgment must go against them. But if respondent can relieve itself from liability only by showing what part of the damage was due to sea peril, in that bad weather prevented ventilation, judgment must go against it for the full damages.

In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his under-

taking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th ed.) Chap. I. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark* v. *Barnwell,* 12 How. 272, 280; *Rich* v. *Lambert,* 12 How. 347, 357; *The Propeller Niagara* v. *Cordes,* 21 How. 7, 29; *The Maggie Hammond,* 9 Wall. 435, 459; *The Edwin I. Morrison,* 153 U. S. 199, 211; *The Folmina,* 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co.* v. *Collins Produce Co.,* 249 U. S. 186, 192, 193; *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 379, 380.

To such exceptions the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it. *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.,* 129 U. S. 397, 438; *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 117. This rule is recognized and continued in the first section of the Harter Act, which makes it unlawful to insert any clause in a bill of lading whereby the carrier shall be relieved of liability for negligence.

It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause,

the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril. *Clark* v. *Barnwell,* 12 How. 272, 280; *Railroad Company* v. *Reeves,* 10 Wall. 176, 189, 190; *Transportation Co.* v. *Downer,* 11 Wall. 129, 134; *The Victory & The Plymothian,* 168 U. S. 410, 423; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 432; *The Malcolm Baxter,* 277 U. S. 323, 334.

But this is plainly not the case where the efficient cause of the injury for which the carrier is *prima facie* liable is not shown to be an excepted peril. *The Mohler,* 21 Wall. 230, 234; *The Edwin I. Morrison, supra,* 211. If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage. *Rich* v. *Lambert, supra,* 357; *The Maggie Hammond, supra,* 459; *The Folmina,* 212 U. S. 354, 361; *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 422, 423.

Here the stipulation was for exemption from liability for a particular kind of injury,—decay. But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes, for some of which, such as the inherent defects of the cargo, or, under the contract, sea peril making it impossible to ventilate properly, the carrier is not liable. For others, such as negligent stowage, or failure to care for the cargo properly during the

voyage, he is liable. The stipulation thus did not add to the causes of injury from which the carrier could claim immunity. It could not relieve him from liability for want of diligence in the stowage or care of the cargo.

It is unnecessary for us to consider whether the effect of the clause is to relieve the carrier from the necessity, in the first instance, of offering evidence of due diligence in caring for a cargo received in good condition, and delivered in a state of decay. See *The Hindoustan,* 67 Fed. 794, 795 (C. C. A. 2d); *The Patria,* 132 Fed. 971, 972 (C. C. A. 2d); *Loma Fruit Co.* v. *International Navigation Co.,* 11 F. (2d) 124, 125 (C. C. A. 2d); *The Gothic Star,* 4 F. Supp. 240, 241 (D. C.). For here want of diligence in providing proper ventilation is established and it is found that the failure to ventilate has caused the damage. It is enough that the clause plainly cannot be taken to relieve the vessel from bringing itself within the exception from liability for damage by sea peril where the shipper has carried the burden of showing that the decay is due either to sea peril, in that bad weather prevented ventilation, or to the vessel's negligence. Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent. *The Folmina, supra.*

Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril. *Corsar* v. *J. D. Spreckels & Bros. Co.,* 141 Fed. 260, 264 (C. C. A. 9th); *The Gualala,* 178 Fed. 402, 406 (C. C. A. 9th); *The Jeanie,* 236 Fed. 463, 472 (C. C. A. 9th); *The Excellent,* 16 Fed. 148 (C. C.); *Thompson* v. *The Nith,* 36 Fed. 383, 384 (C. C.); *Speyer* v. *The Mary Belle Roberts,* 22 Fed. Cas., No. 13,240 (D. C.); *Mainwaring* v. *Bark Carrie Delap,* 1 Fed. 874, 879 (D. C.); *The Aspasia,* 79 Fed. 91 (D. C.);

Knohr & Burchard v. *Pacific Creosoting Co.,* 181 Fed. 856, 860 (D. C.); *The Charles Rohde,* 8 F. (2d) 506, 507 (D. C.); *H. E. Hodgson & Co.* v. *Royal Mail Steam Packet Co.,* 33 F. (2d) 337 (D. C.). In each of these cases the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability.

The vessel in the present case is in no better position because, upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause. *Speyer* v. *The Mary Belle Roberts, supra; The Rona,* 5 Asp. 259, 262; Carver, Carriage by Sea (7th ed.), § 78, p. 114.

Since the respondent has failed throughout to sustain the burden, which rested upon it at the outset, of showing to what extent sea peril was the effective cause of the damage, and as the petitioners are without fault, no question of apportionment or division of the damage arises. *Reversed.*

IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* A. W. PERRY, INC.

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

No. 22. Argued November 5, 6, 1934.—Decided December 3, 1934.

1. A claim based upon a covenant in a lease which provides that the filing of a petition in bankruptcy by or against the lessee shall constitute a breach of the lease, that *ipso facto* and without entry or other action by the lessor the lease shall be terminated, and

that thereupon the lessor shall be entitled to damages equal to the amount of the rent reserved for the residue of the term less the fair rental value of the premises for the residue of the term, is provable in bankruptcy under §§ 1 (11) and 63 (a) and (b) of the Bankruptcy Act, as it was prior to the amendments of June 7 and 18, 1934. P. 311.

So *held* upon construction of the covenant as an agreement on the part of the tenant to pay as liquidated damages, in the event of the specified breach, an amount equal to the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term.

2. The claim is not for rent reserved or upon the lease as such, but is one founded upon an independent express contract, and is within the very words of § 63 (a)(4) of the Bankruptcy Act. *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, distinguished. P. 311.

69 F. (2d) 90, affirmed.

CERTIORARI, 292 U. S. 620, to review a judgment reversing a judgment of the District Court which affirmed an order of the Referee in Bankruptcy disallowing a claim based upon a covenant in a lease.

Mr. Edward K. Hanlon, with whom *Mr. Charles K. Beekman* was on the brief, for petitioner.

The philosophy of the *Manhattan Properties* case was that claims based upon rent stood apart as a matter of well-defined historical development, acquiesced in by Congress. The distinction being historical, reference to cases affecting personalty is futile. See *Gardiner* v. *Butler & Co.*, 245 U. S. 603, 605; *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597; *Maynard* v. *Elliott*, 283 U. S. 273; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581.

In bankruptcy the court is dealing with a statutory system, and can allow only such claims as the statute permits. The bankruptcy statute generally permits proofs of claim for anticipatory breaches of contracts, but as a matter of historical distinction sanctioned by long

legislative history, claims for rent and claims for damages for breach of covenants to pay rent have not been provable.

In equity there may be a distinction between the making and the absence of a promise. In bankruptcy the distinction has to do with the subject matter.

The result below is contrary to the trend of the decisions of the lower federal courts.

Recent legislative history adds evidence that it was not the intention of Congress to have any exception to the general rule. Act of June 7, 1934; H. Rep. 194, 73d Cong., 1st Sess.; S. Rep. 482, 2d Sess.; H. Rep. 1773, 73d Cong., 2d Sess.; Act of June 18, 1934; S. Rep. 1404, 73d Cong., 2d Sess.

In construing an Act of Congress applicable to a controversy, resort may be had to amendments passed after the controversy arose. *Cope* v. *Cope,* 137 U. S. 682; *Dunbar* v. *Dunbar,* 190 U. S. 340; *Wetmore* v. *Markoe,* 196 U. S. 68.

Mr. Thomas F. Dougherty, with whom *Messrs. Albert Stickney* and *Hersey Egginton* were on the brief, for respondent.

By leave of Court, briefs *amicorum curiae* were filed by *Messrs. Walter E. Hope* and *H. Struve Hensel* on behalf of the Trustees in Bankruptcy of Louis K. Liggett Co., in support of petitioner; and *Messrs. Thomas Hunt* and *Earle W. Carr* on behalf of the Trustees of the A. Shuman Real Estate Trust, in support of respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The respondent was lessor in a lease having a number of years to run at the date of the tenant's bankruptcy. The writing stipulated:

". . . for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed

as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

Respondent filed a proof of claim, based upon this clause, which the referee expunged. The District Court affirmed the order. The Circuit Court of Appeals, reversing the decree of the District Court, directed that the claim should be allowed.[1] The case is here upon writ of certiorari.

Decision is to be made under §§ 1 (11) and 63 (a) and (b) of the Act of July 1, 1898, as they stood prior to the filing of the petition on September 30, 1932, and the presentation of respondent's proof of claim on March 29, 1933.[2] The subsequent amendments of June 7 and 18, 1934,[3] are by their terms inapplicable.

In *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, we reserved the question of the provability of a claim for liquidated damages arising upon such a covenant. The petitioner's contention is that inasmuch as claims for future rent, or for damages for the breach of the covenant to pay rent, or claims upon contracts of indemnity conditioned upon reëntry by the landlord subsequent to bankruptcy, were there held not provable, it logically follows that a claim for stipulated damages for

[1] 69 F. (2d) 90.

[2] U. S. C. Tit. 11, §§ 1 and 103.

[3] Public No. 296 [c. 424, 48 Stat. 911] and Public No. 387 [c. 580, 48 Stat. 991], 73d Congress.

breach of the lease may not be proved. We hold otherwise.

By the terms of the contract the filing of the petition in bankruptcy was, of itself, and irrespective of the election of lessor or lessee, a breach of the lease. The claim of the landlord, consequent upon the breach, arose and matured at the moment of the filing of the petition. The claim is not for rent reserved or upon the lease as such, but is founded upon an independent express contract, and hence within the very words of § 63 (a) 4.

The Circuit Court construed the stipulation as an agreement on the part of the tenant to pay as liquidated damages, in the event of the specified breach, an amount equal to the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term. The covenant is fairly susceptible of this construction. So read, the court held the clause provided a reasonable formula for ascertaining the damages of the landlord, did not smack of a penalty, and was therefore enforceable. See *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597. We concur in the view that the contract, as its terms were interpreted and applied, supports a provable claim for the stipulated damages.

The judgment of the Circuit Court of Appeals is

Affirmed.

IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* BOWDITCH ET AL.

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

No. 173. Argued November 6, 1934.—Decided December 3, 1934.

Decided upon the authority of *Irving Trust Co.* v. *A. W. Perry, Inc., ante,* p. 307.

Affirmed.

CERTIORARI * to review a judgment affirming a judgment of the District Court which allowed a claim in bankruptcy based upon a covenant in a lease.

Mr. Lester D. Melzer, with whom *Mr. Irving L. Ernst* was on the brief, for petitioner.

Mr. Burton E. Eames for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case is ruled by No. 22, *Irving Trust Co.* v. *A. W. Perry, Inc.,* decided this day, *ante,* p. 307. The stipulation in the lease is in all pertinent respects similar to that involved in No. 22. The judgment of the Circuit Court of Appeals, affirming an order of the District Court admitting proof of claim, was therefore right, and is

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TWIN BELL OIL SYNDICATE.

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

No. 170. Argued November 15, 16, 1934.—Decided December 3, 1934.

1. The legislative history of § 204 (c)(2) of the Revenue Act of 1926 shows that this section does not grant a deduction for depletion but merely provides methods for computing the amount of the deduction granted by § 234 (a)(8) of the Act. Pp. 315, 319.
2. The deduction for depletion in the case of a lease of oil and gas wells must be apportioned between the lessor and lessee as provided by § 234 (a)(8), irrespective of which of the methods prescribed by § 204 for computing the amount of the deduction is chosen.

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* See Table of Cases Reported in this volume.

The last clause of § 204 (c)(2) providing that ". . . in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph," does not require a different result. P. 319.

3. Under § 204 (c)(2) of the Revenue Act of 1926, which provides that "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year," the basis for computing the allowance in the case of a taxpayer operating under a lease requiring the payment of royalties, is the gross income from production less the amounts which the taxpayer was obligated to pay as royalties, whether the royalties were paid in kind, or their value in cash. Pp. 320–321.

4. The provision of § 114 (b)(3) of the Revenue Act of 1932, which expressly excludes from the basis for computing the percentage depletion for oil and gas wells "any rents or royalties paid or incurred by the taxpayer in respect of the property," was merely clarifying in purpose and declaratory of § 204 (c)(2) of the 1926 Act as administered. P. 322.

70 F. (2d) 402, reversed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, 26 B. T. A. 172, which sustained an assessment of deficiency in income tax.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. P. Jackson* were on the brief, for petitioner.

Mr. George H. Koster, with whom *Mr. L. A. Luce* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Under the Revenue Act of 1926 the taxpayer is entitled, in the case of oil and gas wells, to deduct from gross income an allowance for depletion. The relevant sections

* See Table of Cases Reported in this volume.

of the Act are copied in the margin.[1] The present litigation calls for decision as to the total allowance permitted

[1] Revenue Act of 1926, 44 Stat. 9, 14, 42.

TITLE II.—INCOME TAX.

. . . . .

PART III.—CORPORATIONS.

. . . . .

DEDUCTIONS ALLOWED CORPORATIONS.

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

. . . . .

(8) 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; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee; (U. S. C. App., Title 26, § 986).

TITLE II.—INCOME TAX.

. . . . .

PART I.—GENERAL PROVISIONS.

. . . . .

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204. (c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that—

. . . . .

(2) In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph. (U. S. C. App., Title 26, § 935.)

and its apportionment between lessor and lessee where the income is derived from operation under an oil and gas lease.

During 1925, 1926 and 1927 the respondent, as assignee of the lessee named in an oil and gas lease, extracted substantial quantities of oil. By the terms of the lease and the assignment it was obligated to pay royalties in cash or in kind, totalling one-quarter of the oil extracted. The respondent claimed that the gross proceeds of all the oil produced should form the basis for the computation of the allowance for depletion granted by § 204 (c) (2), but the petitioner ruled that the deduction should be limited to 27½ per cent. of gross production less royalties paid. The Board of Tax Appeals sustained the ruling.[2] The Circuit Court of Appeals reversed the Board.[3] The case is here on writ of certiorari.[4]

The petitioner construes § 204 (c) (2) *in pari materia* with § 234 (a) (8), and asserts the percentage deduction permitted by the former is subject to the requirement of equitable apportionment between the lessor and lessee required by the latter. The respondent urges that § 204 (c) (2) is an independent and complete provision, to be applied without reference to § 234 (a) (8), and that to attempt to apportion the allowance granted by § 204 (c) (2) in the manner indicated by § 234 (a) (8) would violate the plain terms of the statute.

Reference to the structure of the successive income tax laws will aid in a solution of the problem. The Revenue Act of 1916[5] imposed an income tax by Title I. It divided the provisions as to tax into two parts, Part I on individuals, and Part II on corporations. In each part

[2] 26 B. T. A. 172.
[3] 70 F. (2d) 402.
[4] *Post*, p. 540.
[5] 39 Stat. 756.

the statute first lays the tax and in a subsequent section grants certain deductions, those enumerated in § 5 of Part I being available to individuals, and those specified in § 12 of Part II to corporations. Both sections include a reasonable allowance for depletion in the case of oil and gas wells. In the drafting of the Revenue Act of 1918 [6] a new arrangement of the subject matter was adopted. Title I is composed of definitions, Title II treats of income tax. Part I of this title consists of general provisions applicable alike to individual and corporate taxpayers. Sections under this part define taxable years and dividends, and § 202 prescribes the "basis for determining gain or loss," but makes no reference to depletion of mines, timber, or oil and gas wells. Additional sections have to do with inventories, net losses, and other general matters. Part II levies the tax on individuals, defines net and gross income, and in § 214 specifies the deductions allowed from gross income. The opening sentence of subsection (a) (10) is:

"In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted."

Then follow two provisos, one directing how cost shall be ascertained in the case of properties acquired prior to March 1, 1913, and the other allowing an alternative method of calculating depletion upon the basis of discovery value of mines and oil and gas wells. The paragraph ends with the sentence:

"In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

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[6] 40 Stat. 1057.

In Part III, levying the corporation tax, § 234 (a) (9) allows a deduction for depletion in the identical phraseology employed with respect to individual taxpayers in § 214 (a) (10).

The same method was followed in the Revenue Act of 1921.[7] The general provisions contain no reference to depletion, but under Parts II and III of Title II the tax is fixed for individuals and corporations and the allowable deductions from gross income are set forth. The paragraphs of the prior Act as to depletion of oil and gas wells are literally reënacted, but there is inserted in § 214 (a) (10) as to individuals and § 234 (a) (9) as to corporations, an additional proviso with respect to discovery value.

In the framing of the Revenue Act of 1924[8] the same arrangement was observed. General definitions are found in Title I; Title II treats of income tax, and in Part I of that title are included general provisions applicable to both individual and corporate taxes. Amongst such general provisions in the earlier acts there had been a section entitled "Basis for determining gain or loss." In the 1924 Act the draftsman embodied paragraphs similar to those of the earlier act in § 204, but enlarged the caption to read "Basis for determining gain or loss, *depletion, and depreciation,*" and transferred to this section that portion of the depletion provision dealing with the basis of the allowance which had formerly appeared under the heading "Deductions" in Part II, Individuals, and Part III, Corporations. This added to the old § 204 a new subsection (c), which permits the use of cost or discovery value as the basis of depletion in the case of mines and oil and gas wells. Having transferred these provisions from §§ 214 (a) (9) and 234 (a) (8), respecting individual

[7] 42 Stat. 227.

[8] 43 Stat. 253.

and corporate deductions, there remained in those sections the language first found in the Act of 1918, above quoted, including the concluding sentence relating to equitable apportionment between lessor and lessee. The thought apparently was that the authority for the deduction should remain in the sections dealing with all deductions and the formulae for calculating the deduction should be relegated to a general provision applicable alike to corporations and individuals.

The depletion allowance based on discovery value was found difficult of administration, since it required a separate valuation of each well,[9] and was abandoned in the Revenue Act of 1926.[10] There was substituted a flat allowance of 27½ per cent. of gross income. In this Act the same arrangement was followed as in that of 1924. Under Title II, Income Tax, Part I was devoted to general provisions. As the basis for determining gain or loss, depletion and depreciation, had been embodied in § 204 of the general provisions of the Act of 1924, in which was the permitted use of discovery value as a basis for depletion, when that method was discarded in favor of the flat percentage of gross income it was logical to insert the substituted paragraph in the place where the discarded one had been. Thus we find the new formula inserted as paragraph (c) (2) of § 204. The authority for deduction of depletion remains where it has always been since the Act of 1918, namely, in § 214 (a) (9) of Part II, Individuals, and § 234 (a) (8) of Part III, Corporations, and naturally there still remains in these paragraphs the limitation that the allowance shall be apportioned between lessor and lessee.[11]

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[9] See Senate Report No. 52, 69th Cong., 1st Sess., p. 17.

[10] 44 Stat. 9.

[11] In framing the Revenue Act of 1928 (45 Stat. 791) the draftsman reverted to an arrangement similar to that found in the Revenue Act of 1916. Thus under Title I an income tax is laid on both individuals and corporations, and in subsequent portions of the Act general pro-

This outline of the framework of the legislation demonstrates that Congress did not insert § 204 (c) (2) as an independent section *granting* an allowance or deduction for depletion. In the earlier Acts both the grant and the method of computation were embraced in a subsection under the title "Deductions." In the later Acts of 1924 and 1926 the grant remained in the deduction section and the taxpayer was referred to a general provision in § 204 for the method of ascertaining its amount.

Respondent emphasizes the last clause of § 204 (c) (2), which is: "except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." It is argued that as this exception gives the taxpayer an option to compute the allowance either on the cost basis or by the flat percentage method, if he elects the former he proceeds under 234 (a) (8). Thus it is said that section applies only in case the cost basis is chosen. But an examination of the statute demonstrates the error of this position. No basis or formula for computation of the allowance is found in § 234; on the contrary all permissible procedures are covered by § 204, whether cost depletion of mines and oil

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visions are contained. In this Act the deductions from gross income are found in § 23 under Part II, "Computation of Net Income," and the language of § 214 (a) (9) and § 234 (a) (10) of the Revenue Act of 1926 is found only in this section, applicable to both sorts of taxpayers, corporate and individual, as subsection (l). A new subsection (m) is added, which states: "The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114." Section 114 is found in Supplement B, and so far as material here is the same with respect to gas and oil wells as the analogous portions of § 204 (c) of the Act of 1926.

It is quite clear, therefore, from this cross-reference, that the framers of the Act understood the deduction was allowed by § 23 (l) but the method of calculating it was to be ascertained by reference to a general provision on that subject, § 114.

wells, paragraph (c); discovery value basis in the case of mines (c) (1); or flat percentage of gross income in the case of oil and gas wells (c) (2). If, therefore, the taxpayer does not compute under (c) (2) he must do so in accordance with the cost method prescribed by the earlier paragraph (c) of the same section, and not, as contended, under 234 (a) (8).

It follows that whichever method outlined in § 204 is chosen for computing the allowance granted by § 234, the deduction must be apportioned between lessor and lessee.

We come, then, to consider the propriety of the procedure followed by the Commissioner. What he did, in effect, was to treat the gross production less royalties as the measure of the respondent's depletable interest in the property, and the royalties as the measure of the depletable interest of those entitled to receive them. The respondent says, however, that under § 213 the gross production of the wells is respondent's gross income from the property, must be reported as such, and § 204 (c) (2) permits him an allowance of 27½ per cent. thereof. It must follow that the royalties (one-fourth of the same gross production) are gross income to those receiving them and are subject to depletion at the rate of 27½ per cent. The result would be a total allowance of 27½ per cent. of five-fourths of the total production. Certainly this would not be a single allowance, apportioned between lessor and lessee. And we think § 204 (c) (2) does not require such a result. The words used are, "the allowance for depletion shall be 27½ per centum of the *gross income from the property* during the taxable year." Is the italicized phrase synonymous with the taxpayer's gross income as defined in § 213? It cannot be if "property" signifies the tract of land in all its uses, others as well as the extraction of oil and gas. *Darby-Lynde Co.* v.

Alexander, 51 F. (2d) 56. The phrase, we think, points only to the gross income from oil and gas. Compare *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 461; Greensboro Gas Co. *v.* Commissioner, 30 B. T. A. 1361. So restricted, it presents no difficulty where the owner of the land is also the operator, and there is none where the lessee turns over royalty oil in kind to the lessor, for the retained oil, in that case, is the base for the lessee's computation of depletion and the royalty oil that for the lessor's. We think Congress did not intend a different result where, as here, the lessee sells all the oil and pays over the royalty in the form of cash.

At all events, as the section must be read in the light of the requirement of apportionment of a single depletion allowance, we are unable to say that the Commissioner erred in holding that for the purpose of computation "gross income from the property" meant gross income from production less the amounts which the taxpayer was obliged to pay as royalties. The apportionment gives respondent 27½ per cent. of the gross income from production which it had the right to retain and the assignor and lessor respectively 27½ per cent. of the royalties they receive. Such an apportionment has regard to the economic interest of each of the parties entitled to participate in the depletion allowance. Compare *Palmer* v. *Bender,* 287 U. S. 551, 558.

The respondent insists that, so applied, the section may work unjust and unequal results; but it is to be remarked that this is likely to be so wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer. No doubt, as the petitioner points out, equally illogical results might ensue from the application of the section as the respondent construes it. And it is also to be remembered that depletion upon cost or March 1, 1913 value is optional with the taxpayer, if that procedure is more favorable to him.

Finally, the respondent says that in the Revenue Act of 1932[12] the section corresponding to 204 (c) (2) was amended so as to authorize such a procedure as the petitioner adopted in this case, and therefore the section as it stood in the Act of 1926 could not have supported the Commissioner's ruling. The amendment alters the section to read: [13] "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year, *excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. . . .*" The petitioner says that the amendment was merely clarifying in purpose and declaratory of the existing law as administered. We think this is so. When it was offered the chairman of the committee having the bill in charge so stated,[14] and the conference report is to the same effect.[15]

The judgment is *Reversed.*

WILLIAM E. HERRING *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 176. Argued November 16, 1934.—Decided December 3, 1934.

1. The percentage deduction from gross income permitted by § 204 (c) (2) of the Revenue Act of 1926 as an allowance for depletion in the case of oil and gas wells, is applicable to advance royalties and bonuses received by a lessor upon the execution of an oil and

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[12] 47 Stat. 169.

[13] Section 114 (3), 47 Stat. 202.

[14] Cong. Record, Vol. 75, Part 10, pp. 11629–11630.

[15] House Conference Report No. 1492, 72d Cong., 1st Sess., p. 14.

* Together with No. 177, *Eula Day Herring* v. *Commissioner,* certiorari to the Circuit Court of Appeals for the Fifth Circuit.

gas mining lease, even though there were no wells on the property and no production of oil or gas during the taxable year. Pp. 324, 327.

2. The reënactment of a statutory provision without alteration indicates legislative approval of administrative regulations theretofore adopted and applied. P. 325.

70 F. (2d) 785, reversed.

CERTIORARI * to review judgments of the Circuit Court of Appeals in two income tax cases, wherein decisions of the Board of Tax Appeals sustaining the action of the Commissioner in disallowing claimed deductions for depletion were affirmed.

Mr. Robert Ash, with whom *Mr. Leslie E. Martlew* was on the brief, for petitioners.

Assistant to the Attorney General Stanley, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioners are husband and wife and the income which gives rise to this controversy is derived from community property. We are to determine whether, in computing net income under the Revenue Act of 1926, they were entitled to deduct from advance royalty or bonus received upon the execution of oil and gas leases the statutory percentage allowance for depletion, it appearing that there was no production when the leases were made, or at any time within the taxable year.

The petitioners' community estate held a half interest in a partnership whose principal business was cattle raising. The firm owned a tract near Amarillo, Texas. In 1926 it leased portions of this land for the purpose of

* See Table of Cases Reported in this volume.

mining and operating for oil and gas. In that year the lessees paid an aggregate of $683,793.75 as advance royalties or bonuses, and were obligated to pay additional royalties of one-eighth of the product or its value as oil and gas were extracted. The leases were for terms of five years and so long thereafter as oil and gas should be produced. When the instruments were executed there was no oil well within three and a half miles of the demised land. The lessors had no right to compel the drilling of wells and none were put down during 1926. In 1930 four were drilled which proved to be commercial gas wells, all made a showing of oil, and one produced from eight to ten barrels a day.

In their tax returns for 1926 the petitioners each claimed a pro rata share of a depletion allowance of $188,043.28, being 27½ per cent. of the bonus payments to the partnership. The Commissioner disallowed the claim. The Board of Tax Appeals sustained his decision. The Circuit Court of Appeals affirmed the Board's action.[1] We granted certiorari.[2]

The pertinent sections of the Revenue Act of 1926 are 214 (a) (9) granting a reasonable deduction for depletion in the case of oil and gas wells, and 204 (c) (2) permitting computation of the allowance at 27½ per centum of the gross income from the property.[3]

A bonus is not proceeds from the sale of property, but payment in advance for oil and gas to be extracted, and is therefore taxable income.[4] As such it is a part of the "gross income from the property" as the phrase is used in § 204 (c) (2) to designate the base for the application of the percentage deduction. From these premises the

[1] 70 F. (2d) 785.

[2] *Post*, p. 541.

[3] 44 Stat. 9, 14, 26–27; U. S. C. App. Tit. 26, §§ 935, 955.

[4] *Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, *id.* 299; *Bankers Pocahontas Coal Co.* v. *Burnet*, *id.* 308.

petitioners argue that the bonus received does not lose its character as income subject to depletion, merely because it happens that in the year of receipt there was no production of the depletable asset.

The respondent replies that the allowance for depletion is a matter of grace, not of right, and that the act fails to grant any allowance on income such as that here involved. The argument is that in both the relevant sections of the act, the statute says "in the case of . . . oil and gas wells" and this expression necessarily excludes a case where no well exists. In support of this asserted statutory exclusion it is urged that a depletion allowance is essentially and exclusively reimbursement for wastage or exhaustion of assets, and Congress could not have meant to permit an allowance in any year in which there was no extraction of oil or gas, and no practical assurance of production in the future. We think these arguments cannot prevail to defeat the petitioners' right to the deduction.

Each of the Revenue Acts, 1916 to 1934 inclusive, has granted as a deduction from gross income a reasonable allowance for depletion "in the case of . . . oil and gas wells." [5] The regulations under the 1926 Act and its predecessors dealing with cost depletion treated bonus or advanced royalty as subject to depletion,[6] and these have been approved by reënactment of the statutory provision without alteration. That, under the law and the regulations, a lessor is entitled to a depletion allowance on bonus payments is settled by the decisions of this court.[7] It

[5] See *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Helvering* v. *Twin Bell Oil Syndicate*, No. 170, decided this day, *ante*, p. 312; R. A. 1932, § 23 (l) 47 Stat. 169, 181; R. A. 1934, § 23 (m) 48 Stat., 680, 689.

[6] *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 303.

[7] *Burnet* v. *Harmel, supra; Murphy Oil Co.* v. *Burnet, supra; Palmer* v. *Bender*, 287 U. S. 551.

has never been held here that the existence of a well conditioned the right to depletion. Nor, until recently, has the Treasury so ruled. After the decision of the *Murphy Oil Co.* case, *supra,* there arose a doubt as to how the flat percentage allowance first permitted by the Act of 1926 should be applied to bonus payments. In answer to a request, the General Counsel of the Bureau of Internal Revenue rendered an opinion [8] in which he said:

"The four situations to which attention is called are as follows:

"(1) No oil being produced when the bonus was received, but future production practically assured because of nearby wells and geological indications.

"(2) No oil being produced when the bonus was received, but property became productive within the taxable year.

"(3) No oil being produced when the bonus was received, and not more than a speculative prospect of future oil production at that time, but property is now known to have become productive after the taxable year.

"(4) Property has never become productive."

and held that depletion should be allowed in situations (1) and (2) and denied in situations (3) and (4).

In the present case the Board of Tax Appeals followed an earlier decision in which it had referred to portions of the General Counsel's opinion with disapproval, but found it unnecessary to decide whether it was sound.[9] In that case no well had been drilled on the leased property within the taxable year in which the bonus was paid, and the Board, saying that depletion could not be allowed except as an incident of actual production, refused the claimed percentage deduction. In a later case [10]

[8] G. C. M. 11384, XII–1 Cumulative Bulletin 64.

[9] Glide *v.* Commissioner, 27 B. T. A. 1264. See also Umsted *v* Commissioner, 28 B. T. A. 176, affirmed 72 F. (2d) 328.

[10] Sneed *v.* Commissioner, 30 B. T. A. 1121.

where it appeared the whole of the petitioner's land was proved oil and gas territory and a gas well had been drilled in a prior year and shut in for lack of pipe-line facilities, so that there was no actual production during the taxable year in which the bonus was received, the Board overruled the taxpayer's claim for depletion, adhering to its position that production during the year was prerequisite to any allowance and refusing to follow General Counsel's opinion.

The situation presented by the administrative rulings is this: A bonus is not a receipt from a sale of a capital asset and may not be returned as such; it is income in the year received; if any depletion is to be allowed against the receipt, the allowance must be claimed for the year of receipt; it cannot be allowed in any later year; [11] if the taxpayer computes depletion upon the basis of cost or March 1, 1913 value he may deduct depletion from a bonus payment, irrespective of the sinking of a well or the production of any oil or gas; [12] if, however, he elects to avail himself of the alternative method of computing deduction at a per cent. of gross income, though the nature of the deduction is unchanged,[13] he may not have any unless there be production within the taxable year; if the production be but trifling he may take a full percentage deduction upon the entire bonus, however disproportionate the allowance to the actual extraction of oil during the year. To condition the allowance on actual production, however small, or the imminent probability of production, and to deal in refinements as to the degree of probability of future production, is in many cases to deny any deduction where the taxpayer elects to compute it under 204 (c) (2), flat percentage of gross income from

[11] Compare *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 306.

[12] See the regulations cited in *Murphy Oil Co.* v. *Burnet, supra,* at p. 303.

[13] *United States* v. *Dakota-Montana Oil Co., supra,* at p. 467.

the property, and permit it where he elects to compute it under 204 (c), on the basis of cost. But the nature and the purpose of the allowance is the same in both cases, and we find neither statutory authority nor logical justification for withholding it in the one and granting it in the other; much less for making the decision turn upon the circumstance that no production is obtained within the year in which the bonus is paid.

As to income tax liability in the year of termination of the lease, on account of bonus paid at the execution of the lease, if no mineral has then been extracted, we express no opinion.

The judgments are *Reversed.*

DAVIS *v.* AETNA ACCEPTANCE CO.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 68. Argued November 9, 1934.—Decided December 3, 1934.

1. A creditor to whom a bankrupt owes money on a promissory note and against whom the bankrupt has committed an act of conversion by an unauthorized sale of personal property mortgaged to secure the note, may prove on the note, "a fixed liability as evidenced by an instrument in writing," Bankruptcy Act, § 63 (1), or may waive the tort and prove on the implied assumpsit, § 63 (4); but he cannot escape the discharge by electing to ignore the bankruptcy proceedings and suing on the tort. P. 331.
2. Section 17 (2) of the Bankruptcy Act, which excepts from discharge liabilities for "willful and malicious injuries" to the property of another, does not embrace a technical conversion, committed against the mortgagee of personal property by the mortgagor in possession, by an unauthorized sale, if the act was not in fact willful or malicious but done innocently in the honest though mistaken belief that authority to sell existed. P. 331.
3. Section 17 (4) of the Bankruptcy Act, which excepts from discharge liabilities of a bankrupt created by his fraud, embezzlement, etc., while acting in any "fiduciary capacity," refers to strict trusts,

existing before the wrongs creating the excepted liabilities are committed, and not to trusts *ex maleficio* arising from the wrongs themselves. P. 333.

4. A dealer in automobiles purchased a car by means of a loan of money, to secure which he delivered to the lender his promissory note for the amount borrowed, a chattel mortgage covering the car, a "trust receipt" agreeing to hold the car as the property of the lender for the purpose of storage, and not to sell, pledge or otherwise dispose of it without the lender's consent in writing, and, finally, a bill of sale, absolute in form. *Held:*

That the transaction amounted merely to a mortgage for the security of the loan with a covenant by the mortgagor not to sell without the mortgagee's consent, and did not constitute the former a fiduciary for the latter within the meaning of § 17 (4) of the Bankruptcy Act. P. 334.

273 Ill. App. 628, reversed.

CERTIORARI * to review the affirmance of a judgment recovered by the Acceptance Company against Davis in an action of trover counting on the sale of a mortgaged automobile. Davis's special plea of a discharge in bankruptcy was overruled. The Supreme Court of Illinois refused leave to appeal.

Mr. Franklin D. Trueblood, with whom *Messrs. Edward A. Zimmerman* and *George A. Edwards* were on the brief, for petitioner.

Mr. William S. Kleinman for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A discharge in bankruptcy, pleaded as a defense to a declaration in trover for the conversion of a chattel, has been ruled by the courts below not to constitute a bar. The question is whether upon the evidence and the findings the bar should have been upheld.

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* See Table of Cases Reported in this volume.

The petitioner was a dealer in automobiles, selling them at retail and maintaining a salesroom where his wares were displayed. To put himself in funds for the acquisition of the cars, he obtained loans from the respondent, the Aetna Acceptance Company, in thirty-five or more transactions. In particular he borrowed $1,181.87 on July 10, 1929, procuring title thereby to an Auburn sedan. This was 90% of the cost of the car, the residue of the price being paid out of his own money. At once upon receipt of the sedan, he delivered to the respondent a set of four papers; a promissory note for $1,181.87 to the order of the respondent payable in sixty days; a chattel mortgage covering the automobile and securing payment of the note; a trust receipt, acknowledging receipt of the automobile, and agreeing to hold it as the property of the respondent for the purpose of storage, and not to sell, pledge or otherwise dispose of it except upon consent in writing; and finally a bill of sale, absolute in form.

On August 3, 1929, the automobile, then on exhibit in the petitioner's showroom, was sold by one of his salesmen, and thereupon or soon afterwards petitioner received the price. There is a stipulation that the sale was made without concealment and in the ordinary course of business, though without written consent. According to the petitioner's testimony, notice of the transaction was given the same day to one of the respondent's officers. There is also testimony tending to support the inference that on many other occasions cars held upon like terms had been sold without express consent and the proceeds accounted for thereafter. On this occasion the petitioner promised to make prompt remittance of a check, subject to an offset or credit growing out of other dealings. He did not keep his promise. Instead, he filed a petition in bankruptcy on September 13, 1929, obtaining later his discharge after duly listing the respondent in his schedule of creditors.

The filing of that petition was followed by this action for conversion. The trial judge, overruling the special plea of a discharge, gave judgment in favor of the respondent for damages and costs. The Illinois Appellate Court affirmed. There was a refusal of leave to appeal to the Supreme Court of the State, permission being requisite because of the amount involved. The case is here on certiorari.

The effect of a discharge in bankruptcy is to " release a bankrupt from all of his provable debts," with excepted liabilities enumerated in the statute. Bankruptcy Act, § 17; 11 U. S. C. § 35. There is no dispute that the respondent had a provable debt. It might have proved upon the note, " a fixed liability as evidenced by . . . an instrument in writing." Bankruptcy Act, § 63 (1); 11 U. S. C. § 103a. If its grievance was the sale, it might have proved " upon a contract, express or implied," § 63 (4), waiving the tort and standing upon the implied assumpsit. *Crawford* v. *Burke,* 195 U. S. 176, 193; *Tindle* v. *Birkett,* 205 U. S. 183. What it did is not decisive. *Crawford* v. *Burke, supra; Tindle* v. *Birkett, supra.* Enough that a method of proof had been provided to be used at its election.

The debt being provable, the next inquiry must be whether the liability back of it is within one of the excepted classes. For present purposes, only two of the exceptions, § 17 (2) and (4), will have to be considered. The others by concession have no relation to this case. Subdivision 2 excludes from the release " liabilities for . . . willful and malicious injuries to the person or property of another." Subdivision 4 excludes the liabilities of a bankrupt " created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

1. The respondent contends that the petitioner was liable for a wilful and malicious injury to the property

of another as the result of the sale and conversion of the car in his possession. There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre* v. *Kavanaugh,* 242 U. S. 138, where the wrong was unexcused and wanton. But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice. *Boyce* v. *Brockway,* 31 N. Y. 490, 493; *Laverty* v. *Snethen,* 68 N. Y. 522, 527; *Wood* v. *Fisk,* 215 N. Y. 233, 239; 109 N. E. 177; *Stanley* v. *Gaylord,* 1 Cush. (Mass.) 536, 550; *Compau* v. *Bemis,* 35 Ill. App. 37; *In re De Lauro,* 1 F. Supp. 678, 679. There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one. Turning to the findings here, we see that wilfulness and malice have been unmistakably excluded. Cf. *In re Dixon,* 21 F. (2d) 565, 566; *In re Burchfield,* 31 F. (2d) 118, 119. The trial court made a special finding as follows: "The court finds that the defendant in this case was not actuated by wilful, malicious or criminal intent in disposing of the car in question." In these circumstances the respondent is not helped by the later and general finding that the petitioner was "guilty of legal conversion of the property, as described in the count in trover." The special controls the general, just as upon the verdict of a jury. *Walker* v. *New Mexico & S. P. R. Co.,* 165 U. S. 593, 598; *Victor-American Fuel Co.* v. *Peccarich,* 209 Fed. 568, 571.

Nothing in the judgment of the Illinois Appellate Court is at war with the exculpatory finding made upon the trial. The Appellate Court repeats the words of the

trial judge without hint of disapproval. Its only comment is that under the law of Illinois malice and wrongful intent are not necessary constituents of a cause of action in trover. This, of course, is true, but though true, it is beside the mark. The discharge will prevail as against a showing of conversion without aggravated features.

2. The respondent contends that irrespective of wilfulness or malice, the petitioner is within the exception declared by subdivision 4, his liability arising, it is said, from his fraud or misappropriation while acting in a fiduciary capacity. The meaning of these words has been fixed by judicial construction for very nearly a century. *Chapman* v. *Forsyth,* 2 How. 202, decided in 1844, is a decision to the effect that within the meaning of a like provision in the Act of 1841, a factor does not act in a fiduciary capacity; the statute "speaks of technical trusts, and not those which the law implies from the contract." 2 How. at p. 208. The scope of the exception was to be limited accordingly. Through the intervening years that precept has been applied by this court in varied situations with unbroken continuity. *Neal* v. *Clark,* 95 U. S. 704; *Hennequin* v. *Clews,* 111 U. S. 676, 682; *Noble* v. *Hammond,* 129 U. S. 65, 68; *Upshur* v. *Briscoe,* 138 U. S. 365; *Crawford* v. *Burke, supra; Tindle* v. *Birkett, supra.* Cf. *Cronan* v. *Cotting,* 104 Mass. 245; *Clair* v. *Colmes,* 245 Mass. 281; 139 N. E. 519. It is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio.* He must have been a trustee before the wrong and without reference thereto. In the words of Blatchford, J., "The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created." *Upshur* v. *Briscoe, supra,* at p. 378. Was petitioner a trustee in that strict and narrow sense?

We think plainly he was not, though multiplicity of documents may obscure his relation if the probe is superficial. The only writing at all suggestive of a trust is the one that is characterized as a trust receipt. What effect would be given to it if it stood alone there is no occasion to consider. It does not stand alone, but is a member of a group which must be read with a collective meaning. The note, the chattel mortgage, the trust receipt and the bill of sale were made at the same time. We must view them all together. Clearly the respondent's only interest in the car was as security for the debt; this is the central fact, the coördinating element, that unifies the whole transaction. The bill of sale may seem to make the creditor a purchaser; whatever its recitals, it is a mortgage in another form. *Whittemore* v. *Fisher,* 132 Ill. 243. The trust receipt may state that the debtor holds the car as the property of the creditor; in truth it is his own property, subject to a lien. *Barchard* v. *Kohn,* 157 Ill. 579, 585, 586; 41 N. E. 902. The substance of the transaction is this, and nothing more, that the mortgagor, a debtor, has bound himself by covenant not to sell the mortgaged chattel without the mortgagee's approval. The resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust. Cf. *In re Butts,* 120 Fed. 966, 971; *Bloomingdale* v. *Dreher,* 31 F. (2d) 93. The relation would be no different if the duty had been stated in terms of covenant alone without descriptive epithet. A mortgagor in possession before condition broken is not a trustee for the mortgagee within the meaning of this statute, though he has charged himself with a duty to keep the security intact. Cf. *Ten Eyck* v. *Craig,* 62 N. Y. 406, 422.

No question as to a cause of action arising from a conversion of the proceeds of the sale with wilfulness and

malice as distinguished from one arising from the conversion of the car itself is before us on this record.

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

Reversed.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* JOHNSON, ADMINISTRATOR.

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

No. 154. Argued November 15, 1934.—Decided December 3, 1934.

A life insurance policy, issued in Virginia to a resident of that State, provided that if the insured, before attaining a certain age and while no premium was in default, should furnish the company due proof of his being totally and permanently disabled, the company would grant him specified monthly payments from receipt of such proof through the remainder of his lifetime as long as such disability continued, and would also, after receipt of such proof, waive payment of each premium as it thereafter became due during such disability. Before the expiration of a period of grace allowed for payment of a premium, the insured became totally and permanently disabled, both physically and mentally, to such an extent that he was unable to give notice to the company in advance of default, and thus procure the waiver called for by the policy. The disability persisted until his death. *Held:*

1. The contract is to be interpreted according to the law of Virginia where delivery was made. P. 339.

2. So interpreted, the right to have the premiums waived during the disability was not lost by the failure to give notice, caused by the disability. *Id.*

3. The question concerns merely the meaning implied in the words of a highly specialized condition, involving no rule of the law merchant or general principle of the law of insurance contracts; it is a doubtful one upon which the courts of the country are divided; and in deciding it, this Court (though it may have power to do otherwise) will be guided in its decision by the law of the State of the contract. P. 339.

70 F. (2d) 41, affirmed.

CERTIORARI * to review a judgment which reversed a judgment on a verdict directed by the District Court for the Insurance Company in an action on a life insurance policy.

Mr. James C. Martin, with whom *Mr. Frederick L. Allen* was on the brief, for petitioner.

Messrs. Burnett Miller and *John S. Barbour* for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

On May 16, 1930, the petitioner, the Mutual Life Insurance Company of New York, issued in Virginia to Benjamin F. Cooksey, who resided in that state, a policy of life insurance in the amount of $4,500 with disability benefits. Upon the face of the policy, it is provided that if the insured is totally and permanently disabled before the age of sixty, the company will pay him "forty-five dollars monthly during such disability . . ., besides waiving premium payments, all upon conditions set forth in section 3." The conditions thus incorporated by reference are these: "If, before attaining the age of sixty years and while no premium on the policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, . . . the Company will grant the following benefits during the remaining lifetime of the Insured as long as such disability continues. Benefits (a) . . . The Company will pay a monthly income to the Insured of the amount stated on the first page hereof . . . beginning upon receipt of due proof of such disability . . . (b) Waiver of Premiums. The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such

* See Table of Cases Reported in this volume.

disability." There is also a provision that the policy will be reinstated within six months after a default if proof is given within that time that at the date of the default the insured was totally disabled and has continuously remained so.

A quarterly premium became payable under this policy upon November 16, 1931, subject, however, to a period of grace of thirty-one days, whereby the time for payment was extended until December 17. This premium was never paid by the insured, though all earlier premiums had been paid as they matured. On December 17, the date of the default, the insured, who was under sixty, was confined to his bed, a sufferer from chronic nephritis, which on January 20, 1932, resulted in his death. There is evidence by concession that as early as December 14, 1931, he was totally and permanently disabled, not only physically but mentally, to such an extent that he was unable to give notice to the insurer in advance of the default, and thus procure the waiver called for by the policy. The company takes the ground that because of the omission of that notice the default is unexcused and the policy has lapsed.

In this action by the administrator the District Court upheld the company's position, and directed a verdict for the defendant. The Court of Appeals for the Fourth Circuit reversed, and remanded the cause for trial. 70 F. (2d) 41. For the defendant it was argued that insanity is no more an excuse for the failure to give a notice that will cause the payment of the premiums to be waived than for the failure to make payment of the premiums when waiver is not a duty, either conditional or absolute. Cf. *Klein* v. *Insurance Co.,* 104 U. S. 88. For the plaintiff it was argued that waiver having been promised, though subject to a condition as to notice, there must be a liberal construction of a requirement that is

merely modal or procedural, and the insurer will not be deemed, in respect of matters of that order, to have exacted the impossible. The controversy is one as to which the courts of the country are arrayed in opposing camps. Supporting the petitioner's view are *New England Mutual Life Ins. Co.* v. *Reynolds,* 217 Ala. 307; 116 So. 151; *Iannarelli* v. *Kansas City Life Ins. Co.,* 114 W. Va. 88; 171 S. E. 748; *Smith* v. *Missouri State Life Ins. Co.,* 134 Kan. 426; 7 P. (2d) 65; *Berry* v. *Lamar Life Ins. Co.,* 165 Miss. 405; 142 So. 445; 145 So. 887; *Western & Southern Life Ins. Co.* v. *Smith,* 41 Ohio App. 197; 180 N. E. 749; *Reynolds* v. *Travelers' Ins. Co.,* 176 Wash. 36; 28 P. (2d) 310; *Dean* v. *Northwestern Mutual Life Ins. Co.,* 175 Ga. 321; 165 S. E. 235; *Hall* v. *Acacia Mutual Life Assn.,* 164 Tenn. 93; 46 S. W. (2d) 56; *Egan* v. *New York Life Ins. Co.,* 67 F. (2d) 899. Cf. *Courson* v. *New York Life Ins. Co.,* 295 Pa. 518; 145 Atl. 530; *Whiteside* v. *North American Accident Ins. Co.,* 200 N. Y. 320; 93 N. E. 948. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, is not apposite, there being no evidence in that case of incapacity, physical or mental, to give the prescribed notice. Supporting the respondent's view are *Swann* v. *Atlantic Life Ins. Co.,* 156 Va. 852; 159 S. E. 192; *Rhyne* v. *Jefferson Standard Life Ins. Co.,* 196 N. C. 717; 147 S. E. 6; 199 N. C. 419; 154 S. E. 749; *Levan* v. *Metropolitan Life Ins. Co.,* 138 S. C. 253; 136 S. E. 304; *Pfeiffer* v. *Missouri State Life Ins. Co.,* 174 Ark. 783; 297 S. W. 847; *Reed* v. *Loyal Protective Assn.,* 154 Mich. 161; 117 N. W. 600; *Marti* v. *Midwest Life Ins. Co.,* 108 Neb. 845; 189 N. W. 388; *Roseberry* v. *American Benevolent Assn.,* 142 Mo. App. 552; 121 S. W. 785; *Metropolitan Life Ins. Co.,* v. *Carroll,* 209 Ky. 522; 273 S. W. 54; *Comstock* v. *Fraternal Accident Assn.,* 116 Wis. 382; 93 N. W. 22; *Missouri State Life Ins. Co.* v. *Le Fevre,* 10 S. W. (2d) (Tex. Civ. App.) 267. Cf. *Trippe* v. *Provident Fund Society,* 140 N. Y. 23; 35 N. E. 316; *Insurance Com-*

panies v. *Boykin,* 12 Wall. 433, 436; Restatement of the Law of Contracts, American Law Institute, § 301 (4). The case is here on certiorari.

We think the contract is to be interpreted in accordance with the law of Virginia where delivery was made. *Northwestern Mutual Life Ins. Co.* v. *McCue,* 223 U. S. 234; *Equitable Life Assurance Society* v. *Clements,* 140 U. S. 226; *Scudder* v. *Union National Bank,* 91 U. S. 406, 412, 413. As to the meaning and obligation of such a policy, the highest court of the State has spoken in *Swann* v. *Atlantic Life Ins. Co., supra,* construing a provision substantially the same as the one in controversy here. The ruling there was that notice was excused by physical and mental incapacity to give it. "When the disability of the insured occurred while the policy was in force, he was entitled to have his premiums waived until his death, for his disability continued until his death. He had paid for this right, and to say that he should lose the benefit of his policy because he failed, through mental and physical incapacity, to present proofs would be harsh and unreasonable under the circumstances."

In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law merchant is present in this case. *Swift* v. *Tyson,* 16 Pet. 1.

No question is here as to any general principle of the law of contracts of insurance (*Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 559), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so "balanced with doubt," we accept as our guide the law declared by the state where the contract had its being. *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47, 54, 55; *Sim* v. *Edenborn*, 242 U. S. 131, 135; *Community Building Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678, 680; *Fordson Coal Co.* v. *Kentucky River Coal Corp.*, 69 F. (2d) 131, 132.

The judgment is *Affirmed.*

UNITED STATES *v.* GUARANTY TRUST COMPANY OF NEW YORK.

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

No. 120. Argued November 13, 14, 1934.—Decided December 10, 1934.

1. By the law of the District of Columbia, a forged signature of the payee on a check is inoperative to pass to a subsequent bona fide holder for value, either the title to the instrument, or the right to enforce payment, or the right to retain the proceeds if payment is made in ignorance of the forgery. P. 345.
2. Under settled principles of conflict of laws, the validity of a transfer of a chattel brought into a country by consent of the owner, is governed by the law of that country; and this rule applies to negotiable instruments. P. 345.
3. The principle applies in the present case to a government check, drawn and payable in the District of Columbia, but which was

mailed by the Government from the District to the payee at his residence in Yugoslavia, and was negotiated in that Kingdom. P. 346.

4. By the law of Yugoslavia, as stipulated in this case, the transferee of a check, who takes it in good faith and for value without notice that the endorsement of the payee's name was forged or notice of other defect, and without negligence or fraud on his own part, acquires title to the instrument and the right to collect it and retain the proceeds. *Held* that a holder of a check acquired by transfer under these circumstances in Yugoslavia, had the right in this country to enforce payment and to retain the proceeds as against the drawer, although, by the law of the District of Columbia, where the check was drawn and made payable and was delivered by mailing, a forged endorsement is inoperative,— the check having been sent by the drawer to the payee in Yugoslavia with the presumed intention that it should be negotiated there according to the law of that country. P. 346.
5. An express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give legal title and the right to enforce payment. P. 348.
6. A Treasury circular declared that the handling of Government checks by Reserve Banks should be "subject to examination and payment by the Treasurer of the United States"; and a circular of a Reserve Bank declared that, as the Government exercised the right of returning at any time checks which, for any cause, were not considered good, the Bank, as fiscal agent, as a condition of receiving checks on the Treasury, reserved the right to charge back and return them unconditionally. *Held* that collection of a government check through the agency of the Bank with knowledge of these provisions does not imply consent that the Government may demand restitution irrespective of its obligation to make the payment. P. 349.
7. As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals. P. 350.

69 F. (2d) 799, affirmed.

CERTIORARI * to review the reversal of a judgment recovered by the United States in an action for money paid

* See Table of Cases Reported in this volume.

on a check bearing a forged endorsement of the payee's name.

Mr. Justin Miller, with whom *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *W. Marvin Smith* were on the briefs, for the United States.

Mr. Theodore Kiendl, with whom *Mr. John W. Davis* was on the brief, for the respondent.

By leave of Court, *Messrs. Edwin DeT. Bechtel* and *Malcolm S. McNeal Watts* filed a brief as *amici curiae,* on behalf of the American Express Co.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On September 5, 1929, the United States brought in the federal court for southern New York, this action to recover from the Guaranty Trust Company $160 with interest. That sum was claimed as damages resulting from the payment to the Trust Company, through the Federal Reserve Bank of New York acting as fiscal agent of the United States, of a check, payable to Louis Macakanja drawn on the Treasury of the United States by the disbursing clerk of the United States Veterans' Bureau. The complaint alleged that the letter containing the check had been mailed to the payee in Yugoslavia; that neither the " payee of said check nor any one on his behalf had ever received or endorsed the same "; and that " the letter containing the check was taken or received in Jugoslavia by some person other than the payee thereof, and that thereafter the name of Louis Macakanja was written on the back of the said check by some person other than the payee thereof, and by a person who was not authorized to sign the name of said payee and who had no right, title, or interest in and to said check, with pos-

session thereof, and no right or authority to receive, endorse, or dispose of the same."

The answer set up as a special defense that the "check was negotiated and transferred in the Kingdom of Jugo-Slavia"; that under its law "upon the negotiation and transfer of a check every transferee, if he takes without actual notice of any alleged forgery or other defect, in the absence of fraud or gross negligence, obtains a good title to the instrument, even if the endorsement of the payee is forged, and acquires the right to collect and retain the proceeds"; that "each of the transferees of the check mentioned in the complaint gave valuable consideration and took without notice of any alleged forgery or other defect, and without fraud or negligence, and thereby obtained a good title to the instrument and acquired the right to collect and retain the proceeds"; and that the "defendant under the law of Jugo-Slavia, duly obtained title to said check, as aforesaid, and duly collected and retained the proceeds." [1]

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[1] The law of the Kingdom of Yugoslavia in reference to checks and bills of exchange, according to the stipulation, was in 1921, and still is, as follows:

"Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where

"(a) The instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and

"(b) The said transferee, holder or endorsee gives valuable consideration for the instrument; and

"(c) The said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument.

"The law of Jugo-Slavia further provides that

"(a) When an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement

The case was tried before a jury. The evidence consisted of an agreement as to facts and the cancelled check. The agreement recited, among other things, that the purported endorsement of the payee was a forgery, made in Yugoslavia; that on or about November 30, 1921, the check was transferred and delivered there to the "Merkur" Bank; that the "Merkur" Bank duly endorsed the check and transferred it in Yugoslavia to the "Slavenska" Bank; that the "Slavenska" Bank endorsed and transferred the check in Yugoslavia to the Guaranty Trust Company and forwarded it by mail; that each of these banks paid a valuable consideration, received the check in good faith, took it without notice of the forgery or other defect, and was not guilty of any fraud or negligence; that "the Treasurer of the United States upon receipt of said check paid the same by crediting the Federal Reserve Bank of New York with the amount"; that, in December, 1921, that Bank credited the Trust Company with the amount; that the United States first learned of the forgery on or about April 27, 1926; and that on June 1, 1926, it requested, through the Federal Reserve Bank, reclamation from the defendant, which was denied.

The check, dated October 29, 1921, was payable to the order of "Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugoslavia." When presented for payment, it bore what purported to be his endorsement made in the presence of two witnesses and a certification by the Municipal Administration of Maja to the effect that "the holder

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has acquired title to the instrument under the blank endorsement; and

"(b) The transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

"Under the law of Jugo-Slavia, an endorser does not guarantee or warrant the genuineness of prior endorsements."

of the check is identical with the beneficiary thereof" and that the witnesses as well as the receiver of the money had subscribed the instrument. The check bore these further endorsements: "'Merkur' Banking and Exchange Business, Stanko Shon, Zagreb"; "Pay to the order of Guaranty Trust Co. of New York, New York City, N. Y. Slavenska Bank D. D. Zagreb"; also the stamp of the Guaranty Trust Co.: "Previous Endorsements Guaranteed"; and the stamp of the Federal Reserve Bank.

Each party moved for a directed verdict. The District Court directed a verdict for the plaintiff in the sum of $160 with interest from June 1, 1926; and entered judgment for that amount. The Court of Appeals reversed the judgment, 69 F. (2d) 799. This Court granted certiorari.

First. The check was both drawn and payable in the District of Columbia. By the law of the District a forged endorsement of the payee's name is declared to be wholly inoperative.[2] Ordinarily, a subsequent bona fide holder for value without notice of the forgery would acquire neither title to the instrument nor the right to enforce payment; and would acquire no right to retain the proceeds if payment were made in ignorance of the forgery. But under settled principles of conflict of laws, adopted by both federal and state courts, the validity of a transfer of a chattel brought into a country by the consent of the

[2] Code of Laws of the District of Columbia, Title 22, § 24, and also § 42 of the New York Negotiable Instruments Law provides: "Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

owner is governed by its law; and that rule applies to negotiable instruments. *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677; *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488, 494; 173 N. E. 835. Compare *Disconto-Gesellschaft* v. *United States Steel Corp.*, 267 U. S. 22, 28. See *Queensboro Nat. Bank* v. *Kelly*, 48 F. (2d) 574, 576. Here, the rule is particularly applicable; for the Government, having made the check payable to one therein described as resident in Yugoslavia and having mailed it to his Yugoslavia address, must be deemed to have intended that it should be negotiated there, according to the law of that country. It was thereby given something of the quality of a foreign bill; although technically the check was delivered within the District when mailed there. Compare *Koechlin et cie* v. *Kestenbaum Brothers*, [1927] 1 K. B. 889; see Lorenzon, Conflict of Laws Relating to Bills and Notes, (1919) p. 135, n. 267. The law of Yugoslavia provides that the transferee in due course acquires, despite the forgery, not only " a good title to the instrument," but also " the right to collect and retain the proceeds thereof." As the Government sent the check to Yugoslavia and the forged endorsement and the transfers of the check were made there, its law governs the validity of the transfer; and the banks acquired, at least, a good title to the check.[3]

Second. The Government contends that although the title to the check may have passed from the payee to the Trust Company, it acquired, as against the drawer, no right either to enforce payment or to retain the proceeds paid. The argument is that, since the check was both drawn and payable within the District, the obligation

[3] Compare *McClintick* v. *Cummins*, 3 McLean 158; Fed. Cas. 8,699; *Dundas* v. *Bowler*, 3 McLean 397; Fed. Cas. No. 4,141; *Russell* v. *Grigsby*, 168 Fed. 577, 580; rev. on other grounds, 222 U. S. 149.

arising therefrom is governed by its laws; that, under the law of the District the drawer agreed to pay the check only on the order of the payee; and that since there was no such order and the payment made was in ignorance of the forgery, the money may be recovered as having been paid under a mistake. The law of the District determines the formal and essential validity of the check, the interpretation of the contract, the incidents of the obligation. But the Trust Company does not attempt to enlarge or modify the obligation of the drawer as determined by the law of the District. The question presented is: Has the Trust Company, by acquiring title to the check, acquired the right to enforce the obligation which it represents. The enforcement does not contravene the public policy of the District. The question relates to the incidents of the transfer of title to a chattel; and, hence, is determined by the law of Yugoslavia. The Trust Company is not confronted with any procedural obstacle, like that presented in some jurisdictions where the transferee of a non-negotiable cause of action seeks to sue thereon in his own name. Compare *Harper* v. *Butler,* 2 Pet. 239, 240. Nor is the Trust Company confronted by a divergent public policy of the forum, which forbids its courts from applying the Yugoslavian law. Compare *Bond* v. *Hume,* 243 U. S. 15; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 277. Indeed, the courts of New York, where this suit was brought, would doubtless give effect to the rule of the foreign law here relied on. Compare *Weissman* v. *Banque de Bruxelles,* 254 N. Y. 488, 494; 173 N. E. 835.

The Government argues that acquisition of the legal title to negotiable paper does not necessarily imply acquisition of a cause of action thereon. It is suggested that even an instrument properly endorsed by the payee so as to transfer the title may fail to confer any right to enforce the obligation of the maker, as where the cause of

action had been lost by a discharge in bankruptcy; and that when the title to the instrument is transferred to a bona fide holder for value without an endorsement, or after maturity, the transferree may fail to acquire a right to enforce payment, because such paper is subject to any defense open as against the payee. But those rules have no application here. The discharge in bankruptcy operates upon the obligation represented by the check regardless of who the holder may be. The transferee without endorsement, or after maturity, acquires the rights which the payee had; and it is those rights only which the Trust Company asserts. To conclude that the forged endorsement was sufficient to pass legal title, but insufficient to transfer the right of the payee to collect the proceeds, would deprive the transfer of "title" of all significance except as regards the right to retain a scrap of worthless paper.[4]

Third. The Government contends that irrespective of considerations discussed above, the Trust Company is liable because of its endorsement. The argument is that its endorsement, made when the check was presented for payment through the Federal Reserve Bank of New York, is an independent contract governed by the law of New York, *Spies* v. *National City Bank,* 174 N. Y. 222, 225; 66 N. E. 736; that, by the Negotiable Instruments Law of that State, the endorsement warrants, besides the title, the authenticity of penmanship of the payee or the authorization of the endorsement in his name;[5] and that, if

[4] Compare *Texas* v. *White,* 7 Wall. 700, 735; *Meuer* v. *Phenix Nat. Bank,* 94 App. Div. 331, 88 N. Y. S. 83; affd. 183 N. Y. 511, 76 N. E 1100; *Peterson* v. *Swanson,* 176 Minn. 246; 223 N. W. 287; *Beneficial Loan Assn.* v. *Hillery,* 95 N. J. L. 271, 276; 113 Atl. 324.

[5] Negotiable Instruments Law of New York provides:

§ 116. Every endorser who indorses without qualification, warrants to all subsequent holders in due course:

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

there be doubt as to the meaning and effect of an endorsement under the law of New York, there can be no doubt as to the Trust Company's obligation, because of the terms of its stamp: "Prior endorsements guaranteed." The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement; namely that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check.

Fourth. The Government contends that it is entitled to recover because of exceptional rights conferred in express terms by regulations of the Treasury and of the Federal Reserve Bank of New York. A Treasury circular then in effect provided for the handling of Government checks by the Reserve Banks and branches "subject to examination and payment by the Treasurer of the United States." [6] A Reserve Bank circular recited: "The Government has for many years exercised the right of returning at any time warrants and checks which for any cause have not been considered good, and the Federal Reserve Bank of New York as fiscal agent of the United States as a condition of receiving government warrants and checks on the Treasurer of the United States from member banks or through the New York Clearing House reserves the right to charge back any such item and return the same at any time unconditionally to the institution from which it was received." [7]

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(2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things" in § 115 so referred to are:

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract.

[6] Treasury Department Circular No. 176. December 31, 1919.

[7] Reserve Bank Circular No. 258. March 1, 1920.

The argument is that with knowledge of these regulations the check was presented by the Trust Company for payment through the Reserve Bank of New York, and sent by the Bank to the Treasurer of the United States; that the Treasurer paid the check by crediting the Reserve Bank with the amount, and the Reserve Bank so credited the Trust Company; that the Trust Company was not obliged to avail itself of the facilities of the Reserve Bank; and that having done so with full knowledge of the regulation, it consented that the Government might charge back any such item and return the same at any time unconditionally. *Closter National Bank* v. *Federal Reserve Bank,* 285 Fed. 138, 140, is cited as establishing this proposition. And it is suggested, that, since the rule there declared is controlling, no occasion exists for deciding the question of conflict of laws presented by the petition for certiorari. The rule declared in the *Closter* case has no application here.[8] That case dealt solely with the relation between the holder of the check and the collecting agency employed. As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals. Compare *United States* v. *National Exchange Bank,* 270 U. S. 527, 534; *Lynch* v. *United States,* 292 U. S. 571, 579.

[8] The United States was not a party to that litigation. The Closter Bank sued the Reserve Bank, collecting agent, for the proceeds of a check. The court held that it was a term of the employment that the Reserve Bank might charge back any amount paid on a check if the Government refused final payment; and that hence it was unnecessary for the Reserve Bank to prove that the check in question was forged: "By the terms of the collecting agreement under which the defendant in error performed the service, the collection agent had the right, if it acted in good faith, to charge back the item to the plaintiff in error's account, without the necessity of establishing forgery or alteration of the warrant."

Moreover, the Government expressly disclaimed the assertion of a preferred position.[9]

Additional reasons are suggested for affirming the judgment of the Court of Appeals: That the Government cannot recover on the guaranty of prior endorsements, because it has failed to show damage from the alleged breach. That it cannot recover the money as having been paid under a mistake, because it has failed to show " that the defendant cannot retain the money with good conscience." Compare *United States* v. *Chase National Bank,* 252 U. S. 485, 495. That recovery must be denied, regardless of the foreign law, because on the agreed facts, the Government is, under § 24 of the Code of the District, " precluded from setting up the forgery." Compare *Hortsman* v. *Henshaw,* 11 How. 177. Since we sustain the special defense based on the law of Yugoslavia, we have no occasion to pass on these matters.

Affirmed.

McLAUGHLIN, COLLECTOR OF INTERNAL REVENUE, *v.* PACIFIC LUMBER CO.

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

No. 125. Argued November 12, 13, 1934.—Decided December 10, 1934.

1. In an action at law tried without a jury, where both parties move at the close for judgment on the evidence and judgment is rendered for the plaintiff, the question whether the evidence was sufficient to warrant the judgment is a reviewable question of law. P. 355.
2. Consolidated income tax returns of affiliated corporations must truly reflect taxable income of the unitary business and may not

[9] See letter of Jan. 12, 1922, by L. P. Gilbert, Jr., Under Secretary, to The Guaranty Trust Company.

be employed to enable the taxpayer to use more than once the same losses for reduction of income. P. 355.

3. As ground for an action by a corporation to recover the amount of an income tax assessed on a consolidated return and voluntarily paid by the plaintiff, the plaintiff claimed that losses that accrued to it during the tax year by reason of the liquidation in that year of one of its subsidiaries, viz., the loss of the plaintiff's investment in the subsidiary's stock and of money advanced to it, amounting, above all credits, to more than the amount of the tax, should have been deducted in the tax computation. *Held*, that the burden was upon the plaintiff to prove that the losses claimed were not the reflections of losses suffered by the subsidiary and which had been allowed for in the returns and tax assessments for that and prior years; and that, upon the evidence, the burden was not sustained, and the defendant's motion for judgment in his favor should have been granted. P. 356.

66 F. (2d) 895, reversed.

CERTIORARI * to review a judgment affirming a judgment against the Collector in an action to recover an alleged overpayment of income tax.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key* and *Joseph M. Jones* were on the brief, for petitioner.

Mr. Claude R. Branch, with whom *Messrs. F. D. Madison* and *Felix T. Smith* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent brought this action, in the district court for northern California, to recover $143,122.23 it had paid as income tax for 1923. The complaint alleges facts upon which respondent claims to have been overassessed in that sum as a result of failure to take into account deductible losses. One loss ($479,625) resulted from the liquidation in 1923 of A. F. Thane & Company, a wholly owned subsidiary. The other ($953,134.49) was the indebtedness

* See Table of Cases Reported in this volume.

of that company to respondent, ascertained to be worthless and charged off by the latter in that year. Petitioner's answer put in issue some, and admitted other, allegations of the complaint. The parties stipulated for trial by the court without a jury. The evidence consisted of an agreed statement of facts and the separate and consolidated tax returns for 1920 to 1923, inclusive, of respondent, Thane & Company, and Pacific Lumber Company of Illinois. At the close of the evidence each party moved for judgment. The court denied petitioner's motion, granted that of respondent and gave it judgment in the amount sued for with interest and costs. The Circuit Court of Appeals affirmed. 66 F. (2d) 895.

The allegations of the complaint admitted by the answer, the agreed statement and the tax returns show:

During 1918, A. F. Thane & Company had outstanding 600 shares of capital stock of the par value of $100 each; respondent owned 540, for which it had paid $31,500, and A. F. Thane owned 60. In 1920, the company increased its capital to 5,000 shares, respondent subscribed and paid to the company par value, $100 per share, for 3,960, and Thane took the remaining 440 shares. In 1921, respondent bought these shares for $52,125, and so became the owner of all, for which it had paid $479,625. At the close of 1923, Thane & Company was dissolved and its remaining assets were transferred to respondent. Between March 17, 1921, and the end of 1923, respondent had advanced to it and paid for its account large sums. After deducting the amount repaid plus the value of the assets transferred at liquidation, Thane & Company was indebted to respondent in the sum of $953,134.49. Before the end of 1923, respondent charged this off as a debt ascertained to be worthless in that year.

From 1920 to 1923, inclusive, respondent, Thane & Company and the Pacific Lumber Company of Illinois made separate income tax returns and also consolidated

returns as affiliated corporations. Their income taxes were paid on the latter basis. In each year respondent had a large net income and Thane & Company lost heavily; the Pacific Lumber Company of Illinois lost in the first and had relatively small net income in each of the other years.[1] Their separate returns for 1923 respectively showed net income of $1,379,494.78, net loss of $229,942.15, and net income of $8,809.83. The consolidated return reported net income of $1,158,362.46, on which respondent paid $144,795.31 as the total income tax. Upon examination and audit in the Bureau, a greater deduction was made for depreciation than was claimed in the return, overpayment was found in the amount of $1,673.08, and that was refunded.

Insisting that the losses here in question were deductible, respondent filed a claim for refund of the balance, $143,122.23. The letter of the deputy commissioner notifying it that the claim would be rejected stated that, since Thane & Company was affiliated with respondent and allowance was made, in computing consolidated net income, for all deductible losses sustained by the subsidiary during the several years, a further deduction reflect-

[1] The tabulation is:

	1920	1921	1922	1923
Pacific Lumber Company of Maine, Respondent	$2, 262, 959. 39	$379, 624. 88	$1, 266, 450. 51	$1, 379, 494. 78
A. F. Thane & Company	*443, 821. 95	*548, 166. 82	*344, 791. 49	*229, 942. 15
Pacific Lumber Company of Illinois	*23, 052. 35	18, 314. 97	31, 198. 03	8, 809. 83
Consolidated	1, 796, 085. 09	*150, 226. 97	952, 857. 05	1, 158, 362. 46

* Net loss.

The consolidated net loss of $150,226.97 for 1921 was allowed as a deduction from the consolidated net income for 1922, resulting in a consolidated net income for the latter year of $802,630.08, upon which the tax was paid.

ing directly or indirectly the same losses was not allowable. And the claim was disallowed.

Petitioner's motion, at the close of the evidence, for judgment in his favor raised the question of law whether the evidence is sufficient to warrant judgment for respondent; and the trial court's decision of that question was reviewable in the Circuit Court of Appeals and is here for decision. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 407.

Section 240 (a) of the Revenue Act of 1921 declares: "That corporations which are affiliated within the meaning of this section may . . . make separate returns or, under regulations prescribed . . . make a consolidated return of net income . . . in which case the taxes thereunder shall be computed and determined upon the basis of such return." 42 Stat. 227, 260. Treasury Regulations 62 provide: "Consolidated returns are based upon the principle of levying the tax according to the true net income and invested capital of a single enterprise . . . [Art. 631.] Subject . . . to the elimination of intercompany transactions . . . the consolidated taxable net income shall be the combined net income of the several corporations consolidated." Art. 636.

If not inconsistent with its obligation under the statute accurately to report taxable income for 1923, respondent may deduct the losses it sustained in that year as the result of its investment in the stock of Thane & Company and its advances to or for that company. *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 550. But a consolidated return must truly reflect taxable income of the unitary business, and consequently it may not be employed to enable the taxpayer to use more than once the same losses for reduction of income. Losses of Thane & Company that were subtracted from respondent's income are not directly or indirectly again deductible. *Handy & Har-*

man v. *Burnet,* 284 U. S. 136, 140. *United States* v. *Ludey,* 274 U. S. 295, 301. *Ilfeld Co.* v. *Hernandez,* 292 U. S. 62, 68. Respondent voluntarily paid the tax. When disallowing the claim for refund, the Bureau notified it that losses in 1923 reflecting other deductions would not be allowed. Presumably respondent had within its control the records showing facts that would fully disclose the relations between such losses and those reported in the returns of Thane & Company. The Circuit Court of Appeals states that there is no evidence of double deduction or any specific instance of such deduction. But that absence of proof does not support the judgment. Respondent had the affirmative of the issue, and the burden was on it to show that allowance of the deduction claimed would not amount to twice subtracting the same loss. That is an essential fact which cannot be assumed. Respondent may not rely on mere assertion or speculation. *Cochran* v. *United States,* 254 U. S. 387, 393. *Fidelity Title & Trust Co.* v. *United States,* 259 U. S. 304, 306. *United States* v. *Anderson,* 269 U. S. 422, 443. *Compañia General* v. *Collector,* 279 U. S. 306, 310. *United States* v. *Jefferson Electric Co., supra,* p. 400.

The evidence not only fails to establish that essential fact, but is little, if any, less than enough to show that the allowance of the deductions claimed would be a second use of the same losses. The details, given in the tabular statement printed in the margin of an earlier page of this opinion, show that the losses of Thane & Company, which operated through consolidated returns to reduce respondent's income taxed, amount in all to more than respondent's asserted 1923 losses and to more than its income taxed in that year. Thane & Company's statements attached to its separate tax returns show liabilities in excess of assets in each year of the affiliated period, increasing annually until, by the end of 1923, the deficit had become $1,453,134.49. Prior to 1920, Thane

& Company had outstanding only $60,000 of capital stock, 90 per cent. of which was acquired by respondent for less than par. During the affiliated period, its deductible losses amounted to more than three times its capital. While it is conceivable that, as suggested by respondent, the losses do not necessarily indicate that thereby Thane & Company became unable to pay its debts, the circumstances tend strongly to indicate that they did cause its breakdown, resulting in respondent's 1923 losses here claimed. If these losses did not cause, or are not reflected in, those sustained by respondent in 1923 as the result of its investment in and advances to that company, it reasonably may be presumed that respondent would have shown that fact.

The trial court should have granted petitioner's motion for judgment in his favor.

Reversed.

MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE ET AL. *v.* KALT-ZIMMERS MANUFACTURING CO. ET AL.

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

No. 148. Argued November 14, 15, 1934.—Decided December 10, 1934.

1. Bonds issued in Wisconsin payable to bearer recited that they were secured by a deed of trust to a named trustee, " to which deed of trust reference is hereby made with the same effect as though recited at length herein, for the description of the property mortgaged, the nature and extent of the security, the rights of the holders of the bonds, and the terms and conditions upon which said bonds are issued, held and secured, and may, before their fixed maturities, be declared at once due and payable, and the manner of prepayment before maturity." The Supreme Court of Wisconsin, construing the Wisconsin negotiable instruments statute, decided that the reference did not make the bonds non-negotiable.

Held, that the construction is binding in the federal courts, though the statute may have been intended to be declaratory of the rule at common law. *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487. P. 363.

2. Under the Wisconsin negotiable instruments Act, as construed by the Supreme Court of the State, notice of facts tending to put a cautious buyer upon inquiry will not defeat the title of the holder of negotiable paper, if in truth there was neither actual knowledge of an infirmity nor a conscious joinder in a fraud. P. 364.
3. Under the Wisconsin negotiable instruments Act, as construed by the Supreme Court of Wisconsin, the pledgee of a negotiable bond, payable to bearer, who knows from a recital on the face of the bond that the pledgor—pledging it for his own indebtedness—is the trustee under a deed of trust securing it with like bonds and certifier of the bond issue, is not chargeable, from that knowledge alone, with actual notice of the fact that the pledgor is fiduciary of the bonds themselves, or with a fraudulent participation in the abuse of the trust relation. P. 365.
4. This construction binds the federal courts. *Burns Mortgage Co.* v. *Fried, supra.* P. 366.
5. The principle that a construction placed upon a state statute by the highest court of the State is to be read into the statute from the day of its enactment, applies to interests dependent on the statute which were created between the enactment and the decision. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, distinguished. P. 367.

70 F. (2d) 815, reversed.

CERTIORARI * to review the affirmance of a decision of the District Court in a bankruptcy case, denying the present petitioners leave to sell negotiable bonds which had been pledged to them by the bankrupt.

Messrs. Leon E. Kaumheimer and *George A. Affeldt,* with whom *Messrs. George D. Van Dyke* and *Douglass Van Dyke* were on the brief, for petitioners.

The decision below is directly in conflict with *Pollard* v. *Tobin,* 211 Wis. 405. The court below erred in refusing to follow the decision of the Wisconsin Supreme Court

* See Table of Cases Reported in this volume.

on the ground that the federal courts were not bound by a state court's construction of its own uniform laws.

The bearer bonds are negotiable instruments under and governed by the Negotiable Instruments Law in force in Wisconsin at the time of their execution and delivery. Their negotiable character is not destroyed by the reference to the trust deed securing their payment; for the reference is solely to the security and to the rights of the bondholders in and to such security.

Petitioners, as pledgees, took in good faith and are holders in due course under the Wisconsin Negotiable Instruments Law. Under that law, bad faith alone and not constructive notice will defeat the rights of the holder of a negotiable instrument. Neither the reference to the trust deed nor the fact that the pledgor was named trustee of the security was notice to petitioners that the pledgor held the bonds themselves in a fiduciary capacity. The burden of proof was upon respondents to establish bad faith on the part of petitioners in taking the bonds.

Mr. Irving A. Fish for respondents.

The language on the face of the bonds and the nature of the pledge gave the bank actual notice of the breach of trust. *Schroeder* v. *Arcade Theater Co.,* 175 Wis. 79, 103; *Bell* v. *Scranton Trust Co.,* 282 Pa. 562; *Ainsa* v. *Mercantile Trust Co.,* 174 Cal. 504; *Holman* v. *Ryon,* 56 F. (2d) 307; *Spruill* v. *Ballard,* 58 F. (2d) 517; *Wormley* v. *Wormley,* 8 Wheat. 421, 445; *United States* v. *Dunn,* 268 U. S. 121, 131; *Duncan* v. *Jaudon,* 15 Wall. 165, 175; *Brovan* v. *Kyle,* 166 Wis. 347, 352; *Whitford* v. *Moehlenpah,* 196 Wis. 10, 24.

The references in the bonds make the part of the trust deed by which the trust is created a part of the bond. *Paepcke* v. *Paine,* 253 Mich. 636; *Pringle* v. *Dunn,* 37 Wis. 449, 466; *Reichert* v. *Neuser,* 93 Wis. 513, 515–518;

Graff v. *Castleman,* 5 Randolph 195; *Young* v. *Weed,* 154 Pa. 316; *Allen* v. *Moline Plow Co.,* 14 F. (2d) 912; *Crosthwaite* v. *Moline Plow Co.,* 298 Fed. 466, 468.

The Negotiable Instruments Law does not change the rule. *Owens* v. *Nagel,* 334 Ill. 96; *Fehr* v. *Campbell,* 288 Pa. 549; *Ford* v. *Brown,* 114 Tenn. 467; *Gilman* v. *Bailey Carriage Co.,* 125 Me. 108; *First Nat. Bank* v. *National Broadway Bank,* 156 N. Y. 459; *Fidelity & Deposit Co.* v. *Queens County Trust Co.,* 226 N. Y. 225; *Hall* v. *Windsor Savings Bank,* 97 Vt. 125; *Pelton* v. *Spider Lake S. & L. Co.,* 132 Wis. 219; *Wisconsin Yearly Meeting* v. *Babler,* 115 Wis. 289; *Ward* v. *City Trust Co.,* 192 N. Y. 61.

The question of notice has not been passed on by the Wisconsin court. This point was not actually decided in the *Pollard* case.

The Supreme Court of Wisconsin is not bound by decisions where a point might have defeated the action had it been raised but was not raised. *State ex rel. Sheboygan* v. *Sheboygan County,* 194 Wis. 456, 459; *Kuhn* v. *Fairmont Coal Co.* 215 U. S. 349, 360; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 387.

The Circuit Court of Appeals has discussed and severely criticized the opinion in the *Pollard* case on the question of the negotiability of the instruments in question. The conclusion arrived at by the Wisconsin court does seem strange, but we are not concerned with the question of negotiability. The trust deed contained the power in the trustees to sell the bonds and apply their proceeds to the redemption of the outstanding mortgage. If the bank had bought these bonds from these trustees in good faith, whether they are negotiable or not, they are good in the hands of the bank. It seems, however, that the pledge of the bonds for the personal obligation of the trustee, contrary to the terms of the trust, precludes the idea of good faith on the part of the bank.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In bankruptcy proceedings pending in Wisconsin, the petitioners, two Milwaukee banks, prayed an order of the court for permission to sell collateral securities pledged by the bankrupt. The subject of the pledge was bonds payable to bearer, secured by a deed of trust. The District Court refused the relief (6 F. Supp. 638), and the Court of Appeals for the Seventh Circuit affirmed. 70 F. (2d) 815. Two questions are in the case, first, whether the bonds are negotiable in form, and, second, whether the petitioners are holders in good faith. We granted certiorari.

On October 9, 1929, Kalt-Zimmers Manufacturing Company of Milwaukee, Wisconsin, made its deed of trust to Hackett, Hoff and Thiermann, Incorporated, trustee, to secure bonds of the total amount of $115,000. The bonds are payable to bearer. They are stated to be secured by a deed of trust to the above named trustee, "to which deed of trust reference is hereby made with the same effect as though recited at length herein, for the description of the property mortgaged, the nature and extent of the security, the rights of the holders of the bonds, and the terms and conditions upon which the said bonds are issued, held and secured, and may, before their fixed maturities, be declared at once due and payable, and the manner of prepayment before maturity." They are to pass by delivery, but they are not to be valid for any purpose or be secured by the deed of trust until certified by the trustee to be bonds covered by the mortgage.

The deed of trust thus referred to states the duty of the trustee in the disposition of the bonds and the application of the proceeds. The directions are precise and full. As soon as practicable after certifying the bonds the trustee is to negotiate and sell them. The proceeds are to be used, first, for the discharge of an underlying mortgage of $35,000 on real estate in Milwuakee belonging to the mort-

gagor; second, to pay the cost of a building then about to be constructed; "the balance," if any, "to be at the disposal of the party of the first part," the maker of the deed. "The trustee, or any of its officers, agents or stockholders may acquire, own and deal in said bonds and coupons with the same rights as if not trustee hereunder and shall not be obliged to account to any one for any profits made thereby."

Hackett, Hoff and Thiermann, the trustee, did not dispose of the bonds in controversy in accordance with the deed of trust. Instead it pledged them with the petitioners ($6000 of bonds with the Marine Bank and $8,500 with the West Side Bank) as security for its own indebtedness, receiving back in some instances additional loans and in other instances securities of equal value previously pledged. On June 8, 1931, the trustee was adjudicated a bankrupt, whereupon the banks petitioned for authority to sell the bonds in their possession. The courts below have ruled that upon the face of the bonds the bankrupt held them not in its own right, but as trustee for the mortgagor or others, and that by reason of this disclosure the pledgees had been put upon inquiry and were chargeable with constructive notice of the provisions of the trust. All the transactions took place in Wisconsin, where the law of negotiable instruments is governed by statute. Wisconsin Statutes, 1929, § 116.01 *et seq.*

First: Under the Wisconsin statute, as construed by the highest court of that state, the bonds are negotiable.

Section 116.02 Wisconsin Statutes, 1929, provides as follows:

"An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer.

(2) Must contain an unconditional promise or order to pay a sum certain in money.

(3) Must be payable on demand or at a fixed or determinable future time.

(4) Must be payable to order or to bearer.

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." [1]

The bonds in controversy are payable to bearer. They are obviously negotiable, unless the reference, already quoted, to the terms of the deed of trust makes the promise of payment conditional. An identical provision was considered by the Supreme Court of Wisconsin in *Pollard* v. *Tobin,* 211 Wis. 405; 247 N. W. 453. The ruling of the court was that negotiability was not impaired. Cf. *Enoch* v. *Brandon,* 249 N. Y. 263; 164 N. E. 45; *Siebenhauer* v. *Bank of California,* 211 Cal. 239; 294 Pac. 1062; *Pflueger* v. *Broadway Trust & Savings Bank,* 351 Ill. 170; 184 N. E. 318; *Paepcke* v. *Paine,* 253 Mich. 636; 235 N. W. 871; *Merchants National Bank* v. *Detroit Trust Co.,* 258 Mich. 526; 242 N. W. 739; *Bank of California* v. *National City Co.,* 138 Wash. 517; 244 Pac. 690. This construction of a Wisconsin statute is binding upon the national courts, though the statute may have been intended to be declaratory of the rule at common law. *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487.

Second: The bonds being negotiable, the petitioners under the Wisconsin law have the privileges accorded to holders in good faith.

Section 116.61, Wisconsin Statutes, 1929, provides as follows:

"*Actual knowledge of infirmity necessary to notice.* To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual

[1] As to the meaning of the words "determinable future time," see Wisconsin Statutes, 1929, § 116.08.

knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The effect of this section was considered in *Pollard* v. *Tobin, supra.* There the same bankrupt, Hackett, Hoff and Thiermann, Incorporated, was trustee under another deed of trust, made by one Tobin. The bonds had the same provisions contained in the bonds in suit. There, as here, the bankrupt pledged the bonds with a bank as security for loans. The court held that the bank was a holder in due course. It was a holder for value, for it had given up other collateral upon the pledge of the new security (citing *American Savings Bank & Trust Co.* v. *Helgesen,* 64 Wash. 54; 116 Pac. 837). It was a holder in good faith, for there was "no evidence of actual knowledge on the part of the bank of any infirmity in the bonds or any defect in the Hackett Corporation's title to them" (citing § 116.61, Negotiable Instruments Law of Wisconsin).

We interpret that decision as a ruling that under the Wisconsin statute notice of facts tending to put a cautious buyer upon inquiry will not defeat the title of a holder of negotiable paper, if in truth there was neither actual knowledge of an infirmity nor conscious joinder in a fraud. Cf. *Murray* v. *Lardner,* 2 Wall. 110, 121; *Swift* v. *Smith,* 102 U. S. 442, 444; *Crittenden* v. *Widrevitz,* 272 Fed. 871, 873; *Cheever* v. *Pittsburgh, S. & L. E. R. Co.,* 150 N. Y. 59, 65, 66; 44 N. E. 701; *Nickey Bros.* v. *Lonsdale Mfg. Co.,* 149 Tenn. 1; 257 S. W. 403.[2] As applied to the case at hand, the reasoning, it seems, is this: A trustee under a mortgage may or may not be a trustee of bonds payable to bearer, accompanying the mortgage. The existence of the one trust does not lead as a necessary inference to the

[2] The cases are assembled in Brannon's Negotiable Instruments Law, 4th edition by Chafee, § 56, p. 444 *et seq.*

existence of the other. If title or possession as a fiduciary is not apparent from the bonds themselves or is not otherwise made known, there is no duty resting upon the buyer to examine the deed of trust, or explore other avenues of inquiry, to discover the concealed relation. We are not required for present purposes to approve this doctrine or disapprove it. Enough that we accept it as the law of the Wisconsin court. Whether the same result will follow if a pledgee, making a loan upon bonds for the private use of the pledgor, is aware that a trust has been attached to what is taken as security, we do not now consider. There are decisions at common law that acceptance of a pledge upon such terms amounts to bad faith or to evidence thereof, or even to actual knowledge of an infirmity of title. Cf. *Duncan* v. *Jaudon,* 15 Wall. 165; *Manhattan Bank* v. *Walker,* 130 U. S. 267, 278; *Smith* v. *Ayer,* 101 U. S. 320, 328; *Ward* v. *City Trust Co.,* 192 N. Y. 61, 69, 70; 84 N. E. 585; *Newburyport* v. *Fidelity Mutual Life Ins. Co.,* 197 Mass. 596; 84 N. E. 111; *Empire Trust Co.* v. *Cahan,* 274 U. S. 473.[3] We do not understand that any ruling yet made as to the effect of the Wisconsin statute extends to such a state of facts. *Pollard* v. *Tobin,* as we read it, is authority for this: that a bond payable to bearer is not sullied upon its face because tendered by a holder who is known to be a trustee under the mortgage and to have certified the issue. From that knowledge without more, a buyer in Wisconsin is not chargeable with actual notice that the title of the seller is subject to a trust, or with a fraudulent participation in the abuse of a trust relation.

What we have written as to the meaning of *Pollard* v. *Tobin* is not at variance with the construction given to that judgment in the opinion of the court below. Referring to the Wisconsin case, the Court of Appeals said

[3] The cases are brought together in Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454, 457 *et seq.*

that it "involved the identical question now under consideration, arising out of a transaction between the same bankrupt and another bank, in which there were pledged, under similar circumstances, bonds practically identical in form and terms with the bonds herein involved." 70 F. (2d) at 817. With this concession there was none the less a refusal to follow the Wisconsin rule, the court expressing the opinion that the rule had its origin in the misconstruction of a declaratory statute. "The federal courts are not bound," it was said, "by a decision of a state court in the interpretation or application of a provision of a uniform law contrary to the weight of authority as established by decisions of other states." 70 F. (2d) at 818. By our judgment in *Burns Mortgage Co.* v. *Fried, supra,* a case decided shortly after the decision of this case below, the law is settled to the contrary.

The point is made for the respondent that adherence is not owing to *Pollard* v. *Tobin,* for the reason that at the date of the transactions in controversy the meaning of the Wisconsin statute was still undetermined. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, is cited in support of that contention. What was involved in that case was the application of a local decision affecting interests in real estate that were untouched by any statute. The opinion of the court (p. 369) does not deny (citing *Brine* v. *Insurance Co.,* 96 U. S. 627, 636), that the conclusion would have been different if the contested interests had been dependent upon a statute preceding their creation, though not construed till afterwards. In that event the later construction would have been read into the act as if there from the beginning. *Chicago, M., St. P. & P. R. Co.* v. *Risty,* 276 U. S. 567, 570; *Sioux County* v. *National Surety Co.,* 276 U. S. 238, 240; *Hawks* v. *Hamill,* 288 U. S. 52, 58. Cf. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358.

The Negotiable Instruments Law of Wisconsin was part of the law of that state when the bonds in controversy were pledged. This being so, the decision in *Pollard* v. *Tobin* supplies the governing rule irrespective of the date when the decision was announced. In that view, *Kuhn* v. *Fairmont Coal Co.* is seen to be irrelevant.. There is no occasion in such circumstances to mark its limits more precisely. *Hawks* v. *Hamill, supra.*

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

SCHUMACHER, SHERIFF OF BUTLER COUNTY, OHIO, *v.* BEELER, TRUSTEE IN BANKRUPTCY.

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

No. 215. Argued November 16, 1934.—Decided December 17, 1934.

1. Section 23 (b) of the Bankruptcy Act, as amended, operates as a grant of jurisdiction to the District Court of suits brought by trustees in bankruptcy against adverse claimants, provided the defendants consent to be sued in that court, although the suits be such that the bankrupts could not have brought them in that court if the proceedings in bankruptcy had not been instituted. P. 371.
2. Of suits falling within the exceptions specified in § 23 (b), namely, suits for the recovery of property under §§ 60 (b), 67 (e), and 70 (e), the District Court has jurisdiction without the defendants' consent. P. 376.

71 F. (2d) 831, affirmed.

CERTIORARI* to review a decree reversing a decree of the District Court which dismissed the cause for want of jurisdiction. This was a plenary suit by a trustee in bankruptcy against a sheriff, to enjoin the sale of property of the bankrupt under an execution from a state court.

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* See Table of Cases Reported in this volume.

Mr. Coleman Avery, with whom *Messrs. Paul A. Baden, Frank H. Shaffer, Jr.,* and *John W. Peck* were on the brief, for petitioner.

Messrs. Province M. Pogue and *Henry B. Street* for respondent.

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

In granting the writ of certiorari, we limited our review to the question of the jurisdiction of the District Court under § 23 (b) of the Bankruptcy Act. That provision, and its immediate context, § 23 (a), are set forth in the margin.[1] 44 Stat. 664; 11 U. S. C., § 46 (a) (b).

This is a plenary suit brought by respondent, trustee in bankruptcy, in the District Court to enjoin the sale of certain property, alleged to be fixtures, attached to the manufacturing plant of the bankrupt, which petitioner, as sheriff, was threatening to sell under an execution issued more than four months prior to the bankruptcy proceeding upon a judgment recovered against the bank-

[1] Section 23 (a) (b), as amended by the Act of May 27, 1926, c. 406, § 8, is as follows:

"Sec. 23 (a). The United States 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.

"(b) Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subdivision b; section 67, subdivision e; and section 70, subdivision e."

rupt in the Court of Common Pleas of Hamilton County, Ohio. The trustee's petition alleged that sale by the sheriff, pending a determination whether or not the property was a part of the realty, would cause irreparable damage to the bankrupt's estate. The trustee contends that the sheriff's levy upon the property in question was invalid under the law of Ohio, and that at the time of the filing of the petition in bankruptcy all writs of *venditioni exponas,* or orders for the sale of the real estate, had expired, and also that, as there were mortgages upon the property, the appropriate method of enforcing the judgment was by a creditor's bill.

The sheriff first appeared specially, asserting his claim by virtue of levy under execution, and sought dismissal of the suit upon the ground that the court was without jurisdiction. Shortly after, the sheriff withdrew his motion to dismiss, entered his general appearance, and made answer to the petition, expressly consenting that the District Court should hear and determine all matters to which the petition referred. The sheriff in this answer, after stating that he had levied upon personal property and real estate of the judgment debtor, said that a controversy had arisen whether or not certain items of "chattel property," set forth in the exhibit attached to the trustee's petition, were "in law fixtures and therefore a part of the real estate"; that it would be necessary to have that question determined so that he might be advised as to what part of the "chattel property," he had a right to sell under the execution; and that he did not know "as a matter of law whether the levy so made by him upon the real estate" was or was not a valid levy, and therefore he put the plaintiff "on proof thereof." The next day the sheriff asked leave to withdraw his answer. The disposition of that motion does not appear and the court below has assumed that it was not pressed. Later, the sheriff again

moved to dismiss the cause for the want of jurisdiction, and the motion was granted.

This order was reversed by the Circuit Court of Appeals. That court concluded that the validity of the trustee's claim, and of that of the sheriff, depended upon disputed facts and issues of law; that the adverse claim of the sheriff was substantial and that its merits could be adjudged only in a plenary suit; that this proceeding should be treated as one of that nature and that there was consent to the jurisdiction of the District Court within the meaning of § 23 (b) of the Bankruptcy Act. As the case had not been heard upon its merits, and the record presented no findings of fact or conclusions of law, the Circuit Court of Appeals did not deal with any question except that of jurisdiction and directed that the cause be remanded to the District Court with instructions to hear and determine the controversy.

The trustee's petition, which the Circuit Court of Appeals treated as a bill of complaint, did not allege diversity of citizenship. Nor did it contain clear and sufficient averments showing that the complainant, as against the sheriff claiming under a judgment recovered and an execution issued more than four months before the bankruptcy, had possession of the property in question by virtue of which the District Court would have jurisdiction of the suit irrespective of the consent of the defendant.[2]

The case thus turns on the effect of the sheriff's consent under § 23 (b). The sheriff contends that he had no authority to give the consent; but he was the defendant

[2] See *Whitney* v. *Wenman*, 198 U. S. 539, 552; *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568–570; *Hebert* v. *Crawford*, 228 U. S. 204, 208; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432, 434; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738; *Straton* v. *New*, 283 U. S. 318, 321, 326; *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271.

in the suit and his consent was actually given. We find no ground for concluding that the consent was invalid.

Conflicting views have been held of the meaning of the provision for consent in § 23 (b). In one view, the provision relates merely to venue, that is, only to a consent to the "local jurisdiction." *Matthew* v. *Coppin,* 32 F. (2d) 100, 101. See, also, *McEldowney* v. *Card,* 193 Fed. 475, 479; *De Friece* v. *Bryant,* 232 Fed. 233, 236; *Operators' Piano Co.* v. *First Wisconsin Trust Co.,* 283 Fed. 904, 906; *Coyle* v. *Duncan Spangler Coal Co.,* 288 Fed. 897, 901; *Stiefel* v. *14th Street Realty Corp.,* 48 F. (2d) 1041, 1043. Compare *Lovell* v. *Newman & Son,* 227 U. S. 412, 426. It has been said that if § 23 (b) affects "substantive jurisdiction," as distinct from venue, § 23 (a) appears to be redundant. *Stiefel* v. *14th Street Realty Corp., supra.* The opposing view was set forth by the court below in *Toledo Fence & Post Co.* v. *Lyons,* 290 Fed. 637, 645, and that decision was followed in the instant case. See, also, *Boonville National Bank* v. *Blakey,* 107 Fed. 891, 893; *Seegmiller* v. *Day,* 249 Fed. 177, 178; *Stiefel* v. *14th Street Realty Corp., supra; Lowenstein* v. *Reikes,* 60 F. (2d) 933, 935. It proceeds upon the ground that the Congress had power to permit suits by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship, and that by § 23 (b) the Congress intended that the federal courts should have that jurisdiction in cases where the defendant gave consent, and, without that consent, in cases which fell within the stated exceptions.

We think that the latter view is the correct one. The provisions of the earlier bankruptcy acts and the purpose and significance of § 23 of the Act of 1898, as originally enacted, were elaborately considered in *Bardes* v. *Hawarden Bank,* 178 U. S. 524. Section 8 of the Act of 1841 (5 Stat. 446) conferred on the Circuit Courts con-

current jurisdiction with the District Courts of all suits, at law or in equity, between assignees in bankruptcy and adverse claimants. This broad grant of jurisdiction was continued in § 2 of the Act of 1867. 14 Stat. 518. *Lathrop* v. *Drake,* 91 U. S. 516. The Act of 1867 recognized and emphatically declared the distinction between proceedings in bankruptcy, properly so-called, and independent suits between assignees in bankruptcy and adverse claimants. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in § 2 of that act, and was not derived from the other provisions of §§ 1 and 2, conferring jurisdiction of proceedings in bankruptcy. *Bardes* v. *Hawarden Bank, supra,* p. 533. The jurisdiction of such suits in law and equity was of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act of 1789 (*Morgan* v. *Thornhill,* 11 Wall. 65, 80) and the conferring of that jurisdiction upon the federal courts did not divest or impair the jurisdiction of the state courts over like cases. *Eyster* v. *Gaff,* 91 U. S. 521, 525; *Bardes* v. *Hawarden Bank, supra,* pp. 532, 533.

It was with this legislative background that the Congress undertook the framing of the Act of 1898. 30 Stat. 544. The distinction between proceedings in bankruptcy and suits between trustees in bankruptcy and adverse claimants was maintained. As appellate jurisdiction had been vested in the Circuit Courts of Appeals by the Act of 1891 (26 Stat. 826), the Act of 1898, in lieu of the "general superintendence and jurisdiction" given to the Circuit Courts by the Act of 1867 "of all cases and questions" arising in bankruptcy, conferred upon the Circuit Courts of Appeals the jurisdiction "to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

§ 24 b. But the Circuit Courts at that time were still courts of original jurisdiction and, by § 23 of the Act of 1898, the Congress provided the extent to which the Circuit Courts should have jurisdiction of suits at law or in equity between trustees in bankruptcy and adverse claimants. Section 23, as originally enacted, was as follows (30 Stat. 552, 553):

"SEC. 23. *Jurisdiction of United States and State Courts.*—

"a The United States circuit 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.

"b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act."

Section 23a thus related exclusively to the Circuit Courts. Section 23b applied both to the Circuit Courts and the District Courts, as well as to the state courts. "This appears," said the Court in *Bardes* v. *Hawarden Bank, supra,* (p. 536) "not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, 'the courts,' as contrasted with the specific words, 'the United States Circuit Courts,' in the

first and in the third clauses." The argument that if § 23b affects "substantive jurisdiction," § 23a is redundant, loses sight of the original distinction and application of the section and of its historical development.

By § 289 of the Judicial Code of 1911 (36 Stat. 1167), the Circuit Courts were abolished; and by § 291 of that Act it was provided that wherever, in any law not embraced within the Judicial Code, any power or duty is conferred or imposed upon the Circuit Courts, that power and duty shall be deemed to be conferred and imposed upon the District Courts. This provision had the effect of amending § 23a of the Bankruptcy Act so as to make it apply to the United States District Courts instead of the United States Circuit Courts. Formal amendment, to conform the language of the section to the fact, was made by the Act of May 27, 1926. 44 Stat. 664.

In enacting § 23, it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of § 2 of the Act of 1867. The purpose was to leave such controversies to be heard and determined for the most part in the state courts "to the greater economy and convenience of litigants and witnesses." But no reason appeared for a denial of jurisdiction to the federal court if the defendant, the adverse claimant, consented to be sued in that court. The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. See *Sherman* v. *Bingham,* 21 Fed. Cas. (No. 12,762), 1270, 1272. Exercising that power, the Congress prescribed in § 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition.

That this was the interpretation by this Court of § 23b, in its original form, is shown not only by the statement of the result of the Court's analysis in the *Bardes* case, *supra,* (p. 538) but quite clearly by its formal disposition of the questions before it. The *Bardes* case was a bill in equity in the District Court by a trustee in bankruptcy to set aside a conveyance of property in fraud of creditors. The District Court dismissed the bill for want of jurisdiction and the case came here on direct appeal with a certificate by the District Judge submitting the questions which had arisen. This Court considered those questions and specifically answered the first and second questions as follows:

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

As there was no pretence of consent of the defendant in that case, the District Court was found to be without jurisdiction and its decree was accordingly affirmed. Compare *Mueller* v. *Nugent,* 184 U. S. 1, 16; *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526, 531; *Whitney* v. *Wenman,* 198 U. S. 539, 552; *Bush* v. *Elliott,* 202 U. S. 477, 479, 483; *Harris* v. *First National Bank,* 216 U. S. 382, 383; *Wood* v. *Wilbert's Co.,* 226 U. S. 384, 387.

After the decision in the *Bardes* case, and by § 8 of the Act of February 5, 1903 (32 Stat. 797, 798), § 23b was

amended by adding, after the words "unless by consent of the proposed defendant," the following:
"except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e."

The excepted suits are those brought by the trustee in bankruptcy to recover property transferred by the bankrupt in effecting preferences made voidable by the Act, and suits to recover property conveyed by the bankrupt in fraud of creditors within four months prior to the filing of the petition in bankruptcy. The effect of the exception was to remove, as to these classes of cases, the requirement in § 23b of the consent of the defendant as a condition of the exercise of jurisdiction. The Act of 1903 also amended sections 60b, 67e, and 70e, so as to provide that in suits to recover property under those sections "any court of bankruptcy," and "any state court" which would have had jurisdiction if bankruptcy had not intervened, "shall have concurrent jurisdiction," Act of February 5, 1903, §§ 13, 16; 32 Stat. 799, 800. The scope of the amendment of § 23b by the Act of 1903, in the light of the amendment by the same Act of section 70, e—a question which was left undetermined in *Harris* v. *First National Bank, supra* (p. 385)—was passed upon in *Wood* v. *Wilbert's Co., supra* (pp. 389, 390). The Court there decided that the amendment of section 70e could not be regarded as intended to create a conflict with the amendment of § 23b, which did not include in the exception suits brought under section 70e. The Court said: "In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of § 23 exists the consent of the defendant determines the court, except when the suit is 'for the recovery of property under section sixty, subdivision b, and section sixty-seven,

subdivision e.' These special exceptions exclude any other."

By the Act of June 25, 1910 (36 Stat. 840) § 23b was further amended so as to include in the exception suits for the recovery of property under section 70, subdivision e. See *Weidhorn* v. *Levy,* 253 U. S. 268, 272.

We think that the exceptions thus established by the amending acts show clearly that it was the intent of the Congress that § 23b should operate as a grant of jurisdiction to the federal court of suits brought by a trustee in bankruptcy against adverse claimants, provided the defendant consented to be sued in that court, although the bankrupt could not have brought suit there if proceedings in bankruptcy had not been instituted, and that, in suits falling within the exceptions, the federal court should have jurisdiction without the defendant's consent. The question was not necessarily involved in the case of *Lovell* v. *Newman & Son,* 227 U. S. 412, 426, and so far as the language of the opinion indicated a contrary view, it is not approved. Compare *MacDonald* v. *Plymouth Trust Co.,* 286 U. S. 263, 268; *Page* v. *Arkansas Gas Corp.,* 286 U. S. 269, 271, 272.

We conclude that the court had jurisdiction in the instant case, and the decree of the Circuit Court of Appeals setting aside the order of the District Court and directing that court to hear and determine the controversy upon its merits is affirmed.

Decree affirmed.

GEORGE *v.* VICTOR TALKING MACHINE CO.

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

No. 128. Argued December 5, 1934.—Decided December 17, 1934.

1. A decree of the District Court finding infringement of the common law right of property in a song, granting an injunction, and

appointing a master to take and state an account of profits and report to the court, with the usual provisions for exceptions to such report, is interlocutory. P. 378.

2. An appeal from such a decree, taken after the time limited by Jud. Code § 129, 28 U. S. C. § 227, has expired, is beyond the jurisdiction of the Circuit Court of Appeals. P. 379.

69 F. (2d) 871, reversed.

CERTIORARI* to review a decree reversing, on the merits, a decree of injunction and for an accounting of profits, in a suit based on an infringement of the plaintiff's common law right of property in the words of a song.

Mr. Minitree Jones Fulton, with whom *Messrs. Robert L. Nase* and *Q. C. Davis, Jr.,* were on the brief, for petitioner.

Mr. Louis Levinson, with whom *Messrs. Robert P. Myers, Lawrence B. Morris, I. E. Lambert,* and *Isaac D. Levy* were on the brief, for respondent.

PER CURIAM.

Review was limited to the question of the jurisdiction of the Circuit Court of Appeals. The suit was brought for the infringement of the common law right of property in a song, and the bill sought an accounting of profits made by the defendant. The District Court sustained the plaintiff's right as author and found infringement. Decree was entered granting an injunction and appointing a special master to take and state an account of profits and to report to the court, with the usual provisions for exceptions to the report. The decree was interlocutory. *The Palmyra,* 10 Wheat. 502; *Perkins* v. *Fourniquet,* 6 How. 206, 208, 209; *Craighead* v. *Wilson,* 18 How. 199, 202 (explaining *Forgay* v. *Conrad,* 6 How. 201); *Beebe* v. *Russell,* 19 How. 283, 287; *Humiston* v. *Stainthorp,* 2

* See Table of Cases Reported in this volume.

Wall. 106; *Keystone Manganese Co.* v. *Martin,* 132 U. S. 91, 93, 97; *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536, 547; *Guarantee Co.* v. *Mechanics' Savings Bank & Trust Co.,* 173 U. S. 582, 586; *Simmons Co.* v. *Grier Brothers Co.,* 258 U. S. 82, 89. The decree was entered on March 31, 1933, and the appeal to the Circuit Court of Appeals was not taken until May 18, 1933. The Circuit Court of Appeals entertained the appeal and reversed the decree of the District Court. As the appeal was not taken within the time prescribed by law, the Circuit Court of Appeals was without jurisdiction. Jud. Code, § 129, 28 U. S. C. 227. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court with directions to dismiss the appeal.

Reversed.

ENELOW *v.* NEW YORK LIFE INSURANCE CO.

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

No. 47. Argued November 7, 1934.—Decided January 7, 1935.

1. A decree of the District Court under Jud. Code, § 274b, staying an action at law pending determination on the equity side of an equitable defense to the action, is in effect an injunction and, being interlocutory, is appealable to the Circuit Court of Appeals under Jud. Code, § 129. P. 381.
2. An application under Jud. Code, § 274b, to stay (i. e., to enjoin) proceedings of a law action until an equitable defense may be heard, will not lie if the defense is one which is completely available in the law action. The test is whether the defendant could have maintained a bill in equity on the same averments. P. 383.
3. In an action brought by the sole beneficiary of a life insurance policy to collect the insurance after the death of the insured, a defense that the policy was procured by false answers in the application, alleged to have been made by the insured with knowl-

edge of their falsity and fraudulently for the purpose of obtaining the insurance, is completely available in the action at law, and therefore affords no basis for a stay under Jud. Code, § 274b. P. 384.

4. In an action on a life insurance policy, in which the plaintiff was its sole beneficiary and in which the defendant insurance company sought the remedy of cancellation upon the ground of fraud in the application, and tendered the amount of the premiums to the plaintiff, *held* that there was no merit in the company's contention that, because the executors of the insured, who were not made parties, would be entitled to the refund if the defense of fraud prevailed, the remedy at law was inadequate. P. 385.

70 F. (2d) 728, reversed.

CERTIORARI * to review the affirmance of a decree of the District Court staying an action at law on an insurance policy to await the hearing of an equitable defense interposed by the Insurance Company.

Mr. Charles H. Sachs, with whom *Mr. Louis Caplan* was on the brief, for petitioner.

Mr. William H. Eckert, with whom *Mr. Louis H. Cooke* was on the brief, for respondent.

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

This is an action at law upon a policy of life insurance issued by respondent in December, 1931, on the life of petitioner's husband, Max Enelow, who died in May, 1933. The action was brought in a state court in Pennsylvania, in July, 1933, and was removed to the federal court. The policy provided that it should be incontestable after two years from date of issue. In its affidavit of defense, respondent set up the affirmative defense that the policy had been obtained by means of false and fraudulent statements in the decedent's application which

* See Table of Cases Reported in this volume.

was made a part of the policy. These statements consisted of the applicant's answers to questions with respect to hospital observation or treatment and to his consultations with physicians. Respondent alleged that, while the applicant had answered these questions with an unqualified negative, he had in fact repeatedly consulted physicians for neurosis and cardiac disease and had twice been the subject of hospital observation. Respondent further alleged that these answers were made by the applicant "with knowledge of their falsity and fraudulently for the purpose of procuring said insurance." Respondent tendered judgment for the premiums received by it, with interest, and prayed for cancellation of the policy. Petitioner in her reply denied that the answers in the application were either false or fraudulent.

Respondent then presented a petition asking that the "equitable issue" raised by the affidavit of defense and the plaintiff's reply should be heard pursuant to § 274b of the Judicial Code (28 U. S. C. 398) "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues." The District Court entered a rule to show cause why the petition should not be granted and, on hearing, made the rule absolute. Its decree was affirmed by the Circuit Court of Appeals. 70 F. (2d) 728. This Court issued writ of certiorari, October 8, 1934.

First. A preliminary question arises as to the jurisdiction of the Circuit Court of Appeals. The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within the purview of § 129 of the Judicial Code (28 U. S. C. 227) permitting appeal.

This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as

well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between "proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity." Per Van Devanter, J., in *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48, 50, 51.

When the Congress enacted § 274b of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law "by answer, plea or replication without the necessity of filing a bill on the equity side of the court." [1] The defendant is to have "the same rights" as if he had filed a bill seeking the same relief. The equitable issue "is to be tried to the judge as a chancellor." The same order of trial is preserved as under the system

[1] The text of § 274b (28 U. S. C. 398) is as follows:

"*Equitable defenses and equitable relief in actions at law.* In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief

of separate courts. *Liberty Oil Co.* v. *Condon Bank,* 260 U. S. 235, 242, 243. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. *Id.*

It is thus apparent that when an order or decree is made under § 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. Such a decree was made in the instant case, and therefore, although interlocutory, it was appealable to the Circuit Court of Appeals under § 129. See *Ford* v. *Huff,* 296 Fed. 652, 658; *American Cyanamid Co.* v. *Wilson & Toomer Co.,* 62 F. (2d) 1018, 1019, 1020. Compare *Emlenton Refining Co.* v. *Chambers,* 14 F. (2d) 104.

Second. We come to the merits. Was the defense set up by the defendant of such a nature that defendant was entitled to have it heard and determined in equity and to enjoin the proceedings at law pending that determination? The test under § 274b is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged. The defendant's rights to a hearing in equity are " the same," not greater, when he resorts to the summary procedure.

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prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

See *Liberty Oil Co.* v. *Condon Bank, supra; Union Pacific R. Co.* v. *Syas,* 246 Fed. 561, 565; *American Cyanamid Co.* v. *Wilson & Toomer Fertilizer Co., supra; New York Life Ins. Co.* v. *Miller,* 73 F. (2d) 350. Compare *Phillips-Morefield* v. *Southern States Life Ins. Co.,* 66 F. (2d) 29, 30; *New York Life Ins. Co.* v. *Marotta,* 57 F. (2d) 1038. And it necessarily follows that this summary procedure cannot aid the defendant when a bill for the same relief would not lie because the defense is one which is completely available in the action at law. Emphasizing the fundamental principle of the equitable jurisdiction, the Congress, from the first Judiciary Act, has declared that suits in equity shall not be sustained in any court of the United States in any case where a " plain, adequate and complete remedy " may be had at law. Act of September 24, 1789, § 16, 1 Stat. 82; Jud. Code, § 267, 28 U. S. C. 384.

The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable.[2] Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense

[2] See *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U. S. 167, 177; *Jefferson Standard Life Ins. Co.* v. *Keeton,* 292 Fed. 53, 54; *Jefferson Standard Life Ins. Co.* v. *McIntyre,* 294 Fed. 886; *Jones* v. *Reliance Life Ins. Co.,* 11 F. (2d) 69, 70; *Peake* v. *Lincoln National Life Ins. Co.,* 15 F. (2d) 303, 305, 306; *Keystone Dairy Co.* v. *New York Life Ins. Co.,* 19 F. (2d) 68; *Rose* v. *Mutual Life Ins. Co.,* 19 F. (2d) 280, 282; *Brown* v. *Pacific Mutual Life Ins. Co.,* 62 F. (2d) 711, 712.

was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant "with knowledge of their falsity and fraudulently" in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. *Insurance Co.* v. *Bailey,* 13 Wall. 616, 623; *Life Insurance Co.* v. *Bangs,* 103 U. S. 780, 782; *Cable* v. *United States Life Ins. Co.,* 191 U. S. 288, 305; *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 363; *New York Life Ins. Co.* v. *Marshall,* 23 F. (2d) 225; *New York Life Ins. Co.* v. *Miller, supra.* Respondent was in no better position under § 274b.

Nor is there merit in the contention that the remedy at law is not adequate because petitioner is not the only person interested in the policy and that the premiums paid would be refundable to the decedent's executors. The executors have no interest entitling them to enforce the policy. Petitioner is the sole beneficiary of the policy and is entitled to recover upon it, if it is valid, and cannot prevail if the defense of fraud is established. *Insurance Co.* v. *Bailey, supra; Cable* v. *United States Life Ins. Co., supra.* The affidavit of defense raised no question as to petitioner's standing as beneficiary of the policy, and, indeed, it expressly offered judgment in favor of the petitioner for the amount of the premiums in accordance with a tender previously made.

Respondent's petition for a hearing and determination in equity in advance of the trial of the action at law should have been denied. The decree of the Circuit Court of Appeals is reversed and the action is remanded to the

District Court with direction to vacate its order for a hearing in equity and to proceed with the trial of the action at law.

Reversed.

ADAMOS *v.* NEW YORK LIFE INSURANCE CO.

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

No. 452. Argued December 3, 1934.—Decided January 7, 1935.

Decided on the authority of *Enelow* v. *New York Life Ins. Co.*, *ante*, p. 379.

71 F. (2d) 997, reversed.

CERTIORARI * to review the affirmance of a final decree of the District Court, 5 F. Supp. 278, 280, canceling several insurance policies and providing for repayment of the premiums, which were tendered back by the insurance companies. The decree was rendered on an equitable defense set up under Jud. Code, § 274b, in an action by the beneficiary to collect the policies.

Mr. Charles H. Sachs, with whom *Mr. Louis Caplan* was on the brief, for petitioner.

Mr. William H. Eckert, with whom *Mr. Louis H. Cooke* was on the brief, for respondent.

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

Petitioner brought this action at law as beneficiary of several policies of insurance issued by respondent. The policies were alleged to have been issued in April, 1932, upon the life of petitioner's father, who died in July, 1932. The policies were to be incontestable after two

* See Table of Cases Reported in this volume.

years from date of issue. The action was brought in a state court in Pennsylvania and was removed to the federal court in February, 1933. Respondent's affidavit of defense set up as new matter that the insured had made false answers and declarations in his application with respect to a surgical operation he had undergone and to the treatment he had received by physicians and at hospitals; that the insured knew that these answers and declarations were false; and that they had been made by the insured "fraudulently with the intent of deceiving the defendant into issuing to him the policies of insurance in litigation, when the facts were such that if he had answered said questions truthfully and had made a full and honest disclosure, the defendant would not have issued any of said policies, but would have declined his application." Respondent tendered judgment for the amount of the premiums received by it, with interest, and prayed that the policies be cancelled. Petitioner replied, denying the allegations of fraud.

Respondent asked that the equitable issue raised by its affidavit of defense should be heard under § 274b of the Judicial Code (28 U. S. C. 398) "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues." The application was granted over petitioner's objection, and the issue of fraud was tried in equity. The District Judge decided that it was "a very plain case of fraud upon the insurance company," that the insured had "falsely answered the questions as to his medical history," and that "these questions were all as to matters of fact within his knowledge." 5 F. Supp. 278, 280, 1019.

Decree was entered cancelling the policies and providing for the repayment of the premiums tendered. The decree was affirmed by the Circuit Court of Appeals, 71 F. (2d) 997, and this Court granted certiorari.

What we have said in *Enelow* v. *New York Life Ins. Co.*, decided this day, *ante*, p. 379, is directly applicable here. The issue of fraud raised by respondent's affidavit of defense was fully available in the action at law and the court erred in directing the trial of that issue in equity.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to vacate its decree and to proceed with the trial of the action at law.

Reversed.

PANAMA REFINING CO. ET AL. *v.* RYAN ET AL.

AMAZON PETROLEUM CORP. ET AL. *v.* RYAN ET AL.

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

Nos. 135 and 260. Argued December 10, 11, 1934.—Decided January 7, 1935.

1. Upon review of a decree affirming the validity of an executive regulation, and refusing to enjoin its enforcement, rendered in a suit begun and ended below after the regulation had been withdrawn, the question of validity does not cease to be moot because the regulation has since been reinstated and the Government has declared its intention to enforce it from the time of reinstatement. P. 412.
2. A suit to enjoin the enforcement of executive regulations is not made moot by amendments of the regulations, adopted pending the litigation, which continue in force the requirements complained of and present the same constitutional question as before. P. 413.
3. Section 9 (c) of the National Industrial Recovery Act, purporting to authorize the President to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amounts permitted by state authority, attaches criminal penalties to every violation of such an order; and persons who would thus become subject to repeated penalties in carrying on their business are en-

titled to invoke the equitable jurisdiction to restrain enforcement of the order if found unconstitutional. P. 414.

4. Assuming (not deciding) that Congress itself might have the power sought to be delegated to the President by § 9 (c) of the National Industrial Recovery Act—viz., the power to interdict the transportation in interstate and foreign commerce of petroleum and petroleum products produced or withdrawn from storage in excess of the amounts permitted by state authority—, the attempted delegation is plainly void, because the power sought to be delegated is legislative power, yet nowhere in the statute has Congress declared or indicated any policy or standard to guide or limit the President when acting under such delegation. Pp. 414 *et seq.*

The declarations of § 1 of Title I of this Act are simply an introduction in broad outline, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by subsequent sections. The Court can find nothing in § 1 or elsewhere in the Act which limits or controls the authority sought to be conferred by § 9 (c). The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy.

5. The question whether the delegation is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, or will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute. P. 420.

6. If Congress can vest such legislative power in the President, it may vest it in any board or officer of its choice; and the power vested may concern not merely the transportation of oil or of oil produced in excess of what the States may allow; it may extend to transportation in interstate commerce of any commodity, with or without reference to state requirements; indeed, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation. P. 420.

7. The principle forbidding Congress to abdicate, or to transfer to others, the essential legislative functions with which it is vested by Art. I, § 1, and Art. I, § 8, par. 18, of the Constitution, has been recognized by the Court in every case in which the question has been raised. P. 421.

8. Congress may lay down its policies and establish its standards and leave to selected instrumentalities the making of subordinate rules, within prescribed limits, and the determination of facts to which the policy, as declared by Congress, shall apply; but the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. P. 421.
9. The question is not as to the intrinsic importance of the particular statute involved, but of the constitutional processes of legislation which are an essential part of our system of Government. P. 430.
10. Both § 9 (c) and the Executive Order made in pursuance of it are in notable contrast with historic practice (as shown by many statutes and proclamations) by which declarations of policy are made by the Congress, and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority. P. 431.
11. If from the extremely broad description contained in § 1 of the Act, and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under § 9 (c), it would still be necessary for the President to comply with those conditions and to show such compliance as the ground of his prohibition. P. 431.
12. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission; and, if that authority depends on determinations of fact, those determinations must be shown. P. 432.
13. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation. P. 433.

71 F. (2d) 1, 8, reversed.

CERTIORARI * was granted in these two cases to review decrees of the court below which reversed decrees of the District Court enjoining federal officers in Texas from

* See Table of Cases Reported in this volume.

enforcing certain executive orders and regulations. 5 F. Supp. 639. Both bills challenged the constitutionality of § 9 (c) of the National Industrial Recovery Act and of orders made under it by the President and of regulations made under the President's orders by the Secretary of the Interior. In one of the cases, No. 260, part of a Petroleum Code was attacked and defended in ignorance of the fact that it had been dropped when amendments of the Code were promulgated before the beginning of the suit. The bill in that case also challenged legislation and orders of the State curtailing the production of oil, and joined the State Railroad Commission, its members and other state officials as defendants; but this part of the case was severed and decided adversely to the plaintiffs by a three-judge court. See 5 F. Supp. 633, 634, 639. A detailed statement of both cases will be found in the opinion.

Messrs. James N. Saye and *F. W. Fischer,* with whom *Mr. W. Edward Lee* was on the brief, for petitioners in No. 260.

The bill states one cause of action against all of the defendants, both State and Federal officers. The three-judge court had jurisdiction of all the issues and should have decided them. *Louisville & N. Ry. Co.* v. *Garnett,* 231 U. S. 298.

Petitioners are not engaged in interstate commerce, and their activities do not affect interstate commerce, except incidentally and remotely; their business is, therefore, not subject to regulation by the Federal Government. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 407; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Gibbons* v. *Ogden,* 9 Wheat. 1; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Kidd* v. *Pearson,* 128 U. S. 1; *Mobile County* v. *Kimball,* 102 U. S. 692; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Em-*

ployers' Liability Cases, 207 U. S. 463; *Hill* v. *Wallace,* 259 U. S. 44; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *United Leather Workers* v. *Herkert,* 265 U. S. 457.

It has been specifically held that the production of oil is not interstate commerce, and that restriction of production, even though it indirectly diminish the amount of oil entering the channels of interstate commerce, is not such a direct interference with the free flow of interstate commerce as to be a violation of the commerce clause. *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210.

It was never the intention of the framers of the Constitution that Congress should regulate the internal affairs of all businesses the products of which in the process of passing from producer or manufacturer to consumer, pass through the channels of interstate commerce. Such a distorted and unreasonable construction of the commerce clause would result in the destruction of our present dual form of Government.

Shreveport Rate Case, 234 U. S. 342; *Stockyards Cases,* 258 U. S. 495; and the *Grain Futures Act Case,* 262 U. S. 1, distinguished.

The National Industrial Recovery Act, and particularly § 9 (c), is void as an attempted delegation of legislative power to the President. Cooley, Const. Lim., 7th ed., 163; *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *St. Louis & I. M. Ry. Co.* v. *Taylor,* 210 U. S. 281; *Mutual Film Corp.* v. *Industrial Comm'n,* 236 U. S. 230.

It will be noted that the entire enacting part of the Act, if it has an enacting clause, is contained in its first section. It is also interesting to note that the policies declared by Congress were nothing more than a reiteration of what has been the policy of the United States Government since it was founded. In brief, Congress has

stated that it is its policy to do whatever can be done to relieve the existing depression, and, since it does not know what to do, it attempts, by § 3 of the Act, to give each industry power and authority to formulate and adopt, subject to the approval of the President, such laws as in the opinion of a majority of the various industries are best calculated to accomplish that objective.

We do not believe it can be said that merely because acts of Congress become enforceable when approved by the President, acts of the various industries of the country, acting instead of Congress, can become laws when approved by the President.

There could be no clearer delegation of legislative power than § 9 (c).

The chief and possibly the entire purpose of the commerce clause was, so far as interstate commerce was concerned, to empower the federal authorities to prevent the States from interfering with the freedom of commercial intercourse between themselves or with foreign nations. Willoughby, The Constitution, vol. 2, 2d ed., p. 721, § 415.

It should be borne in mind that the right of intercourse between the States is a natural and inherent right. *Gibbons* v. *Ogden,* 9 Wheat. 1.

The facilities of interstate commerce may not be refused by Congress to commodities not dangerous to transport and of such a character that their use or consumption will do no injury, moral or physical, to anyone, simply upon the ground that they have been produced or manufactured in ways or under conditions objectionable to Congress. Willoughby, The Constitution, vol. 2, 2d ed., p. 994, § 592; *Hammer* v. *Dagenhart,* 247 U. S. 251. Distinguishing *United States* v. *Hill,* 248 U. S. 420; *Champion* v. *Ames,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *McDermott* v. *Wisconsin,* 228 U. S. 115; *Hoke* v. *United States,* 227 U. S. 308; *Caminetti* v.

United States, 246 U. S. 470; *Rupert* v. *United States,* 181 Fed. 87; *Brooks* v. *United States,* 267 U. S. 432; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238.

Oil produced in excess of the amount fixed by the state law remains the property of the producer. If the producer has violated a valid law of the State, he is subject to the penalties of the law. Prohibiting shipment of the oil in interstate commerce is merely denying the use of the instrumentalities of commerce to transport a recognized commodity of commerce, the title to which is undisputed. There is no evidence in the record that it would unduly burden interstate commerce; and we all know that the transporting companies are in dire need of business and the revenue derived therefrom. Therefore, it is quite obvious that an Act of Congress prohibiting the transportation of such oil in interstate commerce is an attempt on the part of Congress to aid the State in the enforcement of its conservation laws, and thus regulate the production of petroleum—a local matter over which the National Government has no jurisdiction.

The National Industrial Recovery Act is void because it is an attempt by the National Government to usurp powers reserved to the States and the people by the Tenth Amendment.

The national emergency, brought about by the financial depression, did not bestow upon Congress the power to enact the National Industrial Recovery Act. Emergencies create no power. In emergencies, in panics, in times of peril, when people stampede, when sober judgment is submerged, when expediency seeks to triumph over righteousness and correct principles, then is when we need the safeguards of our Constitution. *Ex parte Milligan,* 4 Wall. 2; *Wilson* v. *New,* 243 U. S. 332; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Nebbia* v. *New York,* 291 U. S. 502.

Article I, § 8, of the Constitution, which empowers the Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make laws which shall be necessary and proper for carrying into effect the foregoing powers, does not authorize the Congress to require petitioners to keep their oil under ground until such time as the National Government may need it in offensive or defensive warfare, without paying petitioners just compensation for it.

Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is void.

Regulations IV and VII of the Secretary of the Interior are null and void.

Mr. F. S. Fischer for petitioner in No. 135.

Title I of the Act must be rejected in its entirety because the provisions relating to interstate and foreign commerce are so interrelated with and dependent upon those provisions regulating intrastate commerce that they cannot be separated therefrom. *Employers' Liability Cases,* 207 U. S. 490; *Pollock* v. *Farmers Loan & Trust Co.,* 158 U. S. 636; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Field* v. *Barber Asphalt Co.,* 194 U. S. 618.

Section 9 (c) is unconstitutional. Congress is without power to forbid the transportation of ordinary and harmless commodities in interstate commerce; or to enact an interstate and foreign commerce regulation dependent on the action of the several States. Distinguishing: *Champion* v. *Ames,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Caminetti* v. *United States,* 242 U. S. 470; *Brooks* v. *United States,* 267 U. S. 432; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U.S. 311; and relying on: *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 156; *Panama Refining Co.* v. *Ryan,* 5 F. Supp. 639; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Vance* v. *Vandercook,* 170 U. S. 442; *Kidd* v. *Pearson,* 128 U. S. 1.

Section 9 (c) is also unconstitutional because Congress has laid down no rule or criterion to guide or limit the President in the orders that he may promulgate under it. It leaves him or his nominees free to promulgate and enforce any order that they may think necessary, and without any requirement of uniformity or applicability throughout the Union. The President, or his nominees, may subject any violator to criminal procedure. Thus the Act delegates to the President not only the power to regulate interstate and foreign commerce at his discretion, but it also delegates to him and his nominees the power to create and define offenses against the United States. *In re Rahrer,* 140 U. S. 545; *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194; *Butte City Water Co.* v. *Baker,* 196 U. S. 119; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 156; *Donnelly* v. *United States,* 276 U. S. 512; *Interstate Commerce Comm'n* v. *Brimson,* 155 U. S. 4; *United States* v. *Maid,* 116 Fed. 650; *United States* v. *Grimaud,* 220 U. S. 506; *United States* v. *Cohen Grocery Co.,* 255 U. S. 88.

Section 9 (c) is too indefinite and uncertain as a penal statute. *United States* v. *11,150 Pounds of Butter,* 195 Fed. 663; *Todd* v. *United States,* 158 U. S. 282.

Regulations IV, V, and VII are invalid and unenforceable. *United States* v. *11,150 Pounds of Butter, supra.* The production of oil and the refining of the same is not commerce, and the purchase, transportation, and storage of oil is not interstate commerce until the same is tendered to a carrier for interstate transportation. *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210; *Hammer* v. *Dagenhart,* 247 U. S. 251. Therefore, the regulations under consideration have no relation to the Act of Congress, unless it may be said that by compliance with the regulations the agents of the Department of the Interior

charged with the enforcement of the Act could better enforce it. But we have not yet reached that stage of Government where citizens can be compelled by regulations to assist the officers of the Government in detecting crime.

It will be seen that these regulations apply to and affect only the East Texas and Oklahoma City oil fields. If they have any support, it must be in the commerce clause, but the rules must be equal and apply uniformly throughout the Union. *Kidd* v. *Pearson,* 128 U. S. 1; *Knickerbocker Ice Co.* v. *Stewart, supra; Panama Refining Co.* v. *Ryan, supra.*

The purpose of the attacked regulations in requiring reports and examining books and records, and making inspections of the physical properties, is to obtain evidence against those who might transport the forbidden articles in interstate and foreign commerce. They are therefore repugnant to the Fourth and Fifth Amendments. *Boyd* v. *United States,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 142 U. S. 547.

There is no power in the Federal Government, over and above the powers delegated to it in the Constitution, to regulate the production of articles that are of general use throughout the Nation. *Kansas* v. *Colorado,* 206 U. S. 89.

Does an emergency, such as Congress in the preamble of this Act declared to exist, create such power in the Federal Government that Congress and the President may set aside the limitations of the Constitution by which they were intended to be restrained, and thereby dictate to the citizens of a State how much petroleum they can produce during any period, and the minimum wage that they shall pay their employees while producing it, and subject such citizens to criminal prosecutions for the violation of any order made by the President in pursuance of such purpose? It has been repeatedly held by this Court that an emergency does not create power and that even dur-

ing a state of war, neither Congress nor the President can exceed the limitations placed upon them by the Constitution, nor deprive a citizen of those rights guaranteed to him by it. *Ex parte Milligan,* 4 Wall. 2, 100; *United States* v. *Lee,* 106 U. S. 196; *United States* v. *Cohen Grocery Co.,* 255 U. S. 86; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

"To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison,* 1 Cranch 137, 176.

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure for a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." *Martin* v. *Hunter,* 1 Wheat. 305, 326.

Assistant Attorney General Stephens and *Mr. L. T. Martineau, Jr.,* with whom *Solicitor General Biggs* and *Messrs. Carl McFarland, M. S. Huberman, Charles H. Weston, A. H. Feller, Nathan R. Margold,* and *Charles Fahy* were on the brief, for respondents.

The commerce clause vests Congress with plenary power to regulate commerce among the several States and with foreign nations, and this means power to enact all appropriate legislation for the protection and advancement of that commerce. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 570. The regulation may extend to any and all kinds of activity which substantially burden or affect such commerce (*Swift & Co.* v. *United States,* 196 U. S. 375; *Minnesota Rate Cases,* 230 U. S. 352; *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1) even though such activity is in itself not commerce at all (*United States* v. *Ferger,* 250 U. S. 199; *Coronado Coal Co.* v. *United*

Mine Workers, 268 U. S. 295). Moreover, it is immaterial whether the activity has occurred wholly within a State before movement in interstate commerce has commenced. *Local 167* v. *United States,* 291 U. S. 293; *United States* v. *Reading Co.,* 226 U. S. 324; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295.

The transactions thus subject to regulation by Congress may often include matters which may also be regulated by the States within their police power or taxed locally. In such cases, if the state regulation does not burden interstate commerce or in any way conflict with the federal law, both federal and state regulations may be in force at the same time. Cf. *Bacon* v. *Illinois,* 227 U. S. 504, and *Dickson* v. *Uhlmann Grain Co.,* 288 U. S. 188, with *Chicago Board of Trade* v. *Olsen, supra; Minnesota* v. *Blasius,* 290 U. S. 1, with *Stafford* v. *Wallace, supra; Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, with *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295. If conflict should arise, however, or if Congress has manifested any intention completely to occupy the field, state law must yield to the paramount federal power. *Minnesota Rate Cases, supra; Houston, E. & W. T. Ry. Co.* v. *United States, supra; Florida* v. *United States,* 292 U. S. 1; *Adams Express Co.* v. *Croninger,* 226 U. S. 491. "The rule which marks the point at which state taxation or regulation becomes permissible" does not necessarily prevent "interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." *Swift & Co.* v. *United States, supra,* p. 400; *Stafford* v. *Wallace, supra,* p. 525.

Such cases as *Kidd* v. *Pearson,* 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord, supra; Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost,* 286 U. S.

165; and *Chassaniol* v. *Greenwood,* 291 U. S. 584, which define the permissible limits of action by the States, are, therefore, not applicable.

Thus the power of the States to restrict the production of oil (*Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210) does not preclude the exercise of federal power over the same subject matter if the conditions surrounding the production of oil afford a reasonable basis for the view that federal control of petroleum production is necessary for the regulation of interstate commerce in petroleum and its products.

The production-control provisions of the Petroleum Code seek to stabilize the interstate market in petroleum and its products through limitation of the production of petroleum to the national consumer demand. States are to apportion the share of the national demand assigned to them among the individual wells and properties within the State. Production in excess of quotas assigned by a State is made a violation of the Code.

This case squarely presents the issue as to whether the Federal Government may, under the commerce clause, regulate the amount of oil produced throughout the Nation. The determination of this issue depends essentially upon questions of economic fact involving a consideration of the structure of the petroleum industry, the conditions governing the production of oil, and the effect of such conditions upon interstate commerce in petroleum and its products.

We are to consider the national scope and importance of the industry; interstate commerce and competition between producing areas; dependence upon oil of agencies of commerce; movement of petroleum in interstate commerce—the pipe-line system; movements from East Texas; intermingling of crude oil in inter- and intrastate commerce; intermingling of petroleum products in inter- and intrastate commerce; interstate competition in petro-

leum products; corporate integration of the industry; and sensitivity of market structure.

A combination of singular geological, legal, and economic factors governing the production of crude oil in this country has compelled excessive production. Producers in the "stripper" or pumping well areas were drastically affected by the collapse of the price structure resulting from the excessive production of the flush fields. Prices in the "stripper" well areas were driven far below the cost of producing oil from such wells, causing many of them to be abandoned, with the permanent loss of oil reserves. Cheap oil from the flush fields deprived many "stripper" well areas of their normal interstate and foreign markets and threatened to monopolize the entire market of most of the "stripper" well areas in the country. The "stripper" fields contain a large proportion of the total oil reserves of the nation; the shutting down of these fields would involve a serious loss of oil reserves.

The fruitless efforts of the industry and of the States to control the competitive conditions attending the production of oil demonstrate the interstate unity of the oil industry and the need for federal control.

Unrestricted production from the flush fields has had a direct and substantial effect upon interstate commerce in petroleum and its products: (1) It has caused violent fluctuations throughout the country in the price of crude oil and its products, and (2) it has absorbed part of the market of the "stripper" well fields, thus diverting the normal flow of oil from the "stripper" areas. Such direct and substantial effects upon interstate commerce afford sufficient basis for the federal control of oil production embodied in the Petroleum Code.

This Court has held that local activity which directly affects the price of commodities moving in interstate commerce may be regulated by Congress. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *United States* v. *Patten,* 226

U. S. 525. See *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169. Local acts, such as production or manufacture, which occur before interstate commerce has commenced, are nevertheless subject to the federal commerce power when they directly affect interstate commerce. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Standard Oil Co.* v. *United States, supra,* p. 169. Decisions of this Court have sustained regulations of local acts which affected interstate commerce much less directly than does the volume of oil produced in the flush fields. *Stafford* v. *Wallace,* 258 U. S. 495; *Colorado* v. *United States,* 271 U. S. 153; *Florida* v. *United States,* 292 U. S. 1; *United States* v. *Ferger,* 250 U. S. 199; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337.

The Federal Government may properly seek to protect the economic welfare of an industry which is predominantly interstate. Where, as in the case of the oil industry, regulation of the purely interstate aspects of the business cannot be accomplished without control of local acts, such as production, regulation of such local acts is within the federal commerce power. *Minnesota Rate Cases,* 230 U. S. 352; *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342. This Court has recognized that the practical course of interstate business has expanded with the growth of the country. *Stafford* v. *Wallace, supra,* pp. 518–519. With the development of industries organized on a national scale and the extraordinary increase in the facilities of transportation, regulation of many intrastate aspects of such industries may be necessary for the protection of interstate commerce.

The purpose of Congress in the Recovery Act was to remove obstructions to interstate and foreign commerce resulting from the general industrial depression. See *Wilson* v. *New,* 243 U. S. 332, 348. The evident purpose of the Act is sufficient to distinguish it from the Child

Labor Law involved in *Hammer* v. *Dagenhart,* 247 U. S. 251.

The production-control provisions of the Petroleum Code do not involve any infringement of the rights guaranteed by the due process clause of the Fifth Amendment. *Nebbia* v. *New York,* 291 U. S. 502, 525; *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210.

The extent to which Congress is permitted to delegate authority must be determined essentially by the necessities of practical administration. *Wayman* v. *Southard,* 10 Wheat. 1; *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *United States* v. *Grimaud,* 220 U. S. 506; *Hampton & Co.* v. *United States,* 276 U. S. 394.

Congress was confronted with the alternative either of not legislating effectively or of making a broad delegation. The phrase "fair competition" in the Recovery Act is given substance and meaning by the context in which it is used. See *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24, 25; *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285.

Production in excess of quotas assigned by a state agency pursuant to the provisions of the Petroleum Code is "unfair" (*Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304) and concerns "competition" and may, therefore, be prohibited in a code of fair competition approved under the Recovery Act.

Section 9 (c) is within the commerce power. Prohibition of the use of interstate commerce as an instrumentality for the promotion of violation of state laws, or for the furtherance of injurious or harmful results in other States, has been consistently upheld. *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *Brooks* v. *United States,* 267 U. S. 432; *Champion* v. *Ames,* 188 U. S. 321. Distinguishing *Hammer* v. *Dagenhart,* 247 U. S. 251.

Section 9 (c) is not an unconstitutional delegation of legislative authority. The President's discretion under this section is limited to determining when the prohibition shall take effect. Delegations of this character have uniformly been upheld. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Grimaud,* 220 U. S. 506. The general policies and purposes of the Recovery Act, of which § 9 (c) is an integral part, govern the President's determination of the time or times during which the prohibition against the transportation of "hot" oil shall be applied.

Neither in the *Grimaud* case nor in the Embargo statutes was there any express requirement for the stating of findings. If it be said that by the phrases "in the public interest" or "insuring the protection" of reservations there is a requirement that the Executive shall in his own mind make a finding, this is not different in substance from requiring him to act according to a standard. And if it be urged that the phrases in "the public interest" or "as will insure the objects of such reservations" fix a standard guiding the Executive in the determination of whether the regulation or embargo shall go into effect, then it is to be answered that in the present statute, if it be read as a whole and § 9 (c) read with the policy of the Act, there is also a standard.

Section 9 (c) sets forth explicitly what may be prohibited. The only delegation there relates to when the prohibition shall be in effect. The standards to govern the President's action under § 9 (c) are found in the declaration of policy in § 1; and the test which the President must apply in determining his action under § 9 (c) is whether it will in his judgment serve to effectuate these policies. He is as much under a duty to conform his

action to these standards as he would be if § 9 (c) had expressly so stated. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

The statute does not require the President to hold a hearing, to make formal findings, or to publish his reasons for exercising his discretion. The validity or invalidity of a delegation of legislative power does not depend upon presence or absence of a statutory requirement that the President or other executive officer make a specified finding before exercising the authority delegated. *United States* v. *Grimaud*, 220 U. S. 506.

In the very nature of the office of President he is to act, and it may properly be assumed that he will act, " in the public interest " or in accordance with the principles and the policy of the particular legislation under which he does act. To require, as a condition to the validity of a statute, that the President make a specified finding, such as that he finds a particular requirement " in the public interest " or " necessary and proper," is a mere formality. It is submitted that the actual exercise of the President's power under § 9 (c) is and necessarily involves a finding as fully as though he had stated some formal finding in the Executive Order putting 9 (c) into effect.

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

On July 11, 1933, the President, by Executive Order, prohibited " the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly

authorized agency of a State." [1] This action was based on § 9 (c) of Title I of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 200, 15 U. S. C. Tit. I, § 709 (c). That section provides:

"Sec. 9 . . .

"(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

On July 14, 1933, the President, by Executive Order, authorized the Secretary of the Interior to exercise all the powers vested in the President "for the purpose of en-

[1] The full text of the Executive Order of July 11, 1933, is as follows:

"EXECUTIVE ORDER

"*Prohibition of Transportation in Interstate and Foreign Commerce of Petroleum and the Products thereof unlawfully produced or withdrawn from storage.*

"By virtue of the authority vested in me by the Act of Congress entitled 'AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes,' approved June 16, 1933, (Public No. 67, 73d Congress), the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, is hereby prohibited.

FRANKLIN D. ROOSEVELT."

"The White House,
July 11, 1933."

forcing Section 9 (c) of said act and said order" of July 11, 1933, "including full authority to designate and appoint such agents and to set up such boards and agencies as he may see fit, and to promulgate such rules and regulations as he may deem necessary."[2] That order was made under § 10 (a) of the National Industrial Recovery Act, 48 Stat. 200, 15 U. S. C. 710 (a), authorizing the President "to prescribe such rules and regulations as may be necessary to carry out the purposes" of Title I of the National Industrial Recovery Act and providing that "any violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both."

On July 15, 1933, the Secretary of the Interior issued regulations to carry out the President's orders of July 11 and 14, 1933. These regulations were amended by orders

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[2] The Executive Order of July 14, 1933, is as follows:

"EXECUTIVE ORDER

"*Prohibition of Transportation in Interstate and Foreign Commerce of Petroleum and the Products thereof unlawfully produced or withdrawn from storage.*

"By virtue of the authority vested in me by the Act of Congress entitled 'AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes,' approved June 16, 1933, (Public No. 67, 73d Congress), in order to effectuate the intent and purpose of the Congress as expressed in Section 9 (c) thereof, and for the purpose of securing the enforcement of my order of July 11, 1933, issued pursuant to said act, I hereby authorize the Secretary of the Interior to exercise all the powers vested in me, for the purpose of enforcing Section 9 (c) of said act and said order, including full authority to designate and appoint such agents and to set up such boards and agencies as he may see fit, and to promulgate such rules and regulations as he may deem necessary.

FRANKLIN D. ROOSEVELT."

"The White House,
July 14, 1933."

of July 25, 1933, and August 21, 1933, prior to the commencement of these suits. Regulation IV provided, in substance, that every producer of petroleum should file a monthly statement under oath, beginning August 15, 1933, with the Division of Investigations of the Department of the Interior, giving information with respect to the residence and post-office address of the producer, the location of his producing properties and wells, the allowable production as prescribed by state authority, the amount of daily production, all deliveries of petroleum, and declaring that no part of the petroleum or products produced and shipped had been produced or withdrawn from storage in excess of the amount permitted by state authority. Regulation V required every purchaser, shipper (other than a producer), and refiner of petroleum, including processors, similarly to file a monthly statement under oath, giving information as to residence and post-office address, the place and date of receipt, the parties from whom and the amount of petroleum received and the amount held in storage, the disposition of the petroleum, particulars as to deliveries, and declaring, to the best of the affiant's information and belief, that none of the petroleum so handled had been produced or withdrawn from storage in excess of that allowed by state authority. Regulation VII provided that all persons embraced within the terms of § 9 (c) of the Act, and the Executive Orders and regulations issued thereunder, should keep " available for inspection by the Division of Investigations of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof."

On August 19, 1933, the President, by Executive Order, stating that his action was taken under Title I of the National Industrial Recovery Act, approved a " Code of

Fair Competition for the Petroleum Industry." [3] By a further Executive Order of August 28, 1933, the President designated the Secretary of the Interior as Administrator, and the Department of the Interior as the Federal Agency, to exercise on behalf of the President all the powers vested in him under that Act and Code. Section 3 (f) of Title I of the National Industrial Recovery Act provides that when a code of fair competition has been approved or prescribed by the President under that title, "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall

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[3] The Executive Order of August 19, 1933, is as follows:

"EXECUTIVE ORDER

"*Code of Fair Competition for the Petroleum Industry.*

"An application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Petroleum Industry, and hearings having been held thereon and the Administrator having rendered his report together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

"NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do adopt and approve the report, recommendations and findings of the Administrator and do order that the said Code of Fair Competition be and it is hereby approved.

FRANKLIN D. ROOSEVELT."

"Approval Recommended:
HUGH S. JOHNSON,
Administrator.
"The White House,
August 19, 1933."

be a misdemeanor, punishable by fine of not more than $500 for each offense, each day of said violation to be deemed a separate offense."

This "Petroleum Code" (in its original form and as officially printed) provided in § 3 of Article III relating to "Production," for estimates of "required production of crude oil to balance consumer demand for petroleum products" to be made at intervals by the Federal Agency. This "required production" was to be "equitably allocated" among the several States. These estimates and allocations, when approved by the President, were to be deemed to be "the net reasonable market demand," and the allocations were to be recommended "as the operating schedules for the producing States and for the industry." By § 4 of Article III, the subdivision, with respect to producing properties, of the production allocated to each State, was to be made within the State. The second paragraph of that section further provided:

"If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article I, Section 3 of this code, in excess of any such quota assigned to him, shall be deemed an unfair trade practice and in violation of this code."

By an Executive Order of September 13, 1933, modifying certain provisions of the Petroleum Code, this second paragraph of § 4 of Article III was eliminated. It was reinstated by Executive Order of September 25, 1934.

These suits were brought in October, 1933.

In No. 135, the *Panama Refining Company,* as owner of an oil refining plant in Texas, and its co-plaintiff, a producer having oil and gas leases in Texas, sued to restrain the defendants, who were federal officials, from enforcing Regulations IV, V and VII prescribed by the Secretary of the Interior under § 9 (c) of the National Industrial

Recovery Act. Plaintiffs attacked the validity of § 9 (c) as an unconstitutional delegation to the President of legislative power and as transcending the authority of the Congress under the commerce clause. The regulations, and the attempts to enforce them by coming upon the properties of the plaintiffs, gauging their tanks, digging up pipe lines, and otherwise, were also assailed under the Fourth and Fifth Amendments of the Constitution.

In No. 260, the *Amazon Petroleum Corporation,* and its co-plaintiffs, all being oil producers in Texas and owning separate properties, sued to enjoin the Railroad Commission of that State, its members and other state officers, and the other defendants who were federal officials, from enforcing the state and federal restrictions upon the production and disposition of oil. The bill alleged that the legislation of the State and the orders of its commission in curtailing production violated the Fourteenth Amendment of the Federal Constitution. As to the federal requirements, the bill not only attacked § 9 (c) of the National Industrial Recovery Act, and the regulations of the Secretary of the Interior thereunder, upon substantially the same grounds as those set forth in the bill of the *Panama Refining Company,* but also challenged the validity of provisions of the Petroleum Code. While a number of these provisions were set out in the bill, the contest on the trial related to the limitation of production through the allocation of quotas pursuant to § 4 of Article III of the Code.

As the case involved the constitutional validity of orders of the state commission and an interlocutory injunction was sought, a court of three judges was convened under § 266 of the Judicial Code (28 U. S. C. 380). That court decided that the cause of action against the federal officials was not one within § 266 but was for the consideration of the District Judge alone. The parties agreed that the causes of action should be severed and that each cause

should be submitted to the tribunal having jurisdiction of it. Hearing was had both on the applications for interlocutory injunction and upon the merits. The court of three judges, sustaining the state orders, denied injunction and dismissed the bill as against the state authorities. 5 F. Supp. 633, 634, 639.

In both cases against the federal officials, that of the *Panama Refining Co.* and that of the *Amazon Petroleum Corp.*, heard by the District Judge, a permanent injunction was granted. 5 F. Supp. 639. In the case of the *Amazon Petroleum Corp.*, the court specifically enjoined the defendants from enforcing § 4 of Article III of the Petroleum Code, both plaintiffs and defendants, and the court, being unaware of the amendment of September 13, 1933.

The Circuit Court of Appeals reversed the decrees against the federal officials and directed that the bills be dismissed. 71 F. (2d) 1, 8. The cases come here on writs of certiorari granted on October 8, 1934.

First. The controversy with respect to the provision of § 4 of Article III of the Petroleum Code was initiated and proceeded in the courts below upon a false assumption. That assumption was that this section still contained the paragraph (eliminated by the Executive Order of September 13, 1933) by which production in excess of assigned quotas was made an unfair practice and a violation of the Code. Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist. The Government's announcement that, by reason of the elimination of this paragraph, the Government "cannot, and therefore it does not intend to, prosecute petitioners or other producers of oil in Texas, criminally or otherwise,

for exceeding, at any time prior to September 25, 1934, the quotas of production assigned to them under the laws of Texas," but that if "petitioners, or other producers, produce in excess of such quotas after September 25, 1934, the Government intends to prosecute them," cannot avail to import into the present case the amended provision of that date.[4] The case is not one where a subsequent law is applicable to a pending suit and controls its disposition.[5] When this suit was brought, and when it was heard, there was no cause of action for the injunction sought with respect to the provision of § 4 of Article III of the Code; as to that, there was no basis for real controversy. See *California* v. *San Pablo,* 149 U. S. 308, 314; *United States* v. *Alaska Steamship Co.,* 253 U. S. 113, 116; *Barker Co.* v. *Painters' Union,* 281 U. S. 462. If the Government undertakes to enforce the new provision, the petitioners, as well as others, will have an opportunity to present their grievance, which can then be considered, as it should be, in the light of the facts as they will then appear.

For this reason, we pass to the other questions presented and we express no opinion as to the interpretation or validity of the provisions of the Petroleum Code.

Second. Regulations IV, V and VII, issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations continue sub-

[4] The Government states that although the second paragraph of § 4 of Article III was a part of the Code for a short period prior to September 13, 1933, no legal basis exists for prosecution for production in Texas during that period.

[5] See *United States* v. *The Schooner Peggy,* 1 Cranch 103, 109, 110; *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115, 120; *Crozier* v. *Krupp,* 224 U. S. 290, 302; *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 464; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 201; *Texas Co.* v. *Brown,* 258 U. S. 466, 474.

stantially the earlier requirements, and expand them. They present the same constitutional questions, and the cases as to these are not moot. *Southern Pacific Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 514–516; *McGrain* v. *Daugherty,* 273 U. S. 135, 181, 182.

The original regulations of July 15, 1933, as amended July 25, 1933, and August 21, 1933, were issued to enforce the Executive Orders of July 11 and July 14, 1933. The Executive Order of July 11, 1933, was made under § 9 (c) of the National Industrial Recovery Act, and the Executive Order of July 14, 1933, under § 10 (a) of that Act, authorizing the Secretary of the Interior to promulgate regulations, was for the purpose of enforcing § 9 (c) and the Executive Order of July 11, 1933. The amended regulations have been issued for the same purpose. The fundamental question as to these regulations thus turns upon the validity of § 9 (c) and the executive orders to carry it out.

Third. The statute provides that any violation of any order of the President issued under § 9 (c) shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both. We think that these penalties would attach to each violation, and in this view the plaintiffs were entitled to invoke the equitable jurisdiction to restrain enforcement, if the statute and the executive orders were found to be invalid. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620, 621; *Terrace* v. *Thompson,* 263 U. S. 197, 214–216; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 499, 500.

Fourth. Section 9 (c) is assailed upon the ground that it is an unconstitutional delegation of legislative power. The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate and

foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Section 9 (c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a State. It does not seek to lay down rules for the guidance of state legislatures or state officers. It leaves to the States and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis, or extent, of the State's limitation of production. Section 9 (c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

We examine the context to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed to relate to the subject of § 9 (c) and thus to imply what is not there expressed. It is important to note that § 9 is headed "Oil Regulation,"—that is, § 9 is the part of the National Industrial Recovery Act which particularly deals with that subject matter. But the other provisions of § 9 afford no ground for implying a limitation of the broad grant of authority in § 9 (c). Thus § 9 (a) authorizes the President to initiate before the Interstate Commerce Commission "proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines," and the Interstate Commerce Commission is to grant preference "to the hearings and determination of such cases." Section 9 (b) authorizes the President to institute proceedings "to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant rates in the transportation of petroleum or its products tends to create a monopoly." It will be observed that each of these provisions contains restrictive clauses as to their respective subjects. Neither relates to the subject of § 9 (c).

We turn to the other provisions of Title I of the Act. The first section is a "declaration of policy." [6] It declares that a national emergency exists "which is pro-

[6] The text of § 1 is as follows:

"Section 1. A national emergency productive of wide-spread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the

ductive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects public welfare, and undermines the standards of living of the American people." It is declared to be the policy of Congress "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof"; "to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups"; "to induce and maintain united action of labor and management under adequate governmental sanctions and supervision"; "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited,—nothing as to the policy of prohibiting, or not prohibiting, the transportation of production exceeding what the

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general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

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States allow. The general policy declared is " to remove obstructions to the free flow of interstate and foreign commerce." As to production, the section lays down no policy of limitation. It favors the fullest possible utilization of the present productive capacity of industries. It speaks, parenthetically, of a possible temporary restriction of production, but of what, or in what circumstances, it gives no suggestion. The section also speaks in general terms of the conservation of natural resources, but it prescribes no policy for the achievement of that end. It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections.

It is no answer to insist that deleterious consequences follow the transportation of " hot oil,"—oil exceeding state allowances. The Congress did not prohibit that transportation. The Congress did not undertake to say that the transportation of " hot oil " was injurious. The Congress did not say that transportation of that oil was " unfair competition." The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative

officer executing a declared legislative policy. We find nothing in § 1 which limits or controls the authority conferred by § 9 (c).

We pass to the other sections of the Act. Section 2 relates to administrative agencies which may be constituted. Section 3 provides for the approval by the President of " codes " for trades or industries. These are to be codes of " fair competition " and the authority is based upon certain express conditions which require findings by the President. Action under § 9 (c) is not made to depend on the formulation of a code under § 3. In fact, the President's action under § 9 (c) was taken more than a month before a petroleum code was approved. Subdivision (e) of § 3 authorizes the President, on his own motion or upon complaint, as stated, in case any article is being imported into the United States " in substantial quantities or increasing ratio to domestic production of any competitive article," under such conditions as to endanger the maintenance of a code or agreement under Title I, to cause an immediate investigation by the Tariff Commission. The authority of the President to act, after such investigation, is conditioned upon a finding by him of the existence of the underlying facts, and he may permit entry of the articles concerned upon such conditions and with such limitations as he shall find it necessary to prescribe in order that the entry shall not tend to render the code or agreement ineffective. Section 4 relates to agreements and licenses for the purposes stated. Section 5 refers to the application of the anti-trust laws. Sections 6 and 7 impose limitations upon the application of Title I, bearing upon trade associations and other organizations and upon the relations between employers and employees. Section 8 contains provisions with respect to the application of the Agricultural Adjustment Act of May 12, 1933.

None of these provisions can be deemed to prescribe any limitation of the grant of authority in § 9 (c).

Fifth. The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the State may allow. If legislative power may thus be vested in the President, or other grantee, as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the State's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact, or not to enact, as he pleases. And if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to state action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person, or board or commission, so chosen, may

think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation.

The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art. I, § 1. And the Congress is empowered " To make all laws which shall be necessary and proper for carrying into execution " its general powers. Art. I, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

The Court has had frequent occasion to refer to these limitations and to review the course of congressional action. At the very outset, amid the disturbances due to war in Europe, when the national safety was imperiled

and our neutrality was disregarded, the Congress passed a series of acts, as a part of which the President was authorized, in stated circumstances, to lay and revoke embargoes, to give permits for the exportation of arms and military stores, to remit and discontinue the restraints and prohibitions imposed by acts suspending commercial intercourse with certain countries, and to permit or interdict the entrance into waters of the United States of armed vessels belonging to foreign nations.[7] These early acts were not the subject of judicial decision and, apart from that, they afford no adequate basis for a conclusion that the Congress assumed that it possessed an unqualified power of delegation. They were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers,[8] they were directed to the effective execution of policies repeatedly declared by the Congress, and they confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the Government.[9]

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[7] Acts of June 4, 1794, 1 Stat. 372; March 3, 1795, 1 Stat. 444; June 13, 1798, 1 Stat. 565, 566; February 9, 1799, 1 Stat. 613, 615; February 27, 1800, 2 Stat. 7, 9, 10; March 3, 1805, 2 Stat. 339, 341, 342; February 28, 1806, 2 Stat. 351, 352; April 22, 1808, 2 Stat. 490.

[8] Marshall's Life of Washington, Vol. 2, pp. 319, *et seq.*

[9] Thus, prior to the Act of June 4, 1794 (1 Stat. 372), the Congress had laid embargoes, for limited periods, upon vessels in ports of the United States bound to foreign ports. Resolutions of March 26, 1794, and April 18, 1794, 1 Stat. 400, 401. Fearing that the national safety might be endangered, the President, by the Act of June 4, 1794, was authorized to lay an embargo, with appropriate regulations, whenever he found " that the public safety shall so require," the authority not to be exercised while the Congress was in session and the embargo to be limited in any case to 15 days after the commencement of the next session. The Act of March 3, 1795 (1 Stat. 444), authorizing the President to permit the exportation of arms, etc. was " in cases connected with the security of the commercial interest of the

The first case relating to an authorization of this description was that of *The Brig Aurora,* 7 Cranch 382. The cargo of that vessel had been condemned as having been imported from Great Britain in violation of the non-intercourse Act of March 1, 1809. 2 Stat. 528. That Act expired on May 1, 1810,[10] when Congress passed another

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United States and for public purposes only." By the Act of June 13, 1798 (1 Stat. 565), commercial intercourse was suspended between the United States and France and its dependencies. The Act was to continue only until the end of the next session of Congress and it was provided (§ 5) that if, before the next session, the Government of France "shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities" against the vessels and other property of citizens of the United States, and shall acknowledge the neutrality of the United States, "it shall be lawful for the President," "being well ascertained of the premises," to remit and discontinue the prohibitions and restraints imposed by the Act and to make proclamation accordingly. The Act of February 9, 1799 (1 Stat. 613), further suspended commercial intercourse between the United States and France and its dependencies until March 3, 1800, and gave a similar authority (§ 4) to the President to remit and discontinue the restraints and prohibitions of the Act, "if he shall deem it expedient and consistent with the interest of the United States," either with respect to the French Republic or to any place belonging to that Republic, "with which a commercial intercourse may safely be renewed," and to revoke such order if he found that the interest of the United States so required. The suspension of commercial intercourse was renewed by the Act of February 27, 1800 (2 Stat. 7) until March 3, 1801, with a similar provision as to the authority of the President. The Act of March 3, 1805 (2 Stat. 339) related to persons committing treason, felony, etc. within the jurisdiction of the United States and taking refuge in foreign armed vessels, and the authority to the President to permit or prevent the entry of such vessels into the waters of the United States (§ 4) was "in order to prevent insults to the authority of the laws, whereby the peace of the United States with foreign nations may be endangered." See also Act of April 22, 1808, 2 Stat. 490. See also, Proclamations of President Adams, "Works of John Adams," Vol. IX, pp. 176, 177.

[10] See Act of June 28, 1809, 2 Stat. 550.

Act (2 Stat. 605, 606) providing that in case either Great Britain or France, before March 3, 1811, "shall . . . so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not within three months thereafter so revoke or modify her edicts in like manner," then, with respect to that nation, as stated, the provisions of the Act of 1809, after three months from that proclamation, "shall . . . be revived and have full force and effect." On November 2, 1810, the President issued his proclamation declaring that France had so revoked or modified her edicts, and it was contended that the provisions of the Act of 1809, as to the cargo in question, had thus been revived. The Court said that it could see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of 1809, "either expressly or conditionally, as their judgment should direct." The provision of that Act declaring "that it should continue in force to a certain time, and no longer," could not restrict the power of the legislature to extend its operation "without limitation upon the occurrence of any subsequent combination of events." This was a decision, said the Court in *Field* v. *Clark*, 143 U. S. 649, 683, "that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States."

In *Field* v. *Clark, supra,* the Court applied that ruling to the case of "the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation." The Court was dealing with § 3 of the Act of October 1, 1890, 26 Stat. 567, 612.

That section provided that, "with a view to secure reciprocal trade" with countries producing certain articles, "whenever, and so often as the President shall be satisfied" that the Government of any country producing them imposed "duties or other exactions upon the agricultural or other products of the United States" which, in view of the free list established by the Act, the President "may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty," to suspend the free introduction of those articles by proclamation to that effect, and that during that suspension the duties specified by the section should be levied. The validity of the provision was challenged as a delegation to the President of legislative power. The Court reviewed the early acts to which we have referred, as well as later statutes considered to be analogous.[11] While sustaining the provision, the Court emphatically declared that the principle that "Congress cannot delegate legislative power to the President" is "universally

[11] Acts of March 3, 1815, 3 Stat. 224; March 3, 1817, 3 Stat. 361; January 7, 1824, 4 Stat. 2; May 24, 1828, 4 Stat. 308; May 31, 1830, 4 Stat. 425; March 6, 1866, 14 Stat. 3; March 3, 1883, 22 Stat. 490; June 26, 1884, 23 Stat. 57; October 1, 1890, 26 Stat. 616. R. S. 2493, 2494, 4219, 4228. Proclamations of Presidents; 3 Stat. App. I; 4 Stat. App. III, 814–818; 9 Stat. App. 1001, 1004; 11 Stat. App. 795; 13 Stat. App. 739; 14 Stat. App. 818, 819; 16 Stat. App. 1127; 17 Stat. App. 954, 956, 957; 21 Stat. 800; 23 Stat. 841, 842, 844.

For other analogous statutes, see Acts of December 17, 1813, 3 Stat. 88, 93; June 19, 1886, 24 Stat. 79, 82; March 3, 1887, 24 Stat. 475; August 30, 1890, 26 Stat. 414, 415; February 15, 1893, 27 Stat. 449, 452; March 2, 1895, 28 Stat. 727, 733; September 8, 1916, 39 Stat. 756, 799; June 15, 1917, 40 Stat. 217, 225; August 10, 1917, 40 Stat. 276; October 6, 1917, 40 Stat. 411, 422; March 4, 1919, 40 Stat. 1348, 1350; June 17, 1930, 46 Stat. 590, 704. Resolutions of March 14, 1912, 37 Stat. 630; January 31, 1922, 42 Stat. 361. Proclamations: 24 Stat. 1024, 1025, 1028, 1030; 27 Stat. 995, 1011; 38 Stat. 1960; 39 Stat. 1756; 40 Stat. 1683, 1689, *et seq.*

recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." The Court found that the act before it was not inconsistent with that principle; that it did not " in any real sense, invest the President with the power of legislation." As " the suspension was absolutely required when the President ascertained the existence of a particular fact," it could not be said " that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws." " He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Id.*, pp. 692, 693. The Court referred with approval to the distinction pointed out by the Supreme Court of Ohio in *Cincinnati, W. & Z. R. Co.* v. *Commissioners,* 1 Ohio St. 88, between " the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law."

Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, " to fill up the details " under the general provisions made by the legislature. *Wayman* v. *Southard,* 10 Wheat. 1, 43. In *Buttfield* v. *Stranahan,* 192 U. S. 470, 496, the Act of March 2, 1897 (29 Stat. 604, 605) was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to " establish uniform standards of purity, quality, and fitness

for the consumption of all kinds of teas imported into the United States." The Court construed the statute as expressing "the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality." The Congress, the Court said, thus fixed "a primary standard" and committed to the Secretary of the Treasury "the mere executive duty to effectuate the legislative policy declared in the statute." "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." See *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 394.

Another notable illustration is that of the authority given to the Secretary of War to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to remove such obstructions. Act of March 3, 1899, § 18, 30 Stat. 1153, 1154. By that statute the Congress declared "a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule" as thus laid down. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 193; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 638. Upon this principle rests the authority of the Interstate Commerce Commission, in the execution of the declared policy of the Congress in enforcing reasonable rates, in preventing undue preferences and unjust discriminations, in requiring suitable facilities for transportation in interstate commerce, and in exercising other powers held to have been validly conferred. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 287; *Intermountain Rate Cases,* 234 U. S. 476, 486; *Avent* v. *United States,* 266 U. S. 127, 130; *N. Y. Central Securities Corp.*

v. *United States,* 287 U. S. 12, 24, 25. Upon a similar ground the authority given to the President, in appropriate relation to his functions as Commander-in-Chief, by the Trading with the Enemy Act, as amended by the Act of March 28, 1918 (40 Stat. 460), with respect to the disposition of enemy property, was sustained. "The determination," said the Court, "of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act." *United States* v. *Chemical Foundation,* 272 U. S. 1, 12.[12]

The provisions of the Radio Act of 1927 (44 Stat. 1162, 1163), providing for assignments of frequencies or wave lengths to various stations, afford another instance. In granting licenses, the Radio Commission is required to act "as public convenience, interest, or necessity requires." In construing this provision, the Court found that the statute itself declared the policy as to "equality of radio broadcasting service, both of transmission and of reception," and that it conferred authority to make allocations and assignments in order to secure, according to stated criteria, an equitable adjustment in the distribution of facilities.[13] The standard set up was not so indefinite "as to confer an unlimited power." *Radio Commission* v. *Nelson Brothers Co.,* 289 U. S. 266, 279, 285.

So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations,—"not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud,* 220 U. S. 506, 517. Such regulations become, indeed, binding rules of con-

[12] See, also, §§ 4 (b) and 5 (a) of the Trading with the Enemy Act, 40 Stat. 411. 414, 415.

[13] Act of March 28, 1928, amending § 9 of the Radio Act of 1927, 45 Stat. 373.

duct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined. In the case of *Grimaud, supra,* a regulation made by the Secretary of Agriculture requiring permits for grazing sheep on a forest reserve of lands belonging to the United States was involved. The Court referred to the various acts for the establishment and management of forest reservations and the authorization of rules which would " insure the objects of such reservation," that is, " to regulate their occupancy and use and to preserve the forests thereon from destruction." The Court observed that " it was impracticable for Congress to provide general regulations for these various and varying details of management," and that, in authorizing the Secretary of Agriculture to meet local conditions, Congress " was merely conferring administrative functions upon an agent, and not delegating to him legislative power." *Id.,* pp. 515, 516. The Court quoted with approval the statement of the principle in *Field* v. *Clark, supra,* that the Congress cannot delegate legislative power, and upheld the regulation in question as an administrative rule for the appropriate execution of the policy laid down in the statute. See *Wayman* v. *Southard, supra; Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, 214, 215; *Selective Draft Law Cases,* 245 U. S. 366, 389; *McKinley* v. *United States,* 249 U. S. 397.

The applicable considerations were reviewed in *Hampton & Co.* v. *United States,* 276 U. S. 394, where the Court dealt with the so-called " flexible tariff provision " of the Act of September 21, 1922 (42 Stat. 858, 941, 942), and with the authority which it conferred upon the President. The Court applied the same principle that permitted the Congress to exercise its rate-making power in interstate commerce, and found that a similar provision was justified for the fixing of customs duties; that is, as the Court said, " If Congress shall lay down by

legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority." The Court sustained the provision upon the authority of *Field* v. *Clark, supra,* repeating with approval what was there said,—that " What the President was required to do was merely in execution of the act of Congress." *Id.*, pp. 409–411.

Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

If § 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.

Sixth. There is another objection to the validity of the prohibition laid down by the Executive Order under § 9 (c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both § 9 (c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin [14]) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. The point is pertinent in relation to the first section of the National Industrial Recovery Act. We have said that the first section is but a general introduction, that it declares no policy and defines no standard with respect to the transportation which is the subject of § 9 (c). But if from the extremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under § 9 (c), it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition. To hold

[14] See Acts and Proclamations cited in Note 11, *supra*.

that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.

We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action.[15] To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown. As the Court said in *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n*, 260 U. S. 48, 59: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

[15] See *Philadelphia & Trenton R. Co.* v. *Stimpson*, 14 Pet. 448, 458; *Martin* v. *Mott*, 12 Wheat. 19, 30, 32; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 182, 184; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14, 15; *Sterling* v. *Constantin*, 287 U. S. 378, 399.

It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this." Referring to the ruling in the *Wichita* case, the Court said in *Mahler* v. *Eby,* 264 U. S. 32, 44: "We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government." We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.

We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, and the Regulations issued by the Secretary of the Interior thereunder, are without constitutional authority.

The decrees of the Circuit Court of Appeals are reversed and the causes are remanded to the District Court with direction to modify its decrees in conformity with this opinion so as to grant permanent injunctions, restraining the defendants from enforcing those orders and regulations.

Reversed.

MR. JUSTICE CARDOZO, dissenting.

With all that is said in the opinion of the court as to the Code of Fair Competition adopted by the President August 16, 1933, for the governance of the petroleum industry, I am fully in accord. No question is before us at this time as to the power of Congress to regulate production. No question is here as to its competence to clothe the President with a delegated power whereby a Code of Fair Competition may become invested with the force of

law. The petitioners were never in jeopardy by force of such a code or of regulations made thereunder. They were not in jeopardy because there was neither statute nor regulation subjecting them to pains or penalties if they set the code at naught. One must deplore the administrative methods that brought about uncertainty for a time as to the terms of executive orders intended to be law. Even so, the petitioners do not stand in need of an injunction to restrain the enforcement of a non-existent mandate.

I am unable to assent to the conclusion that § 9 (c) of the National Recovery Act, a section delegating to the President a very different power from any that is involved in the regulation of production or in the promulgation of a code, is to be nullified upon the ground that his discretion is too broad or for any other reason. My point of difference with the majority of the court is narrow. I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. I deny that such a standard is lacking in respect of the prohibitions permitted by this section when the act with all its reasonable implications is considered as a whole. What the standard is becomes the pivotal inquiry.

As to the nature of the *act* which the President is authorized to perform there is no need for implication. That at least is definite beyond the possibility of challenge. He may prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted by any state law or valid regulation or order prescribed thereunder. He is not left to roam at will among all the possible subjects of interstate transportation, picking and choosing as he pleases. I am far from asserting now that delegation would be

valid if accompanied by all that latitude of choice. In the laying of his interdict he is to confine himself to a particular commodity, and to that commodity when produced or withdrawn from storage in contravention of the policy and statutes of the states. He has choice, though within limits, as to the occasion, but none whatever as to the means. The means have been prescribed by Congress. There has been no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases. His act being thus defined, what else must he ascertain in order to regulate his discretion and bring the power into play? The answer is not given if we look to § 9 (c) only, but it comes to us by implication from a view of other sections where the standards are defined. The prevailing opinion concedes that a standard will be as effective if imported into § 9 (c) by reasonable implication as if put there in so many words. If we look to the whole structure of the statute, the test is plainly this, that the President is to forbid the transportation of the oil when he believes, in the light of the conditions of the industry as disclosed from time to time, that the prohibition will tend to effectuate the declared policies of the act,—not merely his own conception of its policies, undirected by any extrinsic guide, but the policies announced by § 1 in the forefront of the statute as an index to the meaning of everything that follows.[1]

[1] "Section 1. . . . It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of produc-

Oil produced or transported in excess of a statutory quota is known in the industry as "hot oil," and the record is replete with evidence as to the effect of such production and transportation upon the economic situation and upon national recovery. A declared policy of Congress in the adoption of the act is "to eliminate unfair competitive practices." Beyond question an unfair competitive practice exists when "hot oil" is transported in interstate commerce with the result that law-abiding dealers must compete with lawbreakers. Here is one of the standards set up in the act to guide the President's discretion. Another declared policy of Congress is "to conserve natural resources." Beyond question the disregard of statutory quotas is wasting the oil fields in Texas and other states, and putting in jeopardy of exhaustion one of the treasures of the nation. All this is developed in the record and in the arguments of counsel for the government with a wealth of illustration. Here is a second standard. Another declared policy of Congress is to "promote the fullest possible utilization of the present productive capacity of industries," and "except as may be temporarily required" to "avoid undue restriction of production." Beyond question prevailing conditions in the oil industry have brought about the need for temporary restriction in order to promote in the long run the fullest productive capacity of business in all its many

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tion (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The Act as a whole is entitled as one "To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes"; and the heading of Title I, which includes §§ 1 to 10, is "Industrial Recovery."

branches, for the effect of present practices is to diminish that capacity by demoralizing prices and thus increasing unemployment. The ascertainment of these facts at any time or place was a task too intricate and special to be performed by Congress itself through a general enactment in advance of the event. All that Congress could safely do was to declare the act to be done and the policies to be promoted, leaving to the delegate of its power the ascertainment of the shifting facts that would determine the relation between the doing of the act and the attainment of the stated ends. That is what it did. It said to the President in substance: You are to consider whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated in § 1, whether the effect of such conduct is to promote unfair competition or to waste the natural resources or to demoralize prices or to increase unemployment or to reduce the purchasing power of the workers of the nation. If these standards or some of them have been flouted with the result of a substantial obstruction to industrial recovery, you may then by a prohibitory order eradicate the mischief.

I am not unmindful of the argument that the President has the privilege of choice between one standard and another, acting or failing to act according to an estimate of values that is individual and personal. To describe his conduct thus is to ignore the essence of his function. What he does is to inquire into the industrial facts as they exist from time to time. Cf. *Hampton & Co.* v. *United States,* 276 U. S. 394, at p. 409; *Locke's Appeal,* 72 Penn. St. 491, 498, quoted with approval in *Field* v. *Clark,* 143 U. S. 649, at p. 694. These being ascertained, he is not to prefer one standard to another in any subjective attitude of mind, in any personal or wilful way. He is to study the facts objectively, the violation of a standard

impelling him to action or inaction according to its observed effect upon industrial recovery,—the ultimate end, as appears by the very heading of the title, to which all the other ends are tributary and mediate. Nor is there any essential conflict among the standards *inter se,* at all events when they are viewed in relation to § 9 (c) and the power there conferred. In its immediacy, the exclusion of oil from the channels of transportation is a restriction of interstate commerce, not a removal of obstructions. This is self-evident, and, of course, was understood by Congress when the discretionary power of exclusion was given to its delegate. But what is restriction in its immediacy may in its ultimate and larger consequences be expansion and development. Congress was aware that for the recovery of national well-being there might be need of temporary restriction upon production in one industry or another. It said so in § 1. When it clothed the President with power to impose such a restriction—to prohibit the flow of oil illegally produced—it laid upon him a mandate to inquire and determine whether the conditions in that particular industry were such at any given time as to make restriction helpful to the declared objectives of the act and to the ultimate attainment of industrial recovery. If such a situation does not present an instance of lawful delegation in a typical and classic form (*Field* v. *Clark,* 143 U. S. 649; *United States* v. *Grimaud,* 220 U. S. 506; *Hampton & Co.* v. *United States,* 276 U. S. 394), categories long established will have to be formulated anew.

In what has been written, I have stated, but without developing the argument, that by reasonable implication the power conferred upon the President by § 9 (c) is to be read as if coupled with the words that he shall exercise the power whenever satisfied that by doing so he will effectuate the policy of the statute as theretofore declared. Two canons of interpretation, each familiar to our law,

leave no escape from that conclusion. One is that the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view. *Cherokee Intermarriage Cases,* 203 U. S. 76, 89; *McKee* v. *United States,* 164 U. S. 287; *Talbott* v. *Silver Bow County,* 139 U. S. 438, 443, 444. The other is that when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407; *Knights Templars' Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205. Plainly, § 1, with its declaration of the will of Congress, is the chart that has been furnished to the President to enable him to shape his course among the reefs and shallows of this act. If there could be doubt as to this when § 1 is viewed alone, the doubt would be dispelled by the reiteration of the policy in the sections that come later. In § 2, which relates to administrative agencies, in § 3, which relates to Codes of Fair Competition, in § 4, which relates to agreements and licenses, in § 6, which prescribes limitations upon the application of the statute, and in § 10 which permits the adoption of rules and regulations, authority is conferred upon the President to do one or more acts as the delegate of Congress when he is satisfied that thereby he will aid "in effectuating the policy of this title" or in carrying out its provisions. True § 9, the one relating to petroleum, does not by express words of reference embody the same standard, yet nothing different can have been meant. What, indeed, is the alternative? Either the statute means that the President is to adhere to the declared policy of Congress, or it means that he is to exercise a merely arbitrary will. The one construction invigorates the act; the other saps its life. A choice between them is not hard.

I am persuaded that a reference, express or implied, to the policy of Congress as declared in § 1 is a sufficient definition of a standard to make the statute valid. Discretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing. *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Grimaud,* 220 U. S. 506, and *Hampton & Co.* v. *United States,* 276 U. S. 394, state the applicable principle. Under these decisions the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety. The Interstate Commerce Commission, probing the economic situation of the railroads of the country, consolidating them into systems, shaping in numberless ways their capacities and duties, and even making or unmaking the prosperity of great communities (*Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627), is a conspicuous illustration. See, e. g., 41 Stat. 479-482, c. 91, §§ 405, 406, 407, 408; 42 Stat. 27, c. 20; 49 U. S. C. §§ 3, 4, 5. Cf. *Intermountain Rate Cases,* 234 U. S. 476; *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12, 24, 25; Sharfman, The Interstate Commerce Commission, vol. 2, pp. 357, 365. There could surely be no question as to the validity of an act whereby carriers would be prohibited from transporting oil produced in contravention of a statute if in the judgment of the commission the practice was demoralizing the market and bringing disorder and insecurity into the national economy. What may be delegated to a commission may be delegated to the President. "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave

the determination of such time to the discretion of the executive." *Hampton & Co.* v. *United States, supra,* at p. 407. Only recently (1932) the whole subject was discussed with much enlightenment in the Report by the Committee on Ministers' Powers to the Lord Chancellor of Great Britain. See especially, pp. 23, 51. In the complex life of today, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts.

A striking illustration of this need is found in the very industry affected by this section, the production of petroleum and its transportation between the states. At the passage of the National Recovery Act no one could be certain how many of the states would adopt valid quota laws, or how generally the laws would be observed when adopted, or to what extent illegal practices would affect honest competitors or the stability of prices or the conservation of natural resources or the return of industrial prosperity. Much would depend upon conditions as they shaped themselves thereafter. Violations of the state laws might turn out to be so infrequent that the honest competitor would suffer little, if any, damage. The demand for oil might be so reduced that there would be no serious risk of waste, depleting or imperilling the resources of the nation. Apart from these possibilities the business might become stabilized through voluntary coöperation or the adoption of a code or otherwise. Congress not unnaturally was unwilling to attach to the state laws a sanction so extreme as the cutting off of the privilege of interstate commerce unless the need for such action had unmistakably developed. What was left to the President was to ascertain the conditions prevailing in the industry, and prohibit or fail to prohibit according to the effect of those conditions upon the phases of the national policy relevant thereto.

From a host of precedents available, both legislative and judicial, I cite a few as illustrations. By an act approved June 4, 1794, during the administration of Washington (1 Stat. 372; *Field* v. *Clark,* 143 U. S. 649, 683) Congress authorized the President, when Congress was not in session, and for a prescribed period "whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper." By an act of 1799, February 9 (1 Stat. 613, 615) suspending commercial intercourse with France and its dependencies, "it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interest of the United States, by his order to remit, and discontinue, for the time being, the restraints and prohibitions aforesaid, . . . and also to revoke such order, [i. e., reëstablish the restraints] whenever, in his opinion, the interest of the United States shall require." By an act of October 1, 1890 (26 Stat. 567, 612), sustained in *Field* v. *Clark, supra,* the President was authorized to suspend by proclamation the free introduction into this country of enumerated articles when satisfied that a country producing them imposes duties or other exactions upon the agricultural or other products of the United States which he may deem to be reciprocally unequal or unreasonable. By an act of September 21, 1922, (42 Stat. 858, 941, 945), sustained in *Hampton & Co.* v. *United States, supra,* the President was empowered to increase or decrease tariff duties so as to equalize the differences between the costs of production at home and abroad, and empowered, by the same means, to give redress for other acts of discrimination or unfairness "when he finds that the public interest will be

served thereby." Delegation was not confined to an inquiry into the necessity or occasion for the change. It included the magnitude of the change, the delegate thus defining the act to be performed. By an act of June 4, 1897 (30 Stat. 11, 35), amended in 1905 (33 Stat. 628), regulating the forest reservations of the nation, the purpose of the reservations was declared to be " to improve and protect the forest within the reservation," and to secure " favorable conditions of water flows, and to furnish a continuous supply of lumber for the use and necessities of citizens of the United States." Without further guide or standard, the Secretary of Agriculture was empowered to " make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The validity of these provisions was upheld in *United States* v. *Grimaud, supra,* as against the claim by one who violated the rules that there had been an unlawful delegation. Many other precedents are cited in the margin.[2] They teach one lesson and a clear one.

There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. What can be done under cover of that permission is closely and clearly circumscribed both as to subject matter and occasion. The statute was framed in the shadow of a national disaster. A host of unforeseen contingencies would have to be faced from day to day, and faced with a fulness of under-

[2] 2 Stat. 411, December 19, 1806; 3 Stat. 224, March 3, 1815; 23 Stat. 31, 32, May 29, 1884; 25 Stat. 659, February 9, 1889; 38 Stat. 717, September 26, 1914; 41 Stat. 593, May 10, 1920; *Williams* v. *United States,* 138 U. S. 514; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Intermountain Rate Cases,* 234 U. S. 476; *Mahler* v. *Eby,* 264 U. S. 32. Cf. Emergency Banking Act of March 9, 1933; 48 Stat. 1; Agricultural Adjustment Act of May 12, 1933; 48 Stat. 51, 53, § 43.

standing unattainable by any one except the man upon the scene. The President was chosen to meet the instant need.

A subsidiary question remains as to the form of the executive order, which is copied in the margin.[3] The question is a subsidiary one, for unless the statute is invalid, another order with fuller findings or recitals may correct the informalities of this one, if informalities there are. But the order to my thinking is valid as it stands. The President was not required either by the Constitution or by any statute to state the reasons that had induced him to exercise the granted power. It is enough that the grant of power had been made and that pursuant to that grant he had signified the will to act. The will to act being declared, the law presumes that the declaration was preceded by due inquiry and that it was rooted in sufficient grounds. Such, for a hundred years and more, has been the doctrine of this court. The act of February 28, 1795 (1 Stat. 424), authorized the President "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," to call forth such number of the militia of the states as he shall deem necessary and to issue his

[3] "Executive Order. Prohibition of Transportation in Interstate and Foreign Commerce of Petroleum and the Products Thereof Unlawfully Produced or Withdrawn from Storage. By virtue of the authority vested in me by the Act of Congress entitled 'AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes,' approved June 16, 1933, (Public No. 67, 73d Congress), the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, is hereby prohibited. Franklin D. Roosevelt. The White House, July 11, 1933."

orders to the appropriate officers for that purpose. Cf. Constitution, Article I, clause 15. When war threatened in the summer of 1812, President Madison acting under the authority of that statute directed Major General Dearborn to requisition from New York, Massachusetts and Connecticut certain numbers of the states' militia. American State Papers, Military Affairs, vol. 1, pp. 322–5. No finding of "imminent danger of invasion" was made by the President in any express way, nor was such a finding made by the Secretary of War or any other official. The form of the requisitions to Massachusetts and Connecticut appears in the state papers of the government (American State Papers, *supra*); the form of those to New York was almost certainly the same. Replevin was brought by a New York militiaman who refused to obey the orders, and whose property had been taken in payment of a fine imposed by a court-martial. The defendant, a deputy marshal, defended on the ground that the orders were valid, and the plaintiff demurred because there was no allegation that the President had adjudged that there was imminent danger of an invasion. The case came to this court. *Martin* v. *Mott,* 12 Wheat. 19. In an opinion by Story, J., the court upheld the seizure. "The argument is, [he wrote] that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore, it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the Court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance

of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori,* this presumption ought to be favourably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done." A like presumption has been applied in other cases and in a great variety of circumstances. *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 458; *Rankin* v. *Hoyt,* 4 How. 327, 335; *Carpenter* v. *Rannels,* 19 Wall. 138, 146; *The Confiscation Cases,* 20 Wall. 92, 109; *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 97; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15. This does not mean that the individual is helpless in the face of usurpation. A court will not revise the discretion of the Executive, sitting in judgment on his order as if it were the verdict of a jury. *Martin* v. *Mott, supra.* On the other hand, we have said that his order may not stand if it is an act of mere oppression, an arbitrary fiat that overleaps the bounds of judgment. *Sterling* v. *Constantin,* 287 U. S. 378, 399, 400, 401. The complainants and others in their position may show, if they can, that in no conceivable aspect was there anything in the conditions of the oil industry in July, 1933, to establish a connection between the prohibitory order and the declared policies of the Congress. This is merely to say that the standard must be such as to have at least a possible relation to the act to be performed under the delegated power. One can hardly suppose that a prohibitory order would survive a test in court if the Executive were to assert a relation between the transportation of petroleum and the maintenance of the gold standard or the preservation of peace in Europe or the Orient. On the other hand, there can be no challenge of such a mandate unless the possibility of a rational nexus is lacking alto-

gether. Here, in the case at hand, the relation between the order and the standard is manifest upon the face of the transaction from facts so notorious as to be within the range of our judicial notice. There is significance in the fact that it is not challenged even now.

The President, when acting in the exercise of a delegated power, is not a quasi-judicial officer, whose rulings are subject to review upon certiorari or appeal (*Chicago Junction Case,* 264 U. S. 258, 265; cf. *Givens* v. *Zerbst,* 255 U. S. 11, 20), or an administrative agency supervised in the same way. Officers and bodies such as those may be required by reviewing courts to express their decision in formal and explicit findings to the end that review may be intelligent. *Florida* v. *United States,* 282 U. S. 194, 215; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U. S. 74, 86; *United States* v. *Baltimore & Ohio R. Co., post,* p. 454. Cf. *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.,* 289 U. S. 67. Such is not the position or duty of the President. He is the Chief Executive of the nation, exercising a power committed to him by Congress, and subject, in respect of the formal qualities of his acts, to the restrictions, if any, accompanying the grant, but not to any others. One will not find such restrictions either in the statute itself or in the Constitution back of it. The Constitution of the United States is not a code of civil practice.

The prevailing opinion cites *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas,* 260 U. S. 48, and *Mahler* v. *Eby,* 264 U. S. 32, 44. One dealt with a delegation to a public utilities commission of the power to reduce existing rates if they were found to be unreasonable; the other a delegation to the Secretary of Labor of the power to deport aliens found after notice and a hearing to be undesirable residents. In each it was a

specific requirement of the statute that the basic fact conditioning action by the administrative agency be stated in a finding and stated there expressly. If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfilment, there is in truth no delegation, and hence no official action, but only the vain show of it. The analogy is remote between power so conditioned and that in controversy here.

Discretionary action does not become subject to review because the discretion is legislative rather than executive. If the reasons for the prohibition now in controversy had been stated in the order, the jurisdiction of the courts would have been no greater and no less. Investigation resulting in an order directed against a particular person after notice and a hearing is not to be confused with investigation preliminary and incidental to the formulation of a rule. An embargo under the act of 1794 would have been more than a nullity though there had been a failure to recite that what was done was essential to the public safety or to enumerate the reasons leading to that conclusion. If findings are necessary as a preamble to general regulations, the requirement must be looked for elsewhere than in the Constitution of the nation.

There are other questions as to the validity of § 9 (c) in matters unrelated to the delegation of power to the President, and also questions as to the Regulations adopted in behalf of the President by the Secretary of the Interior. They are not considered in the prevailing opinion. However, they have been well reviewed and disposed of in the opinion of Sibley, J., writing for the court below. It is unnecessary at this time to dwell upon them further.

The decree in each case should be affirmed.

SHANFEROKE COAL & SUPPLY CORP. *v.* WESTCHESTER SERVICE CORP.

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

No. 211. Argued December 7, 1934.—Decided January 7, 1935.

1. Denial by the District Court of an application for a stay of proceedings in an action on a contract until an arbitration shall be had in accordance with the terms of the contract, is in effect an order denying an interlocutory injunction, and is appealable, under Jud. Code, § 129, to the Circuit Court of Appeals. *Enelow* v. *New York Life Ins. Co., ante,* p. 379. P. 451.
2. As bearing on this question of jurisdiction on appeal, it is immaterial whether or not the terms of the contract sued on would preclude entry in a federal court of a decree for specific performance of the arbitration. P. 452.
3. The power of the District Court under § 3 of the U. S. Arbitration Act of February 12, 1925, to grant a stay of an action until arbitration has been had in accordance with the terms of a written agreement, is not confined to cases in which that court may itself compel arbitration under § 4 of the same Act, but extends to cases in which the arbitration agreement provides for compulsory proceedings exclusively in the state courts. P. 452.

70 F. (2d) 297, affirmed.

CERTIORARI * to review the reversal, on an interlocutory appeal, of an order of the District Court denying a stay of proceedings in an action on a contract between citizens of different States.

Mr. Alfred B. Nathan for petitioner.

Mr. Ernest E. Wheeler, with whom *Mr. Ralph Royall* was on the brief, for respondent.

* See Table of Cases Reported in this volume.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action was brought by the Shanferoke Coal & Supply Corporation, a citizen of Delaware, in the federal court for southern New York against the Westchester Service Corporation, a citizen of the latter State. The declaration alleged that the defendant had by a contract in writing agreed to purchase from the plaintiff a large quantity of coal to be taken in instalments throughout a period of years; and that the defendant had, after accepting part of the coal, repudiated the contract. The defendant set up in its answer, as a special defense, that prior to the commencement of the action a dispute had arisen concerning the construction of the contract, the rights and duties of the respective parties thereunder and its performance; that the contract contained an arbitration clause; and that prior to the commencement of the action the defendant had notified the plaintiff of its readiness and willingness to submit the dispute to arbitration and ever since had been ready and willing to do so; but that the plaintiff had refused to proceed with the arbitration. The defendant then moved that the action, and all proceedings therein, be stayed until an arbitration should be had in accordance with the terms of the contract sued on. The motion was heard on affidavits and counter affidavits.

The arbitration clause is as follows:

"In case any dispute should arise between the Buyer and Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties.

In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

The District Court interpreted the clause as making the arbitration enforceable only in state courts of New York; and on that ground denied the stay. On an appeal from the order of denial, the Court of Appeals held that even if the clause should be so interpreted, § 3 of the United States Arbitration Act authorized the stay.[1] It, therefore, reversed the order and directed the District Court to grant the stay, with leave to that court "to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration." 70 F. (2d) 297. This Court granted certiorari.

First. The order of the District Court denying the stay was not a final judgment appealable under § 128 of the Judicial Code. Being an interlocutory order, it was appealable to the Circuit Court of Appeals under § 129, only if the denial of the stay should be deemed the denial of an injunction. Compare *General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 432. That question we must first determine although it was not raised below or by counsel here. See *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379,

[1] Act of February 12, 1925, c. 213, § 3, 43 Stat. 883: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

382. For the reasons stated in *Enelow* v. *New York Life Ins. Co.*, decided this day, *ante*, p. 379, an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, is appealable under § 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of § 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense. Compare *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121. As bearing on this question of jurisdiction on appeal it is immaterial whether or not the terms of the contract sued on would preclude entry in a federal court of a decree for specific performance of the arbitration. Since the appeal here in question was taken within thirty days from the entry of the order denying the stay, the Court of Appeals had jurisdiction under § 129.

Second. The plaintiff contends that the District Court was without power to grant the stay, because the contract provides that arbitration can be compelled only by proceedings in a state court of New York. The provision is that "either party may apply to the Supreme Court of the State of New York for an order compelling specific performance of this arbitration agreement in accordance with the arbitration law of the State of New York." The contract does not in terms prohibit proceedings in the federal court. Whether it should be construed so as to exclude the bringing of a suit in the federal court to compel specific performance of the agreement to arbitrate, we have no occasion to decide. For the District Court was not asked, in the proceedings now under review, to compel specific performance. The motion was to stay the action until arbitration shall have been had; and the direction of the Court of Appeals was limited to granting a stay. Section 3 of the United States Arbitra-

tion Act provides broadly that the court may "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act.[2] *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 274, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court. See *Central National Bank* v. *Stevens,* 169 U. S. 432. Compare § 265 of the Judicial Code; *Kline* v. *Burke Construction Co.,* 260 U. S. 226.

Third. The plaintiff also contends that the defendant was not entitled to a stay because its answer raised no arbitrable issues; and because, on the facts developed by the affidavits, the defendant appears to have waived its rights under the arbitration clause by unreasonable delay

[2] In the lower federal courts there has been some difference of opinion as to whether a stay should be granted when the court is not in a position to compel arbitration. Compare *Danielsen* v. *Entre Rios Ry. Co.,* 22 F. (2d) 326, 328, with *The Silverbrook,* 18 F. (2d) 144. See, too, *The Beechwood,* 35 F. (2d) 41; *The Volsinio,* 32 F. (2d) 357, 358; *Ex parte De Simone,* 36 F. (2d) 773; *The Fredensbro,* 18 F. (2d) 983. Interpretations of the English arbitration statutes are in accord with the view adopted here. See *Law* v. *Garrett,* L. R. 8 Ch. Div. 26 (C. A.); *Austrian Lloyd S. S. Co.* v. *Gresham Life Assurance Society,* [1903] 1 K. B. 249; *Kirchner & Co.* v. *Gruban,* [1909] 1 Ch. Div. 413; *The Cap Blanco,* [1913] Pro. Div. 130.

in demanding arbitration. The reasons why these contentions are without merit are sufficiently stated in the opinion of the Court of Appeals.

Affirmed.

UNITED STATES ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

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

No. 221. Argued December 12, 13, 1934.—Decided January 7, 1935.

1. Adoption of a rule requiring rail carriers to substitute power-operated for hand-operated reversing gear, if the latter is found to render the engine unsafe or to subject employees or others to " unnecessary peril of life or limb," is within the scope of the authority vested in the Interstate Commerce Commission by the amended Boiler Inspection Act. P. 458.
2. The Boiler Inspection Act, as amended, imposed upon the Interstate Commerce Commission responsibility for adequate safety rules, and to that end it granted to the Commission the power not only of disapproving rules proposed by the carriers but also of requiring modifications of rules in force. P. 459.
3. This power may properly be exercised on complaint of Brotherhoods representing employees. P. 461.
4. The Act confers authority on the Commission to prescribe by rule specific devices, or changes in equipment, only where these are required in order to remove " unnecessary peril to life or limb "; and a finding by the Commission to that effect is essential to the existence of the authority. P. 462.
5. To support an order of the Commission amending the rules under the Boiler Inspection Act so as to require substitution of power-operated for hand-operated reversing gear in steam locomotives, it must appear, and not merely by inference, that the Commission found that the use of the hand gear, as compared with the use of the power gear, causes unnecessary peril to life or limb. In the absence of such a finding, the order is void. P. 463.

5 F. Supp. 929, affirmed.

APPEAL from a decree of the District Court, constituted of three judges, which set aside an order of the Interstate Commerce Commission amending the rules under the Boiler Inspection Act. The suit was brought against the United States by a number of railroad companies suing on behalf of themselves and other railroads. The Commission and the chiefs of two organizations of locomotive engineers and firemen intervened.

Mr. Daniel W. Knowlton, with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Mr. Elmer B. Collins* were on the brief, for the United States and the Interstate Commerce Commission.

Mr. Harold N. McLaughlin, with whom *Mr. Thomas Stevenson* was on the brief, for Johnston et al., intervener-appellants.

Messrs. Jacob Aronson and *Nye F. Morehouse,* with whom *Messrs. R. V. Fletcher, Sidney S. Alderman, H. Z. Maxwell, Clarence A. Miller,* and *Alfred P. Thom, Jr.,* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a direct appeal from the decree of the federal court for northern Ohio, setting aside an order, under the Boiler Inspection Act, entered by the Interstate Commerce Commission on January 5, 1933.

At the date of the order there were in use in the United States about 31,597 steam locomotives equipped with hand reverse gear and 28,925 equipped with power reverse gear.[1] Prior to the order, Rule 157, which prescribes the

[1] As described in the carriers' bill: "The reversing gear, or 'reverse gear' as it is usually called, of a steam locomotive is the mechanism which controls the position and movement of the locomotive valve

reverse gear on locomotives, left it optional with railroads to equip them with either hand operated or power operated reverse gear.[2] The order amended that rule so as to require the railroads to equip "with a suitable type of power operated reverse gear" all steam locomotives built on or after April 1, 1933; and similarly to equip, "the first time they are given repairs defined by the United States Railroad Administration as Class 3, or heavier," all steam locomotives then in road service "which weigh on driving wheels 150,000 pounds or more," and all then used in switching service "which weigh on driving wheels 130,000 pounds or more." The order required that, in any event, all such steam locomotives be so equipped before January 1, 1937; and that "air operated reverse gear [including thus power gear already installed] shall have a suitable steam connection" so arranged "that in case of air failure steam may be quickly used to operate the re-

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gear and valves which admit steam into the cylinders, and it is by means of this mechanism that the direction of movement of the locomotive is controlled, and the proper and economical use of steam is accomplished. Two general classes of reverse gears are in use, viz: (1) Manually operated reverse gears which depend upon the use of muscular force of the engineer and the force exerted by the counterbalancing weights and springs, for their operation; and (2) power reverse gears which supplement the above-mentioned forces with an auxiliary mechanism which, in normal operation, brings the force of compressed air into play, so that less muscular effort is normally required to be put forth by the engineer in using this type of gear. The engineer operates either class of gear by means of either a lever or handwheel (used with screw type of gear) located near his seatbox in the locomotive cab."

[2] Rule 157: "Reverse Gear.—Reverse gear, reverse levers, and quadrants shall be maintained in a safe and suitable condition for service. Reverse lever latch shall be so arranged that it can be easily disengaged, and provided with a spring which will keep it firmly seated in quadrant. Proper counterbalance shall be provided for the valve gear."

verse gear." A. Johnston *v.* Atlantic Coast Line R. Co., 190 I. C. C. 351.

The order of the Commission was entered on a complaint of the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. The complaint alleged, in substance, that while power reverse gear is a suitable, safe and practical device, manually operated reverse gear is inherently unsafe and unsuitable in principle and design; that it subjects employees and the traveling public to unnecessary peril; and that the use of locomotives equipped with hand reverse gears violates the Boiler Inspection Act. The complaint prayed that the Commission prescribe rules requiring that all steam locomotives be equipped "with power reverse gear, or other devices adequate to protect the employees upon said locomotives from unnecessary peril to life or limb, as provided in section 2," of the Act.

Practically all the railroads of the United States were made respondents. They challenged in their answers the jurisdiction of the Commission on the grounds that the procedure was unauthorized and that a power reverse gear was not a safety device or appliance within the meaning of § 2 of the Boiler Inspection Act; denied the essential allegations of the complaint; and, as additional reason for refusing its prayer, set up the impaired financial condition of the carriers. These issues were referred for hearing to an examiner. Fifty-five days were devoted to the taking of testimony. The witnesses numbered 337. Their testimony covered 6,491 pages. There were introduced, in addition, 109 exhibits, many of them voluminous. The proposed report of the Examiner occupies 40 pages of the printed record in this Court; and the railroads' exceptions to it, 60 pages. The exceptions were heard by a Division of the Commission consisting of three

members; and reargument before the whole Commission was denied.

This suit to set aside the order was brought by Baltimore & Ohio Railroad and other carriers, suing on behalf of themselves and substantially all the other railroads. The original defendant was the United States. The Commission, Grand Chief Johnston of the Brotherhood of Locomotive Engineers and President Robertson of the Brotherhood of Locomotive Firemen and Enginemen are defendants by intervention. The case was heard by the District Court, three judges sitting, on a transcript of the record before the Commission. The railroads again contended that the Commission lacked authority to entertain the complaint. They insisted also that the order was void for lack of essential findings of fact. These objections were overruled. But the court, citing among others, *The Chicago Junction Case,* 264 U. S. 258 and *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, set the order aside, on the ground that the Commission had acted arbitrarily, in failing to give consideration and legal effect to pertinent, uncontradicted facts having a controlling bearing upon the issues, and in disregarding undisputed evidence. 5 F. Supp. 929. An appeal to this Court by all the defendants was allowed. The appellants contended that the action of the District Court constituted substitution of its judgment for that of the Commission. The argument here was devoted, in large part, to the consideration of the findings of the lower court charging disregard by the Commission of the evidence before it. For reasons which will be stated later, we have no occasion to enter upon that enquiry.

First. The Commission clearly has authority, in an appropriate proceeding, to forbid the use of a locomotive equipped with a manually operated reverse gear if, by reason thereof, the engine is rendered unsafe or subjects employees of the railroad or others to " unnecessary peril

to life or limb." The substitution of power operated reverse gear for manually operated reverse gear, might conceivably be found necessary to promote safety, even if it did so only indirectly by preventing the impairment of the health of engineers through excessive exertion or fatigue. To require the installation of power operated reverse gear is, in its nature, within the scope of the authority delegated to the Commission. For " the power delegated to the Commission by the Boiler Inspection Act as amended is a general one.[3] It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 611.

Second. The railroads contend that, in the proceeding under review, the Commission lacks authority to make any change of the existing rule concerning reverse gears; that authority to initiate changes in existing rules was denied to it; that the rules governing boilers and their appurtenances approved June 2, 1911, and the additional ones governing locomotives, tenders and appurtenances approved October 11, 1915, cannot be changed except upon application of the carriers or with their consent. The argument is that the Boiler Inspection Act is an independent and complete piece of legislation and thus the Commission is denied in respect to locomotives those general powers which it exercises in other connections; that by the original Act of 1911 the right to initiate rules was by § 5 conferred not upon the Commission, but upon the several railroads and, only to the extent that one or more of the carriers failed to act within three months, upon the chief inspector; that the Commission's power of requiring modifications was limited to the rules originally filed; that in respect to subsequent changes therein,

[3] February 17, 1911, c. 103, § 2, 36 Stat. 913; amended March 4, 1915, c. 169, 38 Stat. 1192; June 7, 1924, c. 355, 43 Stat. 659.

its sole function is that of approval or disapproval of the carriers' proposals; and that the Commission's only other authority in respect to locomotives is that, conferred by § 6, of reviewing the action of the chief inspector in declaring individual locomotives unfit for service.

To hold that the authority of the Commission is thus limited would defeat, in large measure, the purpose of the legislation; and would be inconsistent with long established practice. Congress imposed the strictly administrative duties, in the main, upon the chief inspector. But it specifically directed, in § 6, that the "first duty [of the district inspectors] shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission." Upon the Commission were conferred, besides some strictly administrative powers, both quasi-legislative and quasi-judicial functions. The latter it was authorized to exercise only in the appellate capacity of reviewing, under § 6, orders of the chief inspector declaring an individual locomotive unserviceable. Its legislative power was to be exercised in the making of rules. Section 5 of the original Act provided that "each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier." When this Act was passed, in 1911, there were doubtless already in force on each railroad some rules established by the carrier. And likewise, in 1915 and in 1924, when the scope of the Act was extended, there were doubtless in force on each railroad rules established by the carrier governing parts, appurtenances or engines, not falling within the field covered by the previously existing legislation. Naturally those carrier-

rules would be the starting point in the Commission's rule making; and, naturally, it would be much influenced, as well as instructed, by the chief inspector's proposals or recommendations. But the responsibility for rules adequate to ensure safety was imposed by Congress upon the Commission; and to discharge that duty, it was essential that the Commission, also, should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force. The power so conferred may obviously be exercised, as was done here, on complaint of the Brotherhoods representing employees directly affected.

In the *Napier* case, the question directly before the Court was not the authority of the Commission to initiate rules. It was the validity of state laws and rules prescribing specific safety devices on locomotives. But the objection now raised by the railroads was discussed by counsel and was considered by the Court. The validity of the state laws and regulations was challenged on the ground that the Boiler Inspection Act had occupied the field; and as the question whether it had done so was one of statutory construction, the provisions of the Act were necessarily examined. The conclusion that the Commission possesses the authority to make rules on its own initiative, or upon complaint, was the basis of the decision there made. (See pp. 611–613.) Referring to the argument of the States " that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521," we said: " The duty of the Commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which the fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not ' in proper condition ' for operation. Thus the Commission

sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915 and has been extensively exercised since." In closing the opinion, we added: "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

In the *Napier* case this Court listed in the margin 18 rules which had, before 1925, been amended by order of the Commission.[4] Acting upon the suggestion there made by this Court, the state authorities and the Brotherhoods applied to the Commission for relief in proceedings similar to those here under review and rules were prescribed by it. All the railroads either conceded its authority to do so or acquiesced in its final orders. Cab Curtain Case, 142 I. C. C. 199, 201; Fire Door Case, 151 I. C. C. 448, 450. Compare Rules for Testing other than Steam Power Locomotives, 122 I. C. C. 414; *Staten Island Rapid Transit Ry. Co.* v. *Public Service Commission,* 16 F. (2d) 313.

Third. The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound. The Act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable. The operation of an engine, however equipped, involves some "danger to life or limb." At common law the carriers were "free to determine how their boilers should be kept

[4] The railroads state that the Commission's orders disclose that "a considerable number" of the changes were brought about as a result of conferences between the chief inspector and committees representing all the railroads, or upon requests of representatives of the carriers, which modifications were agreed to by the representatives of the employees interested and by the chief inspector.

in proper condition for use without unnecessary danger." *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 529. And the Act conferred authority to prescribe by rule specific devices, or changes in the equipment, only where these are required to remove " unnecessary peril to life or limb." The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, *The Chicago Junction Case,* 264 U. S. 258, 263–265,[5] the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States,* 282 U. S. 194.

The primary question of fact presented for determination was, as the report of the Commission states, " whether the use of locomotives equipped with hand reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb." The report discusses, at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail; and concludes with " findings " that, to a certain extent, the change should be made.[6] But whether the use of any or all types of

[5] Compare *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, 527–529.

[6] The closing paragraphs of the report are: " On the record in this case we conclude and find that the safety of employees and travelers on railroads requires that all steam locomotives built on or after April 1, 1933, be equipped with a suitable type of power-operated reverse gear.

" We further find that all steam locomotives used in road service built prior to April 1, 1933, which weigh on driving wheels 150,000 pounds or more, and all steam locomotives used in switching service built prior to April 1, 1933, which weigh on driving wheels 130,000 pounds or more, shall have such power-operated reverse gear applied the first time they are given repairs defined by the United States

steam locomotives "equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb," is left entirely to inference. This complete absence of "the basic or essential findings required to support the Commission's order" renders it void. *Florida* v. *United States,* 282 U. S. 194, 215. Compare *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 58–59; *Mahler* v. *Eby,* 264 U. S. 32, 44–45.[7]

In the *Florida* case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the "complete statement of the grounds of the Commission's determination" which was declared in *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of

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Railroad Administration as class 3, or heavier, and that all such locomotives shall be so equipped before January 1, 1937.

"We further find that air-operated power reverse gear should have a suitable steam connection so arranged and maintained that it can quickly be used in case of air failure.

"An appropriate order amending our rules for the inspection and testing of steam locomotives and tenders and their appurtenances to give effect to these findings will be entered."

[7] The objection presented here is similar to that urged upon the Court in *United States* v. *Louisiana,* 290 U. S. 70, 80. There, however, the Court was satisfied that the essential findings had been made, although "the particular form in which they were cast [was] not to be commended." Compare *Georgia Comm'n* v. *United States,* 283 U. S. 765, 773; *Alabama* v. *United States,* 283 U. S. 776, 779; *Louisiana Public Service Comm'n* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 132; *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, 481–483; *Ohio* v. *United States,* 292 U. S. 498, 511; *Montana* v. *United States,* 2 F. Supp. 448, aff'd 290 U. S. 593; *Kentucky* v. *United States,* 3 F. Supp. 778. See, too, *New York* v. *United States,* 257 U. S. 591, 600.

the reviewing court, compare *Virginian Ry.* v. *United States,* 272 U. S. 658, 675, is not fatal to the validity of the order. It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report " shall state the conclusions of the Commission together with its decision." [8] Compare *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 487; *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But § 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity.[9]

Affirmed.

GREGORY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 127. Argued December 4, 5, 1934.—Decided January 7, 1935.

1. A corporation wholly owned by a taxpayer transferred 1000 shares of stock in another corporation held by it among its assets to a new corporation, which thereupon issued all of its shares to the

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[8] The original Act of February 4, 1887, c. 104, § 14, 24 Stat. 384, which had prescribed that the report should " include findings of fact upon which the conclusions of the Commission are based," was amended by § 3 of the Act of June 29, 1906, c. 3591, 34 Stat. 589, so as to require (except in reparation cases) that it shall make a report " which shall state the conclusions of the commission together with its decision, order, or requirement in the premises."

[9] A different rule has been applied to executive action not subject to review. Compare *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 458; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15.

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taxpayer. Within a few days the new corporation was dissolved and was liquidated by the distribution of the 1000 shares to the taxpayer, who immediately sold them for her individual profit. No other business was transacted, or intended to be transacted, by the new corporation. The whole plan was designed to conform to § 112 of the Revenue Act of 1928 as a "reorganization," but for the sole purpose of transferring the shares in question to the taxpayer, with a resulting tax liability less than that which would have ensued from a direct transfer by way of dividend. *Held:* while the plan conformed to the terms of the statute, there was no reorganization within the intent of the statute. P. 468.

2. By means which the law permits, a taxpayer has the right to decrease the amount of what otherwise would be his taxes, or altogether to avoid them. P. 469.
3. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation here, because the transaction upon its face lies outside the plain intent of the statute. P. 470.

69 F. (2d) 809, affirmed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, 27 B. T. A. 223, which set aside an order of the Commissioner determining a deficiency in income tax.

Mr. Hugh Satterlee, with whom *Messrs. George W. Saam, Rollin Browne,* and *Charles A. Roberts* were on the brief, for petitioner.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key* and *Norman D. Keller* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Ellsworth C. Alvord* and *Edward H. McDermott,* and by *Messrs. Albert E. James, A. Calder Mackay, George M. Morris, Willis D. Nance, Charles B. Rugg, Whitney North Seymour,* and *Harry N. Wyatt,* in support of petitioner's contentions.

* See Table of Cases Reported in this volume.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner in 1928 was the owner of all the stock of United Mortgage Corporation. That corporation held among its assets 1,000 shares of the Monitor Securities Corporation. For the sole purpose of procuring a transfer of these shares to herself in order to sell them for her individual profit, and, at the same time, diminish the amount of income tax which would result from a direct transfer by way of dividend, she sought to bring about a "reorganization" under § 112 (g) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818, set forth later in this opinion. To that end, she caused the Averill Corporation to be organized under the laws of Delaware on September 18, 1928. Three days later, the United Mortgage Corporation transferred to the Averill Corporation the 1,000 shares of Monitor stock, for which all the shares of the Averill Corporation were issued to the petitioner. On September 24, the Averill Corporation was dissolved, and liquidated by distributing all its assets, namely, the Monitor shares, to the petitioner. No other business was ever transacted, or intended to be transacted, by that company. Petitioner immediately sold the Monitor shares for $133,333.33. She returned for taxation as capital net gain the sum of $76,007.88, based upon an apportioned cost of $57,325.45. Further details are unnecessary. It is not disputed that if the interposition of the so-called reorganization was ineffective, petitioner became liable for a much larger tax as a result of the transaction.

The Commissioner of Internal Revenue, being of opinion that the reorganization attempted was without substance and must be disregarded, held that petitioner was liable for a tax as though the United corporation had paid her a dividend consisting of the amount realized from the sale of the Monitor shares. In a proceeding before the

Board of Tax Appeals, that body rejected the commissioner's view and upheld that of petitioner. 27 B. T. A. 223. Upon a review of the latter decision, the circuit court of appeals sustained the commissioner and reversed the board, holding that there had been no "reorganization" within the meaning of the statute. 69 F. (2d) 809. Petitioner applied to this court for a writ of certiorari, which the government, considering the question one of importance, did not oppose. We granted the writ.

Section 112 of the Revenue Act of 1928 deals with the subject of gain or loss resulting from the sale or exchange of property. Such gain or loss is to be recognized in computing the tax, except as provided in that section. The provisions of the section, so far as they are pertinent to the question here presented, follow:

"Sec. 112. (g) *Distribution of stock on reorganization.*—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized. . . .

"(i) *Definition of reorganization.*—As used in this section . . .

"(1) The term 'reorganization' means . . . (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, . . ."

It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result

or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. *United States* v. *Isham,* 17 Wall. 496, 506; *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, 395–6; *Jones* v. *Helvering,* 63 App. D. C. 204; 71 F. (2d) 214, 217. But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said.

When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made "in pursuance of a plan of reorganization" [§ 112(g)] of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function.

When that limited function had been exercised, it immediately was put to death.

In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

Judgment affirmed.

TAYLOR *v.* STERNBERG, TRUSTEE IN BANKRUPTCY.[1]

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

No. 261. Argued December 14, 1934.—Decided January 7, 1935.

1. After the filing of a petition in bankruptcy against a corporation in the federal district court, a state court is without jurisdiction to make an order fixing the compensation of a receiver and his attorney theretofore appointed by it. P. 472.
2. In respect of sums thus erroneously awarded to and retained by the receiver and his attorney, they are not "adverse" claimants, and the bankruptcy court has authority to compel them to turn over the same by summary proceeding and order. P. 473.

71 F. (2d) 157, affirmed.

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[1] Together with No. 262, *Duty* v. *Sternberg, Trustee in Bankruptcy,* certiorari to the Circuit Court of Appeals for the Eighth Circuit.

CERTIORARI [2] to review a judgment affirming a judgment of the District Court, sitting in bankruptcy, which affirmed an order of the referee granting the trustee's application for a turnover order.

Mr. W. N. Ivie submitted for petitioners.

Mr. Clinton R. Barry for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases, depending upon the same facts, present the same question. On January 10, 1931, in an insolvency proceeding, Taylor was appointed by a state chancery court in Arkansas receiver of the Parks Dry Goods Company, and Duty as his attorney. On February 11th, a month later, a petition in bankruptcy against the corporation was filed in the federal district court having jurisdiction. Two days later, the corporation was adjudicated a bankrupt. On the same day, the chancery court allowed Taylor compensation as receiver in the sum of $1500, and Duty compensation as attorney in the sum of $500. The receiver turned over the estate to the trustee with the exception of these sums, which petitioners refused to deliver. The trustee applied for a summary order upon petitioners, directing them to turn over to him the sums thus withheld. The referee granted the trustee's application, which the district court, sitting in bankruptcy, affirmed; and this, in turn, was affirmed upon appeal by the circuit court of appeals. 71 F. (2d) 157. Upon these facts, the question presented is whether the bankruptcy court had authority to compel the turn-over by summary proceeding and order, or whether petitioners

[2] See Table of Cases Reported in this volume.

were adverse claimants so that a plenary action was required.

Upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of the filing of the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 344; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *In re Diamond's Estate*, 259 Fed. 70, 73. This applies while the possession is constructive as well as when it becomes actual. *Mueller* v. *Nugent*, 184 U. S. 1, 14; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432–433; *Orinoco Iron Co.* v. *Metzel*, 230 Fed. 40, 44–45, and cases cited.

The status of a receiver is unlike, for example, that of an assignee for the benefit of creditors. The receiver is an officer of the court which appoints him. *Stuart* v. *Boulware*, 133 U. S. 78, 81. The property in his hands is not, in a legal sense, in his possession. It is in the possession of the court, whose appointee he is, by him as its officer. *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297; *Fosdick* v. *Schall*, 99 U. S. 235, 251. In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. This result was binding upon the state court and equally binding upon the receiver as custodian for that court. Before the petition in bankruptcy was filed, the receiver's compensation as well as that of his counsel were matters wholly within the control of the state court. *Stuart* v. *Boulware, supra*, at pp. 81–82; High on Receivers, 4th ed., § 781. But with the

filing of the petition in bankruptcy, the power of the state court in that respect ceased; and its order fixing the compensation of the receiver and his counsel was a nullity because made without jurisdiction, such jurisdiction then having passed to the bankruptcy court. *Gross* v. *Irving Trust Co., supra.*

Since the order of the state court was the sole foundation for their claims and that was void, petitioners had no more right to the sums subtracted or to be subtracted from the estate than they had to the remainder of the estate. That estate, including such sums, was still *in custodia legis*—only the possession had passed automatically from the state court to the bankruptcy court. Thereafter, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court and, therefore, not adversely; and petitioners, in respect of that part of it erroneously awarded as compensation, were in no sense adverse claimants. Their claims were colorable only and subject to the summary power of the bankruptcy court. *In re Watts,* 190 U. S. 1, 27; *In re Diamond's Estate, supra,* at p. 74; *Moore* v. *Scott,* 55 F. (2d) 863; *Bank of Andrews* v. *Gudger,* 212 Fed. 49; *In re Crosby Stores, Inc.,* 61 F. (2d) 812, 814.

Cases dealing with assignments, like *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, cited by petitioners, in no way militate against this conclusion. The situation presented in each of those cases substantially differs from that presented here. See *May* v. *Henderson,* 268 U. S. 111, 115–6; *In re Louis Neuburger, Inc.,* 233 Fed. 701, aff'd 240 Fed. 947. Moreover, the status of a receiver and that of an assignee, as already sufficiently appears, is essentially different.

Judgment affirmed.

Syllabus.

DIMICK *v.* SCHIEDT.

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

No. 78. Submitted November 9, 1934.—Decided January 7, 1935.

1. Under the Seventh Amendment, a federal court, finding a verdict inadequate, is without power to add to it by refusing to grant the plaintiff a new trial if the defendant will accept an increase which the court deems sufficient. So *held* in an action for personal injuries due to negligence.
2. In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. P. 476.

   English cases examined on the power of the courts to increase damages, *super visum vulneris*, in actions for mayhem; and upon writ of inquiry, and in actions of debt.
3. Upon an examination of many English authorities, it is concluded that while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions sounding in tort such as the present one. P. 482.
4. The authority exercised by federal courts of denying a motion for a new trial because of an excessive verdict if the plaintiff will remit the excess, is embedded in long practice, and has plausible support in the view that what remains of the recovery was found by the jury in the sense that it was included in the verdict along with the unlawful excess, the effect of the remittitur being merely to lop off an excrescence; but where the verdict is too small, an increase by the court is a bald addition of something never included in the verdict. The trial court cannot by assessing an additional amount of damages with the consent of the defendant only, bring the constitutional right of the plaintiff to an end in respect of a matter of fact which no jury has ever passed upon, either explicitly or by implication. P. 482.
5. In the discharge of its duty of construing and upholding the Constitution, the Court must ever be alert to prevent the subversion of

fundamental principles through the extension of doubtful precedents by analogy. P. 485.

6. Maintenance of the jury as a fact-finding body is of such importance, and occupies so firm a place in our history and jurisprudence, that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. P. 486.
7. The effect of the Seventh Amendment was to adopt the common-law rules of jury trial as they existed in 1791; and these, being in effect part of the Constitution, can not be altered now under pretense of adapting the common law to altered conditions. P. 487.

70 F. (2d) 558, affirmed.

CERTIORARI * to review the reversal of a judgment for damages in an action for personal injuries, entered on denial of the plaintiff's motion for a new trial, after the plaintiff had declined to accept an increase offered by the court and agreed to by the defendant.

Messrs. Leo. M. Harlow and *David H. Fulton* submitted for petitioner.

Mr. John G. Palfrey submitted for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by respondent (plaintiff) against petitioner (defendant) in the federal district court for the district of Massachusetts to recover damages for a personal injury resulting from the alleged negligent operation of an automobile on a public highway in Massachusetts. The jury returned a verdict in favor of respondent for the sum of $500. Respondent moved for a new trial on the grounds that the verdict was contrary to the weight of the evidence, that it was a compromise verdict, and that the damages allowed were inadequate. The trial court ordered a new trial upon the last named

* See Table of Cases Reported in this volume.

ground, unless petitioner would consent to an increase of the damages to the sum of $1500. Respondent's consent was neither required nor given. Petitioner, however, consented to the increase, and in accordance with the order of the court a denial of the motion for new trial automatically followed. Respondent appealed to the circuit court of appeals, where the judgment was reversed, the court holding that the conditional order violated the Seventh Amendment of the Federal Constitution in respect of the right of trial by jury. 70 F. (2d) 558. That court recognized the doctrine, frequently stated by this court, that in the case of an excessive verdict it is within the power of the trial court to grant defendant's motion for a new trial unless plaintiff remit the amount deemed to be excessive, but held that the trial court was without power to condition the allowance of plaintiff's motion for a new trial upon the refusal of defendant to consent to an increase in the amount of damages.

The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 269 of the Judicial Code, as amended, U. S. C. Title 28, § 391, confers upon all federal courts power to grant new trials "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson* v. *Utah,* 170 U. S. 343, 350; *Patton* v. *United States,* 281 U. S. 276, 288. A careful examination of the English reports prior to that time fails to disclose any

authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions.

1. In actions for mayhem, there are numerous ancient cases to be found in the Year Books, and occasional cases at a somewhat later period, in which the right of the court to increase damages awarded plaintiff, *super visum vulneris,* is recognized. We deem it unnecessary to catalogue or review these cases. Many of them are referred to in 2 Bacon's Abridgment (7th ed.) 611, and Sayer's Law of Damages (1770), p. 173 *et seq.* The last case called to our attention or that we have been able to find that recognized the rule is that of *Brown* v. *Seymour* (1742), 1 Wils. 5, where the court, while conceding its power to increase damages upon view of the party maimed, refused to exercise it, holding the damages awarded were sufficient. We have found no case where the power was exercised affirmatively since *Burton* v. *Baynes* (1733), reported in Barnes Practice Cases, 153, where the court, upon view of the injury, increased the damages from £11, 14 s., to £50. The power of the trial court to increase damages in such cases was seldom exercised; and it seems quite clear, from an examination of the decisions and of the English Abridgments, that the generally approved practice confined its exercise to the court sitting *en banc.* Moreover, the application for the increase was made by the plaintiff, considered upon a view of his wound, and, when favorably acted upon, granted absolutely and not as a condition upon which to base a denial of a new trial. Indeed, the practice of granting new trials in such cases did not come into operation until a later date. In any event, the rule was obsolete in England at the time of the adoption of the Constitution; and we are unable to find that it ever was acted upon or accepted in the colonies, or by any of the federal or state courts since the adoption of the Constitu-

tion. It was expressly rejected in an early case in South Carolina. *McCoy* v. *Lemon,* 11 Rich. 165. There, the plaintiff, as a result of an altercation with the defendant, lost an eye and the use of one thumb. The jury returned a verdict for $30. The trial court, although conceding the inadequacy of the damages, held that no court possessed the power to bring about an increase or decrease of the amount found by a jury in any other way than by granting a new trial. The Court of Appeals sustained the trial court. "Not a single case," the appellate court said, "has been found in any book of American reports in support of the present motion, notwithstanding the great research displayed by counsel. Neither has there been, for a period of more than a century, any recognition of the rule by any adjudged case in England to which we have been able to procure access." After pointing out the jealous regard of the American people, as evidenced by constitutions and legislation, for the right of jury trial, the court said that the judgment of the jury had been incorporated as an indispensable element in the judicial administration of the country; that in all cases sounding in damages, these damages must be assessed by the jury and not by the court independently thereof; and that where the verdict was excessive or trifling, the remedy was to submit the case to the judgment of another jury. In Mayne's Treatise on Damages (9th ed.), the first edition of which appeared in 1856, after referring to the long current of English decisions in respect of the power of the court to increase damages in mayhem cases, the author (p. 571) said he was not aware of an instance in which such a jurisdiction had been exercised in modern times. And see *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, 252.

2. The power of the court to increase or diminish damages assessed upon a writ of inquiry was likewise upheld; but this upon the ground that the justices might themselves have awarded damages without the writ, and the

inquisition, therefore, was nothing more than an inquest for their information. Sayer's Law of Damages, 194; *Beardmore* v. *Carrington,* 2 Wils. 244, 248; Brooke's New Cases, March's Translation, 56–57; 2 Bacon's Abridgement (7th ed.), 612. But even this rule seems long since to have fallen into disuse, the more modern practice being to award a new writ of inquiry in all cases in which the court would award a new trial. Mayne's Treatise on Damages, 572, 573, citing Chitty's Practice, 14th ed., p. 1326.

3. So it was held in some of the old cases that where the amount of plaintiff's demand was certain, as, for example, in an action of debt, the court had authority to increase or abridge the verdict of the jury. Mayne's Treatise on Damages, 571; Sayer's Law of Damages, 177.

In *Beardmore* v. *Carrington, supra,* decided in 1764, the court reviewed the subject and reached the conclusion that the English courts were without power to either increase or abridge damages in any action for a personal tort, unless in the exceptional cases just noted. The decision is most instructive, as a brief quotation will show. The italics are in the original.

" It is clear," the court said at p. 248, " that the practice of granting new trials is *modern,* and that courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference between cases of damages which [may] be certainly seen, and such as are ideal, as between *assumpsit, trespass for goods* where the sum and value may be measured, and actions of *imprisonment, malicious prosecution, slander and other personal torts,* where the damages are matter of opinion, speculation, ideal; there is also a difference between a principal verdict of a jury, and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed

themselves without any inquest at all; only in the case of *maihem,* courts have in all ages interposed in that single instance only; as to the case of the writ of inquiry in the year-book of *H.*4, we doubt whether what is said by the court in that case be right, *That they would abridge the damages unless the plaintiff would release part thereof,* because there is not one case to be found in the year-books wherever the court abridged the damages after a principal verdict, and this is clear down to the time of *Palmer's Rep.* 314, much less have they interposed in increasing damages, except in the case of *maihem; . . .*"

Sayer, writing between 1765 and 1770 (Sayer's Law of Damages, 173) says that the power of increasing or abridging damages which have been assessed by the jury "has not for many years been exercised by courts in any action except in an action for a corporal hurt"; by which he means, as appears further along, in cases of mayhem. Mayne, in the treatise already cited says (p. 571) that it was always admitted "that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." Recent English decisions fully confirm this view in respect of the common law rule as it existed at the time of the adoption of the Constitution. Thus Mayne (p. 580) says:

"When an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial. In the absence of agreement the Court has no power to reduce the damages to a reasonable sum instead of ordering a new trial. It would seem also from what was said in the case in which this was recently decided, that where the damages are too small, the Court cannot with the defendant's consent increase them, if the plaintiff asks for a new trial."

It is true that *Belt* v. *Lawes,* L. R. 12 Q. B. Div. 356, upheld the authority of the court to deny a new trial

upon the consent of the plaintiff to reduce the damages to an amount which the court would consider not excessive had they been given by the jury; and that the Master of the Rolls in his opinion declared that he was by no means prepared to say that the court might not refuse a new trial if a defendant would agree that the damages should be larger. But this doctrine was expressly repudiated by the House of Lords in *Watt* v. *Watt,* L. R. [1905] A. C. 115; and *Belt* v. *Lawes* was definitely overruled.

In the *Watt* case, the principal opinion (pp. 119–120) pointed out that the notion that the court with the consent of the plaintiff could reduce the amount of the damages probably arose from the fact that in the old cases the courts had "adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable"; that this indirect method shows that the plaintiff's assent was required; and that, since the defendant was not likely to refuse his assent to a proceeding intended for his benefit, the theory of the cases seems to have been that the right of the court to interfere with the verdict depended upon the assent of both parties. It was conceded in the opinions delivered to the House that there had been a certain amount of practice in accordance with the course complained of, but in principle, it was said, this practice was indefensible, and that no reasoned vindication of it had been found. The prevailing opinions in *Barbour & Co.* v. *Deutsche Bank,* L. R. [1919] A. C. 304, while distinguishing the case then under review, are (as all the opinions are) in full accord with the decision in the *Watt* case. Lord Phillimore, in the course of his opinion (p. 335), characterized that decision as one of inconvenient rigor but nevertheless unimpeachable and logical. The principle established, he said, was this:

"Where damages are at large and the Court of Appeal is of opinion that the sum awarded is so unreasonable as to show that the jury has not approached the subject in a proper judicial temper, has admitted considerations which it ought not to have admitted, or rejected or neglected considerations which it ought to have applied, it is the right of the party aggrieved to have a new trial. He is not to be put off by the Court saying that it will form its opinion as to the proper sum to be awarded, and reduce or enlarge the damages accordingly. He is entitled to an assessment by a jury which acts properly. He is not to be put off by a composite decision, or I might describe it as a resultant of two imperfect forces—an assessment partly made by a jury which has acted improperly and partly by a tribunal which has no power to assess."

From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration.

We could well rest this opinion upon that conclusion, were it not for the contention that our federal courts from a very early day have upheld the authority of a trial court to deny a motion for new trial because damages were found to be excessive, if plaintiff would consent to remit the excessive amount, and that this holding requires us to recognize a similar rule in respect of increasing damages found to be grossly inadequate. There is a decision by Mr. Justice Story, sitting on circuit, authorizing such a remittitur, as early as 1822. *Blunt* v. *Little,* 3 Mason 102. There, the jury returned a verdict

for $2,000 damages, suffered as a result of a malicious arrest. Defendant moved for a new trial on the ground that the damages were excessive. The court asserted its power to grant a new trial upon that ground, but directed that the cause should be submitted to another jury unless plaintiff was willing to remit $500 of the damages. This view of the matter was accepted by this Court in *Northern Pacific R. Co.* v. *Herbert,* 116 U. S. 642, 646–7, and has been many times reiterated. See, for example, *Arkansas Cattle Co.* v. *Mann,* 130 U. S. 69, 73; *Kennon* v. *Gilmer,* 131 U. S. 22, 29; *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312; *Gila Valley, G. & N. Ry. Co.* v. *Hall,* 232 U. S. 94, 103–5.

Since the decision of Mr. Justice Story in 1822, this court has never expressed doubt in respect of the rule, and it has been uniformly applied by the lower federal courts. It is, however, remarkable that in none of these cases was there any real attempt to ascertain the common law rule on the subject. Mr. Justice Story, in the *Blunt* case, cited two English cases antedating the Constitution in support simply of his conclusion that the court had power to grant a new trial for excessive damages, and thereupon announced without more that unless the plaintiff should be willing to remit $500 of his damages, the cause would be submitted to another jury. For the latter conclusion, no authority whatever was cited. The plaintiff remitted the amount, and the motion was overruled. The opinion in the *Herbert* case was delivered by Mr. Justice Field. Upon the question now under consideration, the opinion does no more than declare that the exaction, as a condition of refusing a new trial, that plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court, in support of which two American state cases and

the *Blunt* case are cited. The common law in respect of the matter is not referred to. The state cases cited are equally silent in respect of the common law rule.

The nearest approach to a reasoned opinion on the subject in any of the decisions is found in *Arkansas Cattle Co.* v. *Mann, supra.* In that opinion, the court states the contention to be that to make the decision of the motion for new trial depend upon a remission of part of the verdict is in effect a reëxamination by the court in a mode not known at the common law of facts tried by the jury, and therefore a violation of the Seventh Amendment. The court decided against this contention upon the authority of the *Blunt* case, the *Herbert* case, and certain American state decisions. English cases were referred to only upon the point that the court had authority to set aside the verdict and grant a new trial where the damages are palpably or outrageously excessive. No attempt was made to seek the common law rule, in respect of the precise contention which was made, by an examination of the English decisions or of the English practice prior to the adoption of the Constitution.

In the last analysis, the sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution, which we have been able to find.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts

during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Nevertheless, this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land. Compare *Judson* v. *Gray,* 11 N. Y. 408, 412.

That rule applies with peculiar force to the present case, since, accepting *Arkansas Cattle Co.* v. *Mann, supra,* and like cases, as settling the precise question there involved, they do not conclude the question here presented. That is to say, the power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it. As the court below correctly pointed out, in the case of a conditional remittitur, " a jury has already awarded a sum in excess of that fixed by the court as the basis for the remittitur, which at least finds some support in the early English practice; while in the second case, no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law."

The right of trial by jury is of ancient origin, characterized by Blackstone as " the glory of the English law " and " the most transcendent privilege which any subject can enjoy " (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), " . . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions, trial by jury has always been, and still is, generally re-

garded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States,* 281 U. S. 276, 312.

The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly

or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States,* 290 U. S. 371. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124.

It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken similarly to increase the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate. See, for example, *Carter* v. *Wells, Fargo & Co.,* 64 Fed. 1005; *Usher* v. *Scranton Ry. Co.,* 132 Fed. 405; *Glenwood Irr. Co.* v. *Vallery,* 248 Fed. 483; *United Press Assns.* v. *National Newspapers Assn.,* 254 Fed. 284; *Stetson* v. *Stindt,* 279 Fed. 209. This, it is true, is but negative evidence; but it is negative evidence of more than ordinary value. For, when we consider that during

the great length of time mentioned, the federal courts were constantly applying the rule in respect of the remission of excessive damages, the circumstance that the practice here in question in respect of inadequate damages was never followed or, apparently, its approval even suggested, seems highly significant as indicating a lack of judicial belief in the existence of the power.

State decisions in respect of the matter have been brought to our attention and have received consideration. They embody rulings both ways. A review of them we think would serve no useful purpose.

Judgment affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

What the trial court has done is to deny a motion for a new trial, for what seemed to it a good reason: that the defendant had given his binding consent to an increased recovery, which the court thought to be adequate, and thus to remove any substantial ground for awarding a new trial. In denying the motion the trial judge relied on two rules of the common law which have received complete acceptance for centuries. One is that the court has power to act upon a motion to set aside the verdict of a jury because inadequate or excessive, and in its discretion to grant or deny a new trial. *Railroad Co.* v. *Fraloff,* 100 U. S. 24, 31; *Wilson* v. *Everett,* 139 U. S. 616, 621; *Lincoln* v. *Power,* 151 U. S. 436, 438. The other, which is implicit in the first, is that it has power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted, and the authority to set aside a verdict which is not within those limits. *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 69, 74; cf. *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 87.

As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. *Railroad Co.* v. *Fraloff, supra,* 31; *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454, 456; *Fitzgerald & Mallory Construction Co.* v. *Fitzgerald,* 137 U. S. 98, 113; *Wilson* v. *Everett, supra,* 621; *Lincoln* v. *Power, supra,* 438; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 540. This is but a special application of the more general rule that an appellate court will not reëxamine the facts which induced the trial court to grant or deny a new trial.[1] *Barr* v. *Gratz,* 4 Wheat. 213, 220; *The Abbotsford,* 98 U. S. 440, 445; *Railroad Co.* v. *Fraloff, supra,* 31; *Terre Haute & Indiana Ry. Co.* v. *Struble,* 109 U. S. 381, 384, 385; *Fishburn* v. *Chicago, M. & St. P. Ry. Co.,* 137 U. S. 60, 61; *Ayers* v. *Watson,* 137 U. S. 584, 597; *Wilson* v. *Everett, supra,* 621; *Luckenbach S. S. Co.* v. *United States, supra,* 540.

If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it. But the question remains whether, in exercising this power of review, the trial judge should be reversed.

The decision of the Court is rested on the ground that the Constitution prohibits the trial judge from adopting

[1] The power of the English appellate courts to review such action has been enlarged by statute, and the motion itself must be made to the Court of Appeal. Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58; Rules of the Supreme Court of Judicature, Order 39. See *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 482, note 9.

the practice. Accordingly, I address myself to the question of power without stopping to comment on the generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury, or the extent to which that or analogous practice has been adopted and found useful in the courts of the several states. See Correction of Damage Verdicts by Remittitur and Additur, 44 Yale Law J. 318. The question is a narrow one: whether there is anything in the Seventh Amendment or in the rules of the common law, as it had developed before the adoption of the Amendment, which would require a federal appellate court to set aside the denial of the motion merely because the particular reasons which moved the trial judge to deny it are not shown to have similarly moved any English judge before 1791.

The Seventh Amendment commands that "in suits at common law," the right to trial by jury shall be preserved and that "no fact tried by a jury shall be otherwise reexamined by any court of the United States, than according to the rules of the common law." Such a provision of a great instrument of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury

trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons* v. *Bedford,* 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit.

Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.

Thus this Court has held that a federal court, without the consent of the parties, may constitutionally appoint auditors to hear testimony, examine books and accounts and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict, *Ex parte Peterson,* 253 U. S. 300; it may require both a general and a special verdict and set aside the general verdict for the plaintiff and direct a verdict for the defendant on the basis of the facts specially found, *Walker* v. *New Mexico & Southern Pacific R. Co.,* 165 U. S. 593; and it may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone, *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494. Yet none of these procedures was known to the common law. In fact, the very practice, so firmly imbedded in federal procedure, of making a motion for a new trial directly to the trial judge, instead

of to the court *en banc,* was never adopted by the common law.[2] But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury, to decide issues of fact, which it had exercised before the adoption of the Amendment. Compare *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 264.

If we apply that test to the present case it is evident that the jury's function has not been curtailed. After the issues of fact had been submitted to the jury, and its verdict taken, the trial judge was authorized to entertain a motion to set aside the verdict and, as an incident, to determine the legal limits of a proper verdict. A denial of the motion out of hand, however inadequate the verdict, was not an encroachment upon the province of the jury as the common law defined it. It would seem not to be any the more so here because the exercise of the judge's discretion was affected by his knowledge of the fact that a proper recovery had been assured to the plaintiff by the consent of the defendant. Thus the plaintiff has suffered no infringement of a right by the denial of his motion. The defendant has suffered none because he has con-

[2] In England, before the adoption of the Seventh Amendment, the motion was made not to the trial judge but to the court sitting *en banc.* Blackstone's Commentaries, v. 3, p. 391; Tidd's Practice, v. 2, pp. 819–821. By the Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58, see Order 39 of Rules of Supreme Court of Judicature, the motion was required to be made to the Court of Appeal, from whose decision an appeal might be taken to the House of Lords.

The original organization of the federal courts was capable of use in such a fashion that the motion could be made to the circuit court, something in the nature of a court *en banc,* but no such practice developed. Judiciary Act of 1789, c. 20, §§ 4, 17, 1 Stat. 73, 74, 83; Hinton, Power of Federal Appellate Court to Review Ruling on Motion for New Trial, 1 Univ. of Chicago L. Rev. 111, 113.

sented to the increased recovery, of which he does not complain.

It is upon these grounds, as well as the further one that the denial of a new trial may not be reviewed upon appeal, see *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* 75, that this Court has upheld the practice of the remittitur. Recognized more than a century ago by Mr. Justice Story in *Blunt* v. *Little,* 3 Mason 102, 107, it has been consistently used in the federal trial courts, and as consistently upheld in this Court. *Northern Pacific R. Co.* v. *Herbert,* 116 U. S. 642, 646, 647; *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* 72–76; *Kennon* v. *Gilmer,* 131 U. S. 22, 29, 30; *Clark* v. *Sidway,* 142 U. S. 682, 690; *Lewis* v. *Wilson,* 151 U. S. 551, 555; *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312; cf. *Gila Valley, G. & N. Ry. Co.* v. *Hall,* 232 U. S. 94, 104, 105; *Tevis* v. *Ryan,* 233 U. S. 273, 290; *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 334. In *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* at page 74, in considering at length the constitutional question, this Court said:

"The practice which this court approved in *Northern Pacific Railroad* v. *Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker* v. *Wood,* 1 T. R. 277; *Hewlett* v. *Crutchley,* 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages, 6th ed. 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to

determine when they are not of that character. To indicate before the passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint."

See also *Kennon* v. *Gilmer, supra,* 29; *Clark* v. *Sidway, supra,* 690; *Gila Valley, G. & N. Ry. Co.* v. *Hall, supra,* 104; *Belt* v. *Lawes,* L. R. 12 Q. B. D. 356, 358.

All that was there said is equally applicable to the present denial of a motion to set aside the verdict as inadequate. The defendant, who has formally consented to pay the increased amount, cannot complain. The plaintiff has suffered no denial of a right because the court, staying its hand, has left the verdict undisturbed, as it lawfully might have done if the defendant had refused to pay more than the verdict. The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.

The question with which we are now concerned—what considerations shall govern an appellate review of this discretionary action of the trial court—is one unknown to the common law, which provided for no such review. We are afforded but a meager and fragmentary guide if our review is to be controlled by the Seventh Amendment, read as though it had incorporated by reference the particular details of English trial practice exhibited by the law books in 1791. We know that as late as the middle of the eighteenth century the English courts, by directing an increase of the judgment where the verdict was thought to be inadequate, had exercised an extraordinary measure

of control over the verdict of the jury in cases of mayhem and battery; and that the practice of denying a new trial upon a remittitur had received some recognition in the English courts. *Belt* v. *Lawes, supra,* 359; *Watt* v. *Watt,* [1905] A. C. 115, 122. But in no recorded case does it appear that any English judge had considered the possibility of denying a new trial where the defendant had consented to increase the amount of recovery.

If our only guide is to be this scant record of the practice of controlling the jury's verdict, however fragmentary the state of its development at this period, and if we must deny any possibility of change, development or improvement, then it must be admitted that search of the legal scrap heap of a century and a half ago may commit us to the incongruous position in which we are left by the present decision: a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount, but it is powerless to deny the motion if its judgment is influenced by the defendant's consent to a comparable increase in the recovery.

But I cannot agree that we are circumscribed by so narrow and rigid a conception of the common law. The Judiciary Act of 1789, c. 20, 1 Stat. 73, which impliedly adopted the common law rules of evidence for criminal trials in federal courts, and which gave to the federal courts jurisdiction of equity as it had then been developed in England, and the state constitutions which adopted the common law as affording rules for judicial decision, have never been construed as accepting only those rules which could then be found in the English precedents. When the Constitution was adopted, the common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the

system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it. " This flexibility and capacity for growth and adaptation is," as the Court declared in *Hurtado* v. *California,* 110 U. S. 516, 530, " the peculiar boast and excellence of the common law." See also *Holden* v. *Hardy,* 169 U. S. 366, 385–387; *Twining* v. *New Jersey,* 211 U. S. 78, 101; *Funk* v. *United States,* 290 U. S. 371, 380–386.

This Court has recently had occasion to point out that the common law rules, governing the admissibility of evidence and the competency of witnesses in the federal courts, are not the particular rules which were in force in 1791, but are those rules adapted to present day conditions, " in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." *Funk* v. *United States, supra,* 382; see also *Wolfle* v. *United States,* 291 U. S. 7, 12; *Holden* v. *Hardy, supra,* 385–387.

The common law is not one system when it, or some part of it, is adopted by the Judiciary Act, and another if it is taken over by the Seventh Amendment. If this Court could thus, in conformity to common law, substitute a new rule for an old one because it was more consonant with modern conditions, it would seem that no violence would be done to the common law by extending the principle of the remittitur to the case where the verdict is inadequate, although the common law had made no rule on the subject in 1791; and that we could not rightly refuse to apply to either the principle of general application, that it is competent to exercise a discretionary power to grant or withhold relief in any way which is not unjust. See *Belt* v. *Lawes, supra,* 358.

Appellate federal courts, although without common law precedent, have not hesitated to resort to the remittitur where, by its use, the necessity of a new trial could justly

be avoided. *Bank of Kentucky* v. *Ashley,* 2 Pet. 327, 329; *Phillips & Colby Construction Co.* v. *Seymour,* 91 U. S. 646, 656; *Hopkins* v. *Orr,* 124 U. S. 510, 514; *Washington & Georgetown R. Co.* v. *Harmon,* 147 U. S. 571, 590; *Hansen* v. *Boyd,* 161 U. S. 397, 411, 412. The trial judge who denies a motion for a new trial, because the plaintiff has consented to reduce or a defendant has consented to increase the amount of the recovery, does no more than when, sitting in equity, he withholds relief upon the compliance with a condition, the performance of which will do substantial justice. See *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 338.

To me it seems an indefensible anachronism for the law to reject the like principle of decision, in reviewing on appeal denials of motions for new trials, where the plaintiff has consented to decrease the judgment or the defendant has consented to increase it by the proper amount, or to apply it in the one case and reject it in the other. It is difficult to see upon what principle the denial of a motion for a new trial, which for centuries has been regarded as so much a matter of discretion that it is not disturbed when its only support may be a bad or inadequate reason, may nevertheless be set aside on appeal when it is supported by a good one: that the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict.

On this question the decisions of the English courts since the adoption of the Constitution do not have the force of precedents; they are of weight only so far as they are persuasive. It is enough to say that when in 1905 the House of Lords in *Watt* v. *Watt, supra,* overruled *Belt* v. *Lawes, supra,* and terminated the practice of the remittitur, it did not comment on the fact that it was reviewing an exercise of discretion in the denial of a new trial. So far as appears, it did not consider, in the

light of any legal analogy, whether the denial of the motion because of the plaintiff's consent could be deemed in any proper sense an abuse of discretion.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur.

UNITED STATES *v.* SPAULDING.

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

No. 161. Argued November 15, 1934.—Decided January 7, 1935.

1. In an action on a lapsed war risk insurance policy insuring only against "total permanent disability," the evidence established that, since a time prior to the lapse, the insured, as the result of chronic and incurable disorders, was partially disabled, and, at times and during periods of substantial duration, totally disabled; but that, in the year next following the lapse he was officially examined and found fit for service as an air pilot, and that during the larger part of more than eight years between the lapse and the commencement of his suit, he was able to work, and actually did so, and earned substantial compensation. *Held:*

(1) That, in view of these facts, his testimony that under stress of need he worked when not able, cannot be given weight, for he is not entitled to recover unless he became totally disabled before the lapse and thereafter remained in that condition. P. 505.

(2) Since he was not totally disabled when found fit for air service and while performing work admittedly done, total disability occurring while the policy was in force was temporary and not permanent. P. 506.

(3) The fact that, notwithstanding his need of money for the support of his family and himself, he failed for nearly nine years to sue for the insurance money now claimed, strongly suggests that he had not suffered total permanent disability covered by the policy. *Lumbra* v. *United States*, 290 U. S. 551, 560. And that suggestion is emphasized by the fact that he procured examination for reinstatement of his insurance. *Id.*

(4) The opinions of medical witnesses that work impaired his health and tended to shorten his life had no substantial bearing

upon the question whether total disability while the policy was in force continued during the subsequent years. As against the facts directly and conclusively established, this opinion evidence furnishes no basis for opposing inferences. P. 506.

(5) Medical opinions that he became totally and permanently disabled before his policy lapsed are without weight, it being clear that the experts failed to give proper consideration to his fitness for naval air service or to the work he performed, and misinterpreted "total permanent disability" as used in the policy and statute authorizing the insurance. *Id.*

(6) The Government's motion for a directed verdict on the evidence should have been granted. P. 505.

2. An expert ought not be allowed to express an opinion upon the ultimate issue of fact to be decided by the jury. P. 506.

68 F. (2d) 656, reversed.

CERTIORARI * to review the affirmance of a judgment against the United States in an action on a war risk insurance policy.

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.

Mr. Warren E. Miller argued the cause and filed a brief, and *Mr. Philip D. Beall* also filed a brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In September, 1917, respondent, then 24 years old, enlisted in the United States Navy. He was successively commissioned ensign and lieutenant, and became an air pilot. He was honorably discharged June 30, 1922. While in the service he obtained a policy of war risk insurance which lapsed November 30, 1923. He brought this suit March 15, 1932, in the federal district court for northern Florida to recover the amounts payable under

* See Table of Cases Reported in this volume.

the policy for total permanent disability alleged to have resulted from kidney disease and injuries received in an airplane crash occurring while the policy was in force. At the close of all the evidence the United States moved for a directed verdict. The motion was denied, the jury found for respondent, and the court gave him judgment which was affirmed by the Circuit Court of Appeals. 68 F. (2d) 656.

The policy covers total permanent disability, whatever its cause, occurring before the lapse. The evidence was not confined to that period, for respondent's subsequent condition is pertinent to the extent that it tends to show whether he became totally and permanently disabled before the lapse. *Lumbra* v. *United States,* 290 U. S. 551, 560. The United States maintains that the evidence was not sufficient to sustain the verdict. And that is the sole question presented for our consideration.

The material substance of the evidence follows.

In the latter part of 1919, respondent first had kidney trouble. According to the naval medical records, he was sick four times from what was finally diagnosed as a kidney stone. These illnesses were in June and September, 1920, and in January and August, 1921; their duration in all was about six weeks; while they lasted urinalyses sometimes disclosed albumin, casts and corpuscles in varying quantities. Some time after the last attack, the stone was removed. November 14, 1921, respondent's upper and lower jaws were fractured in the airplane crash. He was in the naval hospital until February, 1922. He testified that he continuously had kidney trouble and severe pains in the head and back. When discharged the only defect noted was that his teeth did not occlude properly. Due to that he had gastritis February 28. Urinalysis then disclosed very few blood cells, occasional pus cells but no albumin or casts. The gastritis disappeared. In May following, his teeth were treated for the malocclu-

sion. Respondent testified that he was then suffering kidney pains and that his left antrum was much swollen. A civilian, Dr. Quina, treated the antrum.

May 31 respondent went again to the hospital. He then stated that two years earlier he had suffered acute illness following exposure in wet and cold, had not felt well since and for the last month had been treated for kidney trouble. The diagnosis then made was " nephritis chronic parenchymatous." June 26, 1922, he was examined for discharge from the service. The medical officers noted their opinion that the nephritis was due to toxic materials absorbed from the antrum and that infection of the antrum resulted from injuries sustained in the airplane crash. He was found " not physically qualified for active duty in the Navy by reason of the following physical defects which are of a more or less temporary nature: Infection of left antrum and malocclusion of the teeth." And on that day he certified that he had the following disabilities entitling him to compensation under the War Risk Insurance Act: Infection of the left antrum, malocclusion of the teeth, stomach trouble and heart murmur. He made no claim that he had become totally and permanently disabled or that he was entitled to the amounts that under the policy are payable therefor.

Respondent did nothing from the time he was discharged until February, 1923. He testified that during that period he was ill and under the care of doctors, who forbade work. When he finally did work, it was against their orders and to support his family. From February, 1923, until April, 1924, he took vocational training. During that time his policy lapsed. He quit before completion of the course because, as he says, he was no better and thought outdoor work would be good for him. Then for more than a year he was employed as an automobile salesman. Much riding over rough roads aggravated his condition and prevented continuous work. He was paid

a salary of $125 per month for a part of the time and commissions for the remainder.

Commencing about September 1, 1925, respondent for seven months was employed as superintendent of construction of roads and ditches at a salary of $300 per month. He next worked for an electric company during four years and two months until September, 1930. For the first five or six months he was a salesman and earned commissions amounting to about $500. He then became superintendent of electrical work at a salary of $200 per month. Except for six or seven weeks in another year and three months in 1930, he received salary for every month though not able to work full time. He was discharged because he could not put in full time. Two fellow employees testified that he was ill and at home three or four days a month. That was his last employment.

An official record put in evidence by him shows that in July, 1924, he was given a special physical examination to test his qualifications for flying. It indicates recovery from the airplane crash, heart and blood pressure normal, no recurrence of kidney trouble. As a result of the examination he was officially certified to have no defects and to be qualified for flying duty as a pilot.

Commencing in 1923 while the policy was still in force, respondent was treated by Dr. Quina, to whom he went daily during the first year and three or four times weekly during the next two. His condition did not improve and, because of inability to pay the doctor, he discontinued. For a few years prior to the trial he has been going to doctors for sinus treatment as often as every other day. October 31, 1928, the Veterans' Bureau examined him, apparently in connection with his application to reinstate his insurance. He was classified as a poor risk: "This man has a chronic nephritis. Hypertension. Urine shows occasional hyaline casts and a few red blood cells." In March, 1930, he entered a veterans hospital at Washing-

ton where he remained about six weeks. The diagnoses were albuminaria, nephritis diffuse mild, moderate hypertension. It was found that no hospitalization was necessary. Dr. Fowler, a consultant in urology, found the right kidney out of position and suggested surgery. June 1, 1931, respondent went to a naval hospital for treatment of the infected antrum and remained there until July 7. It was found that his blood pressure and heart were normal. He had moderate hydro-nephrosis of the right kidney and a kink in the upper half of the right ureter. Urinalysis was negative.

Respondent called Dr. Quina, Dr. Bryan and Dr. Pierpont:

Dr. Quina had treated respondent for the antrum infection for several years after the latter's discharge from the navy. He testified that the antrum infection was incurable and that during the period of treatment respondent had nephritis caused by the infection; that it did not improve, that respondent had impaired his health by working and that "In my opinion at the time I first examined him and since that time he has not been capable of continuously carrying on a substantially gainful occupation without injury to his health." The doctor thought that under proper treatment respondent could live a long time. "I would put him in bed and keep him there. If he engages in any work it will make him die a little bit sooner." Although the witness did not testify to any change in respondent's condition, he said: "If a man had mild nephritis in 1923 and in 1932 has diagnosis of mild nephritis . . . his condition is much worse now than it was then because he still has a breaking down of the kidneys."

Dr. Bryan commenced to treat respondent in July, 1929, and at that time found chronic nephritis. He expressed the opinion that the disease existed in 1923. An examination a year before the trial indicated respondent had not improved. Absolute rest was the treatment for his con-

dition, any work physical or mental would impair his health and " If he continuously engages in any kind of work he is going to limit his days on this earth. . . . If a man has mild nephritis in 1923 and actually works for seven years and quits work in 1930 and then in 1932 still has a diagnosis of only mild nephritis I would say that he had injured himself, for a man with that type of disease would injure his health by doing any kind of work. By working he has made it worse; he might have recovered. I would . . . say he was totally and permanently disabled. I don't know about his disability from an occupational standpoint."

Dr. Pierpont never treated respondent but examined him three times shortly before the trial. He found chronic nephritis, a bad heart and high blood pressure. On the history of the case he expressed opinion that respondent's ailments dated back to 1922 or 1923. He said: " I would prescribe absolute rest . . . If plaintiff engaged in work it . . . would impair his health. From my examination I would say that the plaintiff is not able to continuously engage in any substantially gainful occupation without impairment to his health . . . If I had a patient who had an inception or beginning of that disease in 1923 and . . . had actually worked for a period of seven years continuously and then quit work for two years and then in 1932 still had virtually the same condition he had in the beginning, I would say that the disease is progressive, that the work would make his condition worse."

The terms of the contract of insurance are in accordance with § 400, Art. IV, Act of October 6, 1917, 40 Stat. 409, and extend only to death and total permanent disability occurring while it is in force whether during or after termination of the service of the insured. The policy does not cover total temporary disability or partial permanent disability and does not authorize or permit any payment for physical or mental impairment that is less than " total

permanent disability." Periods of total temporary disability, though likely to recur at intervals, do not constitute the disability covered by the policy, for " permanent " means that which is continuing as contrasted with that which is " temporary." The fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life. It may not be assumed that occasional work for short periods by one generally disabled because of impairment of mind or body does as a matter of law negative total permanent disability. But it is plain that work done may be such as conclusively to negative total permanent disability at an earlier time. *Lumbra* v. *United States, supra,* 558 *et seq.*

After considerate examination of the record we are of opinion that the evidence and all inferences that justifiably may be drawn from it do not constitute sufficient basis for a verdict for respondent, and that therefore the trial judge should have directed the jury to find for the United States. *Gunning* v. *Cooley,* 281 U. S. 90, 93. *Stevens* v. *The White City,* 285 U. S. 195, 203–4.

It is shown that since a time prior to the lapse of the policy respondent had incurable infection of an antrum, malocclusion of teeth and chronic nephritis that caused illness and impaired his physical and mental powers to such an extent that generally he was partially disabled and, at times and during periods of substantial duration, totally disabled. In 1924 he was found fit for service as an air pilot. During the larger part of more than eight years between the lapse of his policy and the commencement of this suit he was able to and actually did work and earn substantial compensation. In view of these facts his testimony that under stress of need he worked when not able cannot be given weight, for he is not entitled to recover on the policy unless he became totally disabled

before its lapse and thereafter remained in that condition. If not totally disabled when found fit for air service and while performing work admittedly done, total disability occurring while the policy was in force was temporary and not permanent. The fact that, notwithstanding his need of money for the support of his family and himself, he failed for nearly nine years to sue for the insurance money now claimed, strongly suggests that he had not suffered total permanent disability covered by the policy. *Lumbra* v. *United States, supra,* 560. And that suggestion is emphasized by the fact that in 1928 he procured examination for reinstatement of his insurance. The opinions of respondent's medical witnesses that work impaired his health and tended to shorten his life had no substantial bearing upon the question whether total disability while the policy was in force continued during the subsequent years. As against the facts directly and conclusively established, this opinion evidence furnishes no basis for opposing inferences.

The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted "total permanent disability" as used in the policy and statute authorizing the insurance. Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase, and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U. S. 469, 472. *Schmieder* v. *Barney,* 113 U. S. 645, 648. *Fireman's Ins. Co.* v. *J. H. Mohlman Co.,* 91 Fed. 85, 88. *Mullins Lumber Co.* v. *Williamson &*

Brown Co., 255 Fed. 645, 646. *Germantown Trust Co.* v. *Lederer*, 263 Fed. 672, 676.

There is nothing in the record that at all impairs the significance of the finding that in 1924 respondent was fit for service as an air pilot, or of the work he performed after the lapse of the policy. These facts conclusively establish that he did not become totally and permanently disabled before his policy lapsed. *Lumbra* v. *United States, supra. Falbo* v. *United States*, 291 U. S. 646.*

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TAYLOR.

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

No. 289. Argued December 7, 1934.—Decided January 7, 1935.

1. In review by certiorari the Court is not called upon to consider any question not raised by the petition for the writ. P. 511.
2. Where a taxpayer shows before the Board of Tax Appeals that a tax is arbitrarily assessed and excessive, his relief from payment of it is not conditional upon his showing also the correct amount of tax or that none was assessable. Section 274 (e), Revenue Act of 1926, and §§ 51 (a) and 54 (a), Revenue Act of 1928, considered. P. 512.
3. The evidence before the Board of Tax Appeals showed that a tax on income derived from sale of preferred stock which had been acquired at the same time as common stock of the same corpora-

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* Cf. *United States* v. *Pollock*, 68 F. (2d) 633, 634. *United States* v. *Timmons*, 68 F. (2d) 654, 655. *Tracy* v. *United States*, 68 F. (2d) 834, 837. *United States* v. *Burns*, 69 F. (2d) 636, 638. *United States* v. *Sumner*, 69 F. (2d) 770, 772. *United States* v. *Green*, 69 F. (2d) 921. *United States* v. *Legg*, 70 F. (2d) 106. *United States* v. *Derrick*, 70 F. (2d) 162. *Huffman* v. *United States*, 70 F. (2d) 266. *United States* v. *Johnson*, 70 F. (2d) 399, *United States* v. *Lancaster*, 70 F. (2d) 515. *Atkins* v. *United States*, 63 App. D. C. 164; 70 F. (2d) 768. *Harris* v. *United States*, 70 F. (2d) 889, 891.

tion, was excessive and based on an arbitrary apportionment of cost as between the two kinds of stock. *Held*, (1) That the Board should not have sustained the tax but, on appropriate application, should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax; and (2) That the Circuit Court of Appeals, in reversing the Board's decision sustaining the tax, rightly remanded the case for such further proceedings. P. 516.

70 F. (2d) 619, affirmed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, which sustained a deficiency income tax assessment.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Mr. Sewall Key* was on the brief, for petitioner.

Mr. Truman Henson for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The commissioner determined a deficiency of $9,156.69 on account of respondent's 1928 income tax. The Board of Tax Appeals made the same determination. The court held it excessive and that the evidence did not show the correct amount, reversed the order of the board, and remanded the case for further proceedings in accordance with the opinion. 70 F. (2d) 619. The petition for our writ states the question: "Whether the Circuit Court of Appeals erred in remanding this case to the Board of Tax Appeals for a new hearing on the ground that the Commissioner's determination of the amount of income was incorrect, although the taxpayer had failed to prove facts from which a correct determination could be made."

In August, 1927, respondent acquired all the stock of four utilities at a total cost of $96,030, organized a holding company and, October 13, transferred to it all the

* See Table of Cases Reported in this volume.

utilities stock and received therefor all the shares of the holding company: 1,000 of preferred having no par value, entitled to a dividend of $6 annually, $100 on liquidation and callable at $105 per share; 2,500 of no par value class A common callable at $35 per share; 5,000 of no par value class B common stock having the voting power. As this transaction was "reorganization" under Revenue Act of 1926, § 203 (b) (2), 44 Stat. 12, no taxable gain resulted.

In May, 1928, the holding company sold the stock of the four utilities to the Colonial corporation for $194,930.16. Later in that year the holding company bought or retired all the preferred and paid the taxpayer $99,000 therefor. In his 1928 return he assigned the $96,030 for which he procured the utilities to the preferred stock of the holding company, deducted that amount from the $99,000 received therefor, and reported the difference, $2,970, as the gain derived from the sale. The applicable statutory provisions are contained in Revenue Act of 1928. §§ 111 (a) (d), 112 (b) (3), 113 (a) (6). 45 Stat. 815–19.[1]

[1] "Sec. 111. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized. . . .

"(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

"Sec. 112. (b) (3) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

"Sec. 113. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that . . .

"(6) If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in

They prescribe no rule that is applicable for the ascertainment of the cost of the preferred stock or the apportionment of the total cost between preferred and common. But Regulations 74, Art. 58, declares: "Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost."

The Commissioner, holding the taxpayer not entitled to charge the cost of all to the preferred, apportioned between the preferred and common. He made his calculation upon the assumption that the cost, in 1927, attributable to the preferred shares bears the same relation to cost of all the shares then acquired as the amount respondent received, in 1928, for the preferred bears to the amount paid the holding company by Colonial corporation for all the utilities shares.[2] On that basis, he found that of the total 1927 cost, $96,030, there was chargeable to the preferred only $48,771.16 which deducted from $99,000 received by respondent for the preferred in 1928, leaves $50,228.84 upon which he determined the deficiency of $9,156.69.

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the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made." 45 Stat. 815–819.

[2] The figures are: X : $96,030 : : $99,000 : $194,930.17. The calculation stated in the opinion of the Board of Tax Appeals is:

$$\frac{\$99,000.00}{\$194,930.17} \times \$96,030 = \$48,771.16.$$

Before the Board of Tax Appeals the taxpayer introduced evidence to show the details of the transaction and that there was no change in value of the utilities stock between the time he got it in August, 1927, and the date, October 13 of the same year, on which he transferred it to the holding company in exchange for its shares and that the entire increase in value came after that transfer. No opposing evidence was offered. On the facts shown, the taxpayer maintained that, as total cost was less than $100 per share for the preferred having prior rights to that extent on liquidation, the common stock had no value. Rejecting that contention, the Board of Tax Appeals filed a memorandum opinion in which it said: "It may well be that the properties acquired or all the classes of stocks received by the petitioner were worth only $96,030 . . . and yet the preferred stock . . . may have had the value of $48,771.16 . . . It is obvious that even if all the securities were worth only $96,030 that the proportionate value of the preferred stock to all the stocks would not necessarily be different from that determined by the Commissioner. . . . The question . . . is one of fact to be determined by testimony and not theory. It is conceivable that common stocks may actually sell on the market when preferred stocks in the same corporation are selling at less than par." It was upon that basis, without specific findings of fact, that the board made the redetermination at the figure set by the commissioner.

The only question for consideration is that stated in the petition for the writ of certiorari. *Gunning* v. *Cooley,* 281 U. S. 90, 98. That question in effect assumes, and here it is taken as granted, that the court rightly held the evidence sufficient to require a finding that the commissioner's apportionment of total cost as between preferred and common stock was unfair and erroneous and that therefore the commissioner's determination was exces-

sive. We also assume that the total purchase price is susceptible of fair apportionment and that upon another hearing the correct amount may be found. 70 F. (2d) 619, 620. Regulations 74, Art. 58, *supra*. The point to be considered is whether, the taxpayer having failed to establish the correct amount to be assigned to the preferred stock as its cost to him, the court erred in reversing and remanding for further proceedings in accordance with its opinion.

The commissioner does not contend that, in cases where Circuit Courts of Appeals properly reverse determinations of the board, they are without power to remand for further hearing in the nature of a new trial.[3] His contention is that in this case the burden on the taxpayer was not only to prove that the commissioner's determination is erroneous but to show the correct amount of the tax. In substance he says that, because of the taxpayer's failure to establish facts on which a fair apportionment may be made, the board's redetermination at the commissioner's erroneous figure was valid, and there being no error of law, should have been sustained by the court. And he maintains that, in the absence of error on the part of the board, the court was without power to remand for further hearing.

He cites Revenue Act of 1926, § 274 (e), 44 Stat. 56: "The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency,

[3] § 1003 (b), Revenue Act of 1926, 44 Stat. 110, 26 U. S. C. Supp. VII, § 641 (c) (1) provides: "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing." The purpose of that provision is to define the jurisdiction granted to the board; it does not prescribe any rule of evidence or burden of proof. Plainly it does not support the commissioner's contention that the taxpayer, even though he has shown the determination to be arbitrary and excessive, must nevertheless pay the added tax because he has not also shown that he owes nothing or the correct amount, if any, that legally may be laid upon him.

He also cites Revenue Act of 1928, §§ 51 (a) and 54 (a). 45 Stat. 807, 808. Neither gives any support to his contention. The first requires the taxpayer to make under oath a return stating specifically the amount of his gross income and the amounts of deductions and credits allowed. The other requires the taxpayer to keep such records, render under oath such statements, make such returns, and comply with such rules and regulations as the commissioner may prescribe. These requirements give no support to the commissioner's contention. They tend rather to suggest that taxpayer's returns are correct and may not arbitrarily be set at naught.

He also cites Rule 30 adopted by the board: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent." But there is nothing in it to suggest intention to require the taxpayer to prove not only that a deficiency assessment laid upon him was arbitrary and wrong but also to show the correct amount. Moreover, the board held the evidence not sufficient to show the

apportionment erroneous and on that ground alone sustained the assessment. Necessarily the board did not come to the question that is here presented as to burden of proof. The fact that the commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the board to set it aside. Cf. Bruce & Human Drug Co., 1 B. T. A. 342. Acorn Refining Co., 2 B. T. A. 253. Index Notion Co., 3 B. T. A. 90.

The commissioner cites *United States* v. *Rindskopf,* 105 U. S. 418; *United States* v. *Anderson,* 269 U. S. 422, 443; *Reinecke* v. *Spalding,* 280 U. S. 227, 232–233. The first of these may be put aside without discussion as having no bearing upon the point here in controversy. The other two were adequately distinguished by the Circuit Court of Appeals. Each was an action to recover taxes paid. Obviously the burden was on the plaintiff, in order to establish a basis for judgment in his favor, specifically to show not merely that the assessment was erroneous but also the amount to which he was entitled. For like reason the burden is upon the taxpayer to establish the amount of a deduction claimed. *Burnet* v. *Houston,* 283 U. S. 223, 227. *Helvering* v. *Independent Life Ins. Co.,* 292 U. S. 371, 381. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440.

We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner's determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower courts may not be harmonious, our attention has not

been called to any that persuasively supports the rule for which the commissioner here contends.[4]

Unquestionably the burden of proof is on the taxpayer to show that the commissioner's determination is invalid. *Lucas* v. *Structural Steel Co.*, 281 U. S. 264, 271. *Wickwire* v. *Reinecke*, 275 U. S. 101, 105. *Welch* v. *Helvering*, 290 U. S. 111, 115. Frequently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due. See, e. g., *Darcy* v. *Commissioner*, 66 F. (2d) 581, 585. But, where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon

[4] The Commissioner cites: *Hubinger* v. *Commissioner*, 36 F. (2d) 724. *Sanderson* v. *Commissioner*, 42 F. (2d) 160. *Autosales Corp.* v. *Commissioner*, 43 F. (2d) 931. *Onondaga Co.* v. *Commissioner*, 50 F. (2d) 397. *Darcy* v. *Commissioner*, 66 F. (2d) 581, 585. *Saxman Coal & Coke Co.* v. *Commissioner*, 43 F. (2d) 556. *Williams* v. *Commissioner*, 45 F. (2d) 61. *Alexander Sprunt & Son* v. *Commissioner*, 64 F. (2d) 424. *Atlantic Bank & Trust Co.* v. *Commissioner*, 59 F. (2d) 363. *Lightsey* v. *Commissioner*, 63 F. (2d) 254. *Matern* v. *Commissioner*, 61 F. (2d) 663. *Atlanta Casket Co.* v. *Rose*, 22 F. (2d) 800. *Becker* v. *United States*, 21 F. (2d) 1003.

Cf. *Collin* v. *Commissioner*, 32 F. (2d) 753. *Citrus Soap Co.* v. *Lucas*, 42 F. (2d) 372. *Russell* v. *Commissioner*, 45 F. (2d) 100, 103. *Strother* v. *Commissioner*, 55 F. (2d) 626, 632. And see, involving deduction, *Underwood* v. *Commissioner*, 56 F. (2d) 67, 72.

appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax. The rule for which the commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals.[5] The Circuit Court of Appeals rightly reversed and remanded the case for further proceedings in accordance with its opinion.

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

As respondent failed to establish any amount by which the deficiency fixed by the Commissioner should be reduced, the Board of Tax Appeals was without authority, under the statute defining its jurisdiction, to disturb the determination of the Commissioner, c. 27, §§ 274 (b) (e), 906 (c) (d), 44 Stat. 9, 55, 56, 107; 26 U. S. C., §§ 1048a, 1048c, 1217 (c) (d). If, under § 906 (d), it was the duty of the Board to dismiss the petition and enter on its records a finding that it could not determine the amount of the deficiency, these requirements are formal only. Its failure to comply with them does not require a reversal of its order sustaining the action of the Commissioner or in any case afford ground for decision on appeal that the Board should have held the Commissioner's determination invalid or that it should now take further evidence.

[5] House Report No. 179, p. 7; Senate Report No. 398, pp. 8–9, 68th Congress, 1st session. *Warren Mfg. Co.* v. *Tait*, 60 F. (2d) 982, 984. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 721.

DECISIONS PER CURIAM, FROM OCTOBER 1, 1934, TO AND INCLUDING JANUARY 7, 1935.*

No. 77. SECOR ET AL. *v.* FULTON, SUPERINTENDENT OF BANKS. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted September 10, 1934. Decided October 8, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Seattle & Renton Ry.* v. *Linhoff,* 231 U. S. 568, 570; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 165, 166; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 451; *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317; *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269, 272, 273; *Comer* v. *Washington,* 292 U. S. 610; *Van Schaick* v. *Toledo,* 292 U. S. 611. *Mr. J. S. Rhinefort* for appellants. *Mr. John W. Bricker* for appellee. Reported below: 127 Oh. St. 596; 190 N. E. 249.

No. 88. SKIPPER *v.* FLORIDA. Appeal from the Supreme Court of Florida. Motion submitted September 10, 1934. Decided October 8, 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 properly presented federal question. *Live Oak Water Users Assn.* v. *Railroad Commission,* 269 U. S. 354, 357, 358; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Godchaux* v. *Estopinal,* 251 U. S. 179; *Archerd* v. *Oregon,* 290 U. S. 604. *Mr. W. D. Bell* for appellant. *Messrs. Cary D. Landis* and *Robert J. Pleus* for appellee. Reported below: 114 Fla. 312; 153 So. 853.

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* For decisions on petitions for certiorari, see *post,* pp. 535, 554; for rehearing, *post,* p. 627.

No. 103. WILSON & CO., INC., OF LOUISIANA, *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Motion submitted September 10, 1934. Decided October 8, 1934. *Per Curiam:* The motion of appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 33; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 513; *Great Northern Ry. Co.* v. *Sunburst Co.,* 287 U. S. 358, 362; *Hicklin* v. *Coney,* 290 U. S. 169, 172; *Hartford Accident Co.* v. *Nelson Co.,* 291 U. S. 352, 358. (2) *Kehrer* v. *Stewart,* 197 U. S. 60, 65; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Eastern Air Transport* v. *Tax Commission,* 285 U. S. 147, 152; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 478, 479; *Liggett Co.* v. *Lee,* 288 U. S. 517, 539; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44–47. *Messrs. Edwin T. Merrick* and *W. R. Brown* for appellant. *Messrs. Gaston L. Porterie* and *Peyton R. Sandoz* for appellee. Reported below: 179 La. 648; 154 So. 636.

No. 162. NASHVILLE, CHATTANOOGA & ST. LOUIS RY. *v.* HERNDON. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted September 10, 1934. Decided October 8, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *Ownbey* v. *Morgan,* 256 U. S. 94, 112; *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31; *Corn Exchange Bank* v. *Commissioner,* 280 U. S. 218, 223; *Snyder* v. *Massachusetts,* 291 U. S. 97, 111; *International Milling Co.* v. *Columbia Transportation Co.,* 292 U. S. 511. *Mr. Fitzgerald Hall* for appellant. No appearance for appellee.

No. 163. WADE ET AL. *v.* JACKSONVILLE. Appeal from the Supreme Court of Florida. Motion submitted Sep-

tember 10, 1934. Decided October 8, 1934. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed (1) for the want of properly presented federal questions (*Dewey* v. *Des Moines,* 173 U. S. 193, 197–200; *Whitney* v. *California,* 274 U. S. 357, 360, 362, 363; *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire,* 196 U. S. 128, 131–133; *Archerd* v. *Oregon,* 290 U. S. 604), and (2) for the want of a substantial federal question (*Castillo* v. *McConnico,* 168 U. S. 674, 681–684; *Ballard* v. *Hunter,* 204 U. S. 241, 256, 257; *Witherspoon* v. *Duncan,* 4 Wall. 210, 217; *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317). *Mr. Thomas B. Adams* for appellants. *Mr. Oscar O. McCollum* for appellee. Reported below: 113 Fla. 718; 152 So. 197.

No. 166. DOBRY *v.* IOWA. Appeal from the Supreme Court of Iowa. Motion submitted September 10, 1934. Decided October 8, 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 properly presented federal question. *Bowe* v. *Scott,* 233 U. S. 658, 664, 665; *Layton* v. *Missouri,* 187 U. S. 356, 358, 361; *Jacobi* v. *Alabama,* 187 U. S. 133, 135; *Kipley* v. *Illinois,* 170 U. S. 182, 187; *Miller* v. *Cornwall R. Co.,* 168 U. S. 131, 134; *Porter* v. *Foley,* 24 How. 415; *New York ex rel. Sackett* v. *Lynch,* 291 U. S. 652; 292 U. S. 604. *Mr. Emmet F. Byrne* for appellant. *Mr. J. M. Parsons* for appellee. Reported below: 217 Ia. 858; 250 N. W. 702.

No. 286. KELLIHER ET AL. *v.* INVESTMENT & SECURITIES CO. ET AL. Appeal from the Supreme Court of Washington. Motion submitted September 10, 1934. Decided October 8, 1934. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is

dismissed (1) for the want of a substantial federal question (*Commercial Bank* v. *Buckingham's Executors,* 5 How. 317, 342, 343; *Ross* v. *Oregon,* 227 U. S. 150, 161, 162; *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, 448, 449), and (2) for the want of a properly presented federal question (*Live Oak Water Users Assn.* v. *Railroad Commission,* 269 U. S. 354, 357, 358; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Godchaux* v. *Estopinal,* 251 U. S. 179; *Archerd* v. *Oregon,* 290 U. S. 604). The motion for leave to proceed further herein *in forma pauperis* is denied. *Mr. M. M. Kelliher, Amy Kelliher,* and *Tena Marsh, pro se. Mr. Channing Wakefield* for appellees. Reported below: 177 Wash. 82; 30 P. (2d) 985.

No. 288. CHUBB *v.* WASHINGTON. Appeal from the Supreme Court of Washington. Motion submitted September 10, 1934. Decided October 8, 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 properly presented federal question. *Kerr Glass Mfg. Corp.* v. *Superior Court,* 286 U. S. 532; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.,* 252 U. S. 341, 344; *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Chapin* v. *Fye,* 179 U. S. 127, 129, 130. The motion for leave to proceed further herein *in forma pauperis* is denied. *Mr. Paul Cassel Chubb, pro se. Mr. Charles W. Greenough* for respondent. Reported below: 175 Wash. 424; 27 P. (2d) 689.

No. —, original. EX PARTE BROWN. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied. *Mr. John Brown, pro se.*

No. —, original. Ex parte Horowitz. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied. *Mr. Morris Horowitz, pro se.*

No. —, original. Ex parte Washington. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied. *Mr. George Washington, pro se.*

No. —, original. Ex parte Rubin. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied. *Mr. Lloyd Rubin, pro se.*

No. —, original. Ex parte Morgan. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied without prejudice to appropriate application to the proper District Court of the United States or Judge. *Mr. Harlan O. Morgan, pro se.*

No. —, original. Ex parte Mitchell. October 8, 1934. The motion for leave to file a petition for writ of habeas corpus is denied without prejudice to appropriate application to the proper District Court of the United States or Judge. *Mr. Harry Mitchell, pro se.*

No. —, original. Ex parte Grubbs. October 8, 1934. The motion for leave to file petition for writ of mandamus herein is denied. *Ex parte United States,* 287 U. S. 241, 248. The motion for leave to proceed *in forma pauperis* herein is also denied. *Mr. Millard D. Grubbs, pro se.*

No. —, original. Ex parte Everglades Drainage District et al. October 8, 1934. The motion for leave to file petition for writ of mandamus is denied. *Mr. Herbert S. Sawyer* for the motion.

No. 186. ABRAMS ET AL. *v.* VAN SCHAICK, SUPERINTENDENT OF INSURANCE, ET AL. Appeal from the Supreme Court of New York. October 8, 1934. Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits and attention is called to the question of the nature and finality of the order sought to be reviewed in the light of § 344 (a), U. S. Code, Title 28.

No. 619 (October Term, 1933). RADIO CORPORATION OF AMERICA ET AL. *v.* RADIO ENGINEERING LABORATORIES, INC. Certiorari to the Circuit Court of Appeals for the Second Circuit. October 8, 1934. On due consideration, it is ordered that the opinion filed May 21, 1934, be amended by striking from the last two lines on page eight the following words: "which means that the frequency could be varied at will," and substituting therefor the following: "which means, or was understood, we are told, by DeForest to mean, that by other simple adjustments the frequency of the oscillations could be varied at will." The petition for rehearing is denied. Opinion reported as amended, *ante,* p. 1.

No. 398. BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF NEW YORK, ET AL. *v.* G. A. F. SEELIG, INC. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted October 6, 1934. Decided October 15, 1934. *Per Curiam:* Appeal from an order granting an interlocutory injunction. Jurisdictional statement has been filed. The order is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 338; *United Gas Co.* v. *Public Service Commission,* 278 U. S. 322, 326, 327; *United Drug Co.* v. *Washburn,* 284 U. S. 593; *South Carolina*

Power Co. v. *South Carolina Tax Comm'n,* 286 U. S. 525; *Ogden & Moffet Co.* v. *Michigan Public Utilities Comm'n,* 286 U. S. 525; *Langer* v. *Grandin Farmers Co-operative Elevator Co.,* 292 U. S. 605; *Northwest Bancorporation* v. *Benson,* 292 U. S. 606. *Mr. Henry S. Manley* for appellants. No appearance for appellee. Reported below: 7 F. Supp. 776.

No. 416. AMERICAN BAKERIES CO. *v.* SUMTER. Appeal from the Supreme Court of South Carolina. Jurisdictional statement submitted October 6, 1934. Decided October 15, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Armour & Co.* v. *Virginia,* 246 U. S. 1, 6; *National Linen Service Corp.* v. *Lynchburg,* 291 U. S. 641; *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 315; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537, *et seq. Messrs. Blair Foster* and *R. D. Epps* for appellant. No appearance for appellee. Reported below: 173 S. C. 94; 174 S. E. 919.

No. —, original. NEBRASKA *v.* WYOMING. October 15, 1934. The motion for leave to file bill of complaint herein is granted and process is ordered to issue returnable within 60 days from this date.

No. —, original. EX PARTE BALDWIN ET AL., TRUSTEES, ET AL. October 15, 1934. Motion for leave to file petition for writ of prohibition denied. *Mr. Edward J. White* for petitioners.

No. —, original. EX PARTE DISNEY FILM RECORDING CO., LTD., ET AL. October 15, 1934. Motion for leave to file petition for writ of mandamus denied. *Mr. Ford W. Harris* for petitioners.

No. —, original. Ex parte Cooper. October 15, 1934. Motion for leave to file petition for writ of habeas corpus denied. *Mr. John Ross Cooper, pro se.*

No. —, original. Ex parte Curtis. October 15, 1934. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Edward E. Curtis, pro se.*

No. —, original. Ex parte Martin. October 15, 1934. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Milford B. Martin, pro se.*

No. —, original. Ex parte Mann. October 15, 1934. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Capris Mann, pro se.*

No. 13, original. United States *v.* Oregon. October 15, 1934. The report of the Special Master herein is received and ordered to be filed. It is ordered that exceptions to the said report, if any, be filed on or before December 3, next; that briefs upon such exceptions be filed on or before February 4; and that reply briefs, if any, be filed on or before March 4.

No. 19. Missouri Pacific R. Co. et al. *v.* United States et al. Appeal from the District Court of the United States for the Eastern District of Kentucky. Argued October 16, 1934. Decided October 22, 1934. *Per Curiam:* The decree is affirmed. *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 25–29; *Texas* v. *United States,* 292 U. S. 522, 531; *Virginian Ry.* v. *United States,* 272 U. S. 658, 663; *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287;

Georgia Commission v. *United States,* 283 U. S. 765, 775; *Assigned Car Cases,* 274 U. S. 564, 580–581; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62; *Akron, Canton & Youngstown Ry. Co.* v. *United States,* 284 U. S. 575. *Mr. T. D. Gresham,* with whom *Messrs. Edw. J. White, H. H. Larimore, M. E. Clinton,* and *Herbert Fitzpatrick* were on the brief, for appellants. *Mr. Carl McFarland,* with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Daniel W. Knowlton* and *Charles H. Weston* were on the brief, for the United States and Interstate Commerce Commission, appellees. *Mr. Ben C. Dey,* with whom *Messrs. J. H. Tallichet* and *John P. Bullington* were on the brief, for the Southern Pacific Co., appellee. Reported below: 4 F. Supp. 449.

No. 433. LAING *v.* FOX, STATE TAX COMMISSIONER. Appeal from the Supreme Court of Appeals of West Virginia. Motion submitted October 13, 1934. Decided October 22, 1934. *Per Curiam:* The motion of appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 572 *et seq.; American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 95; *Hicklin* v. *Coney,* 290 U. S. 169, 176. (2) *League* v. *Texas,* 184 U. S. 156, 161; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 152–153; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44; (3) *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32–33; *Hicklin* v. *Coney,* 290 U. S. 169, 172; *Hartford Accident Co.* v. *Nelson Co.,* 291 U. S. 352, 358; *Swiss Oil Corp.* v. *Shanks,* 273 U. S., 407, 413. *Mr. Arthur S. Dayton* for appellant. *Mr. Homer A. Holt* for appellee. Reported below: 115 W. Va. —; 175 S. E. 354.

No. 347. ROSEN *v.* FRY, EXCISE DIRECTOR OF INDIANA, ET AL. Appeal from the Supreme Court of Indiana. Jurisdictional statement submitted October 20, 1934. Decided November 5, 1934. *Per Curiam:* The appeal is dismissed upon the ground that the jurisdictional statement fails to disclose any properly presented substantial federal question. Rule 12. *Mr. Ronald C. Oldham* for appellant. *Messrs. Philip Lutz, Jr.,* and *Herbert J. Patrick* for appellees. 207 Ind. 409; 189 N. E. 375.

No. 450. WHEELER *v.* FARLEY, POSTMASTER GENERAL, ET AL. Appeal from the District Court of the United States for the Southern District of California. Jurisdictional statement submitted October 20, 1934. Decided November 5, 1934. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 238, Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938). *Mr. L. E. Dadmun* for appellant. No appearance for appellees. Reported below: 7 F. Supp. 433.

No. 467. THE 134 WILLIAM STREET CO., INC. *v.* LYNCH ET AL. Appeal from the Supreme Court of New York. Motion submitted October 27, 1934. Decided November 5, 1934. *Per Curiam:* The motion of appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Doyle* v. *Atwell,* 261 U. S. 590; *Farson Son & Co.* v. *Bird,* 248 U. S. 268, 271; *McCoy* v. *Shaw,* 277 U. S. 302; *Ohio ex rel. Eastman* v. *Stuart,* 291 U. S. 643. *Messrs. John Enrietto* and *Glen N. W. McNaughton* for appellant. *Mr. Wendell P. Brown* for appellees. Reported below: 240 App. Div. 935; 268 N. Y. S. 835.

No. 468. KAGARISE *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. Motion submitted October 27, 1934. Decided November 5, 1934. *Per Curiam:* The motion of appellee to dismiss the appeal herein is granted, and the appeal is dismissed upon the ground that it does not appear that the decision of a federal question was necessary to the determination of the cause or was actually determined. *Lynch* v. *New York ex rel. Pierson, ante,* p. 52. *Messrs. Warren E. Libby* and *William A. Sherwin* for appellant. *Mr. Ira H. Rowell* for appellees.

No. 477. BARWISE ET AL., TRUSTEES, *v.* SHEPPARD, COMPTROLLER OF TEXAS, ET AL. Appeal from the District Court of the United States for the Western District of Texas. Jurisdictional statement submitted October 27, 1934. Decided November 5, 1934. *Per Curiam:* Decree affirmed. *Healy* v. *Ratta,* 292 U. S. 263. *Mr. William R. Watkins* for appellants. *Mr. James V. Allred* for appellees. Reported below: 8 F. Supp. 21.

No. —, original. EX PARTE JONES. November 5, 1934. Motion for leave to file petition for writ of mandamus denied. *Miss Charlotte Jones, pro se.*

No. —, original. EX PARTE PORESKY. November 5, 1934. Motion for leave to file petition for writ of mandamus denied. *Mr. Joseph Poresky, pro se.*

No. —, original. EX PARTE HARRELL. November 5, 1934. Motion for leave to file petition for writ of mandamus denied. *Mr. George B. Harrell, pro se.*

No. 254. PARAMOUNT PUBLIX CORP. *v.* AMERICAN TRI-ERGON CORP. November 5, 1934. It is ordered that the petition for rehearing herein be, and the same is hereby, granted. The order heretofore entered on October 8, 1934, [*post,* p. 587] denying the petition for writ of certiorari is vacated, and it is ordered that the petition for writ of certiorari in this case be, and the same is hereby, granted.

No. 255. ALTOONA PUBLIX THEATRES, INC. *v.* AMERICAN TRI-ERGON CORP. ET AL.; and

No. 256. WILMER & VINCENT CORP. ET AL. *v.* SAME. November 5, 1934. It is ordered that the petition for rehearing herein be, and the same is hereby, granted. The order heretofore entered on October 8, 1934, [*post,* p. 587] denying the petition for writs of certiorari is vacated, and it is ordered that the petition for writs of certiorari in these cases be, and the same is hereby, granted.

No. 868 (October Term, 1933). OHIO ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. On rehearing. Argued November 5, 1934. Decided November 12, 1934. *Per Curiam:* On full consideration the Court finds that the grounds advanced in the petition for rehearing are untenable, and that there is no reason for disturbing the judgment heretofore entered. *Messrs. H. Austin Hauxhurst* and *Donald C. Power,* with whom *Mr. John W. Bricker,* Attorney General of Ohio, was on the brief, for appellants. *Mr. J. Stanley Payne,* with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission, appellees. *Mr. Guernsey Orcutt,* with whom *Messrs. M. Carter Hall, Leo*

P. Day, Charles R. Webber, and *Frederic D. McKenney* were on the brief, for the Railroad interveners. See 292 U. S. 498.

No. 491. HOOVER MOTOR EXPRESS CO., INC. ET AL. *v.* FORT, COMMISSIONER OF FINANCE & TAXATION, ET AL. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted November 3, 1934. Decided November 12, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Stephenson* v. *Binford,* 287 U. S. 251, 264, 272, 275–276; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 365–366, 369–371; *Sproles* v. *Binford,* 286 U. S. 374, 388–389, 391–396. *Mr. W. C. Cherry* for appellants. No appearance for appellees. Reported below: 167 Tenn. 628; 72 S. W. (2d) 1052.

No. —, original. EX PARTE MOONEY. November 12, 1934. A rule is ordered to issue, returnable within forty days from this date, requiring the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. *Messrs. Frank P. Walsh, John F. Finerty,* and *George T. Davis* for petitioner.

No. 15, original. WISCONSIN *v.* MICHIGAN. November 12, 1934. The report of the Special Master herein is received and ordered to be filed. It is ordered that exceptions to the said report, if any, be filed on or before December 10, next; that briefs upon such exceptions be filed on or before January 21; and that reply briefs, if any, be filed on or before February 4.

No. 115. HAMMOND CLOCK CO. *v.* SCHIFF. On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Motion submitted November 5, 1934. De-

cided November 12, 1934. *Per Curiam:* On consideration of a suggestion by petitioner that the cause herein has become moot by reason of settlement between the parties, and of a motion by petitioner to reverse the decree of the Circuit Court of Appeals and to remand the cause with directions to dismiss, and respondent having consented to the entry of an order pursuant to the motion, it is ordered that the said motion be, and it is hereby, granted, and the decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to vacate its decree and to dismiss the bill of complaint as against the respondent without prejudice, and without costs to either party, upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U. S. 216; *United States* v. *Hamburg American Co.,* 239 U. S. 466, 477–478; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 350, 362–363; *C. M. Patten & Co.* v. *United States,* 289 U. S. 705; *First Union Trust & Savings Bank* v. *Consumers Co.,* 290 U. S. 585; *Danciger Oil & Refining Co.* v. *Smith,* 290 U. S. 599. *Mr. Clifford C. Bradbury* for petitioner. *Mr. Alvin E. Stein* for respondent. Reported below: 69 F. (2d) 742.

No. 91. HUNT *v.* WESTERN CASUALTY CO. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued November 12, 1934. Decided November 19, 1934. *Per Curiam:* While, under the applicable law of Texas, the District Court was without authority in this suit to enforce an award of the Industrial Accident Board to afford a trial *de novo* (*Vestal* v. *Texas Emp. Ins. Assn.,* 285 S. W. 1041; *Texas Emp. Ins. Assn.* v. *Neal,* 11 S. W. (2d) 847; 14 S. W. (2d) 793), the question of the true construction of the award was necessarily presented, and the decision of the Circuit Court of Appeals in reviewing the judgment of the District Court may be re-

garded as resting upon the determination of that question. The writ of certiorari is dismissed as improvidently granted. *Mr. E. C. Street* for petitioner. *Mr. Charles J. Faulkner, Jr.*, with whom *Mr. W. W. Naman* was on the brief, submitted for respondent. Reported below: 69 F. (2d) 129.

No. 219. POSNER *v.* ANDERSON. On writ of certiorari to the Supreme Court of New York. Submitted November 14, 1934. Decided November 19, 1934. *Per Curiam:* It appearing that petitioner is not a party to the record, the writ of certiorari is dismissed as improvidently granted. *Mr. Emanuel van Dernoot,* with whom *Mr. Arthur Joseph* was on the brief, submitted for petitioner. *Messrs. George L. Buland* and *Charles L. Minor,* with whom *Mr. Jeremiah C. Waterman* was on the brief, submitted for respondent. Reported below: 241 App. Div. 843; 271 N. Y. S. 333.

No. 62. WETZEL *v.* FULTON, SUPERINTENDENT OF BANKS OF OHIO. Appeal from the Supreme Court of Ohio. Argued November 8, 9, 1934. Decided November 19, 1934. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction: (1) *Lynch* v. *New York ex rel. Pierson, ante,* p. 52; (2) *Gibbes* v. *Zimmerman,* 290 U S. 326, 332. *Messrs. Merritt A. Vickery* and *William K. Gardner* for appellant. *Mr. Luther Day* and *Mr. John W. Bricker,* Attorney General of Ohio, with whom *Messrs. Donald W. Kling* and *George H. Rudolph* were on the brief, for appellee. Reported below: 128 Oh. St. 109.

No. 461. MARTHA BRIGHT FARMS, INC. ET AL. *v.* DAVIS ET AL. Appeal from the Supreme Court of Florida. Motion submitted November 3, 1934. Decided November

19, 1934. *Per Curiam:* The motion of appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 717–721; *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 705–708; *Olcott* v. *The Supervisors,* 16 Wall. 678, 694–698; *Pine Grove* v. *Talcott,* 19 Wall. 666, 676–677. *Mr. Carl A. Hiaasen* for appellants. *Mr. Charles A. Carroll* for appellees. Reported below: 117 Fla. 361; 158 So. 70.

No. —, original. Ex parte Wood. November 19, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. G. C. Wood, pro se.*

No. 435. Wishnatzki & Nathel et al. *v.* Railway Express Agency, Inc., et al. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted November 17, 1934. Decided December 3, 1934. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Judicial Code, § 238 (4) as amended by the Act of February 13, 1925 (43 Stat. 936, 938). *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 486, 488; *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 235, 241. *Mr. Bernard H. Arnold* for appellants. *Mr. Albert M. Hartung* for American Railway Express Agency, Inc., appellee. *Messrs. Elmer B. Collins, Nelson Thomas,* and *Daniel W. Knowlton* for the United States and Interstate Commerce Commission, appellees. Reported below: 6 F. Supp. 249.

No. 9. Rowley, Treasurer, *v.* Chicago & Northwestern Railway Co. December 3, 1934. Ordered that in this cause the opinion announced November 5, 1934 be and hereby it is amended by inserting at the end and

before the words "Decree reversed" these words: "The district court may cause to be corrected the error in calculation referred to in marginal note 2." Opinion reported as amended, *ante*, p. 102.

No. —, original. Ex parte Platek. December 10, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Joseph A. Platek, pro se.*

No. 271. Tirrell *v.* Johnston, Attorney General of New Hampshire, et al. Appeal from the Supreme Court of New Hampshire. Argued December 14, 1934. Decided December 17, 1934. *Per Curiam:* Judgment affirmed. *Alward* v. *Johnson*, 282 U. S. 509, 514; *Willcuts* v. *Bunn*, 282 U. S. 216, 225–226; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128–129; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 327–328. *Mr. Samuel A. Margolis* for appellant. *Mr. Francis W. Johnston*, Attorney General of New Hampshire, and *Mr. H. Thornton Lorimer*, Assistant Attorney General, were on the brief for appellees. Reported below: 86 N. H. 530.

No. 183. Nashville, Chattanooga & St. Louis Ry. Co. *v.* Webster, Commissioner of Highways, et al. December 17, 1934. This case is restored to the docket and assigned for reargument on Wednesday, January 16, 1935. It is ordered that Herbert S. Walters, successor in office of Frank W. Webster, be and he is hereby substituted as a party appellee in this cause.

No. 572. Mitchell *v.* Washington. Appeal from the Supreme Court of Washington. Motion submitted December 15, 1934. Decided January 7, 1935. *Per Curiam:*

The motion for leave to proceed further *in forma pauperis* is denied. 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), certiorari is denied. *Mr. W. B. Mitchell, pro se. Mr. Charles W. Greenough* for appellee. Reported below: 178 Wash. 196; 34 P. (2d) 902.

No. 560. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* D. N. MORRISON CONSTRUCTION CO., INC. Appeal from the Supreme Court of Florida. Motion submitted December 22, 1934. Decided January 7, 1935. *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. *Parsons v. Federal Realty Corp.,* 105 Fla. 105; 143 So. 912; *Mutual Life Ins. Co.* v. *Hilton-Green,* 241 U. S. 613, 623; *American Fire Ins. Co.* v. *King Lumber Co.,* 250 U. S. 2, 10–11, 13–14; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 565–566; *National Ins. Co.* v. *Wanberg,* 260 U. S. 71, 73 *et seq.; Stipcich* v. *Insurance Co.,* 277 U. S. 311, 320; *Merchants Liability Co.* v. *Smart,* 267 U. S. 126, 129; *Hancock Mutual Life Ins. Co.* v. *Warren,* 181 U. S. 73, 76–77; *O'Gorman & Young* v. *Hartford Ins. Co.,* 282 U. S. 251, 257. *Messrs. John G. McKay* and *James A. Dixon* for appellant. *Messrs. Frederick M. Hudson* and *Garland M. McNutt* for appellee. Reported below: 116 Fla. 66; 156 So. 385.

No. 561. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* COLEY & PETERSON, INC. Appeal from the Supreme Court of Florida. Motion submitted December 22, 1934.

Decided January 7, 1935. *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. *Parsons* v. *Federal Realty Corp.*, 105 Fla. 105; 143 So. 912; *Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 623; *American Fire Ins. Co.* v. *King Lumber Co.*, 250 U. S. 2, 10–11, 13–14; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 565–566; *National Ins. Co.* v. *Wanberg*, 260 U. S. 71, 73 *et seq.*; *Stipcich* v. *Insurance Co.*, 277 U. S. 311, 320; *Merchants Liability Co.* v. *Smart*, 267 U. S. 126, 129; *Hancock Mutual Life Ins. Co.* v. *Warren*, 181 U. S. 73, 76–77; *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251, 257. *Messrs. John G. McKay* and *James A. Dixon* for appellant. *Messrs. Frederick M. Hudson* and *Garland M. McNutt* for appellee. Reported below: 116 Fla. 73; 156 So. 388.

No. —, original. Ex parte Mooney. January 7, 1935. Return to rule to show cause presented.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 1, 1934, TO AND INCLUDING JANUARY 7, 1935.

No. 47. Enelow *v.* New York Life Insurance Co. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Charles H. Sachs* and *Louis Caplan* for petitioner. *Messrs. Louis H. Cooke* and *William H. Eckert* for respondent. Reported below: 70 F. (2d) 728.

No. 51. Helvering, Commissioner of Internal Revenue, *v.* Union Pacific R. Co. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals

for the Second Circuit granted. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. J. Louis Monarch, Morton K. Rothschild,* and *H. Brian Holland* for petitioner. *Mr. Henry W. Clark* for respondent. Reported below: 69 F. (2d) 67.

No. 60. INDIANA FARMER'S GUIDE PUBLISHING CO. *v.* PRAIRIE FARMER PUBLISHING CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. U. S. Lesh* and *Eben Lesh* for petitioner. *Messrs. Maxwell V. Baghtol* and *Thomas E. Murphy* for respondents. Reported below: 70 F. (2d) 3.

No. 68. DAVIS *v.* AETNA ACCEPTANCE CO. October 8, 1934. Petition for writ of certiorari to the Appellate Court, First District of Illinois, granted. *Messrs. Edward A. Zimmerman, George A. Edwards,* and *Franklin D. Trueblood* for petitioner. *Mr. Wm. S. Kleinman* for respondent. Reported below: 273 Ill. App. 628.

No. 72. MCCULLOUGH, EXECUTRIX, *v.* SMITH, ADMINISTRATOR. October 8, 1934. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Messrs. John M. Robinson* and *J. H. McLain* for petitioner. No appearance for respondent. Reported below: 206 N. C. 102; 173 S. E. 49.

No. 78. DIMICK *v.* SCHIEDT. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Leo M. Harlow* and *David H. Fulton* for petitioner. *Mr. John G. Palfrey* for respondent. Reported below: 70 F. (2d) 558.

No. 91. HUNT *v.* WESTERN CASUALTY Co. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. C. Street* for petitioner. *Messrs. Charles J. Faulkner, Jr.,* and *W. W. Naman* for respondent. Reported below: 69 F. (2d) 129.

No. 95. VAN WART *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Frederick R. Gibbs* and *Preston B. Kavanagh* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 69 F. (2d) 299.

No. 100. WHITE, COLLECTOR OF INTERNAL REVENUE, *v.* ATKINS. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. Earle W. Carr* for respondent. Reported below: 69 F. (2d) 960.

No. 102. SMITH *v.* SNOW ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Amasa C. Paul, Charles Neave, Albert L. Ely, Newton D. Baker,* and *Maurice M. Moore* for petitioner. *Messrs. James F. Williamson* and *Ralph Elmore Williamson* for respondents. Reported below: 70 F. (2d) 564.

No. 208. WAXHAM *v.* SMITH ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Drury W. Cooper, Allan C. Bakewell,* and *Raymond I. Blakeslee*

for petitioner. *Messrs. Charles Neave, Albert L. Ely,* and *Leonard S. Lyon* for respondents. Reported below: 70 F. (2d) 457.

No. 115. HAMMOND CLOCK CO. *v.* SCHIFF. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Clifford C. Bradbury* for petitioner. *Mr. Alvin E. Stein* for respondent. Reported below: 69 F. (2d) 742.

No. 120. UNITED STATES *v.* GUARANTY TRUST COMPANY OF NEW YORK. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for the United States. *Messrs. John W. Davis* and *Theodore Kiendl* for respondent. Reported below: 69 F. (2d) 799.

No. 125. MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE, *v.* PACIFIC LUMBER CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. F. D. Madison, Alfred Sutro, Felix T. Smith, V. K. Butler,* and *Claude R. Branch* for respondent. Reported below: 66 F. (2d) 895.

No. 127. GREGORY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Hugh Satterlee, Rollin Browne, Charles A. Roberts,* and *George W. Saam* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 69 F. (2d) 809.

No. 131. KEYSTONE DRILLER CO. *v.* NORTHWEST ENGINEERING CORP.;

No. 132. SAME *v.* HARNISCHFEGER CORP.; and

No. 133. SAME *v.* BUCYRUS-ERIE CO. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Clarence P. Byrnes, F. O. Richey,* and *H. F. McNenny* for petitioner. *Messrs. Henry M. Huxley, Louis Quarles,* and *Frank Parker Davis* for respondents. Reported below: 70 F. (2d) 13.

No. 134. SCHNELL ET AL. *v.* THE VALLESCURA ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Louis Joffe* and *Joseph Joffe* for petitioners. *Mr. Homer L. Loomis* for respondents. Reported below: 70 F. (2d) 261.

No. 135. PANAMA REFINING CO. ET AL. *v.* RYAN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. F. W. Fischer* for petitioners. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Nathan R. Margold, Carl McFarland, M. S. Huberman, Charles H. Weston,* and *Charles Fahy* for respondents. Reported below: 71 F. (2d) 8.

No. 260. AMAZON PETROLEUM CORP. ET AL. *v.* RYAN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. N. Saye, F. W. Fischer,* and *W. Edward Lee* for petitioners. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Carl McFarland* and *M. S. Huberman* for respondents. Reported below: 71 F (2d) 1.

No. 148. MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE ET AL. *v.* KALT-ZIMMERS MANUFACTURING CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. George D. Van Dyke, Leon E. Kaumheimer,* and *George A. Affeldt* for petitioners. *Mr. Irving A. Fish* for respondents. Reported below: 70 F. (2d) 815.

No. 154. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* JOHNSON, ADMINISTRATOR. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. James C. Martin* and *Frederick L. Allen* for petitioner. *Messrs. John S. Barbour* and *Burnett Miller* for respondent. Reported below: 70 F. (2d) 41.

No. 161. UNITED STATES *v.* SPAULDING. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Biggs* for the United States. *Messrs. Philip D. Beall* and *Warren E. Miller* for respondent. Reported below: 68 F. (2d) 656.

No. 170. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TWIN BELL OIL SYNDICATE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biggs, Assistant Attorney General Wideman, Mr. James W. Morris,* and *Miss Helen R. Carloss* for petitioner. *Messrs. George H. Koster* and *L. A. Luce* for respondent. Reported below: 70 F. (2d) 402.

No. 176. WILLIAM E. HERRING *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 177. EULA DAY HERRING *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Robert Ash* and *Leslie E. Martlew* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 70 F. (2d) 785, 790.

No. 178. BALTIMORE & CAROLINA LINE, INC. *v.* REDMAN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. George Whitefield Betts, Jr.,* for petitioner. *Messrs. Frederick R. Graves* and *Martin A. Schenck* for respondent. Reported below: 70 F. (2d) 635.

No. 210. WILBER NATIONAL BANK OF ONEONTA, ADMINISTRATOR, *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Wm. Wolff Smith* for petitioner. *Solicitor General Biggs* and *Mr. Will G. Beardslee* for the United States. Reported below: 69 F. (2d) 526.

No. 211. SHANFEROKE COAL & SUPPLY CORP. *v.* WESTCHESTER SERVICE CORP. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. George C. Levin* and *Alfred B. Nathan* for petitioner. *Messrs. Ernest E. Wheeler* and *Ralph Royall* for respondent. Reported below: 69 F. (2d) 1016. See also, 70 F. (2d) 297.

No. 214. FORREST *v.* JACK, RECEIVER. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. James F. Pierce* for petitioner. *Messrs. George P. Barse, Will P. Hoyt,* and *F. G. Awalt* for respondent. Reported below: 71 F. (2d) 264.

No. 219. POSNER *v.* ANDERSON. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, granted. *Mr. Emanuel van Dernoot* for petitioner. *Messrs. George L. Buland* and *Charles L. Minor* for respondent. Reported below: 241 App. Div. 843; 271 N. Y. S. 333.

No. 247. CENTRAL VERMONT TRANSPORTATION CO. *v.* DURNING, COLLECTOR OF CUSTOMS. October 8, 1934. Petion for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Horace H. Powers* and *J. W. Redmond* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 71 F. (2d) 273.

No. 249. MCCREA *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John M. Scoble* and *K. Courtenay Johnston* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Sweeney* for the United States. Reported below: 70 F. (2d) 632.

No. 261. TAYLOR *v.* STERNBERG, TRUSTEE; and

No. 262. DUTY *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. W. N. Ivie* for petitioners. *Mr. Clinton R. Barry* for respondent. Reported below: 71 F. (2d) 157.

No. 268. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GRINNELL, EXECUTOR. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Bernhard Knollenberg* and *Allen Evarts Foster* for respondent. Reported below: 70 F. (2d) 705.

No. 289. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TAYLOR. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. Truman Henson* for respondent. Reported below: 70 F. (2d) 619.

No. 292. LERNER *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Emil Hersh* for petitioner. *Messrs. John C. Warner, Edgar L. Wood, Walter J. Mattison,* and *Ben Z. Glass* for respondents. Reported below: 70 F. (2d) 938.

No. 338. JENNINGS, RECEIVER, ET AL. *v.* UNITED STATES FIDELITY & GUARANTY CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John F. Anderson, F. G. Awalt,* and *George P. Barse* for petitioners. *Messrs. Arthur L. Gilliom* and *S. O. Pickens* for respondent. Reported below: 71 F. (2d) 618.

No. 339. JURNEY *v.* MACCRACKEN. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Leslie C. Garnett* and *Harry L. Underwood* for petitioner.

Messrs. Frank J. Hogan and *Edmund L. Jones* for respondent. Reported below: 63 App. D. C. 342; 72 F. (2d) 560.

No. 54. MITCHELL, INSURANCE COMMISSIONER OF CALIFORNIA, *v.* MAURER ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted limited to the question of the validity of the appointment of ancillary receivers upon the petition of the primary receivers, and attention is directed to McCandless *v.* Furlaud, No. 11 on the present docket (*ante,* p. 67). *Mr. Frank L. Guerena* for petitioner. *Messrs. Edward D. Lyman* and *P. B. Plumb* for respondents. Reported below: 69 F. (2d) 233.

No. 107. OLD MISSION PORTLAND CEMENT CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted limited to the question of the right of the taxpayer to deductions (a) on account of amortization of bond discount and (b) on account of contributions to the San Francisco Community Chest. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman, Miss Helen R. Carloss,* and *Messrs. Erwin N. Griswold* and *James W. Morris* for respondent. Reported below: 69 F. (2d) 676.

No. 128. GEORGE *v.* VICTOR TALKING MACHINE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the question of the jurisdiction of the Circuit Court of Appeals. *Messrs. Minitree Jones Fulton* and *Robert L. Nase* for petitioner. *Messrs. Robert P. Myers,*

Isaac D. Levy, I. E. Lambert, Lawrence B. Morris, and *Louis Levinson* for respondent. Reported below: 69 F. (2d) 871.

No. 146. CLIFTON MANUFACTURING CO. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Joseph B. Brennan* and *W. A. Sutherland* for petitioner. *Solicitor General Biggs* for the United States. Reported below: 70 F. (2d) 102.

No. 173. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* BOWDITCH ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Irving L. Ernst* and *Lester D. Melzer* for petitioner. *Messrs. Burton E. Eames* and *Burt Franklin* for respondents. Reported below: 71 F. (2d) 1015.

No. 215. SCHUMACHER, SHERIFF, *v.* BEELER, TRUSTEE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted, limited to the question of the jurisdiction of the District Court under § 23 (b) of the Bankruptcy Act. *Messrs. John W. Peck, Frank H. Shaffer, Jr.,* and *Coleman Avery* for petitioner. *Messrs. Province M. Pogue* and *Henry Burton Street* for respondent. Reported below: 71 F. (2d) 831.

No. 234. UNITED STATES EX REL. CHICAGO GREAT WESTERN R. CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE BRANDEIS took no part in the consideration or decision of this applica-

tion. *Messrs. Frank H. Towner, Ralph M. Shaw, Frank H. Moore, A. F. Smith,* and *Samuel W. Moore* for petitioners. *Messrs. Daniel W. Knowlton, E. M. Reidy, Samuel W. Sawyer, J. C. Gibson, Charles H. Woods, Bruce Scott, W. F. Dickinson, F. W. Clements, E. A. Boyd, Walter McFarland, J. M. Souby, H. H. Larrimore,* and *W. F. Peter* for respondents. Reported below: 63 App. D. C. 215; 71 F. (2d) 336.

No. 270. NORMAN *v.* BALTIMORE & OHIO R. Co. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Emanuel Redfield* and *Dalton Dwyer* for petitioner. *Mr. Frederick H. Wood* for respondent. Reported below: 265 N. Y. 37; 191 N. E. 726.

No. 340. OLD COMPANY'S LEHIGH, INC. *v.* MEEKER, RECEIVER, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Joseph G. M. Browne* and *Israel H. Mandel* for petitioner. *Mr. Humphrey J. Lynch* for respondents. Reported below: 71 F. (2d) 280.

No. 361. CLARK, COMMISSIONER OF INSURANCE OF IOWA, ET AL. *v.* WILLIARD ET AL. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Montana granted. *Messrs. Reuel B. Cook, Edmond M. Cook,* and *M. S. Gunn* for petitioners. *Messrs. Louis P. Donovan* and *H. Leonard DeKalb* for respondents. Reported below: 97 Mont. 503; 34 P. (2d) 982.

No. 383. SWINSON *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. Co. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit granted. *Messrs. Tom Davis* and *Ernest A. Michel* for petitioner. *Messrs. Warren Newcome, Samuel H. Cady,* and *William T. Faricy* for respondent. Reported below: 72 F. (2d) 649.

No. 431. PENN GENERAL CASUALTY CO. *v.* PENNSYLVANIA EX REL. SCHNADER, ATTORNEY GENERAL. October 22, 1934. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Messrs. Thomas F. Mount* and *Joseph W. Henderson* for petitioner. *Messrs. William A. Schnader* and *Harold D. Saylor* for respondent. Reported below: 316 Pa. 1; 173 Atl. 637.

No. 424. HILDEGARD SCHOENAMSGRUBER *v.* HAMBURG AMERICAN LINE; and

No. 425. GUSTAV SCHOENAMSGRUBER *v.* SAME. October 22, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Harry H. Semmes* for petitioners. *Messrs. Christopher B. Garnett, S. Hasket Derby,* and *J. Hampton Hoge* for respondent. Reported below: 70 F. (2d) 234.

No. 374. ADAMS, RECEIVER *v.* CHAMPION, TRUSTEE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. John F. Anderson* for petitioner. *Mr. Harry C. Heyl* for respondent. Reported below: 70 F. (2d) 956.

No. 394. PENNSYLVANIA *v.* WILLIAMS ET AL. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Wm. A. Schnader, Harold D. Saylor,* and *Leo Weinrott*

for petitioner. *Messrs. Gordon A. Block, Grover C. Ladner,* and *Joseph H. Sundheim* for respondents. Reported below: 72 F. (2d) 509.

No. 254. PARAMOUNT PUBLIX CORP. *v.* AMERICAN TRI-ERGON CORP. See *ante,* p. 528.

No. 255. ALTOONA PUBLIX THEATRES, INC. *v.* AMERICAN TRI-ERGON CORP. ET AL.; and

No. 256. WILMER & VINCENT CORP. ET AL. *v.* SAME. See *ante,* p. 528.

No. 395. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, *v.* OMINSKY ET AL. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Wm. A. Schnader, Harold D. Saylor,* and *Leo Weinrott* for petitioner. *Messrs. G. C. Ladner* and *Charles Potes* for respondents. Reported below: 72 F. (2d) 517.

No. 413. GULF, MOBILE & NORTHERN R. Co. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted limited to the question of the right of the taxpayer to deductions on account of amortization of bond discount. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Morton K. Rothschild* for respondent. Reported below: 63 App. D. C. 244; 71 F. (2d) 953.

Nos. 471 and 472. UNITED STATES ET AL. *v.* BANKERS TRUST CO. ET AL. November 5, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the

Eighth Circuit granted. *Solicitor General Biggs, Assistant Solicitor General MacLean,* and *Messrs. Stanley Reed* and *John T. Fowler, Jr.,* for the United States et al. *Messrs. James H. McIntosh, Edward J. White,* and *Clifton P. Williamson* for respondents.

No. 434. SEABURY, RECEIVER, *v.* GREEN, ADMINISTRATRIX, ET AL. November 5, 1934. Petition for writ of certiorari to the Court of Common Pleas for Sumter County, South Carolina, granted. *Mr. R. O. Purdy* for petitioner. *Mr. Samuel Want* for respondents. Reported below: 173 S. C. 235; 175 S. E. 639.

No. 441. UNITED STATES MORTGAGE CO. ET AL. *v.* MATTHEWS ET AL. November 5, 1934. Petition for writ of certiorari to the Court of Appeals of Maryland granted. *Mr. William L. Marbury, Jr.,* for petitioners. *Mr. Frederick H. Hennighausen* for respondents. Reported below: 167 Md. 383; 173 Atl. 903.

No. 386. DOMENECH, TREASURER OF PUERTO RICO, *v.* NATIONAL CITY BANK OF NEW YORK. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. *Mr. Earle T. Fiddler* for respondent. Reported below: 71 F. (2d) 13.

No. 452. ADAMOS *v.* NEW YORK LIFE INSURANCE CO. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Louis Caplan* and *Charles H. Sachs* for petitioner. *Messrs. William H. Eckert* and *Louis H. Cooke* for respondent. Reported below: 71 F. (2d) 997.

No. 496. LAWYERS COUNTY TRUST CO. *v.* REICHERT ET AL. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Saul S. Myers* for petitioner. *Messrs. Selig C. Brez* and *Meyer Marlow* for respondents. Reported below: 73 F. (2d) 56.

No. 478. FOX FILM CORP. *v.* MULLER. December 3, 1934. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. Percy Heiliger* and *James D. Shearer* for petitioner. *Mr. Abram F. Myers* for respondent. Reported below: 192 Minn. 212; 255 N. W. 845.

Nos. 479 and 480. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RY. CO. ET AL.;

Nos. 481 and 482. CHASE NATIONAL BANK OF NEW YORK *v.* SAME;

Nos. 483 and 484. MISSISSIPPI VALLEY TRUST CO. *v.* SAME;

Nos. 485 and 486. HARRIS TRUST & SAVINGS BANK *v.* SAME;

Nos. 487 and 488. NEW YORK TRUST CO. *v.* SAME; and

Nos. 489 and 490. RECONSTRUCTION FINANCE CORP. *v.* SAME. December 3, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Isaac H. Mayer, Carl Meyer, David F. Rosenthal,* and *Herbert A. Friedlich* for petitioner in Nos. 479 and 480. *Messrs. Henry Root Stern, Bertram F. Shipman,* and *Paul D. Miller* for petitioner in Nos. 481 and 482. *Messrs. T. M. Pierce* and *S. Mayner Wallace* for petitioner in Nos. 483 and 484. *Mr. Hal C. Bangs* for petitioner in Nos. 485 and 486. *Messrs. Ed-*

win W. Sims, Franklin J. Standky, and *James P. Carey, Jr.,* for petitioner in Nos. 487 and 488. *Solicitor General Biggs* and *Mr. Stanley Reed* for petitioner in Nos. 489 and 490. *Messrs. George W. Wickersham, Elihu Root, Jr.,* and *Edward C. Bailly* for respondents. Reported below: 72 F. (2d) 443.

No. 499. GREAT NORTHERN RAILWAY CO. *v.* SULLIVAN. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. R. J. Hagman* and *J. P. Plunkett* for petitioner. *Messrs. Ormie C. Lance* and *Stanley B. Houck* for respondent. Reported below: 72 F. (2d) 587.

No. 342. MILLER *v.* UNITED STATES. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Wallace Miller* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Randolph C. Shaw,* and *W. Marvin Smith* for the United States. Reported below: 71 F. (2d) 361.

No. 519. DOUGLAS ET AL. *v.* CUNNINGHAM ET AL. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. George P. Dike* for petitioners. *Mr. Edmund A. Whitman* for respondents. Reported below: 72 F. (2d) 536.

No. 521. THE ANSALDO SAN GIORGIO I *v.* RHEINSTROM BROTHERS CO. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Homer L. Loomis* for petitioner. *Messrs. D. Roger Englar, Henry N. Longley* and *F. Herbert Prem* for respondent. Reported below: 73 F. (2d) 40.

No. 522. MANUFACTURERS' FINANCE CO. *v.* MCKEY, TRUSTEE. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Samuel A. Dew* and *Edward I. Rothbart* for petitioner. *Mr. Thomas L. Marshall* for respondent. Reported below: 72 F. (2d) 471.

No. 524. AKTIESELSKABET CUZCO *v.* THE SUCARSECO. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William H. McGrann* for petitioner. *Messrs. D. Roger Englar, Leonard J. Matteson,* and *Forrest E. Single* for respondent. Reported below: 72 F. (2d) 690.

No. 566. RAILROAD RETIREMENT BOARD ET AL. *v.* ALTON RAILROAD CO. ET AL. December 17, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Biggs* for petitioners. *Messrs. Sydney R. Prince, R. V. Fletcher, Jacob Aronson, Edward S. Jouett, Dennis F. Lyons, Emmett E. McInnis,* and *Sidney S. Alderman* for respondents.

No. 534. NORRIS *v.* ALABAMA. January 7, 1935. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. Walter H. Pollak* and *Osmond K. Fraenkel* for petitioner. *Messrs. Thomas E. Knight, Jr.,* and *Thomas Seay Lawson* for respondent. Reported below: 229 Ala. 226; 156 So. 556.

No. 544. BERGER *v.* UNITED STATES. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Nathan D.*

Perlman for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 73 F. (2d) 278.

No. 549. GORDON, SECRETARY OF BANKING, ET AL. *v.* WASHINGTON ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. William A. Schnader* and *Harold D. Saylor* for petitioners. *Mr. David Bortin* for respondents. Reported below: 73 F. (2d) 577.

No. 550. GORDON, SECRETARY OF BANKING, ET AL. *v.* O'BRIEN ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. William A. Schnader* and *Harold D. Saylor* for petitioners. *Mr. David Bortin* for respondents. Reported below: 73 F. (2d) 577.

No. 557. VULCAN MANUFACTURING CO. *v.* MAYTAG CO. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. I. J. Ringolsky* and *Armwell L. Cooper* for petitioner. *Messrs. Wallace R. Lane* and *Nelson E. Johnson* for respondent. Reported below: 73 F. (2d) 136.

No. 537. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INTER-MOUNTAIN LIFE INSURANCE CO. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Stephen W. Downey* and *A. R. Serven* for respondent. Reported below: 71 F. (2d) 962.

No. 546. ROBERTS, RECEIVER, ET AL. *v.* NEW YORK CITY ET AL. January 7, 1935. Petition for writ of certiorari to the Supreme Court of New York granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Carl M. Owen, Harold C. McCollom, George Welwood Murray, Charles E. Hughes, Jr., Martin A. Schenck,* and *Charles Franklin* for petitioners. *Messrs. Paxton Blair, Richard M. Page, Wm. H. Page, Joseph F. Mulqueen, Jr., Elwood Thomas,* and *Albert S. Wright* for respondents. *Mr. Gregory Hankin* also entered an appearance for respondents.

No. 554. PATTERSON *v.* ALABAMA. January 7, 1935. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. Walter H. Pollak* and *Osmond K. Fraenkel* for petitioner. *Messrs. Thomas E. Knight, Jr.,* and *Thomas Seay Lawson* for respondent. Reported below: 229 Ala. 270; 156 So. 567.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 1, 1934, TO AND INCLUDING JANUARY 7, 1935.

No. 171. GREEN *v.* CROWELL, DEPUTY COMMISSIONER, ET AL. October 8, 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. *Rebecca Green, pro se. Messrs. George H. Terriberry* and *Walter Carroll* for respondents. Reported below: 69 F. (2d) 762.

No. 231. MCGEORGE *v.* CHARLES NELSON CO. October 8, 1934. Petition for writ of certiorari to the District Court of Appeal, First Appellate District, of California, and motion for leave to proceed further *in forma pau-*

peris, denied. *Mr. H. W. Hutton* for petitioner. No appearance for respondent. Reported below: 136 Cal. App. 638; 29 P. (2d) 426.

No. 237. RASMUSSEN *v.* HAMILTON, RECEIVER, ET AL. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jesse C. Duke* for petitioner. No appearance for respondents. Reported below: 63 App. D. C. 202; 71 F. (2d) 212.

No. 243. PUCKETT *v.* UNITED STATES. October 8, 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. John J. McCreary* for petitioner. No appearance for the United States. Reported below: 70 F. (2d) 895.

No. 263. LESSER *v.* NEW YORK. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Samuel Lesser, pro se.* No appearance for respondent.

No. 284. HUNTER *v.* ZERBST, WARDEN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Frank Hunter, pro se.* No appearance for respondent. Reported below: 71 F. (2d) 1008.

No. 325. ANDREAS *v.* CLARK, U. S. MARSHAL. October 8, 1934. Petition for writ of certiorari to the Circuit

Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James E. Fenton* for petitioner. No appearance for respondent. Reported below: 71 F. (2d) 908.

No. 375. FOWLER *v.* AMERICAN MAIL LINE, LTD., ET AL. October 8, 1934. Petition for writ of ceritorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. H. W. Hutton* for petitioner. No appearance for respondents. Reported below: 69 F. (2d) 905.

No. 384. WOHLFELD *v.* NEW YORK. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Robert Wohlfeld, pro se.* No appearance for respondent. Reported below: 241 App. Div. 856; 271 N. Y. S. 963.

No. 389. WHITFIELD *v.* NORTH CAROLINA. October 8, 1934. Petition for writ of certiorari to the Supreme Court of North Carolina, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Frank P. Hobgood* for petitioner. No appearance for respondent. Reported below: 206 N. C. 696; 175 S. E. 93.

No. 303. GASS *v.* WETMORE ET AL. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Mr. John J. Curtin* for petitioner. *Mr. R. Randolph Hicks* for respondents. Reported below: 264 N. Y. 663; 191 N. E. 615.

No. 315. ROYAL INSURANCE CO., LTD., ET AL. *v.* EASTHAM. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Louis M. Denit* and *Leonard J. Ganse* for petitioners. *Mr. Niel P. Sterne* for respondent. Reported below: 71 F. (2d) 385.

No. 31. BEKINS ET AL. *v.* PACIFIC SAVINGS & LOAN ASSN. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. Arthur I. Moulton* for petitioners. *Mr. Erskine Wood* for respondent. Reported below: 146 Ore. 385; 29 P. (2d) 816.

No. 33. CHESAPEAKE & OHIO RY. CO. *v.* MEARS, ADMINISTRATRIX. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. David H. Leake* and *Wm. Leigh Williams* for petitioner. *Mr. James Mann* for respondent. Reported below: 70 F. (2d) 490. See also 64 F. (2d) 291.

No. 34. CONTINENTAL NATIONAL BANK ET AL. *v.* NATIONAL CITY BANK OF NEW YORK. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles W. Collins* and *William C. Day* for petitioners. *Mr. E. E. Bacon* for respondent. Reported below: 69 F. (2d) 312.

No. 40. MCLAUGHLIN & FREEMAN *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Messrs. Malcolm Donald* and *Joseph F. Lockett* for

petitioner. *Solicitor General Biggs,* and *Assistant Attorney General Lawrence* for the United States. Reported below: 21 C. C. P. A. (Cust.) 446; T. D. 46,946.

No. 41. MISSOURI PACIFIC R. Co. *v.* CREIGHTON. October 8, 1934. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, denied. *Messrs. Edward J. White, Thomas J. Cole,* and *D. C. Chastain* for petitioner. *Mr. Walter J. Gresham* for respondent. Reported below: 229 Mo. App. —; 66 S. W. (2d) 980.

Nos. 43 and 44. WINGERT *v.* SMEAD ET AL., TRUSTEES IN BANKRUPTCY. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioner. No appearance for respondents. Reported below: 69 F. (2d) 790. See also, 70 F. (2d) 351.

No. 45. JONES *v.* FOSTER. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry Roberts* for petitioner. *Mr. George S. Shackelford, Jr.,* for respondent. Reported below: 70 F. (2d) 200.

No. 46. AMERICAN TEXTILE WOOLEN CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. J. Robert Sherrod* and *Charles A. Noone* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Charles W. Bunn, James W. Morris,* and *John H. McEvers* for respondent. Reported below: 68 F. (2d) 820.

No. 48. MASTERS ET AL. *v.* DUVAL COUNTY, FLORIDA, ET AL. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. P. H. Odom* for petitioners. *Messrs. Perse L. Gaskins* and *Robert R. Milam* for respondents. Reported below: 114 Fla. 205; 154 So. 172.

No. 49. INTERNATIONAL RAILWAY CO. *v.* BURDICK ET AL. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Martin Lee Clark* for petitioner. *Messrs. Alan V. Parker, Henry Epstein,* and *Joseph H. McLaughlin* for respondents. Reported below: 264 N. Y. 510; 191 N. E. 539.

No. 50. UNION PACIFIC R. CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry W. Clark* and *Edward N. Abbey* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Morton K. Rothschild* for respondent. Reported below: 69 F. (2d) 67.

No. 52. MAYOR AND CITY COUNCIL OF BALTIMORE *v.* GIBBS. October 8, 1934. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. R. E. Lee Marshall, Paul F. Due, J. Francis Ireton,* and *Wm. Preston Lane* for petitioner. *Messrs. George Weems Williams* and *Wm. L. Marbury, Jr.,* for respondent. Reported below: 166 Md. 364; 171 Atl. 37.

No. 53. BECKER ET AL. *v.* MONTGOMERY WARD & CO., INC. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Gilbert*

Lamb for petitioners. *Mr. Frank Y. Gladney* for respondent. Reported below: 334 Mo. 789; 69 S. W. (2d) 674.

No. 56. HOPKINS *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope* and *George A. Carpenter* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Andrew D. Sharpe* for respondent. Reported below: 69 F. (2d) 11.

No. 57. WABASH RAILWAY CO. *v.* HIATT, ADMINISTRATRIX. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. N. S. Brown* and *Homer Hall* for petitioner. *Mr. John S. Marsalek* for respondent. Reported below: 334 Mo. 895; 69 S. W. (2d) 627.

No. 58. DIXON *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Ellsworth C. Alvord* and *Elwood G. Godman* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold* and *James W. Morris* for respondent. Reported below: 69 F. (2d) 461.

No. 59. CHICAGO & NORTHWESTERN RY. CO. *v.* WILCOX CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Samuel H. Cady, William T. Far-*

icy, and *P. F. Gault* for petitioner. *Mr. Thomas B. Lantry* for respondents. Reported below: 68 F. (2d) 883.

No. 61. TRIMBLE *v.* NEW YORK LIFE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Howard B. Warren* for petitioner. *Mr. Louis H. Cooke* for respondent. Reported below: 69 F. (2d) 849.

No. 63. BURDICK ET AL *v.* COCHRAN. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Ira Robinson* and *Louis Titus* for petitioners. *Messrs. Harry Friedman* and *Howe P. Cochran* for respondent. Reported below: 63 App. D. C. 150; 70 F. (2d) 754.

No. 64. SMITH V. COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul Reilly* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 69 F. (2d) 911.

No. 65. AUSTIN ET AL. *v.* COE, COMMISSIONER OF PATENTS. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Melville Church* for petitioners. *Solicitor General Biggs* and *Mr. T. A. Hostetler* for respondent. Reported below: 63 App. D. C. 94; 69 F. (2d) 832.

No. 66. ATLANTIC GREYHOUND LINES, INC., *v.* METZ. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Henry I. Quinn* and *Austin F. Canfield* for petitioner. *Mr. James J. Lenihan* for respondent. Reported below: 70 F. (2d) 166.

No. 67. WICHITA STATE BANK & TRUST CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 69 F. (2d) 595.

No. 71. CUYUNA MINING & INVESTMENT CO. *v.* ICKES, SECRETARY OF THE INTERIOR. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Manton M. Wyvell* and *Clyde L. Rogers* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Blair* for respondent. Reported below: 63 App. D. C. 91; 69 F. (2d) 662.

No. 73. DAKIN, RECEIVER, *v.* FEDERAL RESERVE BANK OF BOSTON ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Kenneth I. McKay* and *Maynard Ramsey* for petitioner. *Mr. Harvey L. McGlothlin* for respondents. Reported below: 69 F. (2d) 319.

No. 74. SPENCER KELLOGG & SONS, INC. *v.* BUCKEYE STEAMSHIP CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Messrs. Sherwin A. Hill* and *Carl V. Essery* for petitioner. *Messrs. Frederick L. Leckie* and *Thomas H. Garry* for respondent. Reported below: 70 F. (2d) 146.

No. 75. SNYPP *v.* OHIO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. A. S. Iddings* for petitioner. *Mr. Harry N. Routzohn* for respondent. Reported below: 70 F. (2d) 535.

No. 76. DUNKLEE *v.* CUNARD STEAMSHIP CO., LTD. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry D. Thirkield* for petitioner. *Mr. George de Forest Lord* for respondent. Reported below: 69 F. (2d) 1003.

No. 79. NUSBAUM, TRUSTEE IN BANKRUPTCY, *v.* NEW LIBERTY LOAN & SAVINGS ASSN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles C. Scott* for petitioner. No appearance for respondent. Reported below: 70 F. (2d) 49.

No. 80. CENTRAL IRON & STEEL CO. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Ralph J. Baker* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 79 Ct. Cls. 56; 6 F. Supp. 115.

No. 169. CLEVELAND AUTOMOBILE CO. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari

to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ellsworth C. Alvord* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for the United States. Reported below: 70 F. (2d) 365.

No. 257. W. H. Bradford & Co., Inc. *v.* United States. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Paul Armitage* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. George H. Foster* for the United States. Reported below: 79 Ct. Cls. 89; 6 F. Supp. 117.

No. 81. United States *v.* Clarke, Executor. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Biggs* for the United States. *Mr. William B. Bodine* for respondent. Reported below: 69 F. (2d) 748.

No. 242. United States *v.* Union Trust Co., Executor. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for the United States. *Mr. Daniel M. Beach* for respondent. Reported below: 70 F. (2d) 629.

No. 82. Donnelley et al., Coexecutors, *v.* Helvering, Commissioner of Internal Revenue. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edward H. McDermott, Ellsworth C. Alvord,* and *Floyd F. Toomey* for petitioners. *Solicitor General Biggs, Assist-*

ant Attorney General Wideman, and *Messrs. James W. Morris, J. P. Jackson,* and *H. Brian Holland* for respondent. Reported below: 68 F. (2d) 722.

No. 83. GREAT LAKES TRANSIT CORP. *v.* NORRIS GRAIN CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lawrence E. Coffey* and *David F. Rosenthal* for petitioner. *Mr. Forrest E. Single* for respondent. Reported below: 70 F. (2d) 32.

No. 84. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* GASSER. October 8, 1934. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. George W. Aubrey* for petitioner. *Mr. E. Burke Finnerty* for respondent. Reported below: 112 Pa. Super. Ct. 420; 171 Atl. 97.

No. 85. SCHWARTZ, TRUSTEE IN BANKRUPTCY, *v.* HOLZMAN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Meyer Kraushaar* for petitioner. *Mr. Louis R. Bick* for respondent. Reported below: 69 F. (2d) 814.

Nos. 86 and 87. THE FARMERS' LOAN & TRUST CO., TRUSTEE, ET AL. *v.* BOWERS, EXECUTOR. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis* and *Carl Taylor* for petitioners. *Solicitor General Biggs, Assistant to the Attorney General Stanley, Assistant Attorney General Wideman* and *Messrs. Sewall Key, Carlton Fox* and *Erwin N. Griswold* for respondent. Reported below: 68 F. (2d) 916.

No. 89. UNITED STATES *v.* JONES ET AL. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. *Mr. George E. H. Goodner* for respondents. Reported below: 78 Ct. Cls. 549; 5 F. Supp. 146.

No. 90. REISENWEBERS, INC. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioner. *Mr. William D. Whitney* for respondent. Reported below: 69 F. (2d) 513.

No. 92. MERCANTILE-COMMERCE BANK & TRUST CO., TRUSTEE, *v.* DRAINAGE DISTRICT NO. 2 OF CRITTENDEN COUNTY, ARKANSAS, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Guy A. Thompson* and *Samuel A. Mitchell* for petitioner. *Messrs. Walter G. Riddick* and *Charles T. Coleman* for respondents. Reported below: 69 F. (2d) 138.

No. 93. BARRYMORE ET AL. *v.* KEMP, RECEIVER, ET AL.; and

No. 94. SAME *v.* WEILER ET AL. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Zack Lamar Cobb* for petitioners. *Messrs. H. W. O'Melveny* and *Walter K. Tuller* for respondents. Reported below: 69 F. (2d) 335.

No. 96. MORRISSEY *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit denied. *Mr. Byron C. Hanna* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 729. See also, 67 F. (2d) 267.

No. 97. WINGERT ET AL. *v.* SMEAD ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioners. No appearance for respondents. Reported below: 70 F. (2d) 351. See also, 69 F. (2d) 790.

No. 98. ANDERSON ET AL. *v.* MOORE ET AL.; and

No. 99. GRAHAM ET AL. *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Lichty* for petitioners. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. Aubrey Lawrence* and *H. Brian Holland* for respondents. Reported below: 68 F. (2d) 191.

No. 101. SHANFEROKE COAL & SUPPLY CORP. *v.* WESTCHESTER SERVICE CORP. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George C. Levin* for petitioner. *Mr. Ralph Royall* for respondent. Reported below: 70 F. (2d) 297; 69 *id.* 1016.

No. 104. LEVY-WARD GROCER CO. *v.* LAMBORN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Dudley Morton Shively* for petitioner. *Messrs. Samuel D. Miller, S. B. Pettengill,* and *A. C. B. McNevin* for respondents. Reported below: 69 F. (2d) 723.

No. 105. SARGEANT *v.* GRIMES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Frederick E. Dickerson* for petitioner. *Mr. Max P. Zoll* for respondent. Reported below: 70 F. (2d) 121.

No. 106. MCCUTCHAN *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Clyde Taylor* and *D. Heywood Hardy* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 658.

No. 108. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* STATE TAX COMM'N ET AL. October 8, 1934. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Alex. H. Elder* and *Maximilian M. Stallman* for petitioner. *Mr. Duane E. Minard* for respondents. Reported below: 112 N. J. L. 5; 169 Atl. 489.

No. 109. PACIFIC WESTERN OIL CO. *v.* MCDUFFIE, RECEIVER, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas A. J. Dockweiler* for petitioner. *Messrs. Atlee Pomerene, Frank Harrison, Robert B. Murphey, Norman S. Sterry, H. W. O'Melveny,* and *Alex. Macdonald* for respondents. Reported below: 69 F. (2d) 208.

No. 111. BANDES *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Allen G. Gartner* for petitioner. *Solici-*

tor General Biggs, Assistant Attorney General Wideman, Messrs. James W. Morris and *H. Brian Holland,* and *Miss Helen R. Carloss* for respondent. Reported below: 69 F. (2d) 812.

No. 112. JOHNSON, RECEIVER, *v.* MERCHANTS & MANUFACTURERS SECURITIES CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frederick H. Wood* for petitioner. *Messrs. Samuel A. Dew* and *Michael J. Doherty* for respondent. Reported below: 69 F. (2d) 940.

Nos. 113 and 114. DORT, ADMINISTRATRIX *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. William P. Smith* and *John C. Evans* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman, Miss Helen R. Carloss,* and *Messrs. James W. Morris* and *Erwin N. Griswold* for respondent. Reported below: 63 App. D. C. 98; 69 F. (2d) 836.

No. 116. WALLACE ET AL. *v.* SEAGRAVES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John Neethe, S. J. Brooks,* and *J. D. Williamson* for petitioners. No appearance for respondent. Reported below: 69 F. (2d) 163.

No. 117. MARYLAND CASUALTY CO. *v.* COOK-O'BRIEN CONSTRUCTION CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. P. H. Marshall* for petitioner. *Mr. Floyd E. Jacobs* for respondent. Reported below: 69 F. (2d) 462.

No. 118. ALDREW OIL & GAS CO. *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE; and

No. 119. BERGEN OIL & GAS CO. *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles H. Garnett* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 70 F. (2d) 160.

No. 121. PERRON *v.* AETNA LIFE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Isaac E. Ferguson* and *Edward Sonnenschein* for petitioner. *Mr. George T. Buckingham* for respondent. Reported below: 69 F. (2d) 401.

No. 122. ULTIMO *v.* PALMER, DISTRICT DIRECTOR OF IMMIGRATION, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold O. Mulks* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondents. Reported below: 69 F. (2d) 1.

No. 123. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BROWN, EXECUTRIX; and

No. 124. SAME *v.* BROWN. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. Herbert Pope* and *Benjamin M. Price* for respondents. Reported below: 69 F. (2d) 602.

No. 250. HYMAN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of

certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. R. Kemp Slaughter* and *Hugh C. Bickford* for petitioner. *Solicitor General Biggs* for respondent. Reported below: 63 App. D. C. 221; 71 F. (2d) 342.

No. 293. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* HENRY B. BABSON;

No. 294. SAME *v.* GUSTAVUS BABSON; and

No. 295. SAME *v.* FRED K. BABSON. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. George K. Bowden* for respondents. Reported below: 70 F. (2d) 304.

No. 126. STRAUS ET AL. *v.* FIEST, TRUSTEE IN BANKRUPTCY, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Dubberstein* for petitioners. *Mr. Oscar A. Lewis* for respondents. Reported below: 68 F. (2d) 1000.

No. 129. GRAMMER, ADMINISTRATRIX, *v.* MID-CONTINENT PETROLEUM CORP. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Roscoe E. Harper* and *Gentry Lee* for petitioner. *Messrs. James C. Denton* and *Richard H. Wills* for respondent. Reported below: 71 F. (2d) 38.

No. 130. UNITED STATES EX REL. SHOSHONE IRRIGATION DISTRICT *v.* ICKES, SECRETARY OF THE INTERIOR. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Chester I. Long, Peter Q. Nyce, E. J.*

Goppert, Roy St. Lewis, and *Samuel W. McIntosh* for petitioner. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. D. B. Hempstead* and *H. Brian Holland* for respondent. Reported below: 63 App. D. C. 167; 70 F. (2d) 771.

No. 269. KEYSTONE DRILLER CO. *v.* BYERS MACHINE CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Clarence P. Byrnes* and *F. O. Richey* for petitioner. *Mr. Robert W. Wilson* for respondents. Reported below: 71 F. (2d) 1000.

No. 136. LAYNE *v.* TRIBUNE CO. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. James A. O'Shea, John H. Burnett,* and *Alfred Goldstein* for petitioner. *Messrs. Howard Ellis* and *Louis G. Caldwell* for respondent. Reported below: 63 App. D. C. 213; 71 F. (2d) 223.

Nos. 137, 138, and 139. COLORADO TAX COMMISSION *v.* COLORADO CENTRAL POWER CO. October 8, 1934. Petition for writs of certiorari to the Supreme Court of Colorado denied. *Messrs. Archibald A. Lee, Clarence W. Miles,* and *Seymour O'Brien* for petitioner. *Messrs. Paul P. Prosser, Charles Roach,* and *Wm. L. Boatright* for respondent. Reported below: 94 Colo. 287, 292, 293; 29 P. (2d) 1030, 1031, 1032.

No. 140. ALLEN *v.* JOHNSON ET AL. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Alvin L. Newmyer* and *George C. Gertman* for petitioner. *Messrs. Walter C. Clephane, J. Wilmer Latimer,* and *Gil-*

bert L. Hall for respondents. Reported below: 63 App. D. C. 200; 70 F. (2d) 927.

No. 141. HOLLOW ET AL. *v.* SHELL PETROLEUM CORP. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Karl Knox Gartner* for petitioners. *Messrs. Guy A. Thompson, Samuel A. Mitchell, Frank A. Thompson,* and *Truman Post Young* for respondents. Reported below: 70 F. (2d) 811.

No. 143. WOODHOUSE *v.* MONCURE, DAVIS & BUDWESKEY ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Raymond M. Hudson* for petitioner. No appearance for respondents. Reported below: 70 F. (2d) 61.

No. 144. I. F. LAUCKS, INC. *v.* CHAS. H. LILLY CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. G. Wright Arnold* for petitioner. *Mr. Alfred Battle* for respondents. Reported below: 68 F. (2d) 175.

No. 145. I. F. LAUCKS, INC. *v.* CHAS. H. LILLY CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. G. Wright Arnold* for petitioner. *Mr. Alfred Battle* for respondents. Reported below: 68 F. (2d) 190.

No. 147. UNITED STATES EX REL. KARPAY *v.* UHL, ACTING COMMISSIONER OF IMMIGRATION. October 8, 1934. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Christopher C. Cousins* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 70 F. (2d) 792.

Nos. 149 and 150. FRITZINGER ET AL. *v.* ILLINOIS. October 8, 1934. Petitions for writs of certiorari to the Supreme Court of Illinois denied. *Mr. Claude U. Stone* for petitioners. *Mr. Montgomery S. Winning* for respondent.

No. 151. SHELTON *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harold J. Bandy* for petitioner. *Solicitor General Biggs* and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 69 F. (2d) 223.

No. 152. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PRYOR & LOCKHART DEVELOPMENT CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. George M. Morris* for respondent. Reported below: 70 F. (2d) 154.

No. 153. CHRISTIE *v.* CLEVELAND HEIGHTS. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Miles E. Evans* for petitioner. *Mr. Edward J. Schweid* for respondent. Reported below: 128 Oh. St. 297; 190 N. E. 770.

No. 155. ILLINOIS CENTRAL R. CO. *v.* HARDIN. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. William R. Gentry,*

M. F. Watts, Edward C. Craig, and *Charles A. Helsell* for petitioner. *Mr. John S. Marsalek* for respondent. Reported below: 334 Mo. 1169; 70 S. W. (2d) 1075.

No. 156. PENNSYLVANIA SLOVAK ROMAN AND GREEK CATHOLIC UNION *v.* AMERICAN SURETY CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Seth W. Richardson, Peter P. Jurchak,* and *David Rosenthal* for petitioner. *Mr. M. J. Martin* for respondent. Reported below: 71 F. (2d) 537.

No. 157. STRONGIN, TRUSTEE IN BANKRUPTCY, *v.* INTERNATIONAL ACCEPTANCE BANK, INC. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis* and *Neil P. Cullom* for petitioner. *Mr. Walter H. Pollack* for respondent. Reported below: 70 F. (2d) 248.

No. 159. CHESAPEAKE & DELAWARE STEAMBOAT CO. *v.* TUG PENNSYLVANIA ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leonard J. Matteson* for petitioner. *Mr. Horace L. Cheyney* for respondents.

No. 160. BEEMSTERBOER *v.* ILLINOIS EX REL. MCDONOUGH, COUNTY TREASURER. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Wm. J. Grace* for petitioner. *Mr. Philip H. Treacy* for respondent. Reported below: 356 Ill. 432; 190 N. E. 920.

No. 164. N. W. PUGH CO., INC. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Frederick L. Pearce* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John MacC. Hudson* for respondent. Reported below: 63 App. D. C. 172; 70 F. (2d) 776.

No. 165. MILWAUKEE *v.* ACTIVATED SLUDGE, INC. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Newton D. Baker, Arthur C. Denison, Wallace R. Lane,* and *Max Raskin* for petitioner. *Messrs. Lynn A. Williams* and *Clifford C. Bradbury* for respondent. Reported below: 69 F. (2d) 577.

No. 167. NORD *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George A. King, George R. Shields,* and *John W. Gaskins* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *H. Brian Holland* for the United States. Reported below: 78 Ct. Cls. 795.

No. 168. LOWERY *v.* CONNECTICUT FIRE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* for petitioner. *Mr. Leonard J. Matteson* for respondent. Reported below: 70 F. (2d) 324.

No. 172. COE MANUFACTURING CO. *v.* NEW YORK. October 8, 1934. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr.*

Paul Koch for petitioner. *Messrs. Samuel Kaufman* and *Henry Epstein* for respondent. Reported below: 112 N. J. L. 536; 172 Atl. 198.

No. 174. LUCKENBACH STEAMSHIP CO., INC. ET AL. *v.* MIDDLETON, ADMINISTRATOR, ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. McGrann* for petitioners. *Messrs. Joseph W. Henderson, John W. Crandall,* and *Thomas F. Mount* for respondents. Reported below: 70 F. (2d) 326.

No. 175. NATIONAL BOX CO. *v.* MCKINLEY, TRUSTEE IN BANKRUPTCY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John M. Lee* for petitioner. *Mr. Nathan William MacChesney* for respondent. Reported below: 69 F. (2d) 642.

No. 232. REDMAN *v.* BALTIMORE & CAROLINA LINE, INC. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick R. Graves* for petitioner. *Mr. George Whitefield Betts, Jr.,* for respondent. Reported below: 70 F. (2d) 635.

No. 179. HOWARD, TRUSTEE IN BANKRUPTCY, *v.* CHICAGO GRAVEL CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Abram N. Pritzker* for petitioner. *Messrs. Kemper K. Knapp* and *Harry I. Allen* for respondent. Reported below: 70 F. (2d) 391.

No. 180. AMERICAN SURETY CO. ET AL. *v.* CONROY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis L. Dent* for petitioners. *Mr. Charles C. Spencer* for respondent. Reported below: 71 F. (2d) 107.

No. 181. PRATT FOOD CO. *v.* GEO. H. LEE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Augustus B. Stoughton* for petitioner. *Mr. T. Hart Anderson* for respondent. Reported below: 71 F. (2d) 823.

No. 182. AETNA LIFE INSURANCE CO. *v.* BRAUKMAN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Elmer L. Brock, E. R. Campbell,* and *Milton Smith* for petitioner. *Mr. Clarence A. Brandenburg* for respondent. Reported below: 70 F. (2d) 647.

No. 184. NEW ENGLAND MUTUAL LIFE INSURANCE CO. *v.* BRAUKMAN. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Wm. W. Grant, Jr., Morrison Shafroth,* and *Henry W. Toll* for petitioner. *Mr. Clarence A. Brandenburg* for respondent. Reported below: 70 F. (2d) 647.

No. 185. WASHBURN ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Watson Washburn* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 70 F. (2d) 1023.

No. 187. DINGFELDER ET AL. *v.* THE BRENTA II ET AL.; and

No. 188. BOERA ET AL. *v.* THE BRENTA II. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank I. Finkler* for petitioners. *Mr. Homer L. Loomis* for respondents. Reported below: 68 F. (2d) 999.

No. 189. CORNELL STEAMBOAT CO. *v.* SCHOLL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioner. *Mr. Horace L. Cheyney* for respondent. Reported below: 71 F. (2d) 682.

No. 190. BROWN *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Bolinger* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman, Mr. James W. Morris,* and *Miss Helen R. Carloss* for respondent. Reported below: 69 F. (2d) 863.

No. 191. DARBY *v.* MONTGOMERY COUNTY NATIONAL BANK. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Lucien H. Mercier* for petitioner. *Messrs. Edwin C. Brandenburg, Louis M. Denit,* and *Leonard J. Ganse* for respondent. Reported below: 63 App. D. C. 313; 72 F. (2d) 181.

No. 218. INTERNATIONAL FINANCE CORP. *v.* GENERAL MOTORS ACCEPTANCE CORP. October 8, 1934. Petition for writ of certiorari to the United States Court of Ap-

peals for the District of Columbia denied. *Messrs. Jo V. Morgan, Charles A. Douglas, Hugh H. Obear,* and *Edmond D. Campbell* for petitioner. *Messrs. Frank S. Bright, George C. Shinn,* and *H. Stanley Hinrichs* for respondent. Reported below: 63 App. D. C. 325; 72 F. (2d) 376.

No. 192. ALPHONSE K. ROY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 193. CHARLES J. DERBES *v.* SAME;

No. 194. INEZ M. ROY *v.* SAME;

No. 195. ALPHONSE K. ROY AND CHARLES J. DERBES, EXECUTORS, *v.* SAME;

No. 196. CARMEN DERBES *v.* SAME;

Nos. 197 to 201. STAFFORD, DERBES & ROY, INC. *v.* SAME; and

No. 202. UPSTREAM REALTY CO., INC. *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John J. Finnorn* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Norman D. Keller* for respondent. Reported below: 69 F. (2d) 786, 788.

No. 203. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* WEBSTER ET AL. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Michael Nagle, Maury Kemp,* and *Jules Henri Tallichet* for petitioners. *Mr. Robert Ewing Thomason* for respondents. Reported below: 70 S. W. (2d) 394. See also, 53 S. W. (2d) 656.

No. 320. TEXAS & PACIFIC RY. CO. *v.* DAWSON. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Joseph H. T.*

Bibb and *T. D. Gresham* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 70 S. W. (2d) 392. See also, 45 S. W. (2d) 367.

No. 204. VAN DEVENTER *v.* TENNESSEE EX REL. WALLACE, COMPTROLLER. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Horace Van Deventer, pro se.* No appearance for respondent. Reported below: 167 Tenn. 240; 68 S. W. (2d) 478.

No. 205. CARROLLTON EXCELSIOR & FUEL CO., LTD. *v.* NEW ORLEANS & NORTHEASTERN R. CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. No appearance for respondent. Reported below: 69 F. (2d) 691.

No. 206. ALEXANDER *v.* THELEMAN, TRUSTEE IN BANKRUPTCY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Henry C. Vidal* and *William V. Hodges* for petitioner. *Mr. Wilbur F. Denious* for respondent. Reported below: 69 F. (2d) 610.

No. 207. BALTIMORE & OHIO R. CO. *v.* DEWALD. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George W. P. Whip* for petitioner. No appearance for respondent. Reported below: 71 F. (2d) 810.

No. 209. HARRIS *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs.*

Neil Burkinshaw and *Wm. B. O'Connell* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 63 App. D. C. 232; 71 F. (2d) 532.

No. 216. MARYLAND CASUALTY CO. *v.* AMERICAN TRUST CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Newton Rayzor* for petitioner. No appearance for respondent. Reported below: 71 F. (2d) 137.

No. 217. PARSONS *v.* PROVIDENT MUTUAL LIFE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. W. Press* for petitioner. No appearance for respondent. Reported below: 70 F. (2d) 863.

No. 220. WITHERBEE ET AL., EXECUTORS, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Spotswood D. Bowers* and *Frank C. Laughlin* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 70 F. (2d) 696.

No. 222. CLINCH-MITCHELL CONSTRUCTION CO. *v.* MCCULLOUGH ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. C. A. Randolph* and *Addison L. Gardner, Jr.,* for petitioner. No appearance for respondents. Reported below: 71 F. (2d) 17.

No. 223. HILLMERT ET AL. *v.* BUSCH, RECEIVER. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter E. Wiles* for petitioners. *Mr. Gustavus J. Tatge* for respondent. Reported below: 71 F. (2d) 411.

No. 224. MCKINLAY, TRUSTEE IN BANKRUPTCY *v.* PHILADELPHIA NATIONAL BANK ET AL. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. Dean Hill Stanley* for petitioner. *Messrs. Bynum E. Hinton* and *Everett H. Brown, Jr.,* for respondents. Reported below: 63 App. D. C. 296; 72 F. (2d) 89.

No. 225. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* B. B. JONES;

No. 226. SAME *v.* ELLIOTT L. JONES;

No. 227. SAME *v.* ROBERT L. JONES; and

No. 228. SAME *v.* BERNARD B. JONES ET AL. October 8, 1934. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Solicitor General Biggs, Assistant Attorney General Wideman, Mr. James W. Morris,* and *Miss Helen R. Carloss* for petitioner. *Mr. F. Edward Mitchell* for respondents. Reported below: 63 App. D. C. 204; 71 F. (2d) 214.

No. 229. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO. ET AL. *v.* NEWBERRY. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. William A. Hayes* and *John E. Palmer* for petitioners. *Mr. W. H. Stafford* for respondent. Reported below: 214 Wis. 547; 252 N. W. 579.

No. 230. COMMERCIAL TRUST CO. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Harper* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *W. Marvin Smith* for the United States.

No. 235. ECKHARDT ET AL., TRUSTEES, *v.* BALL ET AL., TRUSTEES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Frank H. Pardee* for petitioners. *Mr. Charles B. Rugg* for respondents. Reported below: 72 F. (2d) 316.

No. 236. HARDENBROOK ET AL. *v.* LANDQUIST ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Isaac E. Ferguson* and *Edward Sonnenschein* for petitioners. *Mr. Walter E. Wiles* for respondents. Reported below: 70 F. (2d) 929.

No. 238. WHITNEY ET AL., EXECUTORS, *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Will R. Gregg* for petitioners. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 79 Ct. Cls. 480; 6 F. Supp. 849.

No. 239. FARIS *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas R. Dempsey, A. Calder Mackay,* and *Clark J. Milliron* for petitioner. *Solicitor*

General Biggs, Assistant Attorney General Wideman, and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 610.

No. 240. KELLY *v.* NATIONAL CITY BANK OF NEW YORK. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William F. Kelly, pro se. Mr. F. S. Easby-Smith* for respondent. Reported below: 71 F. (2d) 689.

No. 241. MISSOURI EX REL. ABEILLE FIRE INSURANCE CO. ET AL. *v.* SEVIER, JUDGE. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. The CHIEF JUSTICE and MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. E. R. Morrison* and *R. J. Folonie* for petitioners. *Messrs. Gilbert Lamb, Floyd E. Jacobs,* and *John T. Barker* for respondent. Reported below: 335 Mo. 269; 73 S. W. (2d) 361.

No. 244. LOCKE INSULATOR CORP. *v.* JACQUE, ADMINISTRATRIX. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur H. Deibert* for petitioner. *Mr. William L. Clay* for respondent. Reported below: 70 F. (2d) 680.

No. 245. STEVENSON *v.* JEFFERSON STANDARD LIFE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. G. Hudson* for petitioner. *Mr. Sidney L. Herold* for respondent. Reported below: 70 F. (2d) 72.

No. 246. GEORGE E. WARREN CORP. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Mr. George W. Dalzell* for petitioner. *Solicitor General Biggs, Assistant Attorney General Jackson,* and *Mr. John T. Fowler, Jr.,* for the United States. Reported below: 22 C. C. P. A. (Cust.) 178; T. D. 47,125; 71 F. (2d) 434.

No. 248. FULLILOVE ET UX. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Howard B. Warren* and *Joseph D. Barksdall* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for the United States. Reported below: 71 F. (2d) 852.

No. 251. CONSUMERS POWER CO. *v.* ALLEGAN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bernard J. Onen* for petitioner. *Messrs. Thomas G. Long* and *John C. Bills* for respondents. Reported below: 71 F. (2d) 477.

No. 252. ARKANSAS UTILITIES CO. *v.* PARAGOULD ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Leo J. Mundt* and *J. F. Loughborough* for petitioner. *Mr. Arthur L. Adams* for respondents. Reported below: 70 F. (2d) 530.

No. 253. MCINTOSH, TRUSTEE, *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Raymond M. Hudson* and *H. Earlton Hanes* for petitioner. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. A. G. Iverson* and *W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 507.

No. 321. GILLIAM ET AL., RECEIVERS, *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. Earlton Hanes* for petitioners. *Solicitor General Biggs* and *Mr. W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 507.

No. 254. PARAMOUNT PUBLIX CORP. *v.* AMERICAN TRI-ERGON CORP. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE BRANDEIS took no part in the consideration or decision of this application. *Mr. Charles Neave* for petitioner. *Messrs. Thomas D. Thacher, Theodore S. Kenyon,* and *S. Mortimer Ward, Jr.,* for respondent. Reported below: 71 F. (2d) 153.

No. 255. ALTOONA PUBLIX THEATRES, INC. *v.* AMERICAN TRI-ERGON CORP. ET AL.; and

No. 256. WILMER & VINCENT CORP. ET AL. *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE BRANDEIS took no part in the consideration or decision of this application. *Messrs. Charles Neave, Thomas G. Haight, Merrell E. Clark,* and *Henry R. Ashton* for petitioners. *Messrs. Thomas D. Thacher, Hugh M. Morris,* and *S. Mortimer Ward, Jr.,* for respondents. Reported below: 72 F. (2d) 53. See *ante,* p. 528.

No. 258. PROCESS ENGINEERS, INC. *v.* CONTAINER CORPORATION OF AMERICA. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert G. McCaleb* for petitioner. *Mr. Clarence E. Mehlhope* for respondent. Reported below: 70 F. (2d) 487.

No. 259. FIRST NATIONAL BANK OF AMARILLO *v.* CONTINENTAL CASUALTY CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ben H. Stone* for petitioner. *Mr. O. O. Touchstone* for respondent. Reported below: 71 F. (2d) 838.

No. 265. VANDERLIP *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ellsworth C. Alvord* and *Floyd F. Toomey* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. George H. Foster* for the United States. Reported below: 79 Ct. Cls. 489; 6 F. Supp. 965.

No. 266. THE PERTH AMBOY NO. 3 ET AL. *v.* DITTMAR ET AL.; and

No. 267. SAME *v.* HUDSON BARGE CORP. ET AL. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Anthony V. Lynch, Jr.,* for petitioners. *Messrs. John C. Crawley* and *William F. Purdy* for respondents. Reported below: 70 F. (2d) 1014.

No. 273. OTT, TRUSTEE IN BANKRUPTCY, *v.* LONG BEACH CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Messrs. Thomas A. Daily* and *D. A. McDougal* for petitioner. *Messrs. Arthur L. Gilliom, T. C. Mullen,* and *Shepard J. Crumpacker* for respondents. Reported below: 70 F. (2d) 1.

No. 274. ALUMINUM COMPANY OF AMERICA *v.* BAUSCH MACHINE TOOL CO. October 8, 1934. Petition for writ 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. Edward F. McClennen* and *Frederick H. Wiggin* for petitioner. *Mr. Charles D. Lockwood* for respondent. Reported below: 72 F. (2d) 236.

No. 275. VAUGHAN *v.* ATLANTIC LIFE INSURANCE CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Waller* for petitioner. *Mr. Alexander W. Parker* for respondent. Reported below: 71 F. (2d) 394.

No. 276. MORRISON ET AL. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter J. Gex* for petitioners. *Solicitor General Biggs* and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 71 F. (2d) 358.

No. 277. THE YULU ET AL. *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter J. Gex* for petitioners. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 71 F. (2d) 635.

No. 278. MARSHALL & ILSLEY BANK, TRUSTEE, *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter E. Ernst* for petitioner. *Mr. Frederick H. Wood* for respondent. Reported below: 70 F. (2d) 691.

No. 279. PAYNE GLOVE CO. *v.* BOSS MANUFACTURING CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Karl Kindleberger* for petitioner. *Mr. George A. Cooke* for respondent. Reported below: 71 F. (2d) 768.

No. 280. SILVER BROWN CO. *v.* SHERIDAN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Arthur B. Marsh* for petitioner. *Mr. John F. Neary* for respondents. Reported below: 71 F. (2d) 935.

No. 281. CHICAGO TITLE & TRUST CO., TRUSTEE, ET AL. *v.* WELTON ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter T. Fisher* and *Walter H. Eckert* for petitioners. *Messrs. Silas H. Strawn* and *Ralph M. Shaw* for respondents. Reported below: 70 F. (2d) 377.

No. 282. UNITED STATES EX REL. LAZO KOLEFF *v.* REYNOLDS, IMMIGRATION INSPECTOR; and

No. 283. UNITED STATES EX REL. BORIS LAZO KOLEFF *v.* SAME. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit

denied. *Mr. Lazo Koleff, pro se. Mr. Boris Lazo Koleff, pro se. Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 70 F. (2d) 39.

No. 285. WIREN *v.* SHUBERT THEATRE CORP. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar B. Wiren* for petitioner. *Messrs. Louis Phillips* and *Milton R. Weinberger* for respondents. Reported below: 70 F. (2d) 1023.

No. 287. SINGMASTER *v.* NEW JERSEY ZINC CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George P. Dike* and *Nelson Littell* for petitioner. *Mr. Burt D. Whedon* for respondent. Reported below: 71 F. (2d) 277.

No. 290. CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* MAHER. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Samuel Knight, F. Eldred Boland,* and *John H. Riordan* for petitioner. *Mr. Wm. Samuel Graham* for respondent. Reported below: 70 F. (2d) 441.

No. 291. HOGUE ET AL. *v.* STRICKER LAND & TIMBER CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Patrick H. Loughran, S. B. Laub, Allan Sholars,* and *L. T. Kennedy* for petitioners. *Messrs. A. K. Shipe* and *Charles Kerr* for respondent. Reported below: 69 F. (2d) 167; 70 *id.* 722.

No. 297. RITTERSBACHER ET AL. *v.* BOARD OF SUPERVISORS OF LOS ANGELES COUNTY ET AL. October 8, 1934. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Daniel E. Farr* for petitioners. *Mr. Everett W. Mattoon* for respondents. Reported below: 220 Cal. 535; 32 P. (2d) 135.

No. 298. AMERICAN TITLE & TRUST CO. *v.* GULF REFINING CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Branch P. Kerfoot, George S. Hobart,* and *Duane E. Minard* for petitioner. *Mr. Frederick H. Wood* for respondents. Reported below: 72 F. (2d) 248.

No. 299. CORD *v.* MCFIE, RECEIVER. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. W. Odell* for petitioner. *Mr. Jefferson P. Chandler* for respondent. Reported below: 71 F. (2d) 702.

No. 300. CAMPBELL *v.* CHASE NATIONAL BANK. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick B. Campbell* and *Lounsbury D. Bates* for petitioner. *Mr. H. G. Pickering* for respondent. Reported below: 71 F. (2d) 669.

No. 301. CAMPBELL *v.* MEDALIE, DISTRICT ATTORNEY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick B. Campbell* and *Lounsbury D. Bates* for petitioner. *Solicitor General Biggs* and *Mr. Harry S. Ridgely* for respondent. Reported below: 71 F. (2d) 671.

No. 302. HENSLEY *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO. October 8, 1934. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Nelson C. Pratt* for petitioner. *Messrs. Wymer Dressler, Robert D. Neely, Samuel H. Cady,* and *William T. Faricy* for respondent. Reported below: 126 Neb. 579; 254 N. W. 426.

No. 304. ANNUNZIATO *v.* UNITED STATES. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. C. Cousins* for petitioner. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Mr. M. S. Huberman* for the United States. Reported below: 70 F. (2d) 1021.

No. 305. OTIS ELEVATOR CO. *v.* PACIFIC FINANCE CORP. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edwin W. Sims, Wallace R. Lane, Franklin J. Stransky,* and *Benton Baker* for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondents. Reported below: 68 F. (2d) 664; 71 *id.* 641.

No. 306. KULESZA ET AL. *v.* BLAIR ET AL., RECEIVERS. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob G. Grossberg* for petitioners. *Messrs. James M. Sheean* and *Weymouth Kirkland* for respondents. Reported below: 70 F. (2d) 505.

No. 307. FIDELITY MUTUAL LIFE INSURANCE CO. *v.* MERCHANTS & MECHANICS BANK ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. A. O. B. Sparks* for petitioner. No appearance for respondents. Reported below: 71 F. (2d) 777.

No. 308. TEXAS STEEL CO. *v.* MISSOURI-KANSAS-TEXAS R. CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Court of Civil Appeals of Texas, 2d Supreme Judicial District, denied. *Mr. George W. Armstrong* for petitioner. *Mr. Fred L. Wallace* for respondents. Reported below: 70 S. W. (2d) 484.

No. 309. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WALBRIDGE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. Russell D. Morrill* and *Chauncey Newlin* for respondent. Reported below: 70 F. (2d) 683.

No. 310. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ARCHBALD. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. W. W. Spaulding* for respondent. Reported below: 70 F. (2d) 720.

No. 311. ELTING, COLLECTOR OF CUSTOMS, *v.* LANCASHIRE SHIPPING CO., LTD. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. John W. Crandall* for respondent. Reported below: 70 F. (2d) 699.

No. 312. E. A. LABORATORIES, INC. *v.* TRICO PRODUCTS CORP. October 8, 1934. Petition for writ of certiorari to

the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Hugh M. Morris* and *Holland S. Duell* for petitioner. *Mr. Edwin J. Prindle* for respondent. Reported below: 71 F. (2d) 677.

No. 313. ARTCRAFT SILK HOSIERY MILLS, INC. *v.* GOTHAM SILK HOSIERY CO. ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Clifton V. Edwards,* and *Leon Edelson* for petitioner. *Mr. Samuel E. Darby, Jr.,* for respondents. Reported below: 72 F. (2d) 47.

No. 314. LEVERING & GARRIGUES CO. ET AL. *v.* MORRIN ET AL. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick H. Wood* and *Merritt Lane* for petitioners. *Messrs. Frank P. Walsh* and *John Walsh* for respondents. Reported below: 71 F. (2d) 284.

No. 316. COASTWISE TRANSPORTATION CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert E. Goodwin* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 71 F. (2d) 104.

No. 317. KELLY *v.* NEW YORK, CHICAGO & ST. LOUIS R. CO. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William C. Bachelder* and *H. K. Bachelder* for petitioner. *Mr. Russell P. Harker* for respondent. Reported below: 70 F. (2d) 548.

No. 318. ART METAL WORKS, INC. *v.* ABRAHAM & STRAUS, INC. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Martin W. Littleton, Joseph Lorenz,* and *Kenneth S. Neal* for petitioner. *Mr. Robert S. Blair* for respondent. Reported below: 70 F. (2d) 639.

No. 322. UNITED STATES EX REL. NEW MEXICO *v.* ICKES, SECRETARY OF THE INTERIOR. October 8, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Frank H. Patton, Peter Q. Nyce, Roy St. Lewis,* and *Samuel W. McIntosh* for petitioner. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Mr. C. E. Collett* for respondent. Reported below: 63 App. D. C. 278; 72 F. (2d) 71.

Nos. 323 and 324. POWERS ET AL. *v.* JOHNSON, TRUSTEE IN BANKRUPTCY, ET AL. October 8, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frank S. Quinn* and *Will Steel* for petitioners. *Mr. James D. Head* for respondents. Reported below: 71 F. (2d) 48.

No. 326. MURPHY ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin L. Garvin* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John J. Pringle* for respondent. Reported below: 70 F. (2d) 790.

No. 327. METROPOLITAN LIFE INSURANCE CO. *v.* TRAPP. October 8, 1934. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry I. Eager, William C. Michaels, Leroy A. Lincoln,* and *Charles M. Blackmar* for petitioner. *Mr. Clarence A. Randolph* for respondent. Reported below: 70 F. (2d) 976.

No. 329. BOSTON & MAINE RAILROAD *v.* HANLEY, ADMINISTRATRIX; and

No. 330. SAME *v.* MURPHY, ADMINISTRATRIX. October 8, 1934. Petition for writs of certiorari to the Superior Court in and for the County of Middlesex, Massachusetts, denied. *Mr. John M. Maloney* for petitioner. *Mr. Edward M. Dangel* for respondents. Reported below: 286 Mass. 390; 190 N. E. 501.

No. 332. HERZOG *v.* STERN ET AL., EXECUTORS. October 8, 1934. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. James Marshall* for petitioner. *Mr. George Whitefield Betts, Jr.,* for respondents. Reported below: 264 N. Y. 379; 191 N. E. 23.

No. 334. DARDEN *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY. October 8, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Herman J. Nord* and *C. C. Grassham* for petitioner. *Messrs. G. T. Fitzhugh* and *Fitzgerald Hall* for respondent. Reported below: 71 F. (2d) 799.

No. 429. POCH *v.* HILL, WARDEN; and

No. 430. SAME *v.* FAKE, U. S. DISTRICT JUDGE. October 15, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leonard R. Poch, pro se.* No appearance for respondents. Reported below: 71 F. (2d) 906.

No. 432. MARTIN ET AL. *v.* TEXAS & PACIFIC RY. CO. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Texas, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Deck Martin, pro se.* No appearance for respondent. Reported below: 123 Tex. 383; 71 S. W. (2d) 867.

No. 319. PEVELY DAIRY CO. *v.* CRIPE. October 15, 1934. Petition for writ of certiorari to the Appellate Court, Fourth District, of Illinois, denied. *Messrs. June C. Smith* and *Walter L. Hensley* for petitioner. No appearance for respondent. Reported below: 275 Ill. App. 231.

No. 328. CAPONE *v.* ADERHOLD, WARDEN. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. E Leahy, Wm. J. Hughes, Jr.,* and *James F. Reilly* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Justin Miller, James W. Morris, John H. McEvers,* and *Earl C. Crouter* for respondent. Reported below: 71 F. (2d) 160.

No. 331. TEXAS EMPLOYERS' INSURANCE ASSN. ET AL. *v.* VOLEK ET AL. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Roy C. Sewell* and *Lawrence Walton Morris* for petitioners. *Mr. Lewis Fisher* for respondents. Reported below: 69 S. W. (2d) 33.

No. 333. MCGINLEY CORPORATION *v.* LIDO OIL CO. ET AL. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. R. Boone* for petitioner. No appearance for respondents. Reported below: 71 F. (2d) 81.

No. 335. OLD GOLD CHEMICAL CO., INC. *v.* CHESEBROUGH MANUFACTURING CO. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. E. Gwinn* for petitioner. *Messrs. Charles N. Burch, Hugh M. Morris,* and *Wm. Wallace White* for respondent. Reported below: 70 F. (2d) 383.

No. 336. STANDARD OIL CO. (INDIANA) *v.* UNITED STATES. October 15, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Albert L. Hopkins, Harry B. Sutter, Louis L. Stephens,* and *Anderson A. Owen* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. H. Brian Holland* for the United States. Reported below: 78 Ct. Cls. 714; 5 F. Supp. 976.

No. 337. UNITED STATES *v.* AMERICAN SAFETY RAZOR CORP. October 15, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Biggs* for the United States. *Messrs. Charles D. Hamel* and *John Enrietto* for respondent. Reported below: 79 Ct. Cls. 141; 6 F. Supp. 293, 7 *id.* 196.

No. 341. SAUNDERS, TRUSTEE IN BANKRUPTCY, *v.* GIVEN. October 15, 1934. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, denied. *Mr. U. S. Goen* for petitioner. *Messrs. Thornton Hardie* and *Ben R. Howell* for respondent. Reported below: 70 S. W. (2d) 310.

No. 343. UNITED STATES *v.* YOUNGSTOWN SHEET & TUBE CO. October 15, 1934. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General*

Biggs for the United States. *Mr. Charles F. Fawsett* for respondent. Reported below: 79 Ct. Cls. 683; 7 F. Supp. 290.

No. 346. HAY, EXECUTOR, *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry S. Miller* for petitioner. *Mr. Wm. D. Whitney* for respondent. Reported below: 71 F. (2d) 1018.

No. 348. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WALLACE, EXECUTRIX. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Cedric A. Major* for respondent. Reported below: 71 F. (2d) 1002.

No. 349. JOSEPH JOSEPH & BROTHERS CO. *v.* UNITED STATES. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Preston B. Kavanaugh* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Frank J. Ready, Jr.,* and *H. Brian Holland* for the United States. Reported below: 71 F. (2d) 389.

No. 350. SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Drury W. Cooper, Allan C. Bakewell,* and *William B. Jaspert* for petitioners. *Messrs. Clarence P. Byrnes, Vernon M. Dorsey, Thomas G. Haight, Wm. J. Belknap,* and *Robson D. Brown* for respondent. Reported below: 68 F. (2d) 726.

No. 351. DOWNERS GROVE SANITARY DISTRICT *v.* BUNGE ET AL. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Daniel S. Wentworth* for petitioner. *Mr. Ralph C. Putnam* for respondents. Reported below: 356 Ill. 531; 191 N. E. 73.

No. 352. ALFRED HOFMANN, INC. *v.* TEXTILE MACHINE WORKS. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Samuel E. Darby, Jr.,* and *Walter A. Darby* for petitioner. *Mr. Hubert Howson* for respondent. Reported below: 71 F. (2d) 973.

No. 353. WOODS *v.* REGAIN, INC. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Fischer* for petitioner. *Mr. Joseph Glass* for respondent. Reported below: 71 F. (2d) 270.

No. 354. ADA V. PEABODY *v.* MARLBORO IMPLEMENT CO.; and

No. 355. JOHN T. W. PEABODY *v.* SAME. October 15, 1934. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Leonard J. Ganse* and *Louis M. Denit* for petitioners. *Mr. Edwin A. Swingle* for respondent. Reported below: 63 App. D. C. 288; 72 F. (2d) 81.

No. 356. VINTON PETROLEUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Bolinger* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wide-*

man, and *Messrs. James W. Morris* and *Warren F. Wattles* for respondent. Reported below: 71 F. (2d) 420.

No. 357. NISLEY SHOE CO. *v.* NISLEY CO. ET AL. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. H. A. Toulmin, H. A. Toulmin, Jr.,* and *Chalmers M. Parker* for petitioner. *Mr. Francis J. Wright* for respondents. Reported below: 72 F. (2d) 118.

No. 358. MCLEAN *v.* JAFFRAY ET AL., RECEIVERS. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Mortimer H. Boutelle, John H. Hougen,* and *Adrian H. David* for petitioner. *Messrs. Charles R. Fowler, Henry C. Carlson,* and *John B. Faegre* for respondents. Reported below: 71 F. (2d) 743.

No. 359. TOWNSHEND, TRUSTEE IN BANKRUPTCY, *v.* LAMB, RECEIVER. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. V. Townshend* for petitioner. No appearance for respondent. Reported below: 71 F. (2d) 590.

No. 360. MONTGOMERY *v.* TERMINAL RAILROAD ASSN. OF ST. LOUIS. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. John S. Marsalek* for petitioner. No appearance for respondent. Reported below: 335 Mo. 348; 73 S. W. (2d) 236.

No. 362. NEALE ET AL. *v.* HAZEN ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA. October 15,

1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Paul E. Lesh, Dion S. Birney,* and *C. Clinton James* for petitioners. *Messrs. E. Barrett Prettyman, Vernon E. West,* and *Walter L. Fowler* for respondents. Reported below: 63 App. D. C. 239; 71 F. (2d) 692.

No. 363. WHEELING MOLD & FOUNDRY CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Percy W. Phillips, Kingman Brewster, James S. Y. Ivins,* and *O. R. Folsom-Jones* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Justin Miller* and *James W. Morris* for respondent. Reported below: 71 F. (2d) 749.

No. 364. MISSOURI-KANSAS-TEXAS R. CO. ET AL. *v.* EMBREY, ADMINISTRATRIX. October 15, 1934. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Joseph M. Bryson* and *M. D. Green* for petitioners. *Messrs. H. L. Stuart, R. R. Bell,* and *E. P. Ledbetter* for respondent. Reported below: 168 Okla. 433; 33 P. (2d) 481.

No. 365. TRANSCONTINENTAL & WESTERN AIR, INC. *v.* FARLEY, POSTMASTER GENERAL, ET AL. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Thomas Smith* for petitioner. *Solicitor General Biggs* and *Messrs. Carl L. Ristine, W. Marvin Smith,* and *Lee A. Jackson* for respondents. Reported below: 71 F. (2d) 288.

No. 366. MISSISSIPPI VALLEY TRUST CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. H. Stanley Hinrichs, Abraham Lowenhaupt, Frank S. Bright,* and *Stanley S. Waite* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 72 F. (2d) 197.

No. 368. HANSEN *v.* UNITED STATES. October 15, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Warren E. Miller* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *Randolph C. Shaw* for the United States. Reported below: 70 F. (2d) 230.

No. 369. MILLER ET AL. *v.* PYRITES CO., INC. ET AL.; and

No. 370. MERRELL ET AL. *v.* SAME. October 22, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Wm. Burnet Wright* for petitioners. *Messrs. Murray F. Johnson* and *G. Ridgely Sappington* for respondents. Reported below: 71 F. (2d) 804.

No. 371. WADSWORTH ELECTRIC MANUFACTURING CO. *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* for petitioner. *Messrs. Drury W. Cooper, Thomas J. Byrne,* and *Victor S. Beam* for respondent. Reported below: 71 F. (2d) 850.

No. 378. HUTTON *v.* NEW YORK TITLE & MORTGAGE Co. October 22, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Levi H. David* and *E. Hilton Jackson* for petitioner. *Messrs. George P. Hoover* and *James C. Rogers* for respondent. Reported below: 63 App. D. C. 266; 71 F. (2d) 989.

No. 380. FRED W. MEARS HEEL Co., INC. *v.* WALLEY. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Eben Winthrop Freeman* and *Walter Bates Farr* for petitioner. *Mr. Nathan W. Thompson* for respondent. Reported below: 71 F. (2d) 876.

No. 396. STANDARD NUT MARGARINE Co. *v.* MELLON ET AL. October 22, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. George N. Murdock* and *Lloyd Anderson* for petitioner. *Messrs. Frank J. Hogan, Donald D. Shepard, Arthur B. Van Buskirk, William M. Robinson, William J. Donovan,* and *Henry Herrick Bond* for respondents. Reported below: 63 App. D. C. 339; 72 F. (2d) 557.

No. 410. UNITED STATES *v.* MATOIL SERVICE & TRANSPORT Co. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Biggs* for the United States. *Mr. Louis Halle* for respondent. Reported below: 72 F. (2d) 772.

No. 367. LITTLE, TRUSTEE IN BANKRUPTCY, *v.* BANK OF WADESBORO. October 22, 1934. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. C. Davis* for petitioner. *Mr. John M. Robinson* for respondent. Reported below: 71 F. (2d) 513.

No. 372. ALEXANDER PICKERING & Co., LTD. *v.* CHINESE AMERICAN COLD STORAGE ASSN., INC. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alfred Sutro* and *Eugene M. Prince* for petitioner. No appearance for respondent. Reported below: 71 F. (2d) 895.

No. 376. MORGAN *v.* HOAGE, DEPUTY COMMISSIONER, ET AL. October 22, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. H. Mason Welch* for petitioner. *Mr. Edward S. Brashears* for respondents. Reported below: 63 App. D. C. 355; 72 F. (2d) 727.

No. 377. SAN FRANCISCO SHOPPING NEWS CO. *v.* SOUTH SAN FRANCISCO ET AL. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. M. C. Sloss* for petitioner. *Mr. Charles N. Kirkbride* for respondents. Reported below: 69 F. (2d) 879.

No. 381. FARLEY ET AL., TRUSTEES, *v.* SEIDL ET AL. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph Very Quarles* for petitioners. *Messrs. Thomas A. Sanderson, Samuel Becker,* and *Charles B. Quarles* for respondents. Reported below: 71 F. (2d) 791.

No. 382. SCHLEIER *v.* UNITED STATES. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Koch* for petitioner. *Solicitor General Biggs* and *Mr. Harry S. Ridgely* for the United States. Reported below: 72 F. (2d) 414.

No. 385. AMERICAN COMPRESS & WAREHOUSE CO. *v.* BENDER. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. Scott Wilkinson* and *C. Huffman Lewis* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Lee A. Jackson,* and *H. Brian Holland* for respondent. Reported below: 70 F. (2d) 655.

No. 388. CARLSEN *v.* NEBRASKA. October 22, 1934. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. Ernest B. Perry* and *Walter D. James* for petitioner. *Messrs. Paul F. Good* and *Wm. H. Wright* for respondent. Reported below: 127 Neb. 11; 254 N. W. 744.

No. 390. KIMBALL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Watson Washburn* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 71 F. (2d) 1011.

No. 391. ILLINOIS CENTRAL R. CO. *v.* CRAIN, ADMINISTRATRIX. October 22, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs.*

M. F. Watts, Wm. R. Gentry, Edward C. Craig, and *Charles A. Helsell* for petitioner. No appearance for respondent. 335 Mo. 658; 73 S. W. (2d) 786.

No. 392. ARKO MINING CO. *v.* ICKES, SECRETARY OF THE INTERIOR. October 22, 1934. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Clyde L. Rogers* for petitioner. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Mr. Aubrey Lawrence* for respondent. Reported below: 63 App. D. C. 321; 72 F. (2d) 189.

No. 402. HOUGHTON ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 403. HOUGHTON *v.* SAME; and

No. 404. HOUGHTON ET AL. *v.* SAME. October 22, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Angulo, Russell L. Bradford,* and *George H. Craven* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 656.

No. 405. CORNING TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Angulo, Russell L. Bradford,* and *George H. Craven* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 656.

No. 406. SULLIVAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Angulo, Russell L. Bradford,* and *George H. Craven* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 656.

No. 407. HOLLISTER *v.* COMMISSIONER OF INTERNAL REVENUE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Angulo, Russell L. Bradford,* and *George H. Craven* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 656.

No. 408. CITY BANK FARMERS TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Angulo, Russell L. Bradford,* and *George H. Craven* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 71 F. (2d) 656.

No. 409. ROBISON *v.* FIRST NATIONAL PICTURES, INC., ET AL. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Zach Lamar Cobb* for petitioner. *Mr. Irving M. Walker* for respondents. Reported below: 72 F. (2d) 37.

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No. 459. HANDY, RECEIVER, *v.* OKLAHOMA EX REL. KING, ATTORNEY GENERAL. October 22, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Joseph W. Bailey, Jr.*, for petitioner. *Mr. Malcolm E. Rosser* for respondent. Reported below: 71 F. (2d) 697.

No. 393. WARSHAUER *v.* LLOYD SABAUDO, S. A. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is denied, for the reason that application for the writ of certiorari was not made within the time provided by law. Act of February 13, 1925, § 8 (a), 43 Stat. 936, 940; U. S. Code, Title 28, § 350; *Medhurst* v. *The South American*, 264 U. S. 587. *Mr. Bernard S. Barron* for petitioner. *Mr. Homer L. Loomis* for respondent. Reported below: 71 F. (2d) 146.

No. 264. WARREN STEAM PUMP CO. *v.* UNITED STATES. November 5, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. M. Manning Marcus* and *Merrill S. June* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct. Cls. 751; 5 F. Supp. 781.

No. 397. MAXFIELD *v.* CANADIAN PACIFIC RY. CO. ET AL. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Alfred W. Bowen* and *Donald O. Wright* for petitioner. *Mr. John E. Palmer* for respondents. Reported below: 70 F. (2d) 982.

No. 399. MCSHANE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. November 5, 1934. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Kenaz Huffman* for petitioners. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 991.

No. 401. SABINE TOWING CO., INC. ET AL. *v.* BRENNAN, ADMINISTRATRIX, ET AL. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William G. Feely* and *M. A. Grace* for petitioners. *Messrs. C. W. Howth, M. G. Adams,* and *H. C. Hughes* for respondents. Reported below: 72 F. (2d) 490.

No. 411. AHLES REALTY CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Montgomery B. Angell* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 71 F. (2d) 150.

No. 415. INVESTMENT PROPERTIES CORP. *v.* MOORE, TRUSTEE IN BANKRUPTCY. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edward Hohfeld* and *Herbert W. Clark* for petitioner. *Mr. Thomas S. Tobin* for respondent. Reported below: 71 F. (2d) 711.

No. 417. SEIBERLING RUBBER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frederick L. Pearce* and *George M. Morris* for petitioner. *Solicitor General Biggs,*

Assistant Attorney General Wideman, and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 70 F. (2d) 651.

No. 418. LAURENT, RECEIVER, ET AL. *v.* STITES, TRUSTEE IN BANKRUPTCY. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David R. Castleman* for petitioners. *Mr. Elwood Hamilton* for respondent. Reported below: 71 F. (2d) 802.

No. 419. SKELLY OIL CO. *v.* UNIVERSAL OIL PRODUCTS CO. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Dean S. Edmonds, William H. Davis, W. P. Z. German,* and *Alvin F. Molony* for petitioner. *Messrs. Thomas G. Haight* and *William F. Hall* for respondent. Reported below: 73 F. (2d) 1013.

No. 420. CINCINNATI, NEWPORT & COVINGTON RY. CO. *v.* COVINGTON ET AL.; and

No. 421. COVINGTON ET AL. *v.* CINCINNATI, NEWPORT & COVINGTON RY. CO. November 5, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John Weld Peck, Frank M. Tracy, Charles W. Milner, Matt Herold,* and *Chester J. Gerkin* for Cincinnati, Newport & Covington Ry. Co. *Messrs. Stephens L. Blakely* and *Charlton B. Thompson* for Covington et al. Reported below: 71 F. (2d) 117.

No. 422. CINCINNATI, NEWPORT & COVINGTON RY. CO. *v.* CINCINNATI ET AL. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the

Sixth Circuit denied. *Messrs. Charles W. Milner, Frank M. Tracy, Chester J. Gerkin, Matt Herold,* and *John Weld Peck* for petitioner. *Mr. John D. Ellis* for respondents. Reported below: 71 F. (2d) 124.

No. 427. HILTON LUMBER CO. *v.* GRISSOM, COLLECTOR OF INTERNAL REVENUE. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John W. Townsend* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. Louis Monarch* for respondent. Reported below: 70 F. (2d) 892.

No. 428. CEM SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 72 F. (2d) 295.

No. 436. COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR *v.* SAN SOUCI, COLLECTOR OF CUSTOMS. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. A. Warner Parker* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Wm. S. Ward* and *W. Marvin Smith* for respondent. Reported below: 71 F. (2d) 651.

No. 440. BRODERICK, SUPERINTENDENT OF BANKS OF NEW YORK, *v.* IRVING TRUST CO. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Second Circuit denied. *Mr. Gerald Donovan* for petitioner. *Mr. Edward F. Colladay* for respondent.

No. 451. OSGOOD CO. ET AL. *v.* KOGER, TRUSTEE. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel H. Cotter* for petitioners. *Mr. John T. L. Hubbard* for respondent.

No. 414. VINEYARD *v.* UNITED STATES. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. A. Sutherland* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Wilbur C. Pickett,* and *Young M. Smith* for the United States. Reported below: 71 F. (2d) 624.

No. 426. STALCUP ET AL. *v.* STALCUP. November 5, 1934. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Harry W. Colmery* for petitioners. *Messrs. Benjamin F. Hegler* and *A. V. Roberts* for respondent. Reported below: 139 Kan. 213; 30 P. (2d) 1106.

No. 453. JOHN HASSALL, INC. *v.* ROSENBERG ET AL. November 5, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Asher Blum* for petitioner. *Messrs. Drury W. Cooper* and *Edgar M. Kitchin* for respondents. Reported below: 73 F. (2d) 58.

No. 509. PHILIPPO *v.* CALIFORNIA. November 12, 1934. Petition for writ of certiorari to the District Court of Appeal, 3rd Appellate District, of California, and motion for leave to proceed further herein *in forma*

pauperis, denied. *Mr. Pierre d'A. Philippo, pro se.* No appearance for respondent. Reported below: 140 Cal. App. 236; 35 P. (2d) 134.

No. 507. MORSE DRY DOCK & REPAIR CO. *v.* THE PRESIDENT ARTHUR. November 12, 1934. Petition for writ 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. Courtland Palmer* and *Chauncey I. Clark* for petitioner. *Messrs. Cletus Keating* and *Saul S. Myers* for respondent. Reported below: 72 F. (2d) 276.

No. 449. UNITED STATES EX REL. CAMPBELL *v.* HILL, WARDEN. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John A. Campbell, pro se.* No appearance for respondent. Reported below: 72 F. (2d) 549.

No. 438. LONERGAN ET AL. *v.* LILLARD ET AL., RECEIVERS, ET AL. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Harry W. Colmery* and *Fred Robertson* for petitioners. *Messrs. T. M. Lillard* and *Roland Boynton* for respondents. Reported below: 72 F. (2d) 865.

No. 442. UNITED STATES EX REL. KNIGHT *v.* MELLON;
No. 443. SAME *v.* STONE;
No. 444. SAME *v.* NUTTY;
No. 445. SAME *v.* LEOVY;
No. 446. SAME *v.* GUTHRIE; and
No. 447. SAME *v.* DAVISON. November 12, 1934. Petion for writs of certiorari to the Circuit Court of Appeals

for the Third Circuit denied. *Mr. Wm. A. Gray* for petitioner. *Messrs. Wm. Watson Smith, Leon E. Hickman,* and *R. L. Batts* for respondents. Reported below: 71 F. (2d) 1021.

No. 448. GREENBAUM, ADMINISTRATRIX, *v.* COLUMBIAN NATIONAL LIFE INSURANCE CO. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. George Silberstein* for petitioner. *Messrs. Frederick H. Nash, Claude R. Branch,* and *Arthur C. Patterson* for respondent. Reported below: 70 F. (2d) 1016.

No. 458. SHREVEPORT PRODUCING & REFINING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, S. E. Blackham,* and *H. Brian Holland* for respondent. Reported below: 71 F. (2d) 972.

No. 464. EASTERN OHIO TRANSPORT CORP. *v.* WHEELING ET AL. November 12, 1934. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Howard D. Matthews* for petitioner. *Mr. Charles M. McCamic* for respondents. Reported below: 115 W. Va. —; 175 S. E. 219.

No. 473. SHEFFORD CHEESE CO. *v.* LAKESHIRE CHEESE CO. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur M. Hood* and *Louis Quarles* for

petitioner. *Mr. Charles Neave* for respondent. Reported below: 72 F. (2d) 497.

No. 495. PITTSBURGH TERMINAL COAL CORP. *v.* BENNETT, ADMINISTRATRIX. November 12, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert T. McCracken* and *Sidney J. Watts* for petitioner. *Messrs. Harvey A. Miller* and *G. C. Ladner* for respondent. Reported below: 70 F. (2d) 65.

No. 462. HUDSON ET AL. *v.* TEXAS GULF SULPHUR CO. ET AL. November 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Messrs. Nathan L. Miller* and *William W. Miller* for petitioners. *Messrs. Joseph M. Hartfield, Richard T. Fleming,* and *Jacob J. Lesser* for respondents. Reported below: 72 F. (2d) 251.

Nos. 512 and 513. CONSOLIDATED DAIRY PRODUCTS CO., INC. *v.* IRVING TRUST CO., TRUSTEE. November 19, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. Edward H. Green* for petitioner. *Mr. William D. Whitney* for respondent. Reported below: 72 F. (2d) 673.

No. 110. JOHNSON, RECEIVER, ET AL. *v.* KANSAS CITY. November 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied.

Mr. Frederick H. Wood for petitioners. *Mr. Marcy K. Brown, Jr.,* for respondent. Reported below: 70 F. (2d) 360.

No. 463. JEFFERS *v.* BANKERS LIFE CO. November 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James B. Lewright* for petitioner. *Messrs. R. B. Alberson, Charles L. Black,* and *Ireland Graves* for respondent. Reported below: 71 F. (2d) 603.

No. 466. FIREMEN'S INSURANCE CO. *v.* FOLLETT ET AL. November 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frederick D. Silber* and *Herbert W. Hirsh* for petitioner. *Mr. John A. Brown* for respondents. Reported below: 72 F. (2d) 49.

No. 476. GENERAL GAS & ELECTRIC CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. November 19, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Donald V. Hunter, Francis J. Sweeney,* and *C. Edward Paxson* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, Joseph M. Jones,* and *H. Brian Holland* for respondent. Reported below: 72 F. (2d) 364.

Nos. 497 and 498. JONESBORO COMPRESS CO. *v.* MENTE & CO., INC. November 19, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. S. M. Casey* and *Shields M. Goodwin* for petitioner. *Messrs. W. R. Roddy* and *J. W. House* for respondent. Reported below: 72 F. (2d) 3.

No. 506. MINCHELLA *v.* MICHIGAN. December 3, 1934. Petition for writ of certiorari to the Supreme Court of Michigan, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles Minchella, pro se.* No appearance for respondent. Reported below: 268 Mich. 123; 255 N. W. 735.

No. 535. GOODMAN *v.* KUNKLE, WARDEN. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John P. Goodman, pro se.* No appearance for respondent. Reported below: 72 F. (2d) 334.

No. 502. TOLFREE *v.* NEW YORK TITLE & MORTGAGE CO. ET AL.;

No. 503. REES *v.* SAME;

No. 504. JACOBY ET AL. *v.* BOND & MORTGAGE GUARANTEE CO. ET AL.; and

No. 505. DEPEN ET AL. *v.* LAWYERS TITLE & GUARANTY CO. ET AL. December 3, 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. *Mr. Henry W. Pollock* for petitioners. *Messrs. Charles E. Hughes, Jr.,* and *Lawrence S. Greenbaum* for respondents. Reported below: 72 F. (2d) 702, 420, 705.

No. 470. GARDNER *v.* UNITED STATES. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 71 F. (2d) 63.

No. 474. ERIE RAILROAD CO. *v.* FRITSCH ET AL.; and

No. 475. SAME *v.* LANDAU ET AL. December 3, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George S. Hobart* and *Ralph E. Cooper* for petitioner. No appearance for respondents. Reported below: 72 F. (2d) 766.

No. 493. WARNER *v.* COMMISSIONER OF INTERNAL REVENUE. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sumner Ford* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John MacC. Hudson* for respondent. Reported below: 72 F. (2d) 225.

No. 492. OREGON-WASHINGTON RAILROAD & NAVIGATION CO. *v.* JORGENSEN. December 3, 1934. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. Arthur C. Spencer* for petitioner. No appearance for respondent. Reported below: 176 Wash. 399; 33 P. (2d) 898; 29 *id.* 744.

No. 494. THRELKELD *v.* UNITED STATES. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. George A. Threlkeld, pro se. Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. Edward T. Burke* and *H. Brian Holland* for the United States. Reported below: 72 F. (2d) 464.

No. 500. STANDARD OIL COMPANY OF COLORADO *v.* STANDARD OIL CO. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George Heber Swerer* and

Wm. D. Harris for petitioner. *Messrs. Henry McAllister* and *Louis L. Stephens* for respondent. Reported below: 72 F. (2d) 524.

No. 501. HARTZELL *v.* UNITED STATES. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Carlos W. Goltz* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 72 F. (2d) 569.

No. 508. FREEMAN *v.* UNITED STATES. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. F. Stambaugh* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. P. Jackson* for the United States. Reported below: 71 F. (2d) 969.

No. 510. STRONG *v.* ROGERS, COLLECTOR. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Davis* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, Norman D. Keller,* and *H. Brian Holland* for respondent. Reported below: 72 F. (2d) 455.

No. 514. O'CONNOR *v.* DAVITT. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James S. Y. Ivins* and *George E. O'Connor* for petitioner. *Messrs. Myron Kommel* and *David L. Podell* for respondent. Reported below: 73 F. (2d) 43.

No. 525. NEW YORK & CUBA MAIL STEAMSHIP CO. *v.* AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSN., INC. December 3, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Oscar R. Houston* and *Leonard J. Matteson* for petitioner. *Messrs. Cletus Keating* and *Roger Siddall* for respondent. Reported below: 72 F. (2d) 694.

No. 553. COLLIER ET AL. *v.* FLORIDA. December 10, 1934. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. W. D. Bell* for petitioners. No appearance for respondent. Reported below: 116 Fla. 703; 156 So. 703.

No. 511. H. M. BYLLESBY & CO. *v.* OTIS, JUDGE. December 10, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry L. Jost* for petitioner. *Mr. Paul R. Stinson* for respondent. Reported below: 73 F. (2d) 1002.

No. 515. REMINGTON RAND BUSINESS SERVICE, INC. *v.* ACME CARD SYSTEM CO. December 10, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Samuel E. Darby, Jr.,* and *Harrison M. Brooks* for petitioner. *Messrs. J. Kemp Bartlett* and *Wm. F. Hall* for respondent. Reported below: 71 F. (2d) 628.

No. 516. TEAL MOTOR CO., INC. *v.* ORIENT INSURANCE CO., INC., ET AL.; and

No. 517. SAME *v.* ATLAS ASSURANCE CO., INC. December 10, 1934. Petition for writs of certiorari to the

Supreme Court of the Philippine Islands denied. *Mr. Guillermo B. Guevara* for petitioner. *Mr. Allison D. Gibbs* for respondents.

No. 518. AUSTIN ORGAN CO. *v.* HAWTHORNE ET AL. December 10, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Homan W. Walsh* for petitioner. *Mr. John S. Eggleston* for respondents. Reported below: 71 F. (2d) 945.

No. 520. PACIFIC FIRE INSURANCE CO. *v.* PENNSYLVANIA SUGAR CO. December 10, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Hiram B. Calkins* and *Horace Michener Schell* for petitioner. *Messrs. Charles Myers* and *Thomas Raeburn White* for respondent. Reported below: 72 F. (2d) 958.

No. 542. MANHATTAN OIL CO. ET AL. *v.* MOSBY. December 10, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry L. Jost* for petitioners. *Messrs. H. M. Longworthy* and *Byron Spencer* for respondent. Reported below: 72 F. (2d) 840.

No. 565. CUSICK *v.* WHIPP, WARDEN. December 17, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Michael J. Cusick, pro se.* No appearance for respondent. Reported below: 73 F. (2d) 254.

No. 523. MASSACHUSETTS BONDING & INSURANCE CO. *v.* UNITED STATES QUARRY TILE CO. December 17, 1934.

Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Atlee Pomerene* and *Clan Crawford* for petitioner. *Messrs. Arthur D. Baldwin* and *John L. Cable* for respondent. Reported below: 71 F. (2d) 400.

No. 526. CONTINENTAL TRUST CO., TRUSTEE, ET AL. *v.* W. R. BONSAL & CO. ET AL. December 17, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Gordon M. Buck, Edward Duffy, Edwin S. Sunderland, Thomas O'G. Fitzgibbon, Edward R. Baird, Jr., Carlyle Barton, Leon T. Seawell,* and *Theodore S. Garnett* for petitioners. *Messrs. C. Francis Cocke* and *T. H. Willcox* for respondents. Reported below: 72 F. (2d) 975.

No. 529. FREDERICK *v.* MUTUAL BUILDING & INVESTMENT CO. ET AL. December 17, 1934. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Hiram Ralph Burton* for petitioner. *Mr. John W. Bricker* for respondents. Reported below: 128 Ohio St. 474; 191 N. E. 729.

No. 530. AMERICAN SILK MILLS, INC. *v.* IRVING TRUST CO. ET AL., RECEIVERS. December 17, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leonard Acker* for petitioner. *Mr. Basil O'Connor* for respondents. Reported below: 72 F. (2d) 288.

No. 572. MITCHELL *v.* WASHINGTON. See *ante*, p. 533.

No. 577. THRASHER *v.* ADERHOLD, WARDEN. January 7, 1935. 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. Frank B. Thrasher, pro se.* No appearance for respondent. Reported below: 72 F. (2d) 1020.

No. 608. SPRUILL *v.* BALLARD ET AL. January 7, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondents. Reported below: 64 App. D. C. 60; 74 F. (2d) 464.

No. 609. SPRUILL *v.* SUPREME COURT OF THE DISTRICT OF COLUMBIA. January 7, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondent. Reported below: 64 App. D. C. 60; 74 F. (2d) 464.

No. 533. HARTFORD-EMPIRE CO. *v.* OBEAR-NESTER GLASS CO. ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas G. Haight, Amasa C. Paul, Robson D. Brown, William J. Belknap,* and *Maurice M. Moore* for petitioner. *Messrs. John D. Rippey* and *Lawrence C. Kingsland* for respondents. Reported below: 71 F. (2d) 539.

No. 536. MARSHALL ELECTRIC CO. *v.* PULLMAN, INC. ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas Marshall* for petitioner. *Messrs. Robert S. Blair, George L. Wilkinson,* and *Delos G. Haynes* for respondents. Reported below: 72 F. (2d) 474.

No. 540. CANTOR *v.* CHERRY, TRUSTEE IN BANKRUPTCY, ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jacob Weinstein* for petitioner. *Mr. Emil F. Goldhaber* for respondents. Reported below: 73 F. (2d) 188.

No. 539. MCDUFFIE, ANCILLARY RECEIVER, *v.* WELLS FARGO BANK & UNION TRUST CO. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Hiram W. Johnson* for petitioner. *Messrs. Sidney M. Ehrman* and *Lloyd W. Dinkelspiel* for respondent. Reported below: 71 F. (2d) 720.

No. 541. DOUGLAS *v.* WILLCUTS, COLLECTOR OF INTERNAL REVENUE. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clark R. Fletcher* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 73 F. (2d) 130.

No. 545. HIGHWAY TRAILER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert Ash* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. P. Jackson* for respondent. Reported below: 72 F. (2d) 913.

No. 548. FLEETWAY, INC. *v.* PUBLIC SERVICE INTERSTATE TRANSPORTATION CO. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis B. LeDuc* for petitioner. *Mr. William H. Speer* for respondent. Reported below: 72 F. (2d) 761.

No. 543. MERRILL *v.* UNITED STATES. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James W. Ryan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. M. Leo Looney, Jr.,* for the United States. Reported below: 73 F. (2d) 49.

No. 547. WILLEY, ADMINISTRATOR, ET AL. *v.* HOBBS, WALL & Co. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioners. *Mr. Ira S. Lillick* for respondent. Reported below: 71 F. (2d) 891.

No. 558. PERSONAL FINANCE COMPANY OF COUNCIL BLUFFS *v.* GILINSKY FRUIT CO. ET AL. January 7, 1935. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. David J. Gallert* for petitioner. No appearance for respondents. Reported below: 127 Neb. 450; 256 N. W. 511.

No. 559. FIDELITY & DEPOSIT CO. *v.* PEOPLES BANK OF SANFORD ET AL. January 7, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Isaac C. Wright* and *A. L. Brooks* for petitioner. *Messrs. Clawson L. Williams, Kenneth R. Hoyle,* and *Edwin L. Gavin* for respondents. Reported below: 72 F. (2d) 932.

PETITIONS FOR REHEARING, FROM OCTOBER 1, 1934, TO AND INCLUDING JANUARY 7, 1935.

No. 868 (October Term, 1933). OHIO ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. On pe-

tition for rehearing. October 8, 1934. A rehearing is granted to the appellant Empire Sheet & Tinplate Company as respects only so much of the decree of the court below and the order of the Interstate Commerce Commission in its docket No. 7036, Empire Steel Corp. *v.* Baltimore & Ohio R. Co. et al., as affects the reduction in the rate by the Ohio Public Utilities Commission between the Cambridge district and Mansfield, Ohio, from $1.76 to $1.51, and the restoration thereof by the Interstate Commerce Commission to $1.76. See 292 U. S. 498.

No. 619 (October Term, 1933). RADIO CORPORATION OF AMERICA ET AL. *v.* RADIO ENGINEERING LABORATORIES, INC. See *ante,* p. 522; also, p. 1.

No. 709 (October Term, 1933). EASTMAN KODAK CO. ET AL. *v.* GRAY. October 8, 1934. Petition for rehearing denied. See 292 U. S. 332.

No. 787 (October Term, 1933). ILLINOIS COMMERCE COMMISSION ET AL. *v.* UNITED STATES ET AL. October 8, 1934. Petition for rehearing denied. See 292 U. S. 474.

No. 995 (October Term, 1933). SIMPSON ET AL. *v.* STERN ET AL. October 8, 1934. Petition for rehearing denied. See 292 U. S. 649.

No. 1016 (October Term, 1933). GLASER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for rehearing denied. See 292 U. S. 654.

No. 1029 (October Term, 1933). TRICOU *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 8, 1934. Petition for rehearing denied. See 292 U. S. 655.

No. 1044 (October Term, 1933). PATTEN *v.* UNITED STATES. October 8, 1934. Petition for rehearing denied. See 292 U. S. 645.

No. 1045 (October Term, 1933). ALEOGRAPH CO. *v.* WESTERN ELECTRIC CO., INC. October 8, 1934. Petition for rehearing denied. See 292 U. S. 656.

No. 1078 (October Term, 1933). LONG *v.* MICHIGAN. October 8, 1934. Petition for rehearing denied. See 292 U. S. 647.

No. 1083 (October Term, 1933). ILLINOIS EX REL. COBINE *v.* ANGSTEN, CHAIRMAN. October 8, 1934. Petition for rehearing denied. See 292 U. S. 648.

No. 254. PARAMOUNT PUBLIX CORP. *v.* AMERICAN TRI-ERGON CORP. See *ante*, p. 528.

No. 255. ALTOONA PUBLIX THEATRES, INC. *v.* AMERICAN TRI-ERGON CORP. ET AL.; and

No. 256. WILMER & VINCENT CORP. ET AL. *v.* SAME. See *ante*, p. 528.

No. 1083 (October Term, 1933). ILLINOIS EX REL COBINE *v.* ANGSTEN, CHAIRMAN. November 5, 1934. Petition for rehearing denied. See 292 U. S. 648.

No. 50. UNION PACIFIC R. Co. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for rehearing denied. See *ante,* p. 559.

No. 93. BARRYMORE ET AL. *v.* KEMP, RECEIVER. November 5, 1934. Petition for rehearing denied. See *ante,* p. 566.

No. 94. BARRYMORE ET AL. *v.* WEILER ET AL. November 5, 1934. Petition for rehearing denied. See *ante,* p. 566.

Nos. 113 and 114. DORT, ADMINISTRATRIX, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for rehearing denied. See *ante,* p. 569.

No. 116. WALLACE ET AL. *v.* SEAGRAVES. November 5, 1934. Petition for rehearing denied. See *ante,* p. 569.

No. 160. BEEMSTERBOER *v.* ILLINOIS EX REL. MCDONOUGH, COUNTY TREASURER. November 5, 1934. Petition for rehearing denied. See *ante,* p. 575.

No. 182. AETNA LIFE INSURANCE CO. *v.* BRAUKMAN. November 5, 1934. Petition for rehearing denied. See *ante,* p. 578.

No. 203. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* WEBSTER ET AL. November 5, 1934. Petition for rehearing denied. See *ante,* p. 580.

No. 220. WITHERBEE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 5, 1934. Petition for rehearing denied. See *ante,* p. 582.

No. 263. LESSER *v.* NEW YORK. November 5, 1934. Petition for rehearing denied. See *ante,* p. 555.

No. 285. WIREN *v.* SHUBERT THEATRE CORP. ET AL. November 5, 1934. Petition for rehearing denied. See *ante,* p. 591.

No. 321. GILLIAM ET AL., RECEIVERS, *v.* UNITED STATES. November 5, 1934. Petition for rehearing denied. See *ante,* p. 587.

No. 409. ROBISON *v.* FIRST NATIONAL PICTURES, INC. ET AL. November 5, 1934. Petition for rehearing denied. See *ante,* p. 609.

No. 459. HANDY, RECEIVER, *v.* OKLAHOMA EX REL. KING, ATTORNEY GENERAL. November 5, 1934. Petition for rehearing denied. See *ante,* p. 610.

No. 191. DARBY *v.* MONTGOMERY COUNTY NATIONAL BANK. November 12, 1934. Petition for rehearing denied. See *ante,* p. 579.

No. 366. MISSISSIPPI VALLEY TRUST CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 12, 1934. Petition for rehearing denied. See *ante,* p. 604.

No. 369. MILLER ET AL. *v.* PYRITES CO., INC. ET AL.; and

No. 370. MERRELL ET AL. *v.* SAME. November 19, 1934. Petition for rehearing denied. See *ante*, p. 604.

No. 9. ROWLEY, TREASURER, ET AL. *v.* CHICAGO & NORTHWESTERN RY. CO. December 3, 1934. Petition for rehearing denied. See *ante*, p. 102.

No. 11. MCCANDLESS, RECEIVER, *v.* FURLAUD ET AL. December 3, 1934. Petition for rehearing denied. See *ante*, p. 67.

No. 32. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. *v.* PINKSTON. December 3, 1934. Petition for rehearing denied. See *ante*, p. 96.

No. 303. GASS V. WETMORE ET AL. December 3, 1934. Petition for rehearing denied. See *ante*, p. 556.

No. 397. MAXFIELD *v.* CANADIAN PACIFIC RY. CO. December 3, 1934. Petition for rehearing denied. See *ante*, p. 610.

No. 401. SABINE TOWING CO., INC. ET AL *v.* BRENNAN, ADMINISTRATRIX, ET AL. December 3, 1934. Petition for rehearing denied. See *ante*, p. 611.

No. 62. WETZEL *v.* FULTON, SUPERINTENDENT OF BANKS. December 10, 1934. Petition for rehearing denied. See *ante*, p. 531.

No. 356. VINTON PETROLEUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 17, 1934. Petition for rehearing denied. See *ante,* p. 601.

No. 55. HAMILTON ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. January 7, 1935. Petition for rehearing denied. See *ante,* p. 245.

No. 60. INDIANA FARMER'S GUIDE PUBLISHING CO. *v.* PRAIRIE FARMER PUBLISHING CO. ET AL. January 7, 1935. Petition for rehearing denied. See *ante,* p. 268.

No. 520. PACIFIC FIRE INSURANCE CO. *v.* PENNSYLVANIA SUGAR CO. January 7, 1935. Petition for rehearing denied. See *ante,* p. 623.

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No. 158. NORPHLET SCHOOL DISTRICT NO. 50 *v.* EL DORADO SCHOOL DISTRICT NO. 15 ET AL. On petition for writ of certiorari to the Supreme Court of Arkansas. October 1, 1934. Dismissed for failure to comply with the Rules. *Messrs. Kenneth W. Coulter, Boone T. Coulter,* and *Edward H. Coulter* for petitioner. No appearance for respondent. Reported below: 188 Ark. 875; 69 S. W. (2d) 400.

No. 3. UNITED STATES *v.* SMITH ET AL. Appeal from the District Court of the United States for the Eastern District of Texas. October 1, 1934. Dismissed and mandate granted on motion of *Solicitor General Biggs* for the United States.

No. 100. WHITE, COLLECTOR OF INTERNAL REVENUE, *v.* ATKINS. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. November 16, 1934. Dismissed on motion of *Solicitor General Biggs* for petitioner. Reported below: 69 F. (2d) 960.

No. 527. FLORIDA EX REL. VETTER *v.* KNOTT, STATE TREASURER. Appeal from the Supreme Court of Florida. November 19, 1934. Dismissed, per stipulation, on motion of *Mr. Robert J. Boone* for appellant. Reported below: 114 Fla. 95; 153 So. 606.

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