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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1934

FROM JANUARY 7 (CONCLUDED) TO AND INCLUDING
(IN PART) APRIL 1, 1935

ERNEST KNAEBEL
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

ERRATA

P. 97, line 5, "*Ousler*" should be "*Oursler.*"

291 U. S., p. 692, II, 2, page number for *Chassaniol* v. *Greenwood* should be 584.

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.[2]
STANLEY REED, Solicitor General.[2]
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.

[2] Mr. Biggs submitted his resignation March 13, 1935, and it was accepted March 14, 1935, to take effect upon the qualification of his successor. On March 18, 1935, President Roosevelt nominated Mr. Stanley Reed, of Kentucky. The nomination of Mr. Reed was confirmed on March 21, 1935; he was commissioned and took the oath on March 23, 1935.

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.

In Memoriam

MR. JUSTICE HOLMES

SUPREME COURT OF THE UNITED STATES

Wednesday, March 6, 1935

Present: The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, and MR. JUSTICE CARDOZO.

The CHIEF JUSTICE said:

"It is my sad duty to announce that our former colleague, MR. JUSTICE HOLMES, passed away this morning. Peacefully, painlessly, and in the fullness of time, came the inevitable end, the close of a career of unique distinction, as patriot, scholar, judge. We have lost a great jurist and a noble friend.

"As a mark of respect to his memory, the Court will now adjourn until tomorrow noon. We shall then resume the hearing of cases and at the close of the session tomorrow the Court will adjourn until Monday, next, at noon, in order that the members of the Court may attend the funeral services to be held on Friday." *

Adjourned until tomorrow at 12 o'clock.

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* OLIVER WENDELL HOLMES died in Washington, March 6, 1935. On the second day thereafter his funeral service was held in All Souls' Unitarian Church, and he was buried in Arlington National Cemetery. He was born at Boston, Massachusetts, March 8, 1841. His nomination by President Theodore Roosevelt, to be an Associate Justice of this Court, vice Horace Gray, deceased, was made on December 2, 1902, and confirmed on December 4, 1902. He was commissioned December 4, 1902, and took the oath and was seated, December 8, 1902. He served as Associate Justice until January 12, 1932, when his resignation under U. S. C., Title 28, § 260, was tendered to and accepted by President Hoover. 284 U. S. vii.

The opinions of MR. JUSTICE HOLMES will be found in these official Reports from Vol. 187 to Vol. 284, both included.

TABLE OF CASES REPORTED.

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES

Cited in Opinions

(A) Statutes of the United States.

(B) Statutes of the States and Territories.

(C) TREATIES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1934.

SMITH *v.* SNOW ET AL.

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

No. 102. Argued December 3, 4, 1934.—Decided January 7, 1935.

1. Claim 1 of the Smith Patent, No. 1,262,860, for a method for the incubation of eggs, *held* valid, and infringed. P. 7.
2. Claim 1 covers broadly the essential elements of the Smith invention, viz., (a) the arrangement of the eggs at different levels in staged incubation in a closed chamber, having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture; (b) the application to the eggs of heated air in a current created by means other than variation of temperature; and (c), as marking the boundaries of the claim, a sufficient velocity in the current to circulate and diffuse the air and maintain it throughout the chamber at substantially the same temperature, whereby the air will be vitalized, moisture conserved, and the units of heat carried from the eggs in the more advanced stage of incubation to those in a less advanced stage. *Held:*

(1) The claim is not limited by the particular mode of use described in the specifications, since the claims of the patent, not its specifications, measure the invention. P. 11.

(2) Examination of the claim in the light both of scientific fact and of the particular form in which the inventor reduced it to practice as described in the specifications, makes it plain that the claim does not require any particular order or arrangement of the eggs in staged incubation in the incubator, or that the propelled air current

should reach them in any particular order, or that it should be guided, controlled or directed by any particular means, or in any particular manner other than that it should be of sufficient velocity to produce the results prescribed by the claim. Pp. 9, 13.

(3) There is nothing in the file wrapper to suggest that any addition was made to Claim 1 to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claim is not restricted by such features. P. 14.

(4) The claim is not limited by the prior art. P. 16.

(5) The invention as claimed was infringed by respondents' apparatus in this case. P. 18.

3. The fact that a claim broadly covering the essentials of an invention omits particular means of application which are called for by other claims is evidence that the broader claim was not intended to be so restricted. P. 13.

4. The inventor of a novel method of artificial incubation of eggs, which solved the major problems of that art in a highly efficient manner and was attended by great practical and commercial success, is entitled to broad claims in his patent, and to a liberal construction of them tending to secure to the patentee the benefit of his invention rather than to defeat the grant. P. 14.

5. A broad claim is not to be given a restricted construction because its allowance in the Patent Office followed the rejection of narrow claims. P. 16.

6. The invention of a combination is not anticipated by earlier and impracticable experiments, for the same end, with isolated elements of the combination. P. 17.

70 F. (2d) 564, reversed.

CERTIORARI * to review a decree reversing a decree of the District Court and holding valid, but not infringed, a claim of a patent for an improved apparatus and method for the incubation of eggs.

Messrs. Newton D. Baker and *Albert L. Ely* argued the cause, and *Messrs. Charles Neave, Albert L. Ely, Amasa C. Paul,* and *Maurice M. Moore* filed a brief, for petitioner.

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* See Table of Cases Reported in this volume.

Mr. Ralph E. Williamson, with whom *Mr. James F. Williamson* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari was granted to review a decree of the Circuit Court of Appeals for the Eighth Circuit, 70 F. (2d) 564, which reversed the decree of the district court and held valid, but not infringed, the first claim of the Smith Patent, No. 1,262,860, of April 16, 1918, for an improved apparatus and method for the incubation of eggs.[1] The Court of Appeals for the Ninth Circuit held the same claim valid and infringed in *Waxham* v. *Smith* 70 F. (2d) 457, in which case certiorari was also granted. The question thus presented is one of the scope of the claim.

Only so much of the patent as relates to a method for incubation is now involved. Correct appreciation of the contentions made requires a brief exposition of the well-known phenomena which attend the incubation of eggs under natural conditions.

The period for hatching eggs of the domestic hen is twenty-one days. The eggs are cold at the beginning of the period of incubation, although at that time generation has already progressed slightly. Continuation of this process and successful incubation depend upon the

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[1] The patent has been extensively litigated. Claim 1 has been held valid and infringed in *Buckeye Incubator Co.* v. *Wolf,* 291 Fed. 253, aff'd 296 Fed. 680 (C. C. A. 6th); *Buckeye Incubator Co.* v. *Cooley,* 17 F. (2d) 453 (C. C. A. 3rd); *Miller Hatcheries* v. *Buckeye Incubator Co.,* 41 F. (2d) 619 (C. C. A. 8th); *Smith* v. *Jensma,* 1 F. Supp. 999 (D. C.); *Waxham* v. *Smith,* 70 F. (2d) 457 (C. C. A. 9th). It has been held valid, but not infringed, in *Buckeye Incubator Co.* v. *Blum,* 17 F. (2d) 456, aff'd 27 F. (2d) 333 (C. C. A. 6th); *Buckeye Incubator Co.* v. *Petersime,* 19 F. (2d) 721 (C. C. A. 6th); *Buckeye Incubator Co.* v. *Hillpot,* 22 F. (2d) 855, aff'd 24 F. (2d) 341 (C. C. A. 3d); *Boling* v. *Buckeye Incubator Co.,* 33 F. (2d) 347, reversed on other grounds, 46 F. (2d) 965 (C. C. A. 6th); *Snow* v. *Smith,* 70 F. (2d) 564 (C. C. A. 8th).

application of heat to the eggs, and the maintenance of their temperature at not less than body heat, about 100° F., and not more than 105° F. Any substantial divergence from this range of temperature results in deterioration or death of the embryo, and consequent failure of the hatching process. If the temperature is maintained within this range, the eggs during the first ten days of the period absorb heat required to generate and maintain the life of the embryo. The eggs are then said to be endothermic or heat absorbing. From the eleventh day until the end of the period the embryo has developed to a point at which the egg generates more heat than is needed to keep the embryo alive. They are then said to be exothermic. From that time on the excess heat is given off to the surrounding air or to objects in contact with the eggs, if at a lower temperature than the eggs.

The development of heat accompanies the oxidation of food elements within the egg, in consequence of which it gives off carbon dioxide during the period of incubation and absorbs oxygen from the external air, both of which pass through the shell of the egg and its lining membrane. During the period of incubation there is also gradual evaporation of moisture from the egg, which tends to reduce its temperature slightly. The best results are obtained if the total evaporation during incubation does not exceed about 15%. Evaporation in excess of that amount affects the embryo adversely, the chick when hatched being undeveloped and lacking normal strength.

Successful artificial incubation therefore involves conformity to three principal requisites: the maintenance of proper temperature during the period of incubation, the prevention of excessive evaporation of moisture, and the supply of an adequate amount of oxygen, which involves also the removal from the incubator of the carbon dioxide which results from oxidation of the contents of the egg.

The artificial incubation of eggs is an ancient art. It appears to have been known to the Egyptians two thousand years ago, and for a comparable period to the Chinese. Until Smith, the patentee, carried on his experiments, the effort had been generally to reproduce as nearly as practicable the natural conditions of incubation. In practice, eggs, in relatively small number, seldom more than three hundred and usually less, were placed, on the same level, in a cabinet with heating means above the eggs, so that the temperature above the eggs was maintained at a higher point, about 103° F., than that below. To secure the requisite exposure of the eggs to the higher temperature, it was necessary, in the course of incubation, to turn the eggs frequently, as is done by the hen in nature. Provision was made for supplying fresh air to the cabinet and for humidifying the air within the cabinet. All incubators were of the still air type; that is to say, the only movement of air within the incubator was that caused by variations of temperature at different points within the cabinet, resulting in some transmission of heat by radiation or convection. The opinion seems to have prevailed that the presence of currents of air either within or surrounding the cabinet was harmful. Successful operation of this method required nice adjustments of the heating means so as to avoid overheating as the eggs passed into the more advanced stages of incubation, reaching their highest temperature about the seventeenth day.

Smith conceived the idea, embodied in his patent, of setting the eggs in staged incubation within the cabinet and applying to them, in convenient arrangement for that purpose, a current of heated air, propelled by means other than convection. Staged incubation is the successive setting of eggs in the same cabinet at brief intervals, of about three days. At the twenty-first day there would thus be several settings of eggs in the incubator, each at a different stage of incubation, part in the endothermic stage and part in the exothermic. Smith arranged the egg trays or racks in tiers, so that air could be freely circulated among the eggs. He subjected them to a continuous current of air of the requisite constant temperature of about 100° F., propelled by a fan so that it would circulate freely and repeatedly throughout the cabinet. The heat of the eggs in the later stages of incubation was thus carried by the circulating air of lower temperature to the cooler eggs, in the earlier stages, so that there was a continuous tendency to equalize the temperature throughout the cabinet at approximately the temperature of the introduced current of air.

Before Smith there had been efforts to set eggs in staged incubation, but without practical success, because of the difficulties of securing adequate heat distribution within the incubator. He was the first to apply mechanically circulated currents of air to eggs so arranged. He followed this procedure in conjunction with the use of a restricted opening for the elimination of foul air. By this combination the difference in temperature of the eggs was equalized within the desired range throughout the incubator during the period of incubation, the air within the incubator was gradually replaced by fresh air, and the moisture of the eggs was conserved. His method thus solved the major problems of artificial incubation in a highly efficient manner. It was novel and involved invention. See *Barbed Wire Patent Case,* 143 U. S. 275, 283; *Krementz* v. *S. Cottle Co.,* 148 U. S. 556, 559, 560.

That it was invention is not seriously disputed here, and of the many courts which have passed on the patent none has denied its validity. The new method had certain marked advantages over earlier ones. It was possible to carry on the process of incubation continuously by placing fresh eggs in the incubator at intervals, as those of the most advanced stage hatched and the new born chicks were removed. It was possible to apply heated air to the eggs at a constant temperature, thus avoiding the necessity of varying by nice adjustments the temperature of the applied air, so as to conform to the varying temperatures of the eggs as they passed through successive stages of incubation. As the egg racks or trays could be placed in tiers, instead of on a single level, it was possible to arrange them more compactly and greatly increase the number of eggs in a single incubator. Before staged incubation, as developed by Smith, it had not been practicable to operate incubators of a capacity of more than about three hundred eggs. By use of the new method it is possible to operate successfully an incubator containing as many as 52,000 eggs, and the percentage of eggs successfully hatched by artificial incubation has been materially raised.

The commercial success of the new method was immediate and striking. At first the inventor devoted himself to developing his own hatchery for the use of the new method; it was the largest in existence, with a capacity of over 1,000,000 eggs. In 1922 he began the manufacture and sale of the new incubator. In ten years he, and a corporation which he had organized for the purpose, had made sales of incubators aggregating about $24,000,000, having a total egg capacity of over 188,000,000. The old type of incubator, with eggs arranged at a single level, all in a single stage of incubation, has thus become obsolete.

That the method employed in the Smith type of incubator was novel and revolutionary in the industry is not challenged. The question presented here is what scope may rightly be given to Claim 1 of the patent; whether the petitioner has drafted it in such form as to secure the fruits of his invention. Claim 1 reads as follows:

"1. The method of hatching a plurality of eggs by arranging them at different levels in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture and applying a current of heated air, said current being created by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature, whereby the air will be vitalized, the moisture conserved and the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified."

It will be observed that the claim, standing by itself, asserts the essential elements of the method of incubation to be: (a) the arrangement of the eggs at different levels in staged incubation in a closed chamber, having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture; (b) the application to the eggs of heated air in a current created by means other than variation of temperature; and (c), as marking the boundaries of the claim, the current of air is to be of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature whereby the air will be vitalized, moisture conserved, and the units of heat carried from the eggs in the more advanced stage to those in the less advanced.

To avoid petitioner's charge of infringement two main contentions are pressed by respondents. First, that Claim 1 is restricted to an arrangement of the eggs in such order with respect to the direction of the propelled current of heated air that it will first come in contact with the more advanced eggs. Thus construed, respondents do not infringe, as concededly the movement of air within their incubator does not pass to the eggs in staged incubation in any particular order. Second, that the movement of air in respondents' incubator, produced by the agitating action of fans or propellers, does not result in "a current of air" traveling in a constant predestined path within the meaning of Claim 1. In passing upon these contentions it is necessary to ascertain the proper scope of Claim 1, and to determine whether the characteristic features of respondents' incubator come within its scope. Respondents maintain that the claim is restricted in its scope in the manner indicated above (a) by the disclosures of the patent itself, (b) by the prior art, including the patentee Smith's own prior public usage, and (c) by estoppels arising from the file wrapper record of the patent.

1. The court below rested its decision on its interpretation of Claim 1, read in the light of the disclosures of the patent, as restricting the patented method to a particular arrangement of the eggs, whereby the current of heated air, after being introduced into the cabinet, first comes in contact with the eggs in the most advanced stage of incubation. It reached this conclusion by comparison of that part of the claim, which speaks of the units of heat as being "carried from the eggs in the more advanced stage of incubation to those in a less advanced stage," with the specifications, which disclose an arrangement of the eggs such that the introduced current of heated air first passes to the more advanced eggs. As respondents' incubators have no such arrangement of the eggs, and as in consequence the forced draft of heated air does not reach the eggs in any particular order, the court held that the respondents do not infringe Claim 1.

The patentee, obedient to the command of the statute (R. S. § 4888), gave such description of the manner of using his discovery as would enable others skilled in the art to use it. The specifications first describe generally the method by which the eggs in staged incubation are arranged in tiers and subjected to forced circulation of heated air through the incubating chamber. The patent states: "The temperature of circulating air should be such as will prevent the eggs in the early stage of incubation from falling below 100° and the speed or velocity of the circulating air should be such as to carry the heat away from the eggs in the later stage of incubation and thereby hold the temperature of those eggs at 105° or slightly below that. It is manifest that the temperature will remain practically the same throughout the column of eggs, but the air is impelled with sufficient velocity to carry the heat away from the eggs which happen to be in the advanced stage of incubation." The drawings and specifications show the eggs arranged in tiers on either side of the chamber, with an open space or corridor between, at the top of which a revolving fan forces the air downward in the open space of the corridor. Above the fan is a valve-controlled air intake for the introduction of fresh air and above the trays of eggs on either side are shown "outlets for the release of foul air . . . of such restricted capacity as to prevent the undue escape of moisture."

It is true that drawings and specifications indicate a particular arrangement of the eggs from the top to the bottom of the tiers of trays, according to the stage of the incubating process, the eggs being arranged progressively from the least advanced, placed at the top, to the most advanced, placed at the bottom of the tiers. They indicate also that as the eggs most advanced are hatched, they are to be replaced by moving downward the trays containing the several successive settings of eggs which are in earlier stages of incubation. They also speak of a "column" of air of such speed as to keep the temperature substantially uniform, and show curtains hanging from the top of the chamber covering the ends of the trays on either side of the corridor and extending to a point a short distance above the floor.

With this arrangement the air would be propelled downward to the floor of the chamber, gaining access to the eggs by passing beneath the ends of the curtains to the trays of eggs at the bottom of the tiers. So much of the air as was introduced through the intake would thus reach the more advanced eggs first. It would then be deflected upward through the egg trays to the top of the chamber, and so much of it as did not pass out through the restricted capacity outlets located at the top of the tiers of trays would be returned to the fan to be propelled again through the described circuit.

We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor's method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. *Paper Bag Patent Case,* 210 U. S. 405, 419; *McCarty* v. *Lehigh Valley R. Co.,* 160 U. S. 110, 116; *Winans* v. *Denmead,* 15 How. 330, 343. While the claims of a patent may incorporate the specifications or drawings by reference, see *Snow* v. *Lake Shore R. Co.,* 121 U. S. 617, 630, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice. It is enough that the principle claimed is exemplified by a written description of it and of the manner of using it " in such full, clear, concise, and exact terms " as will enable one " skilled in the art to make, construct, compound and use the same."

Here the specifications showed an arrangement of the eggs and a means of guiding the current of air so that it would reach the most advanced eggs first. But neither the arrangement nor the means of guiding the current of air are requisite to the application of the principle which Smith discovered and claimed. Without either, the heated air may be given, as Claim 1 prescribes, " sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature whereby . . . the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage." Claim 1 made no mention of curtains or any column of air or means of guiding the current of air, and the inventor made no claim for any particular arrangement of the eggs, except that they should be at different levels. Moreover, while the specifications and drawings show a particular arrangement of the eggs and a particular direction of the current, nowhere, in specifications or claim, is it stated either that the direction of the current is material or, what is the equivalent, that the order in which it reaches the eggs is material.

Only by resort to the assumption that heat units could not be carried from the more advanced to the cooler and less advanced eggs, unless the initially introduced air first came in contact with the more advanced, is it possible to support the conclusion of the court below and read the claim as calling for a particular arrangement which would enable the air current to reach the advanced eggs first. Such, of course, would be the case only if the current of air were to make a single circuit, and either remain at its end in contact with the cooler eggs or pass out of the incubator altogether. Neither occurs in petitioner's machine, and there is no reason to suppose that either would produce the desired equalization of temperature. The specifications and claim both contemplate a continuous circulation of the current of heated air through the chamber, which, regardless of its direction, would continuously operate, by repeated contacts with the eggs in all stages, to equalize the temperature throughout the chamber by carrying heat units from the warmer to the cooler eggs.

The claim conforms to the specifications in prescribing "restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture." The amount of foul air allowed to escape through the outlet of restricted capacity necessarily controls the amount of air taken in. In petitioner's commercial machines, regulated to produce the prescribed result in air vitalization and conservation of moisture, the interchange of foul air for fresh is from ½ of 1% to 3% of the air content for each complete circuit of the chamber. This means that the air content of the chamber must make the circuit many times, theoretically from 33 to 200, before an equal volume of fresh air would be drawn in through the intake. Such continuous circulation of the air at constant temperature, lower than that of the more advanced eggs and higher than that of the less advanced, tends to produce the equalization of the temperature of the eggs by flow of heat units from the warmer eggs to the cooler, regardless of the direction of the current in the circuit, and regardless of the particular stage of the eggs which it reaches first. With other factors constant, the efficiency of this equalization process would depend upon the velocity of the current. The statement of Claim 1 is that the current of air is to be " of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature." The specifications state: " It is obvious that the fans can be so arranged and can be operated at such speed as to cause the hot air to circulate fast enough to keep the temperature throughout the chamber between the limits of 100° and 105°."

It is evident that Claim 1 does not prescribe that the current of air shall be propelled by any particular means, except that it shall be by means other than variation of temperature, nor does it prescribe that the means of propulsion shall be given any particular location, or that the current of air shall be guided by any particular means or given any particular direction. The omission of these requirements from Claim 1 is the more pointed as the other claims of the patent speak in particular of a power-driven fan, of the location of the fan, of curtains and a partition obviously intended to give direction to the current of air, of a vertically directed current of air, and of air circulating from the bottom of the chamber into the parts of it occupied by the tiers of egg trays. Thus by striking and obviously intended contrast with other claims, Claim 1 covers broadly the essential elements of the Smith invention as we have already described it. *Symington Co.* v. *National Malleable Castings Co.*, 250 U. S. 383, 385; *Lamson Consolidated Store Service Co.* v. *Hillman*, 123 Fed. 416, 419 (C. C. A. 7th); *Wm. B. Scaife & Sons Co.* v. *Falls City Woolen Mills*, 209 Fed. 210, 214 (C. C. A. 6th).

Examination of the claim, in the light both of scientific fact and of the particular form in which the petitioner reduced the claim to practice as described in the specifications, makes it plain that the claim does not call for a particular order or arrangement of the eggs in staged incubation in the incubator, or that the propelled current should reach them in any particular order, or that it should be guided, controlled or directed by any particular means, or in any particular manner other than that it should be of sufficient velocity to produce the results prescribed by the claim. If the matter were doubtful, it is plain from what has been said that the character of the patent and its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made. *Moreley Machine Co.* v. *Lancaster*, 129 U. S. 263, 273–277; *Eibel Co.* v. *Paper Co.*, 261 U. S. 45, 63; *Winans* v. *Denmead, supra*, 341. In such circumstances, if the claim were fairly susceptible of two constructions, that should be adopted which will secure to the patentee his actual invention, rather than to adopt a construction fatal to the grant, *Keystone Manufacturing Co.* v. *Adams*, 151 U. S. 139, 144, 145; *McClain* v. *Ortmayer*, 141 U. S. 419, 425.

2. We find nothing in the file wrapper defense to disturb our conclusion as to the correct interpretation of Claim 1. It is a familiar rule that a patentee cannot

broaden his claim by dropping from it an element which he was compelled to add in order to secure his patent. *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 443; *Smith* v. *Magic City Club,* 282 U. S. 784, 789, 790. But the file wrapper lends no support for the application of this rule to petitioner's Claim 1.

The history of Smith's application in the Patent Office is a long one. Four groups of method claims were successively presented to the Patent Office and three were successively rejected. The fourth group ultimately matured into Claims 1, 2, and 3 of the patent. It suffices to say that Claims 1 and 25 of the first group claimed broadly, "The method of hatching eggs by arranging the eggs in a column and applying heated air forced about the eggs, the heated air being adapted to the eggs in various stages of incubation," and "the method of hatching eggs by arranging the eggs in a column one above the other and forcing heated air through said column." In due course the broad claims thus asserted were modified and narrowed by the inclusion of new elements, until they appeared in the form of Claim 1 of the patent. But, as we have seen, none of these additions involves any particular order of arrangement of the eggs or any particular direction or control of the air current, except that the current is to be "of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature."

It is an illuminating fact that the entire written argument filed in support of Claim 1, as it was finally presented to the Patent Office and allowed, makes no reference to any order or arrangement of the eggs, or to shifting the location of the eggs in the incubator, no reference to the location of the fan, the direction of the air current, or to curtains or partitions. The features emphasized were the superiority, over drafts caused by variations of temperature, of "current produced by mechanical means" applied to eggs in staged incubation arranged at different levels, the conservation of moisture, and the elimination of foul air by the restricted air outlets, all features of Claim 1 which are characteristic of both petitioner's and respondents' incubators. We find nothing in the file wrapper to suggest that any addition was made to Claim 1 to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claim is not restricted by such features. See *Baltzley* v. *Spengler Loomis Mfg. Co.*, 262 Fed. 423, 426 (C. C. A. 2d); *National Hollow B. B. Co.* v. *Interchangeable B. B. Co.*, 106 Fed. 693, 714 (C. C. A. 8th). It is of no moment that in the course of the proceedings in the Patent Office the rejection of narrow claims was followed by the allowance of the broader Claim 1. *Westinghouse Electric & Mfg. Co.* v. *Condit Electrical Mfg. Co.*, 194 Fed. 427, 430 (C. C. A. 2d).

3. Claim 1 is not limited by the prior art. It is urged that there was disclosure by Smith by public use more than two years before his application for the patent. At the time indicated he used commercially an incubator arranged in three completely separated compartments in each of which there was circulation of the air by a fan. But there was no staged incubation in any single compartment.

The German patent, Stulik, No. 155,917, issued in 1901, disclosed the arrangement of trays of eggs in staged incubation in an enclosed column or stack, with the endothermic eggs at the bottom. The eggs were subjected to a rising column of heated air, which was allowed to escape at the top of the chimney. There was no forced draft of air, no circulation or re-circulation of air, and in consequence no carrying of heat units from the more advanced eggs at the top to the less advanced eggs at the bottom.

Other patents named, as Winkler, No. 286,756, of 1883, and Zimmer, No. 1,075,747, of 1913, show types of staged incubation, but made no use of a current of air propelled by means other than variations of temperature, and in other respects were so plainly impractical as to call for no extended discussion. This is true also of the description in the 1867 edition of Ure's Dictionary, 652–3, said to represent a method of incubation devised in 1777 by Bonnemain, a Frenchman, and not used since the French revolution, by which eggs in staged incubation were placed in a closed room heated by hot water pipes, but without other means of producing currents of air. Such rudimentary experiments with isolated elements of Smith's combination did not anticipate his invention. See *Smith & Griggs Mfg. Co.* v. *Sprague,* 123 U. S. 249, 255.

Other patents are cited showing varying types of incubators in which the eggs were placed at different levels, but in which the circulation of air through the incubating chamber by means other than variations in temperature is wanting.[2]

The Proctor & Knowles Patent, No. 426,321 of 1890, and the Schwartz Patent, No. 535,175 of 1895, for methods and apparatus for conditioning tobacco and other materials, as well as other procedures for ventilation, are so remote from the problems and procedure for hatching eggs as to call for no comment.

This history of the prior art serves to emphasize rather than to discredit the striking advance made by Smith in effecting the combination defined in Claim 1. More than the skill of the art was involved in combining and adjusting its elements in such fashion as to solve the major prob-

[2] Guerin, U. S. Patent, No. 3,019, March 30, 1843; Bassini & Heyden, U. S. Patent, No. 330,457, November 17, 1885; Van Keuren, U. S. Patent, No. 1,160,793, November 16, 1915; Bell, U. S. Patent, No. 691,837, January 28, 1902; Koons, U. S. Patent, No. 916,454, March 30, 1909.

lems of artificial incubation. The prior art discloses no application of a continuously circulating current of air to eggs in staged incubation which would restrict Claim 1 with respect either to the arrangement of the eggs or the direction or control of the current of air.

4. There remains the question of infringement. The respondents' machine exhibits a closed chamber, with restricted outlet for the escape of foul air and an intake for fresh air, with eggs arranged at different levels in staged incubation, with a fan-impelled movement of air which circulates and recirculates throughout the chamber. The air moves over and about the eggs, carrying the units of heat from the warmer to the cooler eggs, maintains a substantially uniform temperature throughout the chamber, vitalizes the air and conserves moisture.

As Claim 1 of petitioner's patent is not restricted to any particular order in which the current of air reaches the eggs, respondents do not avoid infringement by interspersing indiscriminately, as they do, the trays of eggs in different stages of incubation. Respondents' claim of non-infringement is thus reduced to the contention that their incubators do not employ circulating currents of air called for by Claim 1. Their emphasis is on the agitation of air in respondents' machine in such a manner that its movement does not follow defined paths through the chamber so as to answer to the description " current of air."

In respondents' machine fans or air propellers are located at either side of the chamber, about mid-way of its height, near the wall and between the wall and tiers of egg trays. They are constructed and operated in such fashion that the air is " drawn " by their action from the central corridor through the tiers of eggs toward the center of the propellers. There, by the centrifugal action of the propellers, it is thrown off the ends of the propeller blades toward the top, bottom and adjacent ends of the chamber. There it is deflected by ceiling, floor and ends of the chamber into the corridor, from whence it is, in due course, again drawn through the tiers of eggs to the propellers. The propellers are operated, and the air moves, continuously. Since the main movement of the air at the top and bottom of the tiers is toward the center corridor, and since the fans draw in air through the middle of the tiers, there are points in the space occupied by the tiers where the movement of the air is toward the corridor until it joins and is turned back by the current moving toward the propellers.

Claim 1, as already stated, does not call for a current of air moving in any particular direction. Assuming, without deciding, that it calls for a current of air so constant in its movement and direction as not to depart substantially from a well defined path, one would expect that a fan operating, as in respondents' machine, within a closed chamber under substantially constant conditions, would produce currents of air without substantial variations of path. No valid scientific reason or explanation is advanced for any different result. Extensive testimony and elaborate arguments are presented to support the contention that notwithstanding the application of force to the air within the closed chamber by the action of respondents' propellers, under practically constant conditions, the results produced are so variable that "the air goes where it 'listeth';" they are not convincing. The conclusion is abundantly supported by evidence that there is a continuous movement of air from the blades of respondents' propellers toward the top and bottom and sides of the chamber, thence to the corridor and thence through the tiers of egg trays back to the propellers, and that this movement achieves the purpose declared in Claim 1, "to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature." The trial judge so found.

That there is a mixture of the air and some confusion of its movement in the corridor, and that at different levels within the space occupied by the tiers of trays the movement is not in the same direction, is immaterial. It is enough that there is a movement of air in current form following substantially defined paths through the tiers of egg trays, sufficient to effect the desired transfer of heat units. Claim 1 does not prescribe that a current of air is to be maintained throughout the chamber. It calls for the application to the eggs of a current of air "of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature." This respondents accomplish by the currents of air set in motion either directly or indirectly by the movement of the blades of the propellers. The method is that of Smith. Respondents do not avoid infringement of the method by varying the details of the apparatus by which they make use of it. *Cochrane* v. *Deener,* 94 U. S. 780, 788; *Tilghman* v. *Proctor,* 102 U. S. 707, 730, 731.

Reversed.

WAXHAM *v.* SMITH ET AL.

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

No. 208. Argued December 4, 1934.—Decided January 7, 1935.

1. Claim 1 of Patent No. 1,262,860, to Smith for a method of incubating eggs, *held* valid and infringed. See *Smith* v. *Snow, ante,* p. 1. P. 21.
2. The claim is for a method or process and not for a machine or the function of a machine. P. 21.
3. A method, otherwise patentable, is not to be rejected as "functional" merely because the specifications show a machine capable of using it. P. 22.
4. Infringement of the Smith method is not avoided by use of it, whether more or less efficiently, in an incubator of different structure than Smith's. P. 23.

70 F. (2d) 457, affirmed.

CERTIORARI * to review a judgment affirming a judgment of the District Court holding a patent valid and infringed.

Mr. Drury W. Cooper, with whom *Messrs. Raymond I. Blakeslee* and *Allan C. Bakewell* were on the brief, for petitioner.

Mr. Albert L. Ely, with whom *Messrs. Charles Neave* and *Leonard S. Lyon* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

In this companion case to No. 102, *Smith* v. *Snow,* decided this day, *ante,* p. 1, certiorari was granted to review a decree of the Court of Appeals for the Ninth Circuit, 70 F. (2d) 457, which affirmed the decree of the district court and held valid and infringed the first claim of the Smith Patent, No. 1,262,860, of April 16, 1918, for an improved apparatus and method for the incubation of eggs.

The issues here, as in the *Snow* case, are the scope of Claim 1 and its infringement as rightly construed. For reasons stated at length in the opinion in the *Snow* case, our decision as to the scope of the claim is the same as in that case. Petitioner argues that the claim, if thus broadly construed, is invalid, as an attempt to patent the function performed by the petitioner's incubator. See *Risdon Iron & Locomotive Works* v. *Medart,* 158 U. S. 68, 77. It is said also that the function of the machine involves merely the application of the natural law that heat units flow from warm to cooler objects placed in proximity. But the function which a machine performs, here the hatching of eggs, is to be distinguished from the means by which that performance is secured. It is true that Smith made use of the difference in temperature of

* See Table of Cases Reported in this volume.

eggs in different stages of incubation, and the flow of heat units from one to the other, in achieving the desired result. He did this by arrangement of the eggs in staged incubation and applying to them a current of heated air under the conditions specified in Claim 1. By the use of materials in a particular manner he secured the performance of the function by a means which had never occurred in nature, and had not been anticipated by the prior art; this is a patentable method or process. *Corning* v. *Burden*, 15 How. 252, 267, 268; *Risdon Iron & Locomotive Works* v. *Medart, supra*, 77; *Cochrane* v. *Deener*, 94 U. S. 780, 788. A method, which may be patented irrespective of the particular form of the mechanism which may be availed of for carrying it into operation, is not to be rejected as "functional," merely because the specifications show a machine capable of using it. *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 382–386; *Cochrane* v. *Deener, supra*, 787, 788; cf. *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 255, 256.

Petitioner's incubator differs only in unimportant mechanical details from the infringing machine in the *Snow* case. In it the eggs are set in staged incubation, at different levels, but in no particular order. They are subjected to circulation of heated air, set in motion by fans, which carries heat units from the warmer to the cooler eggs and maintains the air throughout the chamber at substantially uniform temperature. There is a fresh air intake behind the fans and openings in the ceiling for the exit of foul air. There is no central corridor, the tiers of egg trays being placed in or near the center of the chamber. There are no curtains or similar means of guiding the air currents set in motion by the fans. Two fans are placed on the side wall at the back of the chamber. They turn continuously, and are so constructed and operated as to propel currents of air, which proceed along the sides and the ceiling and floor of the chamber to the front wall, where they are deflected in the direction of the fans and there "drawn" toward them through the central part of the chamber. Less than 1% of the air passes out through the foul air exits in the course of making the described circuits, so that there is circulation and re-circulation of the air within the chamber. The evidence supports the finding of the special master and of the two courts below that the currents of air set in motion by the fans flow continuously along defined paths.

The petitioner's machine thus employs every essential of the patented method as it is defined by Claim 1. Petitioner does not avoid infringement of respondent's method patent merely by employing it in a machine of different structure than respondent's, whether more or less efficiently. *Winans* v. *Denmead*, 15 How. 330, 344; *Sewall* v. *Jones*, 91 U. S. 171, 184; *Cochrane* v. *Deener*, *supra*, 789; *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 441.

Affirmed.

McCREA *v.* UNITED STATES.

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

No. 249. Argued December 14, 1934.—Decided January 7, 1935.

1. A seaman is not entitled to the extra wages and other relief afforded by R. S., § 4583, unless his claim was upheld, and his discharge granted, by a consul or consular agent. P. 27.
2. To entitle a seaman to double wages under R. S., § 4529, upon the ground that payment of wages due, as therein provided, was refused or neglected "without sufficient cause," the delay of payment must have been in some sense arbitrary, wilful, or unreasonable. P. 30.
3. Upon the demand of a seaman for his discharge, payment of wages due, a month's additional pay, and employment on another vessel homeward bound, the master of a vessel, busily engaged about his duties on arrival in a foreign port and ignorant of the legal basis

for the demand, requested the seaman to meet him at the consular office shortly after noon of the following day; the seaman called early, was advised by the consul that he was not entitled to his discharge, and failed to keep the appointment with the master; he left the vessel later without having communicated with the master, and gave no forwarding address. *Held*, the failure of the master to make payment of wages as provided by R. S., § 4529 was not " without sufficient cause." P. 28.

4. The double liability under § 4529 arises from failure, without sufficient cause, to make payment of what was due, during the period prescribed by the statute. If the failure was justifiable then (in this case because of the seaman's own conduct), the double liability does not arise afterwards because of a subsequent refusal to pay the wages due. P. 31.

5. A decree entered by the District Court on rehearing, becomes the final decree in the cause and supersedes the earlier one. P. 32.

70 F. (2d) 632, affirmed.

Certiorari * to review a judgment affirming a judgment of the District Court entered on rehearing in a suit against the United States under the Suits in Admiralty Act. See 3 F. Supp. 184, 187.

Mr. John M. Scoble, with whom *Mr. K. Courtenay Johnston* was on the brief, for petitioner.

Assistant Attorney General Blair, with whom *Solicitor General Biggs, Assistant Attorney General Sweeney*, and *Mr. Aubrey Lawrence* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

This is a suit under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, §§ 1, 2 and 6, 46 U. S. C., §§ 741, 742, 746, against the United States as owner and operator of the S. S. American Shipper, brought in the district court for southern New York by petitioner, a seaman, to recover for loss of his clothing, for wages, and for

* See Table of Cases Reported in this Volume.

one month's additional wages and other relief provided by R. S. § 4583, because of the failure of respondent to divide the firemen and other employees of the vessel into three equal watches, as required by § 2 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164, 46 U. S. C., § 673. He also demanded, under R. S. § 4529, as amended by § 3 of the Seamen's Act, double wages, aggregating about $7,000, for failure to pay wages earned in 1928.

The district court at first gave a decree for the value of the clothing, $28.95 for the wages due, and a part of the double wages demanded. 3 F. Supp. 184. On reargument it reduced the amount of the recovery to the value of the clothing and the amount of wages due, on the ground that the demand for double wages was for a penalty for which the United States, as sovereign, is not liable. 3 F. Supp. 187. The Court of Appeals for the Second Circuit took the same view and affirmed the decree. 70 F. (2d) 632.

Certiorari was granted upon a petition which urged that the decision below was erroneous because: (a) the provision for the recovery of double wages is compensatory and not for the imposition of a penalty; and (b), even though a penalty, it is one for which the government is liable by virtue of the provisions of the Suits in Admiralty Act and of the government's waiver of sovereign immunity by engaging in the business of operating vessels in competition with private owners. It is also insisted that the Court of Appeals erred in holding that the decree first entered by the district court, allowing recovery of double wages, was set aside and superseded by its later decree, which allowed recovery only for the amount claimed for loss of petitioner's clothing and for earned wages.

We find it unnecessary to decide the questions raised with respect to the liability of the government for double wages. For upon examination of the record it is apparent that petitioner has failed to establish his right to the double wages demanded, regardless of the asserted immunity of the government.

Both courts below are in substantial agreement as to the facts, which, so far as now material, may be detailed as follows: Petitioner shipped as a fireman on the S. S. American Shipper on a voyage from New York to London and return; on arrival at London, he demanded of the master his discharge, payment of the balance of wages due, one month's additional pay, and that he be provided with adequate employment on some other vessel bound for New York. As reason for his demand he quoted the titles of § 2 of the Seamen's Act and R. S. § 4583. The master, who was then occupied with his duties in advancing money to members of the crew who were about to take shore leave, offered to pay one-half the wages due, which petitioner refused. The master then told him that he did not know what the cited sections of the statute were about and that he would have to look them up. He asked petitioner to meet him in the office of the American Consul in London, whose address he gave, shortly after noon of the following day, when he would discuss with petitioner the matter of his demand.

Petitioner went to the Consulate the next forenoon and left about half-past eleven, after stating his complaint and being informed by the Consul that he was not entitled to his discharge. He requested that the decision be placed in writing; this was done and sent to him in care of the vessel. The master, who had been busy preparing his papers for entry at the customs house, arrived at the Consulate about two o'clock of the same day and was told that the petitioner had been there and had gone. He then returned to the vessel, where he remained most of the time it was in port, but did not see petitioner again. Petitioner testified that he returned to the vessel, knocked at the master's door that night and again the next morning, but received no answer at either time. He then asked the chief mate if the master was aboard and the mate said that he didn't know. On that day he left the vessel, without making any further attempt to see the master, or leaving any information which would enable the officers to communicate with him. When he asked the mate for a pass for his clothes he was told that the mate could not give him one and he was not allowed to take his clothes with him. He did not intend to return to the vessel when he left, and never did return. After some weeks in England he purchased passage on another vessel and returned to the United States.

1. The petitioner rests his claim for a month's extra pay and for the cost of his return passage on § 2 of the Seamen's Act and R. S. § 4583. By § 2 a seaman is given the right to demand his discharge and payment of the wages due whenever the master of the vessel fails while at sea to divide the sailors into at least two, and firemen, oilers and water-tenders into at least three, watches. In *O'Hara* v. *Luckenbach Steamship Co.*, 269 U. S. 364, 367, we held that the purpose of this provision was to provide for the safety of vessels at sea rather than to regulate working conditions of the crew, and that it commands division of the specified classes of the crew into watches as nearly equal as the number in each class will permit.

Section 4583 provides that:

"Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is . . . unseaworthy, . . . it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, . . ."

As the government sought no review, either in the Court of Appeals or in this Court, of the determination of the district court that petitioner was entitled to demand his discharge and payment of his earned wages because of the failure to make proper division of the crew into watches, there is no occasion for us to pass on that question. Nor do we decide the further one, which the petitioner raises, whether a seaman is entitled to claim the benefits of § 4583 by reason of a failure to provide equal watches as directed by § 2 of the Seamen's Act. Laying aside that question and possible doubts as to the correct construction of other parts of § 4583, it is plain that by its provisions the Consul or Consular Agent is made the arbiter of the seaman's demand for the month's extra wages and for other relief which it affords, and that his favorable action upon the demand and his discharge of the seaman are prerequisite to any recovery under it. As in the present case the Consul refused to give petitioner his discharge and to certify that he was entitled to the relief demanded, his recovery under that section was rightly denied by the courts below.

2. The seaman's right to double wages for failure of the master to pay wages due is conferred by R. S. §4529.[1]

[1] Sec. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without suf-

By this section the master or owner of a vessel is required to pay a seaman his wages within a specified time after the termination of the agreement under which he was shipped or after the time of his discharge, whichever first happens. In the case of vessels making foreign voyages, payment is required within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever first happens. In all cases the seaman is entitled at the time of his discharge to one-third of the balance of wages due him. It directs that "every master or owner who refuses or neglects to make payment in the manner" specified "without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages. . . ."

Since it does not appear in the present case when the cargo was discharged, the time within which the master could pay the wages due and thus avoid liability for double wages cannot be taken to be less than four days from the time of arrival. There is no question of failure to pay one-third of the wages due since petitioner did not avail himself of the master's offer to pay him one-half of his wages. As it has been determined that the petitioner was entitled to his discharge and to payment of the wages due, and as payment was not made within the time specified by the statute, we may assume, for present purposes, that he was entitled to the double pay demanded if the master's failure to pay the wages due was "without sufficient cause."

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ficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. (46 U. S. C. 596.)

We had occasion to pass upon the meaning of this phrase, as used in § 4529, in *Collie* v. *Fergusson,* 281 U. S. 52, where it was held that there was no right to double wages where the failure to pay earned wages was occasioned by the insolvency of the owner and the arrest of the vessel subject to accrued claims beyond her value. After pointing out that the words "without sufficient cause" must be taken to mean something more than the absence of valid defenses to the claim for wages, we said, page 55:

"the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2d Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.

"The words 'refuses or neglects to make payment . . . without sufficient cause' connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."

The statute thus confers no right to recover double wages where the delay in payment of wages due was not in some sense arbitrary, wilful or unreasonable. In view of the many duties imposed, some by law, on the master of a vessel upon arrival in a foreign port, we cannot say that the statute compels him, on pain of subjecting himself or his owner to heavy loss, to make immediate decision of questions of law involved in a seaman's demands, of whose nature he is left in ignorance. In the circumstances, he did not unreasonably defer action by fixing the following day and the Consul's office as the time and place for his decision. The failure of petitioner to keep the appointment and to communicate with the master again, after rejection by the Consul of petitioner's demand, left the master uninformed whether or not petitioner still persisted in his demand. His departure from the vessel on the following day, without leaving an address, precluded payment of the wages due within the four days which the statute allowed. The case is not one of neglect to pay wages without sufficient cause.

In its opinion before reargument the district court, notwithstanding its conclusion that the master had sufficient cause for his failure to pay wages, ruled that the petitioner was entitled to recover double pay for the number of days which had intervened after the suit was brought. Petitioner argues here that, as there was no excuse for delay in payment after the suit was brought, the duty to pay double wages accrued from that date. But the liability is conditioned by the statute upon the refusal or neglect to pay wages "in the manner hereinbefore mentioned without sufficient cause." The quoted phrase refers to the specified periods within which the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages within the prescribed period. Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at any time after an excusable failure to pay within the prescribed period. This possibility is precluded by the further provision of the section that double wages shall be paid for each day "during which payment is delayed beyond the respective periods" within which the payment is to be made. Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made. It must be determined by the happening of an event within the period, failure to pay wages without sufficient cause. The statute affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. But it affords no basis for recovery if, by his own conduct, he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it.

3. Following the trial of the cause in the district court a decree was entered allowing recovery for loss of petitioner's clothing, for wages and double wages. After the reargument a second decree was entered which did not in terms vacate or modify the first one, but which granted recovery as in its first decree, except for double wages. After the appeal was taken to the Circuit Court of Appeals the district court amended the second decree by the addition of a direction that the first decree be vacated.

The application for rehearing was seasonably made and by granting it the district court retained jurisdiction of the case. The decree entered on the rehearing thus became the final decree in the cause and superseded the earlier one, as the court below held. *Barrell* v. *Tilton,* 119 U. S. 637, 643; see *Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552.

It is unnecessary to inquire whether, after the appeal was taken, the district court retained jurisdiction to correct its own records by vacating the first decree, which had already become *functus officio.* See *Hovey* v. *McDonald,* 109 U. S. 150, 157, 158.

Affirmed.

CENTRAL VERMONT TRANSPORTATION CO. *v.* DURNING, COLLECTOR OF CUSTOMS.

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

No. 247. Argued December 13, 1934.—Decided January 7, 1935.

1. A vessel owned by a Maine corporation, the stock of which is owned by a Vermont corporation, whose shares, with the voting power, are in turn vested in a Canadian corporation, is not "a vessel . . . owned by persons who are citizens of the United States," within the meaning of § 27 of the Merchant Marine Act, 1920, prohibiting the transportation of merchandise, on penalty of its forfeiture, between points in the United States, by water, or by land and water, in a vessel other than one "owned by persons who are citizens of the United States." P. 37.

   So *held* in view of §§ 37 and 38 of this Act (the latter amending § 2 of the Shipping Act of 1916) whereby the interests required to be held by citizens in order that a corporation may be deemed "a citizen of the United States" are defined.
2. The proviso of § 27 of the Merchant Marine Act, exempting from its operation "merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities . . .," does not apply to merchandise shipped from St. Albans, Vt., to New London, Conn., by rail, and thence by water to New York City, even though the route be part of a through route which elsewhere embraces Canadian rail lines and for which tariffs were filed with the Interstate Commerce Commission. P. 37.
3. An interpretation of the proviso which would enable foreign-owned vessels to carry merchandise in coastwise traffic, over routes wholly within the United States, by the expedient of filing tariffs showing participation in through routes extending over Canadian railways, would go beyond its purpose and in large measure defeat the prohibition of § 27. P. 39.
4. The fact that a carrier by water is subject to the jurisdiction of the Interstate Commerce Commission, by virtue of the provisions of

the Interstate Commerce Act which extend its application "to the transportation of passengers or property . . . partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage of shipment" and which authorize the Commission to establish through routes and maximum joint rates over such rail and water lines and to determine "the terms and conditions under which such lines shall be operated in the handling of the traffic embraced," *held* not to exempt it from the operation of § 27 of the Merchant Marine Act. P. 40.

5. The application of § 27 of the Merchant Marine Act to a foreign-controlled corporation—Shipping Act of 1916, § 2, as amended by § 38 of the Merchant Marine Act and made applicable by § 37 of that Act—which had not theretofore been subjected to the prohibition there reënacted, and though it will result in the loss of a substantial part of the business of the corporation, does not deprive it of its property without due process of law in violation of the Fifth Amendment. P. 41.

71 F. (2d) 273, affirmed.

CERTIORARI* to review a judgment which reversed an interlocutory order of the District Court restraining the seizure and forfeiture of merchandise alleged to have been transported in violation of § 27 of the Merchant Marine Act.

Messrs. J. W. Redmond and *Horace H. Powers* for petitioner.

Assistant Attorney General Sweeney, with whom *Solicitor General Biggs* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This suit in equity was brought by petitioner in the district court for southern New York, to restrain respondent, a United States customs officer, from seizing merchandise transported by petitioner's vessels in coastwise traffic, in

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* See Table of Cases Reported in this volume.

alleged violation of § 27 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999, 46 U. S. C., § 883. An interlocutory order of the district court restraining the seizure and forfeiture of the merchandise thus transported was reversed and set aside by the Court of Appeals for the Second Circuit, on the ground that the transportation was a plain violation of the statute. 71 F. (2d) 273. This Court granted certiorari upon a petition which the government, considering the question one of importance, did not oppose.

Petitioner is a Maine corporation, engaged in operating a steamship line on Long Island Sound between New London, Connecticut, and New York City, employing vessels built in the United States and documented under its laws. All of petitioner's shares of stock, with the exception of directors' qualifying shares, are owned and held by the Central Vermont Railway, Inc., a Vermont corporation, which is an interstate rail carrier, with its railroad extending northward from New London to points in Connecticut, Massachusetts and Vermont. The Railway's stock, except directors' qualifying shares, is held in turn by the Canadian National Railway Company, a Canadian corporation. The acquisition of stock of petitioner by the Central Vermont Railway, Inc. and of the latter's stock by the Canadian National Railway Company were duly approved by the Interstate Commerce Commission. 40 I. C. C. 589; 158 I. C. C. 397, 405, 406.

Petitioner and Central Vermont Railway, Inc., maintain a line for transportation of merchandise by rail and water, by continuous carriage, between points in the New England states and New York City. About two-thirds of the freight passing over the line either originates at points in the northwestern states and is routed over Canadian rail lines and thence over the Central Vermont rail and water line to New York City or passes over the same route in the other direction. These through routes have been recognized by the Interstate Commerce Commission and tariffs for them have been filed with the Commission. The remainder of the traffic originates in New England or New York City and moves between those points. All the freight which moves by petitioner's boats between New London and New York City is therefore transported over the whole or some part of a through route recognized by the Interstate Commerce Commission.

Respondent has seized merchandise which had been shipped over the Central Vermont from St. Albans, Vermont, to New London and carried thence by petitioner's vessel to New York City, and threatens to seize other articles carried by petitioner's vessels upon shipments between points in New England and New York City. Petitioner contends that the threatened seizures, which will work irreparable injury to its business, are unauthorized by § 27 because: (a) not within its prohibition; (b) it does not apply to petitioner or the merchandise which it transports, because of the paramount and therefore exclusive jurisdiction of the Interstate Commerce Commission over the traffic in which petitioner participates; and (c), if applicable to them, it infringes the due process clause of the Fifth Amendment.

1. Section 27 of the Merchant Marine Act prohibits the transportation of merchandise, under penalty of its forfeiture, " by water, or by land and water," between points in the United States " in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, . . . Provided, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said Commission when such routes are in part over Canadian rail

lines and their own or other connecting water facilities. . . ."

The vessels of petitioner are not owned by persons who are citizens of the United States within the meaning of the Merchant Marine Act. Section 38, when read with § 37, provides that within the meaning of the Act "no corporation . . . shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States . . . but in the case of a corporation . . . operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum." Subdivision (b) of the section declares: "The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States." Under these provisions the stock of petitioner, owned by a Vermont corporation, whose stock in turn is owned and its voting power vested in a Canadian corporation, is not "owned by persons who are citizens of the United States."

It is said that the merchandise transported by petitioner's vessels is freed from the prohibition of § 27 by the proviso that it shall not apply to merchandise transported over through routes recognized by the Interstate Commerce Commission, where such routes are in part over

Canadian rail lines. It is true that all merchandise transported on petitioner's vessels between New London and New York is transported over a part of such through routes as are exempted by the proviso. But the proviso does not speak of transportation merely over a domestic segment of a through route which elsewhere embraces Canadian rail lines. The immunity which it grants is to merchandise transported " over " the through routes described. Even though the merchandise carried between points in New England and New York City by rail and water line might be said to be transported on a through route which embraces Canadian rail lines, it plainly is not transported over the route.

The construction for which petitioner contends does violence to the words of the statute and would thwart its purpose. The policy declared by the enacting clause, and restated in the first section, of the Merchant Marine Act, is " to provide for the promotion and maintenance of an American merchant marine." The policy has found expression in the enactment of a series of statutes, beginning with the first year of the government, which have imposed restrictions of steadily increasing rigor on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States.[1] The Act of March 1, 1817, c. 31, 3 Stat. 351, forbade shipment in foreign vessels between ports in the United States. The Act of February 15, 1893, c. 117, 27 Stat. 455, prohibited shipment in foreign vessels from one part of the United States

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[1] See c. 2, § 5, Act of July 4, 1789, 1 Stat. 24, 27; c. 31, § 4, Act of March 1, 1817, 3 Stat. 351; c. 201, § 20, Act of July 18, 1866, 14 Stat. 178, 182; c. 213, § 4, Act of March 1, 1873, 17 Stat. 482, 483; cf. Treaty with Great Britain of May 8, 1871, 17 Stat., Treaties, 67, repealed March 3, 1883, 22 Stat. 641; c. 117, Act of February 15, 1893, 27 Stat. 455; c. 26, Act of February 17, 1898, 30 Stat. 248.

to another via a foreign port, and the Act of February 17, 1898, c. 26, 30 Stat. 248, forbade such shipments "either directly or via a foreign port, or for any part of the voyage." As these restrictions were thought not to include transportation that was partly by water and partly by land, see 30 Op. Atty. Gen. 3, the statute was amended by the addition in § 27 of the Merchant Marine Act of the words "or by land and water." The bill for the amendment as originally introduced did not contain the proviso, which was later added in the conference committee. See Conference Report, H. R. No. 1093, 66th Cong., 2d Sess., p. 12. The proviso has no other recorded legislative history, but its evident purpose was to avoid disturbance of established routes, recognized by the Interstate Commerce Commission as in the public interest, between the northwestern and eastern states through the lake ports. In these routes foreign-owned water carriers participated as well as Canadian and American rail lines. See Application of Grand Trunk Ry. Co. of Canada, 43 I. C. C. 286; Rail-Lake-and-Rail Rates via Canada, 96 I. C. C. 633. The proviso obviously would enable American carriers, participating in such through routes, to retain the benefits of the traffic which in some instances might otherwise be diverted to all water transportation by foreign owned vessels between points in Canada and the United States.

An interpretation of the proviso which would enable foreign-owned vessels to carry merchandise in coastwise traffic, over routes wholly within the United States, by the expedient of filing tariffs showing participation in through routes extending over Canadian railways, would go beyond its purpose and in large measure defeat the prohibition of § 27. Both the words of the statute and the unmistakable policy of Congress compel the conclusion that the merchandise respondent has seized and threatens to seize is not within the immunity of the proviso.

2. The argument that § 27 of the Merchant Marine Act does not apply, because petitioner is under the paramount jurisdiction of the Interstate Commerce Commission, is based on the provisions of the Interstate Commerce Act, which provide (§ 1, Par. (1) (a), 41 Stat. 474) that the Act shall apply " to the transportation of passengers or property . . . partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment," and which authorize (§ 6 (13) (b), 37 Stat. 568) the Commission to establish through routes and maximum joint rates over such rail and water lines and to determine the " terms and conditions under which such lines shall be operated in the handling of the traffic embraced." But these and other sections of the Interstate Commerce Act, c. 104, 27 Stat. 379, defining generally the Commission's authority, which by § 1, Par. (1) (a), is extended over such water carriers, are not concerned with the subject matter of § 27 and do not conflict with it. The application of its prohibition in terms to any part of the transportation " by land and water," by a foreign-owned vessel, is not to be erased from the statute because the Interstate Commerce Commission was not given authority to enforce it. It is not to be supposed that Congress, by giving jurisdiction to the Interstate Commerce Commission to establish through routes and maximum joint rates for rail and water lines, intended to remove from them an unrelated prohibition enacted March 1, 1817, 3 Stat. 351, repeatedly reënacted, and specifically made applicable in § 27 of the Merchant Marine Act to the transportation of merchandise by foreign vessels in coastwise traffic " by water or by land and water." We know of no principle of statutory construction which would admit of such a result.

3. Petitioner, in challenging the constitutionality of the statute, does not deny the power of Congress to exclude

from coastwise traffic vessels which are foreign-owned or controlled, regardless of the corporate form which that control may take. But it points to the loss of its business which will ensue if § 27 is applied to it, and to the fact that it established its business with the same corporate relationships which were only later defined so as to bring them within the prohibition reënacted in § 27. § 38 of the Merchant Marine Act, amending § 2 of the Shipping Act of 1916, c. 451, 39 Stat. 728, 729, and made applicable to the Merchant Marine Act by § 37 of the latter Act. It insists that the prohibition of § 27, to which it was subjected by the amendment, deprives it of property without due process of law, in violation of the Fifth Amendment.

This contention is answered by the numerous cases in which this Court has upheld regulations of interstate commerce which have compelled the rail carriers to discontinue parts of their business which had previously been lawful. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415, 416; *Delaware, L. & W. R. Co.* v. *United States,* 231 U. S. 363, 369, 370; *Assigned Car Cases,* 274 U. S. 564, 575. There has been no taking of petitioner's property. It established its business under foreign domination, subject to the power of Congress to regulate it, and in the face of a long established national policy to restrict such foreign control of coastwise shipping. The amendment of the statute, so as to include within its prohibition the particular form of foreign control to which petitioner was subject, was no more arbitrary, burdensome or unreasonable than that involved in the statutes prohibiting transportation by a railroad of its own commodities. See *United States* v. *Delaware & Hudson Co., supra,* 415; *Delaware, L. & W. R. Co.* v. *United States, supra,* 369, 370.

Affirmed.

KEYSTONE DRILLER CO. *v.* NORTHWEST ENGINEERING CORP.*

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

No. 131. Argued December 5, 1934.—Decided January 7, 1935.

1. Claim 4 of Patent 1,317,431, to Clutter, for improvements in excavating machines, *held* not infringed. P. 44.

   The invention is said to consist in a "pivotal means carried by the boom" of the machine, "and connecting the pulling member therewith and with the scoop-carrying member," or ditcher stick. In machines of this kind, the boom swings on a pivot at its base and is pivoted at its other end to the ditcher stick near the top, or inner end, of the latter. The specifications and drawings of the patent showed a pulley mounted between two links, pivoted to the boom near its upper end, and two cross links extending from the axle of the pulley to the top of the ditcher stick and pivotally attached to it. By tensing or relaxing a cable passed through the pulley, the boom could be raised or lowered and the ditcher stick, bearing the scoop at its outer end, could be advanced or retracted.

   Held, that in view of the prior art and of the file wrapper, the claim cannot be construed broadly; and that it is not infringed by devices which, doing away with the links and cross links, run the cable over pulleys in brackets rigidly mounted to the boom and fasten it to the top of the stick; or by devices in which a pulley is attached to the top of the stick firmly or by a link pivoted to the top. P. 46.

2. Where broad claims are denied in the Patent Office and a narrower one is granted in lieu, the patentee is estopped to read the granted claim as the equivalent of those that were rejected. P. 48.

3. Claim 6 of Patent No. 1,476,121, to Wagner, claiming means for mounting a sheave at the upper end of the ditcher stick of an excavating machine and a hoisting line passed about the sheave for raising and lowering the boom and stick, and also for moving the

* Together with No. 132, *Keystone Driller Co.* v. *Harnischfeger Corp.*, and No. 133, *Keystone Driller Co.* v. *Bucyrus-Erie Co.*, certiorari to the Circuit Court of Appeals for the Seventh Circuit.

stick outwardly lengthwise of the boom; and Claim 7 of the same patent for a hoisting line connected to the top of the ditcher stick,—*held* void for want of novelty. P. 49.

4. Claims 6, and 9–14, of Patent No. 1,511,114, to Downie, for a drop-bottom scoop with side rake teeth, in excavating machines, *held* void for want of novelty and invention. Pp. 49–50.

The fixation of the scoop to the ditcher stick, the pivoting of a drop bottom near the front of the scoop, which can be unlatched to drop the contents and closed by checking the momentum of the scoop, and the addition of rake teeth to the sides, were all old in the art; and their combination and adaptation required no more than mechanical skill.

70 F. (2d) 13, affirmed.

Certiorari, 293 U. S. 539, to review the reversal of three decrees obtained by the petitioner in three suits charging infringements of its patents.

Mr. Clarence P. Byrnes, with whom *Messrs. F. O. Richey* and *H. F. McNenny* were on the brief, for petitioner.

Mr. Frank Parker Davis, with whom *Messrs. Henry M. Huxley* and *Louis Quarles* were on the brief, for respondents.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner brought suit against each respondent in the District Court for Eastern Wisconsin, charging infringement of claim 4 of the Clutter patent, No. 1,317,431, claims 6 and 7 of the Wagner patent, No. 1,476,121, and claims 6 and 9 to 14, inclusive, of the Downie patent, No. 1,511,114. The suits were consolidated and the court found that the claims were valid and infringed. The Circuit Court of Appeals concluded that none of the respondents' machines infringed claim 4 of the Clutter patent, and that the specified claims of the Wagner and Downie patents were invalid for lack of invention.[1] By reason of asserted conflict of decision [2] we granted certiorari.[3]

The patents in question relate to excavator attachments used in connection with a base carrying suitable machinery for operating the lines or cables controlling the attachments. As the machinery on the base is no part of the structure disclosed, it is not the subject of any of the patents.

1. The Clutter Patent.

Claim 4 of the patent is:

"In an excavating machine a pivoted boom, a scoop-carrying member pivotally connected therewith, a pulling member for elevating and lowering said boom, *a pivotal*

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[1] 70 F. (2d) 13.

[2] In *Byers Machine Co.* v. *Keystone Driller Co.*, 44 F. (2d) 283 (C. C. A. 6) the claims were held valid and infringed. In *General Excavator Co.* v. *Keystone Driller Co.*, 62 F. (2d) 48, 64 F. (2d) 39, the same court found that the owner of the patents had attempted suppression of evidence of prior use, so as to render more certain the sustaining of the Downie patent which was involved in the *Byers* case, and had then used the decree in that case as the basis of application for preliminary injunction in the *General Excavator* case. Without passing on the merits, therefore, the court because of the plaintiff's unclean hands reversed a decree finding validity and infringement. We affirmed the judgment; 290 U. S. 240. Meantime the Circuit Court of Appeals has permitted reopening of the *Byers* case and the District Court, after considering proofs as to suppression, has again found the patents valid and infringed. 4 F. Supp. 159, 160. Its decree has been set aside by the Circuit Court of Appeals, 71 F. (2d) 1000, but it is not clear whether this action nullifies the finding on the merits. Meantime, also, the District Court which decided the *Byers* and *General Excavator* cases has, in another suit (against Day & Maddock Company) found validity and infringement, and this cause is now pending on appeal. The petitioner asserts that the original decision of the Circuit Court of Appeals for the Sixth Circuit in the *Byers* case has never been set aside so far as concerns the issues of validity and infringement.

[3] 293 U. S. 539.

means carried by the boom and connecting the pulling member therewith, and [with] said scoop-carrying member, a scoop connected with the scoop-carrying member and projecting toward the boom, and a pulling member connected with said scoop."

In the patent drawing is shown a boom pivoted at its base, and a scoop-carrying member, often called a ditcher stick, pivoted to the outer end of the boom. On the boom near its outer end are two uprights, pivoted to the boom, which support a pulley. Two links extend from the axle of the pulley to the top of the ditcher stick, to which they are pivotally attached. The purpose of the contrivance is to raise and lower the boom and to advance or retract the scoop by taking up or slacking a cable passed through the pulley. A second cable, attached to the scoop, limits the outreach of the ditcher stick and pulls the scoop toward the base to fill it with earth. Thus by tension on the hoisting line the boom can be raised and the scoop held out beyond the end of the boom, by slacking on that line the boom can be lowered until the scoop comes into contact with the earth, by tension on the scoop-line the scoop can be pulled against the earth until it is filled. By again taking up on the hoisting line the boom can be raised, the scoop extended, and placed in position for the discharge of its contents. The respondents found they could accomplish the same results by doing away with the links pivoted to the boom, carrying the pulley and the cross-links connecting the pulley with the stick. In some of their apparatus the line passes over pulleys in brackets rigidly mounted on the boom and is fastened to the upper end of the stick; in others a pulley is attached to a link pivoted to the top of the stick; and in still others the pulley is firmly fixed upon the end of the stick.

No claim of novelty is made for a pivoted boom, a ditcher stick pivoted on the end of the boom, or a scoop fastened to the bottom of the stick opening toward the base. The petitioner asserts that the invention consisted in the pivotal means carried by the boom and pivotally attached to it and to the ditcher stick; that this constituted a revolutionary improvement which for the first time made in-digging excavators practicable for use in all sorts of material; that as the patent is basic it should be liberally construed and a large range of equivalents allowed. The respondents, on the other hand, say the invention is in a developed and crowded art, and both the prior art and the evolution of the claims in the Patent Office proceedings require a strict construction of the claim in suit. They assert that in those of their appliances wherein the pulley is held by immovable brackets on the boom there is no "pivotal attachment" of the pulley to the boom, and in those wherein the pulley is linked to the upper end of the ditcher stick, or firmly affixed to it, they neither use a "pivotal means" nor one "carried by the boom." The petitioner replies that any pivotal means comes within the claim; that the method shown in the drawing and described in the specifications is merely a preferred form of application; that a pulley is a pivotal means, and, since the ditcher stick is attached to the boom, if the pulley is affixed or linked to the stick it is necessarily "carried" by the boom. And as in each of the accused devices the respondents employ a pulley either fixed on the boom or the stick or linked to the latter, each employs pivotal means carried by the boom and pivotally connected with the boom and the stick.

We hold, in view of the prior art and of the file wrapper, the petitioner is not entitled to a broad reading of the claim. It is unnecessary to determine whether within the language used a pulley is "a pivotal means," or if attached only to the stick it is "carried by the boom," or whether a pulley so attached can properly be said to connect the pulling member, i. e., the cable, with the boom and the ditcher stick, since a reading of the terms employed as petitioner's position requires, precludes patent-ability, in view of the prior art, and, in addition, would be contrary to the limitation which the Patent Office file wrapper shows the applicant placed upon his asserted invention.

At the date of filing the application excavators with pivoted booms, with ditcher sticks pivoted to the booms, with lines attached to the scoop and the ditcher stick, and with sheaves upon the boom and at the upper end of the stick, had been patented, and some had been used. Contrivances of these sorts, in which the same line or cable could be used to elevate the boom and to extend the lower end of the ditcher stick, had been in use and had been patented.[4] Prior to Clutter several excavating machines had embodied the device of attaching a pulley by a link to the top of the ditcher stick, or the fixing of a pulley on the end of the stick.[5]

Clutter's application as shown by the file wrapper broadly claimed "means for operating the other [upper] end of the pivotally attached member [ditcher stick] so as to adjust either scoop or boom, singly or together, at the will of the operator." The claim was rejected on the earlier Cross and Fairbanks patents. All of the claims were cancelled and new ones submitted, which included claims 3 and 4 of the patent. These two were alike in the use of the phrase "a pivoted (or pivotal) means carried by the boom and connecting the pulling member therewith and with the scoop-carrying member." In order to distinguish this construction from that of Cross or Fairbanks the applicant's solicitor in a printed argument said:

". . . none of the references disclose . . . means carried by the boom for connecting the pulling member . . . The applicant was the first in the art to mount a means

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[4] See the following patents: Rood, 386,438; Cross, 808,345; Benedick, 876,517; Fairbanks, 1,056,268.

[5] See Benedick, 876,517; Fairbanks, 1,056,268.

upon the boom for connecting a pulling member therewith but also for connecting the pulling member with the scoop-carrying member."

Claims 3 and 4 so phrased were allowed, but the applicant continued, without success, to press other claims not so narrowly limited.[6]

We do not attribute the force of an estoppel to what was said by the claimant in seeking to avoid the prior art cited against his broad claims, but we do apply the principle that where such broad claims are denied and a narrower substituted, the patentee is estopped to read the granted claim as the equivalent of those which were rejected.[7] If the claim should be held to comprehend a pulley linked or fixed to the top of the ditcher stick or immovably fastened to the boom, we find such applications in the prior art, upon the basis of which claims worded so broadly as to embrace this method were rejected by the Patent Office and abandoned by the applicant.

The claim in suit would not have been allowed without the limitations that the pivotal means was to be "carried" by the boom, and to "connect" the pulling member (the cable) with both the boom and the stick. In other words, we find no justification for enlarging the

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[6] Claims presented and rejected on the prior art embodied such descriptions as: "means carried by the boom for connecting the pulling member therewith and with said scoop-carrying member"; "a pulling member for operating said boom and said scoop-carrying member"; "pulling means for simultaneously shifting said boom and scoop-carrying member." They were finally cancelled, and effort was abandoned to secure a claim not limited to a pivotal means carried by the boom and connecting the pulling member with the boom and the stick.

[7] *Shepard* v. *Carrigan*, 116 U. S. 593, 597; *Crawford* v. *Heysinger*, 123 U. S. 589, 606; *Roemer* v. *Peddie*, 132 U. S. 313, 316–317; *Royer* v. *Coupe*, 146 U. S. 524; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.*, 150 U. S. 38; *Hubbell* v. *United States*, 179 U. S. 77, 80, 83; *I. T. S. Rubber Co.* v. *Essex Rubber Co.*, 272 U. S. 429, 443; *Smith* v. *Magic City Kennel Club*, 282 U. S. 784, 788.

scope of what is described, but rather the requirement of strict limitation to that which is specified, namely, a pivotal means carried by the boom and connecting the pulling member with the boom and the stick. We think the court below was right in holding that the respondent's devices did not infringe.

2. The Wagner Patent.

This patent is for an "Excavating Scoop." Some of the claims have to do with the construction of the scoop and the manner of mounting it on the ditcher stick. These are not in issue. Claims 6 and 7, on which petitioner relies, differ from claim 4 of the Clutter patent only in this respect: the first claims "means for mounting a sheave to the upper end of the stick" and "a hoisting line passed about the sheave for raising and lowering the boom and stick, and also for moving the stick outwardly lengthwise of the boom . . . ;" and the second claims, "a hoisting line connected to the top of the ditcher stick." One or the other of these claims unquestionably reads upon the respondents' accused devices. But in this patent the applicant adopted the very means of the prior art which was cited against Clutter's application and necessitated the narrowing of his claims as a condition of allowance. In this prior art both methods described in the Wagner patent for connecting the pulling member to the ditcher stick were employed in excavating appliances.[8] The claims were properly held void for want of novelty.

3. The Downie Patent.

Generally speaking the claimed invention includes three features; in an excavator operating on the principles of that described in the Clutter Patent, a certain form of link to connect a pulley to the top of the ditcher stick, a scoop

[8] See these patents: Williams, 711,449; Benedick, 876,517; Fairbanks, 1,056,268; and Hudson, 1,281,379, granted October 15, 1918, that is, after Clutter and before Wagner.

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rigidly connected to the lower end of the stick, having a drop bottom to insure accurate discharge of the excavated material, and side rake teeth on the scoop. Only the claims as to the two last-named elements are involved in these cases. It is uncontradicted that prior to Downie's application drop-bottom scoops had been used on out-digging machines. As designed they would probably not have worked upon an in-digging machine operated upon Clutter's principle. The question is then, as stated by petitioner's counsel, was invention involved in taking a known form of out-digging bucket or scoop, rebuilding and applying it to the Clutter in-digging excavator, and making the changes necessary so that it would perform the alleged new functions and results of Downie. We are convinced that the fixation of the scoop to the stick, the pivoting of a drop bottom near the front of the scoop which could be unlatched to drop the contents and closed by checking the momentum of the scoop, and the addition of rake teeth at the sides of the scoop, were all old in the art and that the combination of them and adaptation of the combined result was a mere aggregation of old elements requiring no more than mechanical skill, and was not, therefore, patentable invention.[9]

The judgments are *Affirmed.*

UNITED STATES EX REL. CHICAGO GREAT WESTERN RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL.

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

No. 234. Argued December 13, 1934.—Decided January 7, 1935.

1. Mandamus does not lie to control the action of an administrative agency in the exercise of its discretionary powers. P. 59.

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[9] See *Grinnell Washing Machine Co.* v. *Johnson Co.*, 247 U. S. 426, 433; *Powers-Kennedy Corp.* v. *Concrete Mixing & Conveying Co.*, 282 U. S. 175, 186.

2. A refusal by the Interstate Commerce Commission to act upon a complaint, upon the ground that it has no statutory power to grant the relief prayed, is equally a denial of jurisdiction, as distinguished from a decision on the merits, whether the Commission rejects the complaint on its face or dismisses it after a hearing. P. 60.
3. A refusal by the Commission to exercise jurisdiction on a complaint is reviewable in mandamus if plainly erroneous, even though the refusal came after a hearing; but if it was not plainly erroneous, it is not reviewable by mandamus even though no other remedy, by suit or action, be available to the complainant. P. 61.
4. Railroads which, with other railroads, were coproprietors of a city terminal and participated in its use under a terminal agreement which required all to meet the fixed charges of interest and taxes in equal proportions and to share the cost of maintenance and operation in proportion to use, intervened in a proceeding by which another railroad sought to gain the right to use the terminal facilities, and to have the compensation fixed, under § 3 (4) of the Interstate Commerce Act. They alleged that the agreement was harsh and inequitable to them, who used the terminal but little, and unjustly advantageous to the other proprietors, who used it much more; and they sought to have the burden readjusted on the basis of use, invoking § 3 (1), (3), and (4), and § 15 (a) of the Act. The Commission decided that the Act conferred no authority to grant relief from the agreement. *Held* that the decision was not clearly erroneous, and that mandamus to compel the Commission to take jurisdiction was rightly refused. P. 61.

63 App. D. C. 215; 71 F. (2d) 336, affirmed.

CERTIORARI, 293 U. S. 545, to review the affirmance of a judgment dismissing a petition for a writ of mandamus.

Mr. Frank H. Towner, with whom *Messrs. Ralph M. Shaw, S. W. Moore, F. H. Moore,* and *A. F. Smith* were on the brief, for petitioners.

The Court of Appeals erred in holding that the Commission had exercised jurisdiction when it dismissed the intervening petitions filed with it by these petitioners.

If the Commission had the jurisdiction claimed for it, its duty was to determine the merits of the issues presented by petitioners' intervening petitions.

Mandamus is unquestionably the proper remedy, and indeed, it is the only remedy available to petitioners. *In-*

terstate Commerce Comm'n v. *Humboldt Steamship Co.*, 224 U. S. 474, 484, 485; *Louisville Cement Co.* v. *Interstate Commerce Comm'n*, 246 U. S. 638, 642, 643; *Kansas City Southern Ry. Co.* v. *Interstate Commerce Comm'n*, 252 U. S. 178, 187; and *Interstate Commerce Comm'n* v. *Los Angeles*, 280 U. S. 52. The same rule has been applied in the Court of Appeals for the District of Columbia. *Blair* v. *U. S. ex rel. Union Pacific R. Co.*, 6 F. (2d) 484, 486; *United States* v. *Board of Tax Appeals*, 16 F. (2d) 337, 339; *United States* v. *Interstate Commerce Comm'n*, 34 F. (2d) 228.

The Commission had jurisdiction to consider and determine upon the merits the issues presented to it by the intervening petitions.

Mr. Daniel W. Knowlton, with whom *Mr. E. M. Reidy* was on the brief, for the Interstate Commerce Commission.

Mr. Samuel W. Sawyer for the Kansas City Terminal Ry. Co., respondent.

Messrs. Charles H. Woods, Jonathan C. Gibson, E. A. Boyd, Bruce Scott, Walter McFarland, W. F. Dickinson, W. F. Peter, J. M. Souby, Francis W. Clements, and *H. H. Larimore* submitted for the Atchison, Topeka & Santa Fe Ry. Co. et al., respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This cause calls for the application of familiar principles governing the issuance of the writ of mandamus. The petitioners urge that the courts below erred in denying the writ. For an understanding of the contention the circumstances out of which the litigation arose should be stated.

Prior to the year 1906 ten railroads entering Kansas City used a union depot. Two others, the Chicago Great Western and the Kansas City Southern (the petitioners), used the station belonging to the latter. The union station was inadequate and there was agitation for better facilities. As a consequence the ten roads set about to acquire the necessary property and rights and to construct a new union terminal. The instrumentality created for the purpose was the respondent, the Kansas City Terminal Railway Company, a corporation organized by the railroads, for whose stock they subscribed in equal shares. This company acquired from the constituent roads and from others the property and franchises requisite to the construction of the terminal. In addition to the moneys subscribed for stock, the terminal company borrowed in excess of $50,000,000.

The financing and operation of the project were governed by an operating agreement between the railroads, the terminal company and a trustee, which provided, amongst other things, for the construction, maintenance and operation of the terminal and its use by the proprietary companies throughout a term of two hundred years; equal ownership of the terminal company's stock; the admittance of other railroads on equal terms as to ownership of stock and use of the property by consent of two-thirds of the participants not in default under the agreement; issuance and sale of the terminal company's bonds secured by mortgage on its property; payment by each proprietary road of an equal share of taxes and governmental charges of the company and of interest and principal of its mortgage indebtedness; payment of a defaulting railroad's share of these charges by the remaining proprietaries in equal shares; exclusion of any defaulting road from the use of the facilities; the sharing of expenses of maintenance and operation by the using companies in proportion to each one's use. The stock of the terminal company was deposited with a trustee, subject to a voting trust, to prevent its transfer to any one not a party to the operating agreement. The roads also assigned the operating agreement to the mortgage trustee as additional security. In 1910 the petitioners became parties to the agreement pursuant to its provisions.

The appointment of receivers in 1915 for the Missouri, Kansas and Texas Railway Company, one of the proprietary railroads, was followed by foreclosure under its mortgages. The decree of sale in foreclosure permitted the purchaser to adopt or reject any executory contract of the debtor. The purchasers organized the Missouri, Kansas & Texas Railroad Company (hereinafter designated M., K. & T.) to take title to the property, and that company elected not to be bound by the operating agreement, with the result that it was without terminal facilities in Kansas City. Because of this lack it applied to the Interstate Commerce Commission pursuant to § 3 (4) of the Interstate Commerce Act[1] for an order granting it the right to use the terminal, conditioned on payment of compensation proportioned to use. A temporary order was issued, and the matter set for final hearing. Prior to the hearing all of the eleven remaining railroads, parties to the operating agreement, intervened. Those designated as the larger users of the terminal opposed the granting of the petition. Those termed the smaller users (including the petitioners in the present case) asked that if the prayer of the M., K. & T. should be granted they be afforded relief from the hardship and inequality of burden imposed upon them by the agreement, by revision of the existing arrangement so that they might thereafter make use of the terminal upon terms as favorable as might be granted the M., K. & T. They based their request upon §§ 3 (1) (3) (4) and 15 (a) of the Act to regulate commerce, as amended. A motion was made to strike the intervening petitions of the small users on various grounds, amongst them that the Commission had no power to make an order superseding, modifying, nullifying or reforming the operating contract.

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[1] 49 U. S. C. § 3 (4).

The matter came on for hearing, evidence was presented, and the petitioners showed that their use of the terminal over a period of years had averaged less than 3 per cent. of the total use, while their contribution to the interest and taxes amounted to 8⅓ per cent. of the total. For example, in 1932 each of the twelve proprietary railroads paid approximately $200,000 on account of interest and taxes. If these charges had been divided on the basis of actual use some of the larger users would have paid approximately $600,000 and the petitioners only a little more than $50,000 each. The Commission's report indicates that the operating agreement is inequitable, since it calls for payments by the smaller lines in excess of benefits derived, and permits the larger lines to enjoy the use of the facilities at an expense, proportioned to use, much less than that imposed upon the smaller users.

The Commission filed its report and order November 10, 1925.[2] With respect to the relief sought by the M., K. & T. it developed there was pending in a federal court an action to determine the legality of that road's election to denounce the operating agreement. The Commission therefore withheld action, ordering that if the decision of the court should be that the new railroad had no right of abandonment the petition would, upon motion, be dismissed; but if the court should sustain the right of abrogation, the M., K. & T. might then move for an order granting it the use of the terminal upon an agreed compensation, and if no agreement could be reached, upon such terms as the Commission might fix. The intervening petitions of the smaller users were dismissed. So matters stood until the right of the M., K. & T. to reject the agreement had been judicially affirmed. Thereupon that company applied to the Commission for the ascertainment of the compensation it should pay for use of the terminal, and the small users, including the present

[2] 104 I. C. C. 203.

petitioners, presented petitions for rehearing upon the order of November, 1925, dismissing their interventions. These petitions were denied June 1, 1933, and the Commission proceeded to hear the case as one involving only the compensation to be paid by the M., K. & T. for use of the terminal. The petitioners then applied to the Supreme Court of the District of Columbia for a writ of mandamus directed to the Commission requiring it to vacate its orders of November, 1925, and June, 1933, with respect to the petitioners' interventions, and to hear and decide upon the merits the issues thereby raised. A rule to show cause issued, the Commission and certain interveners answered, the petitioners demurred to the answers, the court overruled the demurrers, and as the petitioners elected to stand thereon, dismissed the petitions. Upon appeal, the Court of Appeals of the District affirmed the judgment.[3] We granted a writ of certiorari.[4]

The petitioners rely principally upon paragraphs (1) (3) and (4) of § 3 of the Act. The paragraphs are quoted in the margin.[5] Their position is that if the M., K. & T.

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[3] 63 App. D. C. 215; 71 F. (2d) 336.

[4] 293 U. S. 545.

[5] "(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting is granted the use of the terminal pursuant to § 3 (4) on a basis more favorable than that available to its predecessor and to the petitioners under the operating agreement, unlawful discrimination forbidden by § 3 will result; and further, that they are entitled to petition for the grant of use upon compensation to be fixed by the Commission under paragraph (4) although they are parties to the agreement fixing their rights in the terminal. The respondents, by their motion to dismiss, challenged the power of the Commission to grant the relief asked. That body thus stated the problem presented:

"Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here

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line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." 49 U. S. C. § 3 (1), (3), (4).

to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of paragraph (4) the Commission concluded:

" The power and authority thus invoked are not conferred by the quoted paragraph."

With respect to paragraph (3) it was held that, as the charges in question were essentially capital charges, they have no relation direct or indirect to the interchange of traffic between the several lines using the terminal, as contemplated by this paragraph, and the Commission was without authority thereunder to make the requested order.

Referring to paragraph (1), which prohibits undue prejudice or preference as between particular persons, firms, corporations, or localities, or particular descriptions of traffic, the Commission said:

"Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property."

A contention that the case came within the declaration of policy of § 15 (a), with respect to the adjustment of rates so that the carriers as a whole or by groups will under honest, efficient and economical management earn a fair return upon their railway property used in transportation, was answered by the Commission thus:

"Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

The petitioners insist that under the plain terms of the Act the Commission had jurisdiction of their complaints, but refused to entertain them, and that mandamus is the appropriate remedy to compel a hearing and determination upon the merits. The respondents reply that the Act plainly confers no such jurisdiction, or at least that the matter is not so clear as to warrant interference by mandamus, and, in the alternative, that the Commission did take jurisdiction of the complaints and decide the merits. The Court of Appeals, without deciding whether the Act confers authority to grant the relief, held that the Commission in fact took jurisdiction, heard the cases, and decided as matter of law that it was without power or authority in the premises; that this constituted a decision which, whether right or wrong as matter of law, was impregnable to the writ of mandamus. We concur in the result reached, but for reasons differing somewhat from those announced by that court.

1. The language used by the Commission with respect to the application of paragraph (1) of § 3 of the Act lends color to the respondents' argument that upon consideration of the whole record the Commission reached the conclusion that the enforcement of the operating agreement against the petitioners while exempting the new applicant, the M., K. & T., from its terms, did not amount to dis-

crimination as defined by the Act. If this is a proper characterization of that body's action, no court can by mandamus compel it to alter its decision. Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ to compel a different conclusion.[6] We are, however, of opinion that, fairly considered, the report does not bear the construction contended for, but shows the Commission, upon analysis of the complaint and the evidence, found that the Act did not confer authority to accord the relief demanded.

2. The petitioners insist that as they stated a case alleged to fall within the provisions of the Act, they were entitled to have the Commission consider the case as stated, and this right they were denied. They say the writ ought to issue to compel that body to hear and decide their case. The Court of Appeals, answering the contention, held that the Commission did in fact entertain the complaint, decided the cause, and even if it erred as matter of law in respect of its statutory power, cannot be coerced by mandamus to reverse its decision. The petitioners say that the fallacy in this reasoning is that whether the Commission refuses to receive a complaint, or upon receiving it entertains and grants a motion to dismiss for lack of jurisdiction, its action comes to the same thing, namely, a refusal of jurisdiction. We think that this is so. Whether an administrative tribunal refuses to hear, or upon a hearing determines that as a matter of law it lacks power to act, it is either correct in its conclusion or incorrect, and the question is whether, if it errs in refusing to act, it is compellable by mandamus to proceed.

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[6] *Interstate Commerce Comm'n* v. *United States ex rel. Waste Merchants Ass'n*, 260 U. S. 32; *Interstate Commerce Comm'n* v. *United States*, 289 U. S. 385, 394. Compare *Wilbur* v. *United States*, 281 U. S. 206, 218.

3. If beyond peradventure the Act does not confer upon the Commission the power invoked by a complainant, the writ will not be granted.[7] If on the other hand power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits. The fact that the complaint has been heard and, after hearing, the Commission has refused to enter an order because in its opinion no authority for such action is conferred by the statute, will not avail with the courts to prevent mandamus to correct a plain error of the Commission in renouncing jurisdiction.[8]

4. The ultimate question, then, upon the answer to which the decision of this case must turn, is whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue. It is to be noted that the solution of this question does not depend upon whether in a proper case this court would reach the same conclusion as that of the Commission. If that body had taken jurisdiction and granted relief a remedy would have been available to the respondents by the filing of a bill in equity to set aside the order and to enjoin its enforcement.[9] Had the matter been thus presented it would have been incumbent upon the courts, however doubtful the question, to decide it. But the order here made was negative in form and substance,—the refusal of relief,—and the remedy by suit in equity

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[7] *Interstate Commerce Comm'n* v. *Los Angeles*, 280 U. S. 52.

[8] *Interstate Commerce Comm'n* v. *United States*, 224 U. S. 474, 484; *Louisville Cement Co.* v. *Interstate Commerce Comm'n*, 246 U. S. 638, 642; *Kansas City Southern Ry. Co.* v. *Interstate Commerce Comm'n*, 252 U. S. 178, 187. Compare *Interstate Commerce Comm'n* v. *United States*, 289 U. S. 385, 393.

[9] U. S. C. Tit. 28, § 41 (28); §§ 43-47, inclusive.

was therefore not available to the petitioners.[10] The absence of a remedy by suit or action to redress alleged error of an administrative body is not in itself sufficient to invoke the power of mandamus. Not only must there be no such remedy, but it must appear that the administrative tribunal was plainly and palpably wrong in refusing to take jurisdiction. Is this shown in the present instance? We think not. The Commission in a careful and painstaking review of the legislation defining its powers, professed itself unable to find a grant of authority to set aside commitments in the nature of capital charges for property owned and used by the carriers. It adverted to the fact that paragraph (1) of § 3 of the Act was directed to discriminations, preference and prejudice in the performance of the duties of the carrier towards the public which dealt with them as carriers, and related particularly to rates, fares and charges, and that paragraph (3) was adopted to prevent discriminations and unfair practices as between carriers in interchange of freight and traffic. The language now found in these paragraphs has remained without amendment since the adoption of the original Act in 1887. It concluded that petitioners could not invoke the new paragraph (4) added to § 3 by the Transportation Act, 1920, because it was intended to give a right of use to one then having no such right in a terminal owned by another line, and was inapplicable to a case like the present, where the petitioners by their own voluntary agreement were entitled, and for many years had been entitled, to the use of a terminal of which they were in effect part owners. The Commission found itself unable to hold that the broad policy declared by § 15 (a) so altered the meaning of § 3 as to change the nature of the discriminations and practices denounced by that section. Its decision was not unanimous, certain of the members being of the opinion that power to grant the

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[10] *Interstate Commerce Comm'n* v. *United States,* 289 U. S. 385, 388.

relief demanded could be spelled out of the Act reading it as a whole and as amended by the Transportation Act, 1920. This statement of the views of the Commission indicates that its conclusion was not so clearly erroneous as to call for the exercise of the extraordinary power involved in the issuance of mandamus. Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body.[11] We think this principle applicable in the present case, and that the courts below were right in refusing the writ.

The judgment is *Affirmed.*

WEST OHIO GAS CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. (No. 1).

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 212. Submitted December 7, 1934.—Decided January 7, 1935.

1. In computing the operating expenses of a gas-distributing company, in the process of fixing its rates, the company's books are presumptively correct. P. 67.
2. Where the company's accounts showed that the amount of gas lost through leakage, etc., was 9% per annum of the amount purchased by it, and the books were found regular, but the public commission, in fixing its rates, struck off 2% of this from operating expense, upon the ground that with proper care the loss would have been less, and did so without any evidence of waste or neglect, and without giving to the company any warning of this action or opportunity to oppose it by proof of due care,—*held* that the action was wholly arbitrary. P. 67.

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[11] *Reeside* v. *Walker,* 11 How. 272, 289; *International Contracting Co.* v. *Lamont,* 155 U. S. 303, 308; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 323; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108; *Ness* v. *Fisher,* 223 U. S. 683, 691; *Hall* v. *Payne,* 254 U. S. 343, 347; *Wilbur* v. *United States,* 281 U. S. 206, 219; *United States* v. *Wilbur,* 283 U. S. 414, 420; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178, 191, 203.

3. Where the sole method provided by state law for review of a rate-fixing order is by hearing upon the law and facts on an appeal to the state supreme court, the facts relied on to sustain the rates against unimpeached evidence submitted by the utility must be exhibited in the record, otherwise the hearing is inadequate and not judicial. P. 68.
4. In fixing rates of a gas company, a public commission, after closing the hearings and without further notice to the company, adopted a new method of distributing certain expenses over the area served and applied it to one city, where its effect on the rate was unfavorable to the company, and omitted to apply it to another where the effect would have been favorable. The reallocation was based on the commission's construction of annual reports of the company which had not been put in evidence, and no opportunity was allowed to contest the reallocation or to secure a rate readjustment in harmony with it. *Held* that the procedure was unfair and contrary to due process. Pp. 69, 71.
5. In reviewing rate cases coming from state courts, under the due process clause, the function of this Court is not concerned with error or irregularity in the rate-making, however gross, if the consequences, in their totality, are consistent with enjoyment by the regulated utility of a revenue something higher than the line of confiscation, and if suitable opportunity was afforded the utility through evidence and argument to challenge the result. P. 70.
6. In deciding a rate case the Court may take judicial notice of the record of a similar and related case pending before it between the same parties. P. 70.
7. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes; and a refusal by a public commission to make allowance for such expenditures, on the ground that they were excessive and wasteful but without any evidence to support it, is contrary to due process. P. 72.
8. Good faith on the part of the managers of a business is to be presumed; and in the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. P. 72.
9. Judicial notice is taken of the fact that gas is in competition with other fuels, such as oil or electricity. P. 72.
10. Rates fixed by city ordinance for a term of years were set aside as unfair and higher rates substituted for the same term in a proceeding brought before a public commission by the utility affected.

Held that, in determining whether the higher rates yield a fair return, the amount reasonably laid out by the utility as expenses of the proceeding, including the charges of engineers and counsel, should be included in the costs of operation and spread over the period for which the rates were prescribed. P. 72.

11. As applied to a corporation engaged in the sale of gas during 1928–1931, compulsory rates which net an income of only 4.53% upon its proper rate base, are confiscatory. P. 75.

12. The claim made by the Gas Company that the allowance for depreciation reserve was inadequate, and that it was entitled to add to operating charges the amortized value of a transmission main extending from the city to fields of natural gas, cannot be upheld. P. 77.

128 Ohio St. 301; 191 N. E. 105, reversed.

Appeal from the affirmance of an order of the Public Utilities Commission fixing the rates of the Gas Company in the City of Lima, Ohio.

Messrs. Edmond W. Hebel, Harry O. Bentley, and *Charles C. Marshall* submitted for appellant.

Mr. John W. Bricker, Attorney General of Ohio, and *Mr. Donald C. Power,* Assistant Attorney General, submitted for appellee.

Mr. Justice Cardozo delivered the opinion of the Court.

The appellant, West Ohio Gas Company, supplies gas to the inhabitants of the city of Lima, Ohio, and to neighboring communities, part of what it sells being artificial gas manufactured by itself and part natural gas bought from another company which is wholly independent.

On March 19, 1928, the municipal authorities of the city of Lima passed an ordinance, effective April 19, prescribing the maximum price to be charged for gas to consumers within the city during a period of five years. The rates were to be as follows: for the first 1,000 cubic feet of gas, 90 cents per month; for the next 3,000 cubic feet per month, 80 cents per M c. f.; for the next 6,000, 75 cents per M c. f.; and for all over 10,000 per month, 55 cents per M c. f. This was a sharp reduction of the rates previously charged, which were $1.25 for the first 400 cubic feet; $1.05 for the next 9,600 cubic feet; $1 for the next 15,000; and for all over 25,000, 75 cents per M c. f.

In adherence to the Ohio statutes (Ohio General Code, §§ 614–44 *et seq.*), the company filed a complaint with the Public Utilities Commission of Ohio, protesting against the ordinance, praying that the commission fix a fair and reasonable schedule, electing, as it might, to charge in the meantime the rates previously in force, and giving bond for the return of the excess, if any. The hearings before the Commission began in July, 1928, and ended in July, 1932. While the proceeding was pending, there was a final order of valuation, made in January, 1932, whereby the value of the property in Lima, used and useful for the business, was fixed at $1,901,696.26 as of March 31, 1928, approximately the date of the adoption of the ordinance. There being no appeal from that order within the time prescribed by law, it became binding on the company, as well as on the commission, though the valuation was less than the company had urged. 128 Ohio St. 301, 311; 191 N. E. 105. The rate base being thus established, what was next to be ascertained was the amount of the operating expenses as compared with the gross income, after which a conclusion could be drawn as to the rates that would be necessary for a fair return on the investment. An order entered by the commission on March 10, 1933, adjudged the rates under the ordinance to be insufficient and unjust. It substituted rates averaging about 13½% less than those that the company had been charging: for 400 cubic feet or less per month, $1; for the next 9,600, 95 cents per M c. f.; for anything in excess of 10,000 cubic feet per month, 75 cents per M c. f., with penalties to be charged if payment was delayed. The rates so fixed were to be retroactive as of the effective date of the ordinance, April 19, 1928, from which time they were to remain in force for a term of five years, and the difference between their yield and the amount collected by the company was to be refunded to consumers. A motion for a rehearing having been denied, the company filed a petition in error with the Supreme Court of Ohio, invoking the protection of the Fourteenth Amendment. The order of the commission was affirmed, 128 Ohio St. 301; 191 N. E. 105; and the case is here upon appeal.

The commission made its order, as it has informed us by an amended opinion, in the belief that the new rates would yield a return of 6.65% on the value of the property included in the base. Its estimate was wide of the mark as a result of mathematical errors, and this on the assumption that its rulings as to the items of operating expenses to be allowed or disallowed were correct in fact and law. Even on that assumption, the average net income during the four years of the ordinance period for which figures were available was $109,414, which upon a rate base of $1,901,696 is equivalent to an average return of about 5.75%. This is now admitted by counsel for the commission, and must be accepted as a datum. What is still to be determined is whether the rate of return has been further overestimated to the point of confiscation through error in the rejection of charges upon income.

1. The company made claim to an allowance for "unaccounted for gas," which is gas lost as a result of leakage, condensation, expansion or contraction. There is no dispute that a certain loss through these causes is unavoidable, no matter how carefully the business is conducted. Cf. *Consolidated Gas Co.* v. *Newton,* 267 Fed. 231, 244; *Brooklyn Union Gas Co.* v. *Prendergast,* 7 F. (2d) 628, 652, 671. The company, basing its claim upon its

proved experience, reported the average loss as 9% per annum. The Commission fixed the allowance at 7%, thereby reducing the operating expenses by $3,800 a year. In making this reduction, it did not deny that the loss had been suffered to the extent stated by the company. The presumption of correctness that gives aid in controversies of this order to the books of public service corporations (*Consolidated Gas Co.* v. *Newton, supra,* at p. 242; *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, 176) was confirmed in this instance by what amounts to a finding of regularity. Accepting the loss as proved, the commission refused to allow it for more than 7% upon the ground that with proper care of the system the loss would have been less. A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault. Cf. *Ohio Utilities Co.* v. *Public Utilities Commismission of Ohio,* 267 U. S. 359, 363. There is not even the shadow of a warning to the company that fault was imputed and that it must give evidence of care. Without anything to suggest that there was such an issue in the case, the commission struck off 2%; it might with as much reason have struck off 4 or 6. This was wholly arbitrary. *Ohio Utilities Co.* v. *Public Utilities Commission of Ohio, supra.*

Under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. The sole method of review is by petition in error to the Ohio Supreme Court, which considers both the law and the facts. *Dayton P. & L. Co.* v. *P. U. Commission of Ohio,* 292 U. S. 290, 302; *Hocking Valley Ry. Co.* v. *Public Utilities Commission,* 100 Ohio St. 321, 326, 327; 126 N. E. 397. To make such review adequate the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.

2. The company made claim to an allowance of "distribution expenses" incurred in the superintendence of distribution, in work on the premises of customers incidental to the service, in the change of meters used to measure the gas sold, and in the maintenance of local mains and equipment. There is no denial, even now, that these expenses were incurred as claimed. There was no challenge upon the trial to the practice of the company whereby moneys spent in Lima, the territorial unit affected by the ordinance, were allocated to that city, and not to territory beyond. The case was tried on the assumption that the practice was acceptable and was so submitted for decision. Eight months later, on the eve of a determination, the commission conceived the thought that distribution costs in Lima should be borne also by consumers in outlying communities (including the city of Kenton) served by the same company, which would mean, of course, that like expenses in the other communities must be borne by residents of Lima. Up to that stage the data were lacking for a division on that basis. Accordingly, by an order made *ex parte* on March 8, 1933, without the appellant's knowledge, the commission directed of its own motion that the annual reports for the years 1928 to 1931 inclusive be introduced in evidence and made a part of the record. On the basis of these reports it ascertained the average distribution expense per customer for all the eleven communities served by the appellant, multiplied this average by the number

of customers in Lima, and thus arrived at the share to be allocated to that city in the determination of the local rates. By that mode of apportionment, the operating expenses were reduced to the extent of $6,200 annually.

We do not now decide that there would be a denial of due process through the spread of distributing costs over the total area of service, if the new method of allocation had been adopted after timely notice to the company and then consistently applied. This court does not sit as a board of revision with power to review the action of administrative agencies upon grounds unrelated to the maintenance of constitutional immunities. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California,* 289 U. S. 287. Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern Ry. Co.* v. *Virginia,* 290 U. S. 190) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error. But the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities, nor did opportunity exist to bring the rates outside of Lima into harmony with the exigencies of a new method of allocation adopted without warning.

The need for such an opportunity is brought into clear relief by the record in number 213, a case submitted along with this one, and within the range of our judicial notice. *Butler* v. *Eaton,* 141 U. S. 240, 243, 244; *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 38; *Bienville*

Water Supply Co. v. *Mobile,* 186 U. S. 212, 217; *Fritzlen* v. *Boatmen's Bank,* 212 U. S. 364, 370. The subject matter of that case was the rate schedule for the city of Kenton, served with gas by the appellant. In Kenton, unlike Lima, a spread of distribution costs over the whole area of service would have been favorable to the appellant and unfavorable to customers. Strange to say, the commission, though prescribing the larger area for Lima, adopted the smaller one for Kenton, and this by a decision rendered the same day. An injustice so obvious may not be suffered to prevail. The commission by its counsel suggests as an excuse that a division on a different basis was not requested by the company. There was no reason to request it, for the record as made up when the case was finally submitted did not contain the necessary data for a spread over a larger area, nor was there any hint by the commission that such a division was in view. Manifestly, whatever territorial unit is adopted must be made use of consistently, and regardless of the consequences. If a different course were to be followed, there would be less than full requital after all the communities affected had contributed their quotas.

To resume: division on one basis in Lima and on another basis in Kenton, all without notice to the company that the spread was to be altered and new evidence received, was an exercise of arbitrary power, at variance with "the rudiments of fair play" (*Chicago, M. & St. P. Ry. Co.* v. *Polt,* 232 U. S. 165, 168) long known to our law. The Fourteenth Amendment condemns such methods and defeats them.

3. The company made claim to commercial expenses incurred in reading the meters of the customers, keeping their accounts, and sending out and collecting bills. The commission treated these items the same way that it treated the expenses of distribution, and spread them over the whole territory instead of confining them to Lima. The result was a reduction of operating expenses

to the extent of $1,085.25 yearly. For reasons already stated, the reduction may not stand.

4. The company made claim to expenses incurred in procuring new business or in the endeavor to procure it, such expenses amounting on the average to $12,000 a year. The commission did not question the fact of payment, but cut down the allowance to $5,000 a year on the ground that anything more was unnecessary and wasteful. The criticism has no basis in evidence, either direct or circumstantial. Good faith is to be presumed on the part of the managers of a business. *Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri,* 262 U. S. 276, 288, 289. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. *Banton* v. *Belt Line Ry. Corp.,* 268 U. S. 413, 421; *Brooklyn Borough Gas Co.* v. *Prendergast,* 16 F. (2d) 615, 623; *New York & Richmond Gas Co.* v. *Prendergast,* 10 F. (2d) 167, 181. The suggestion is made that there is no evidence of competition. We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others. *Consolidated Gas Co.* v. *Newton, supra,* at p. 253. When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service.

5. The company made claim to an allowance of the expenses of the rate litigation amounting in all to about $30,000, to be spread in equal parts over a term of five years, the duration of the ordinance. No part of these expenses has been allowed, though apparently both commission and court intended to allow them, spreading them, however, over a term of six years instead of five. "It

must be conceded," said the court, "that the gas company is entitled to a fair and reasonable allowance for rate case expenses." This is followed by the statement that if the spread be six years (instead of five), and $5,100 be allowed for each of those years "as contended by the commission," the rate fixed by the order will give an adequate return. True there is also the statement that the commission would have been warranted in ignoring this item altogether "in the absence of proof that the gas company's book figures represented an amount that was fair and reasonable." Even in that remark the implication is obvious that this is not what the commission did. Moreover, there is nothing in the record justifying an inference that the figures were erroneous or the payments improvident. *Consolidated Gas Co.* v. *Newton, supra,* at p. 242; *Newton* v. *Consolidated Gas Co., supra,* at p. 176. The course of the trial exhibits very clearly the understanding of the parties that expenditures shown by the books would be deemed to have been made in good faith and with reasonable judgment unless evidence was at hand overcoming the presumption. In the absence of any challenge of their necessity or fairness, we must view them as they were accepted by the triers of the facts.

Thus viewing them, we think they must be included among the costs of operation in the computation of a fair return. The company had complained to the Commission that an ordinance regulating its rates was in contravention of the statutes of the state and of the Constitution of the nation. In that complaint it prevailed. The charges of engineers and counsel, incurred in defense of its security and perhaps its very life, were as appropriate and even necessary as expenses could well be.

A different case would be here if the company's complaint had been unfounded, or if the cost of the proceeding had been swollen by untenable objections. There is neither evidence nor even claim that the conduct of the company's representatives was open to that reproach.

The statute laid a duty on the commission, when it found the ordinance unjust, to prescribe its own schedule. The one it adopted, though higher than the one condemned, did not satisfy the company, but there was nothing unreasonable or obstructive in laying before the commission whatever data might be helpful to that body in reaching a considered judgment. Indeed, we shall be brought to the conclusion, if we analyze the record, that the two phases of the controversy were substantially coincident. Everything relevant to the schedule adopted by the commission was relevant also to an inquiry into the fairness of the ordinance.

In this matter of rate case expenses, we must distinguish between the function of a court and that of a commission. A court passing upon a challenge to the validity of statutory rates does not determine the rates to be adopted as a substitute. *Central Kentucky Natural Gas Co.* v. *Railroad Commission of Kentucky,* 290 U. S. 264, 271, 272; *Newton* v. *Consolidated Gas Co., supra.* If the rates are inadequate to the point of confiscation, the complainant has no need, it is said, to count upon the expenses of the lawsuit; if they are not already inadequate, the lawsuit cannot make them so. Cf. *Columbus Gas & Fuel Co.* v. *City of Columbus,* 17 F. (2d) 630, 640. An argument to that effect runs through some of the decisions, though we are not required now either to accept or to reject it. But the case is different where a commission, after setting a schedule of rates aside, is empowered to substitute another to take effect by retroaction and cover the same years. In determining what the substitute shall be, the commission must give heed to all legitimate expenses that will be charges upon income during the term of regulation, and in such a reckoning the expenses of the controversy engendered by the ordinance must have a place like any others. *Denver Union Stockyard Co.* v. *United States,* 57 F. (2d) 735, 753, 754; *New York & Richmond Gas Co.* v. *Prendergast, supra,* at pp. 181, 182;

Monroe Gas Light Co. v. *Michigan Public Utilities Commission,* 11 F. (2d) 319, 325.

There are suggestions in the books that the cost of litigation is to be reckoned as an extraordinary expense and so a charge upon capital rather than a charge upon income to be paid out of the revenues of one year or of many. Cf. *New York & Queens Gas Co.* v. *Newton,* 269 Fed. 277, 290; *Reno P. L. & W. Co.* v. *Public Service Commission,* 298 Fed. 790, 801; *contra, New York & Richmond Gas Co.* v. *Prendergast, supra,* at pp. 181, 182; *Mobile Gas Co.* v. *Patterson,* 293 Fed. 208, 224. There is no need to consider what practice is to be followed where the rate is prescribed for a period of indefinite duration, though there would seem to be little difficulty in amortizing the charge over a reasonable term. Cf. *New York & Richmond Gas Co.* v. *Prendergast, supra.* In the case at hand, the period of duration has been definitely fixed, and the charge upon the income can be distributed accordingly.

We conclude that an addition of $5,100 must be made to the yearly operating expenses as the cost of proceedings necessary to keep the business going. Cf. *Kornhauser* v. *United States,* 276 U. S. 145. The company makes no point as to the ruling of the commission that the cost should be spread over six years instead of five, and we follow that concession.

6. The items enumerated in subdivisions 1 to 5 of this opinion amount altogether to $23,185.25 annually. Added to the operating charges they reduce the net income from $109,414 to $86,228.75, or about 4.53% upon the rate base of $1,901,696. This is too low a rate to satisfy the requirements of the Constitution when applied to a corporation engaged in the sale of gas during the years 1928 to 1931, two at least of the four years being before the days of the depression. *Los Angeles Gas & Electric Co.* v. *Railroad Commission of California, supra,* at pp. 319, 320; *Dayton Power & Light Co.* v.

Public Utilities Commission of Ohio, 292 U. S. 290, 311; *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra*, at p. 288; *Ohio Utilities Co.* v. *Public Utilities Commission of Ohio, supra*, at p. 364.

Counsel for the commission argues that disbursements for charitable and other gifts, allowed by the commission, ought in law to have been excluded. This may well be, but the record is too meagre to enable us to ascertain with certainty the reasons for the payments. Cf. *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; In re Southern California Edison Co., P. U. R. (1924c) 1, at pp. 32, 33. We do not feel at liberty to eliminate them upon inconclusive testimony when court and commission have treated them as proper. If, however, all were to be dropped, the increment to the rate would be only about one-tenth of one per cent. The change would be too small to induce a different conclusion.

Counsel also argues that the rate base, though fixed by the commission in January, 1932, was determined as of March, 1928, when the ordinance was passed, and we are reminded that since that time there has been a marked decline of values, at least during the later years of the period affected. How great the decline has been we cannot learn with any accuracy from the record now before us. The value fixed by the commission was adopted as the base on which to estimate the rate of return at the beginning of the period, but also at the end. The company acquiesced, believing that the valuation would be effective during every portion of the term, and abandoned the appeal it might otherwise have taken. Under the statutes of Ohio the " sum so fixed must be regarded as a valuation binding upon the Gas Company and the city alike, and is the rate base." 128 Ohio St. 301; 191 N. E. 105. No other sum was considered by the commission, or deemed to be properly before it. No other sum was subject to consideration upon the petition in error to the court. To put into the case now an issue heretofore kept out of it and thereby reach another value would be a denial of a full and fair hearing by the tribunals of the state, a denial forbidden by the constitution of the nation. If the appellee may be heard to say that during some part of the term the valuation was too high, the company must be free to urge that at other times it was too low. Upon the record now submitted to us no such issue is involved. To bring it into the case at all there is need of a new hearing with a new reckoning of the rate base, unhampered by restrictions to any single point of time. Only in that way can review be full and fair.

7. The company makes the claim that it has received an inadequate allowance to the extent of $28,021.40 for depreciation reserve, and that it should have been permitted to amortize the value of a transmission main extending from Lima to fields of natural gas, thereby adding $22,935.97 to its operating charges.

We have considered these objections, and are unable to uphold them.

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

Reversed.

MR. JUSTICE STONE, concurring.

As there was a denial of due process by the Commission in arbitrarily reducing the allowance for "unaccounted for gas," and in failing to apply consistently either of the two methods of allocation of distribution and commercial expenses adopted in the two cases submitted to us, I concur in the judgment of the Court that the case must be remanded for further proceedings. But with two of the conclusions in the opinion I am unable to agree.

1. I think that the petitioner has failed to sustain the burden, which rests upon it in a confiscation case from

a state court as well as from any other, to show that the item of expense for "new business" was a proper charge against gross income. The property for which constitutional protection is invoked is that "used and useful in the public service," not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money. I know of no constitutional principle upon which this expenditure must be taken from the pockets of the patrons of the present business, any more than the cost of future service lines required to carry on the new business. The record does not suggest that the expenditure for new business was necessary to prevent shrinkage of the present business, and the petitioner has failed to show that the charge is not a capital charge, which it appears on its face to be. If the action of the Commission with respect to this item alone were sustained, the rate of return, as found by this court, would be increased to 4.91%.

2. I am not prepared to say that petitioner sustains the burden of showing confiscation, by showing a rate of return even as low as 4.91% where it is upon reproduction value determined as of March 31, 1928. We judicially know, and cannot ignore, the large declines in price levels and the earnings of capital which have taken place since that date. The period for which the ordinance fixed the rate extends from April 19, 1928, to April 19, 1933. At least three of the five years are those of declining prices and diminishing capital returns. Since the commission's order was based on known income for four of the five years, the possibly lowered revenues of the fifth year cannot be taken to off-set the effect of the declining prices and capital returns. The record gives no hint of what the rate base would be were it ascertained for the entire period. While the Commission and the Ohio courts are bound to adopt a rate base determined as of the beginning of the ordinance period, this does not relieve the com-

pany of the burden of showing that the value of the property for the entire period is such that the net return under the Commission's rates would have been so low as to confiscate its property. See *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304. No contention is made that the Ohio procedure precludes such proof or that it prevented petitioner from showing facts which would establish confiscation.

WEST OHIO GAS CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. (No. 2).

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 213. Submitted December 7, 1934.—Decided January 7, 1935.

1. In fixing the rates of a public utility for a series of past years, it is contrary to due process to adopt the gross income and operating expenses of the first year as an exclusive standard or test for the period, and to ignore unimpeached evidence of the gross income and operating expenses of later years. To prefer forecast to experience in such cases is arbitrary. P. 81.
2. A prediction, mere guesswork, that lower rates prescribed for a public utility will ultimately increase its profits by increasing its business, cannot atone for present confiscation. P. 82.
3. Other questions presented in this case are disposed of by the opinion in the case preceding.

128 Ohio St. 301; 191 N. E. 105, reversed.

APPEAL from a judgment affirming an order of the Public Utilities Commission, which fixed rates of the Gas Company in the City of Kenton, Ohio. See *ante,* p. 63.

Messrs. Edmond W. Hebel, Harry O. Bentley, and *Charles C. Marshall* submitted for appellant.

Mr. John W. Bricker, Attorney General of Ohio, and *Mr. Donald C. Power,* Assistant Attorney General, submitted for appellee.

Mr. Justice Cardozo delivered the opinion of the Court.

The rates to be charged by the appellant in Kenton, Ohio, are the subject matter of this controversy.

An ordinance adopted by the city council of Kenton on July 16, 1929, effective on August 16, prescribed a schedule of rates within the city for a period of two years. The appellant, West Ohio Gas Company, filed a complaint with the Public Utilities Commission, maintaining its existing schedule for the time being and giving bond as it had done in the Lima case (*ante,* 63), for the return of the excess, if any. The commission fixed the value of the property in Kenton for the purpose of a rate base at $189,856.56. The company acquiesced in the valuation, which for the purpose of this review must be accepted as correct. Thereafter, on March 10, 1933, the commission made a final order determining the ordinance schedule to be unjust and unreasonable, and establishing a new schedule, which was to be effective during the period of the ordinance (August 16, 1929 to August 16, 1931) and a year and a half afterwards (i. e., till February 16, 1933). Collections during the course of the proceeding in excess of the new rates were to be refunded to consumers. A motion for a rehearing having been denied, the company filed a petition in error with the Supreme Court of Ohio, asserting that the order of the commission was in contravention of the limitations of the Fourteenth Amendment. The Supreme Court of Ohio affirmed, writing a single opinion here and in the Lima case. 128 Ohio St. 301; 191 N. E. 105. An appeal to this court followed.

The intention of the commission was to establish a schedule of charges that would enable the appellant to receive a return of 6% upon the value of the Kenton property. To accomplish that result there was need of a net income of $11,391.39. As the result of mathematical errors, the commission arrived at the conclusion that income in that amount had been earned in 1929, the year chosen as a standard. In fact the rate of return for that year was only 4.92%, even if all contested rulings in respect of points of law are assumed to be correct.

Errors of computation such as these are far from exhausting the list of defects in these proceedings. There are others more clearly vital. To ascertain the gross income and the operating expenses the commission confined itself to the business in 1929, predicting on that basis the income and expenses to be looked for in the years to follow. Besides the figures for 1929, there was evidence, full and unchallenged, as to the actual revenue and outlay for 1930 and 1931. The commission refused to give any heed to that evidence in fixing the new rates. It did this in the face of a petition for rehearing which sharply brought to its attention the effect of such exclusion. If heed had been given to the later years, the return for 1930 would have been seen to be 4.23% and for 1931, only 3.68%, all this, moreover, on the assumption that further error was not committed in the classification or disallowance of operating charges. If such error existed, the return would be even lower.

We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and of "the rudiments of fair play" made necessary thereby. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (appeal No. 1), decided herewith, *ante*, p. 63; *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, 168. The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from the reckoning, is as much arbitrary action as to build a schedule upon guesswork with evidence available. There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, "an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances" (*Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri,* 262 U. S. 276, 288; *Los Angeles Gas & Electric Corp.* v. *Public Service Commission of California,* 289 U. S. 287, 311), is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. "Estimates for tomorrow cannot ignore prices of today." *Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri, supra,* at p. 288. We have said of an attempt by a utility to give prophecy the first place and experience the second that "elaborate calculations which are at war with realities are of no avail." *Lindheimer* v. *Illinois Bell Telephone Co.,* 292 U. S. 151, 164. We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment.

In the light of this conclusion we find it needless to dwell upon more particular objections affecting the classification and disallowance of payments which, in the view of the appellant, are charges upon the expenses of operation. For the most part the objections are similar to those considered in number 212, decided herewith. What has been said in that case will guide the commission and the state court in the event of a rehearing.

We are not unmindful of the argument urged by counsel for the commission that the effect of lower prices may be to swell the volume of the business, and by thus increasing revenues enhance the ultimate return. Upon the record as it comes to us, this is guesswork, and no more. There has been no attempt to measure the possible enhancement by appeal to the experience of other companies similarly situated or by any other line of proof. Present confiscation is not atoned for by merely holding out the hope of a better life to come.

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

Reversed.

DETROIT INTERNATIONAL BRIDGE CO. *v.* CORPORATION TAX APPEAL BOARD OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 272. Argued December 14, 1934.—Decided January 14, 1935.

By owning and operating a toll bridge over which pedestrians and vehicles pass between this country and Canada, a corporation does not itself engage in foreign commerce, and therefore a state tax on its privilege to be a corporation and exercise its functions, measured upon paid up capital and surplus, is not inconsistent with the commerce clause of the Constitution. *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150. P. 86.

267 Mich. 384; 255 N. W. 368, affirmed.

Appeal from a judgment sustaining an order of the Corporation Tax Appeal Board, which in turn sustained the action of the Secretary of State of Michigan, in laying a privilege tax on the appellant corporation.

Mr. Victor W. Klein, with whom *Messrs. Alfred A. Cook* and *Thomas G. Long* were on the brief, for appellant.

Mr. Patrick H. O'Brien, Attorney General of Michigan, and *Mrs. Alice E. Alexander* for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant, incorporated under the laws of Michigan, owns and operates an international highway bridge across the Detroit River. That State demanded that it pay, for 1933, the tax laid by the Act of 1921 as amended, (85 Public Acts 1921, 175 Public Acts 1929) which requires that "every corporation organized or doing business under the laws of this state . . . shall . . . for the privilege of exercising its franchise and of transacting its business within this state, pay . . . an annual fee . . . upon each dollar of its paid up capital and surplus . . ."; but no property or capital located without the state "and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation . . ."

The Supreme Court of the State sustained the tax. A reversal is sought upon two grounds.

That "the only power it [the corporation] has is to engage exclusively in foreign commerce"; to tax the privilege of doing this would burden such commerce and offend the Federal Constitution.

Also, that if the corporation is subject to the challenged tax, the statute requires the capital represented by the bridge structure to be excluded from the computation since this is used exclusively in foreign commerce.

The imposition has been characterized by the court below as "a privilege tax imposed as an incident to the right to be a corporation, and exercise corporate functions by means of paid-up capital and surplus." *In re Detroit & Windsor Ferry Co.*, 232 Mich. 574; 205 N. W. 102; *In re Detroit International Bridge Co.*, 257 Mich. 52; 240 N. W. 68; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218. It held the provision of the statute excluding from the computation all property used exclusively in interstate commerce [and foreign commerce] inapplicable, since the company "is not engaged in foreign commerce and its property is not so used by it."

In *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 287 U. S. 295, we considered appellant's claim to exemption from the demand for 1930, under the same statute. It there appeared that in addition to general power to own and operate the bridge, and do whatever is related to that enterprise, the corporation had authority to carry on other business in Michigan and elsewhere. "It has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause." Consequently we did not consider whether it was engaging in foreign commerce, but affirmed the judgment below upholding the tax.

Subsequently to our decision, and prior to the tax year 1933, the corporate charter was amended. The powers were limited and stated thus—

"To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and the appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

"To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

The record discloses that the appellant owns, maintains and operates a bridge between Michigan and Canada across the Detroit River; that for passing over this it demands and collects tolls from vehicles and pedestrians. It "conveys no persons or goods across the international boundary line. It merely collects tolls from such persons as use it [the bridge]. It provides an instrumentality which others may use in conducting foreign commerce."

Unless by reason of what appellant is now shown to do, it engages in foreign commerce, then, considering our ruling upon the appeal challenging the tax for 1930—287 U. S. 295—clearly, the judgment below must be affirmed. The argument for reversal is, of course, ineffective if ownership and operation of the bridge do not constitute foreign commerce.

After much consideration, and notwithstanding emphatic dissent, *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said (p. 153):

" The company was chartered by the State of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the company's property for taxation. *Central Pacific Railroad* v. *California,* 162 U. S. 91. The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, presented an entirely different question.

" Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

We find no adequate reason for departing from the view so expressed. The judgment of the court below must be

Affirmed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result.

FOX *v.* STANDARD OIL COMPANY OF NEW JERSEY.

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

No. 69. Argued November 9, 1934.—Decided January 14, 1935.

1. Filling stations and distribution plants where gasoline, other petroleum products, and automobile accessories are sold, are "stores" within the meaning of the West Virginia Chain Store License Tax Act, defining the term store as including any mercantile establishment in which goods, wares or merchandise of any kind are sold, etc. P. 95.
2. The legislative history of this Act, and contemporaneous interpretation by the agent charged with its enforcement, help to confirm the above-stated conclusion. P. 96.
3. Although administrative constructions of state statutes by state officials are not binding in cases coming from federal tribunals, this Court will lean to an agreement with them. P. 96.
4. A chain of gasoline stations maintained in a single ownership, *held* constitutionally subject to a different measure of taxation from stations in separate ownership. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Liggett Co.* v. *Lee,* 288 U. S. 517. P. 97.
5. Graduated state taxes on a chain of gasoline stations in single ownership, *held* valid against objections that the accumulated exactions were so oppressive and disproportionate to benefits as to amount to arbitrary discrimination and confiscation, repugnant to the Fourteenth Amendment. P. 99.
6. A chain of stores is a distinctive business species, with its own capacities and functions; broadly speaking, its opportunities and powers become greater with the number of the component links; and the greater they become, the more far-reaching are the economic and social consequences. P. 100.
7. For that reason, the State may tax large chains more heavily, upon a graduated basis; and it may make the tax so heavy as to discourage multiplication of units and by the incidence of the burden develop other forms of industry. P. 100.
8. The graduated tax law being uniform in its application to chains of gasoline stations and chains of other stores, the fact that the tax

burden falls very largely on the former chains, because of the great multiplication of their units, does not render the classification arbitrary. P. 101.

9. The West Virginia graduated tax on stores does not violate § 1 of Art. 10 of the West Virginia constitution, which requires that taxation shall be equal and uniform throughout the State. P. 102.

6 F. Supp. 494, reversed.

Appeal from a decree of the District Court, constituted of three judges, enjoining the Tax Commissioner of West Virginia from paying into the state treasury a sum of money exacted by him, and paid to him under protest, as license taxes on a chain of filling stations owned by the plaintiff Oil Company. The decree also commanded that the money be repaid to the plaintiff.

Mr. Homer A. Holt, Attorney General of West Virginia, with whom *Messrs. R. Dennis Steed* and *Wm. Holt Wooddell,* Assistant Attorneys General, were on the brief, for appellant.

Mr. H. D. Rummel, with whom *Messrs. Donald O. Blagg* and *A. G. Stone* were on the brief, for appellee.

State Board of Tax Commissioners v. *Jackson,* 283 U. S. 527, decided that chain store operators and independent store merchants may be classified separately for purposes of taxation, because of special factual advantages in chain store operation. It was held that these advantages justified a progressively graduated tax upon the group of chain store operators, based upon the number of store units and rising to a maximum of $25 per unit. This Court pointed out that the statute treated "upon a similar basis all owners of chain stores similarly situated." This was said apparently because the same unit measurement for the tax was applied to the entire group of chain store operators, and because, when compared to the situation of the independently operated store, it could not be said that a progression up to $25 per store did not roughly and reasonably relate to the value of the privilege of operating a chain of stores and of adding stores to the chain. The Court, in its consideration of the *Jackson* case, did not have before it a tax which was either arbitrarily oppressive, or which palpably and unreasonably discriminated between members of the chain store class.

The Court there recognized that there must be some correlation, albeit a rough and ready correlation, between the difference in fact and the difference in the tax. The difference in fact which the Court found was present was the advantage of operation through chain store methods, and it was this advantage which justified the difference in tax treatment. But, when the tax treatment so far exceeds the advantage secured through chain store operation that any one must recognize that the treatment bears no relation to the advantage, then the tax ignores the difference in fact and bears no reasonable relation to the purpose of the statute.

It is clearly impossible to decide as to the validity of the differentiation of subjects into classes, without giving consideration to the treatment which is to be based upon such classification and the practical effect of such treatment. The rates are the heart of a system of tax classification, and only upon consideration of them can it be determined whether a classification is rational or arbitrary.

The proposition that the Court may not consider the rates withdraws from judicial consideration the very factor which renders the discrimination oppressive.

The record shows that the tax attempted to be imposed confiscates the entire earnings of appellee's stations, and as to the other oil companies paying the highest rate, the tax is a capital levy.

The company contends, as the district court held, that the "combined characteristics" which feature typical chain store systems do not inhere in the operation of multiple service stations as compared with the operation of single stations.

It denies that service stations come within the category of "stores," and it contends that any broad classification and tax graduation which applies to service stations must bear some reasonable relation to the facts of the service station business.

The validity of a taxing statute is to be determined from its practical operation and effect. The practical effect of the Act, as administered, is to single out the business of operating service stations, already heavily burdened, as the object of an enormous exaction.

The application of the Act to service stations is an imposition of palpably arbitrary and discriminatory rates of taxation without rational relationship to the value of the privilege subjected to the tax.

The appellant's application of the Act produces a discrimination so arbitrary and capricious as to amount to the confiscation of the appellee's property and business without due process of law.

This Court has said that a federal statute passed under the taxing power may be "so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment" (*Tyler* v. *United States,* 281 U. S. 497), and by like reasoning a state statute may fall before the similar clause of the Fourteenth Amendment. *Towne* v. *McElligott,* 274 Fed. 960.

The Act designates "stores" as the subjects of the license tax. The legislature used the word "stores" in its ordinary, popular signification, which does not include service stations and bulk plants. The incidental sale of accessories does not change the controlling character of appellee's service stations.

The construction of the language, as written, is sufficiently clear and certain to render resort to the legislative history of the Act unnecessary.

The Act must be construed strictly in favor of the taxpayer.

The taxing and licensing of service stations as "stores" would violate the presumption against multiple taxation.

The Act does not apply to appellee's bulk distributing plants.

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy hinges upon the meaning and validity of the chain store license tax of West Virginia in its application to distributing plants and service stations for the sale of gasoline and kindred products.

On March 8, 1933, the legislature of West Virginia passed a law whereby all persons and corporations operating or maintaining a store as therein defined were required to obtain an annual license from the state tax commissioner. The license fee was graduated according to the number of stores. Upon one store the fee was to be $2; upon two stores or more, but not to exceed five, the fee was to be $5 for each additional store; upon six or more, but not to exceed ten, $10 for each additional store; upon each store in excess of ten, but not to exceed fifteen, $20; upon each in excess of fifteen, but not to exceed twenty, $30; upon each in excess of twenty, but not to exceed thirty, $35; upon each in excess of thirty, but not to exceed fifty, $100; upon each in excess of fifty, but not to exceed seventy-five, $200; and upon each in excess of seventy-five, $250.

Appellee, complainant in the court below, is a Delaware corporation, engaged in the business of refining, transporting and distributing petroleum products. It owns or controls in West Virginia 949 service or filling stations, and 54 bulk plants, a total of 1003. Of the 949 stations, there are 101 which are described as "company owned"; these are both owned and operated by the complainant itself. "Leased outlets," 388 in number, and "vending privilege outlets," 460 in number, are leased by the complainant and operated by agents under commission contracts. By concession its control over these outlets is so complete as to amount to operation within the meaning of the statute. Finally there are 54 "bulk or distributing plants," maintained chiefly for the storage of petroleum products to be distributed to the stations, but in part as a source of supply from which deliveries are made to buyers.

Chains for the sale of gasoline have units many times more numerous than chains for other purposes. The longest "general commodity" chain is that of the Great Atlantic & Pacific Tea Company with 198 stores within the boundaries of West Virginia. Not only are the gasoline units more numerous, but the sales from any one unit are, comparatively speaking, small, as must always be the case when subdivision is so minute. The result is to cast upon the complainant and upon competing chains in the same business a burden much heavier, both absolutely and relatively to earnings, than any that is borne by others. This is brought out clearly through statistical tables in the record. The store license fees from all sources during the year 1933 amounted to $569,693. Of this total, stores other than gasoline stations contributed $83,525 (single stores $21,723, and multiple stores $61,802). Single gasoline stations, maintained by independent dealers, 2,000 in number, contributed $5,000, and chain gasoline stations $481,168, or 84.46% of the whole. Five oil companies including the complainant paid $476,171 or 83.5%, and the complainant alone paid $240,173 or 42.16%. Other tables supply the data for a comparison between the business done by the gasoline chains and that of chains for other purposes. If we look to the year 1932, the latest year for which complete figures are forthcoming, 2,453 gasoline chain stations did an aggregate business of $15,198,638, or 4.6% of the total chain business of the state, yet they would have paid 84.46% of the tax if the law had been in force during that year; 1,889 general retail stores in chain organizations did a total business of $75,454,257, or 22.9% of the whole, and would have paid 10.7% of the tax, this because the number of the units was relatively small. In 1932 the average gross revenue of the complainant's gasoline stations was $26,822 for each of the company-owned stations, and $3,892 for each of the agency stations, the company-owned stations making by far the better showing. During the same year the average net income for company stations was $1,782.78 (it had been more than double in 1931), and for agency stations only $89.75. Upon that basis a tax of $250 would have left a profit for the one group, but a loss for the other. In the computation of this loss, a word may be of use as to the bookkeeping methods in vogue in the complainant's business. The complainant's practice has been to bill the gasoline to its stations at the current market prices, as if there were a sale to strangers. Such a mode of segregation, unless corrected by other data, will give at times a partial picture of the economic situation. If the price at which the oil is billed includes a reasonable profit for refining and transporting, the business may show a gain when viewed in all its parts, though the later work of marketing is carried on at cost or less. Stations scattered far and wide address a mass appeal to customers, and thus stimulate them to buy at the sign that has made itself familiar. True, the complainant lost money in the process of refining from 1930 to 1933, but for anything that is shown, the loss had its origin in the general economic depression prevailing in those years. Even so, there can be no denial that service filling stations, when organized in chains, bear a heavier and harsher burden than chains whose units are fewer and yet individually larger.

Impatient of that burden, the complainant brought this suit in June, 1933, to restrain the State Tax Commissioner from paying into the treasury of the state the sum of $240,173.50 paid under protest as the license taxes of the year. The reason for resort to equity was the uncertainty as to the existence of any remedy at law for the recovery of the taxes when once the moneys were deposited in the treasury, and subjected thereby to the state's ownership and power. In its bill of complaint the complainant took the ground that the exactions were illegal, first, because the gasoline stations were not stores within the meaning of the statute, and, second, because even though they were, the imposition of taxes was a denial to the complainant of immunities secured by the equal protection clause and the due process clause of the Fourteenth Amendment, and also by provisions of the constitution of the State. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), heard the complainant's application for interlocutory and permanent relief. The court decided, after a careful review of the West Virginia statutes, that there was an imperfect remedy at law which made permissible resort to equity. In that conclusion we concur. The court decided also that the operation of the tax in its application to chains of gasoline stations was so much harsher and heavier than the operation of the tax when applied to other chains as to constitute a denial to the complainant of the equal protection of the laws. Finally the court decided that gasoline stations were not stores within the meaning of the statute. 6 F. Supp. 494. The decree enjoined the payment of the contested fees into the treasury of the State, and ordered restitution. An appeal to this court followed.

First. The filling stations and distribution plants are stores or mercantile establishments within the meaning of the statute.

By § 8, "the term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership, or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale."

There is no doubt that goods, wares and merchandise of a kind, i. e., gasoline and other petroleum products, and even tires and other automobile accessories, are sold by the complainant and its agencies at its plants and service stations. This satisfies the test of the statute, and subjects the seller to the tax. We are told that the average man if requested to point out to a stranger the store nearest by or even the nearest mercantile establishment would not be likely to think of a filling station as within the range of the inquiry.* *Wadhams Oil Co.* v. *State,* 210 Wis. 448; 245 N. W. 646, 649; also 246 N. W. 687. There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has attempted to secure precision and certainty by rejecting a test so fluid and indeterminate and supplying its own glossary. The goods offered for sale are to be understood as having reference to goods "of any kind," and the place at which the sale is made shall include not only places that in the common speech of men would be designated as stores, but, broadly speaking, any mercantile establishment,

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* Filling stations are ranked as stores by students of the chain store problem: Zimmerman, The Challenge of Chain Store Distribution, p. 52.

whether a store or something else. In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. Cf. *Midwestern Petroleum Corp.* v. *State Board of Tax Commissioners,* 206 Ind. 688; 187 N. E. 882. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.

Extrinsic tokens of intention, however, are not lacking altogether, and though their force may not be great, they point us the same way. In the passage of the bill through the Senate, an amendment was proposed whereby the definition of a store in § 8 was to be supplemented by the following proviso: "Provided, however, that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products." The amendment was put to a vote and rejected. What was done in that connection is doubtless not conclusive as to the meaning of the bill in the unamended form. *Murdock* v. *Memphis,* 20 Wall. 590, 618. It is, however, a circumstance to be weighed along with others when choice is nicely balanced. *Finlayson* v. *Shinnston,* 113 W. Va. 434, 437; 168 S. E. 479; cf. *United States* v. *United Shoe Machinery Co.,* 264 Fed. 138, 174; *Lapina* v. *Williams,* 232 U. S. 78, 89. Reinforcing this token is the contemporaneous interpretation of the statute by the Tax Commissioner of the State, the administrative agent charged with its enforcement. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. We give to such construction "respectful consideration," though we have power to disregard it. *United States* v. *Moore,* 95 U. S. 760, 763; *Fawcus Machine Co.* v. *United States, supra.* The complainant was at liberty to maintain a suit in the state courts, where the meaning of the statute could have been determined with finality. It chose to have recourse to the courts of the nation. In such circumstances we are charged with a duty of independent judgment (*Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 194; *Hurn* v. *Ousler,* 289 U. S. 238, 243), but in default of other tests, we lean to an agreement with the agents of the state.

Second. The statute in its application to the complainant and others similarly situated does not deny to the taxpayer the equal protection of the laws.

The inquiry divides itself into two branches which call for separate consideration. Is a series of filling stations a chain of such a kind as to be subject to a different measure of taxation from stations in separate ownership? This question was answered by the court below in favor of the State, but it is still pressed in this court by counsel for the complainant. If the stations in a chain may be taxed differently from independent units and the amount of the tax fixed upon a graduated basis, is the graduation in its consequences so extreme, so disproportionate to benefits, as to be an arbitrary discrimination between longer chains and shorter ones, or between chains for the sale of gasoline and for the sale of other products? This question was answered by the court below in favor of the taxpayer.

(1) We think a series of gasoline stations maintained in a single ownership has the benefit of chain organization in such a sense and measure as to fall within the scope of the decisions of this court in *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, and *Liggett Co.* v. *Lee,* 288 U. S. 517. The opinion in Jackson's case enumerates some of the advantages of chain store operation, and finds a sufficient basis for taxing chains differently from stores separately owned. The opinion in Liggett's case makes it clear that the list of benefits was for illustration only, but that in every "integrated chain," whatever its particular quality, there is something constant and distinctive which marks it off from stores main-

tained in separate ownership, and even from those combining in coöperative leagues. 288 U. S. at p. 532. The complainant in this suit returns to the same method of attack, picking out one feature of management after another from the list in Jackson's case, as if what was enumerated there were a code to which every chain is to conform if it is to be subject to taxation in accordance with a special system. The method is deceptive, yet many of the chief benefits found in the structure of other integrated chains will be discovered to be present here.

We have here abundant capital; standardization in equipment and display; superior management; more rapid turnover; uniformity in store management; special accounting methods; and a unified sales policy coördinating the diverse units. The complainant receives the crude oil from a subsidiary company, which produces one-third of what it sells and buys two-thirds from others, these others, for all that appears, being affiliated corporations. The oil when delivered is refined by the complainant, and then billed to itself, that is to its stations and agencies, at current market rates. Through all these far flung instruments it distributes its own products and spreads through every hamlet its repute as a distributor. Ownership or control of a host of well-appointed depots, uniform in design and color, has put the chains in a position to bring home to the consuming public the knowledge of their wares and of the quality of their service in a way far beyond the capacity of the independent dealer with one station or a few. The mere statement of the number of depots maintained by the complainant—1,000 separate centres of attraction and distribution—must bear persuasive witness to the tremendous potencies of advertisement, of reiterated suggestion, inherent in a business conducted on such a scale. The results confirm the prophecy. There are 4,453 filling stations in West Virginia. Of these only 55% are members of a chain, yet this 55%

has been able to make 75% of the sales of motor fuel. True the complainant has been willing to loan its distinctive labels and equipment to independent operators dealing in its products, and even to paint their stations so that they will seem to be its own. This practice has been discontinued since the passage of the National Recovery Act and the adoption of a code thereunder. Even before that time, however, the gasoline was billed to independents at a price one-half cent per gallon higher than the price payable by agencies acting on a commission basis. The discrimination may mean the difference between a profit and a loss. More important is this, that the effect of multitudinous agencies, reaching into every corner, and yet subject to regulation at a centre, is to fix a uniform retail price to which independents must conform as the price of their existence. They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery. They are reminded every hour that a chain efficiently conducted, with ample capital behind it, is able to attract the public in a degree impossible for others. Indeed, some of them are driven to pose as members of the chain by borrowing its insignia in order to share its popularity. The popularity would be unattainable without a multiplicity of units repeating the same message.

(2) Chains of gasoline stations being subject like other chains to a graduated tax, the question remains whether the rates are so oppressive as to amount to arbitrary discrimination or to unlawful confiscation.

When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in *Magnano Co.* v. *Hamilton,* 292 U. S. 40, decided at the last term. "Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk." *Alaska Fish*

Co. v. *Smith,* 255 U. S. 44, 48, quoted in *Magnano Co.* v. *Hamilton, supra,* p. 46. True the reservation was made (292 U. S. at p. 44) that an act might be so arbitrary as not to be an exercise of the taxing power at all, the form of a tax being a cloak for something else. Cf. *Child Labor Tax Case,* 259 U. S. 20. In respect of the challenged act, there is neither evidence nor even claim of any such abuse. On the contrary, the complainant has stated in its bill that the " act is, in effect, a tax measure," its validity or invalidity to be adjudged upon that basis. A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of the component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, *State Board of Tax Commissioners* v. *Jackson, supra; Liggett Co.* v. *Lee, supra.* Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 95; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126; *Sproles* v. *Binford,* 286 U. S. 374, 394; *Stephenson* v. *Binford,* 287 U. S. 251. In principle there is no distinction between such an exercise of power and the statute upheld in *Magnano Co.* v. *Hamilton, supra,* whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. " Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry." *Magnano Co.* v. *Hamilton, supra,* at p. 44; *McCray* v. *United States,* 195 U. S. 27, 56. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only.

The argument against the statute rings the changes upon a comparison between the position of the gasoline chains and that of chains for other products. The gasoline chains,* as already noted in this opinion, have units more numerous by far than those that deal in other things, and because of their size must pay a large percentage of the tax, though it is not to be forgotten that there are general commodity chains also within the upper brackets. The outcome is no evidence of an arbitrary discrimination, defiant of the restraints of law. All members of a class within the same graduated levels are treated impartially and subjected to an equal rule. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, 296. If only one form of chain chooses so to multiply its units, after arriving at the topmost levels, as to make the burden heavy, it owes its position on the scale and the aggravation of the tax to the exigencies of business and not to those of law. The classification is not arbitrary, but in its normal operation has a rational relation to the subject matter to be taxed, the capacity to pay, and the justice of the payment. Cf. *Magoun* v. *Illinois Trust & Savings Bank, supra; Knowlton* v. *Moore,* 178 U. S. 41, 54; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Lake Shore & Michigan*

* The Standard Oil Co. of New Jersey, Sinclair Refining Co., Ashland Refining Co., Pure Oil Co., and Gulf Refining Co.

Southern Ry. Co. v. *Clough,* 242 U. S. 375, 385; *Maxwell* v. *Bugbee,* 250 U. S. 525, 540, 541; *Watson* v. *State Comptroller,* 254 U. S. 122, 124; *State Board of Tax Commissioners* v. *Jackson, supra,* at p. 537. We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.

Third. The statute does not violate the constitution of West Virginia which requires that taxation shall be equal and uniform throughout the state. Article 10, § 1.

The constitution of Indiana has a like provision which was considered by this court when sustaining the chain store tax in *State Board of Tax Commissioners* v. *Jackson, supra,* at p. 542. The view was expressed that the standard of uniformity under the constitution of the state was substantially the same as the standard of equality under the Fourteenth Amendment of the constitution of the nation.

Not finding that the courts of West Virginia have spoken on the subject differently, we reach the same conclusion now. *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 305. Cf. *Laing* v. *Fox,* 115 *W. Va.* 272; 175 S. E. 354, 359; *Hope Natural Gas Co.* v. *Hall,* 102 W. Va. 272; 135 S. E. 582; *Pipe Line Co.* v. *Hallanan,* 87 W. Va. 396; 105 S. E. 506; *Virginia* v. *Bibee Grocery Co.,* 153 Va. 935; 151 S. E. 293; *Great Atlantic & Pacific Tea Co.* v. *Maxwell,* 199 N. C. 433; 154 S. E. 838; *Moore* v. *State Board of Charities & Corrections,* 239 Ky. 729; 40 S. W. (2d) 349; *Standard Lumber Co.* v. *Pierce,* 112 Ore. 314; 228 Pac. 812.

Fourth. What has been said in respect of the contention that the tax has the effect of an arbitrary discrimination is a sufficient answer to the contention that property has been taken without due process of law.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland, and Mr. Justice Butler, accepting the opinion and concurring opinion of the court below as embodying a sound and correct view of the law applicable to the first and second points discussed in the opinion just delivered, think the judgment should be affirmed.

MOONEY v. HOLOHAN, WARDEN.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. —, original. Rule to Show Cause Issued November 12, 1934. Return to Rule Presented January 7, 1935. Decided January 21, 1935.

1. The due process clause of the Fourteenth Amendment governs any action of a State through its legislature, its courts, or its executive officers, including action through its prosecuting officers. P. 112.
2. A criminal conviction procured by the state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment. P. 112.
3. It is the duty of every State to provide corrective judicial process for the relief of persons convicted and imprisoned for crime without due process of law; and it is to be presumed that this duty has been complied with. P. 113.
4. *Semble* that in the courts of California the writ of *habeas corpus* is available for one who is deprived of his liberty without due proc-

ess of law in violation of the Constitution of the United States. P. 113.

5. Before this Court is asked to issue a writ of *habeas corpus* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. P. 115.

Leave to file denied.

On a motion for leave to file a petition for *habeas corpus*. The case was heard upon the petition and upon a return made by the State, in response to an order to show cause. The return did not put in issue any of the facts alleged in the petition but was in the nature of a demurrer.

Messrs. Frank P. Walsh, John F. Finerty, George T. Davis, Murray C. Bernays, and *Herbert D. David* were on the brief for petitioner.

Mr. U. S. Webb, Attorney General of California, and *Mr. William F. Cleary,* Deputy Attorney General, were on the return filed in response to the order to show cause.

In this case, as in *Frank* v. *Mangum,* 237 U. S. 309, no question respecting the original jurisdiction of the trial court is raised. Consequently, the contention is and must be that the alleged fraud occurring during the course of the trial deprived the trial court of jurisdiction to receive the verdict and pronounce the sentence.

It is manifest that the due process of law clause of the Fourteenth Amendment was never intended to deprive courts generally of the power to hear and determine issues of fact and in so doing to decide which evidence is true and which evidence is false. That clause must, of necessity, be held to apply only to the process of law by means of which jurisdiction over the subject matter of actions and over the parties to actions is acquired and retained, that is, by means of which notice is given and a fair opportunity to be heard is afforded.

Petitioner's contention, reduced to its final analysis, is that although the trial court was vested with jurisdiction to hear and determine the issues of fact raised by the pleadings and had the power to decide which evidence was true and which evidence was false, yet the court lost jurisdiction during the course of the trial, and therefore lost the power to decide which evidence was true and which evidence was false, by reason of the fact that during the course of the trial false evidence was introduced against him.

The rule announced by this Court in *United States* v. *Throckmorton,* 98 U. S. 61, has been applied in criminal cases as often as the occasion for its application has arisen. *Springstein* v. *Saunders,* 182 Ia. 658; *State* v. *Asbell,* 62 Kan. 209; *Beard* v. *State,* 99 S. W. 837; *State ex rel. Davis* v. *Superior Court,* 15 Wash. 339; *Howard* v. *State,* 58 Ark. 229.

Here we may draw attention to this Court's action in denying petitioner's application for a writ of certiorari to review a decision of the Supreme Court of California wherein it was held that the factual assertions upon which this petition is based, even if true, did not entitle petitioner to relief from the judgment by virtue of which petitioner is now being held—a decision following the rule of the *Throckmorton* case, *supra.* 178 Cal. 525, 530, cert. den., 248 U. S. 589.

Petitioner contends that the rule of law announced by this Court in the *Throckmorton* case, *supra,* and followed by every court in the land, is in need of revision. He argues that courts should have the power to reopen cases wherein intrinsic fraud is alleged. That, however, is a matter for legislative rather than judicial action. At the present time courts are not empowered, by constitution or statute, to exercise such a jurisdiction. The only remedial power in such cases is that of executive pardon or executive clemency.

Petitioner realizes the force of this objection and attempts to overcome it by asserting that intrinsic fraud reduces the process of law to a mere sham, and that, consequently, this and other courts are given jurisdiction by the due process clause of the Fourteenth Amendment to set aside judgments procured by intrinsic fraud. He cites no authority in support of such contention.

Petitioner would persuade this Court to change the accepted meaning of the word "process," and to so broaden it as to include that which has never been regarded as process by any court in the history of our country. He would have the meaning of the due process clause expanded into a guarantee against the presentation of false evidence; he would have the federal courts charged with the duty of setting aside each judgment based, in whole or in part, upon false evidence, and, in so doing, perform, if not usurp, the function which, under our system of law, is the peculiar province of a trial by jury; and he would have no limit placed upon the period within which, or the number of times that, such a review could be invoked.

If the presentation of false evidence is a denial of due process in criminal cases, it is likewise a denial of due process in civil cases, and if it is a denial of due process in cases in which severe penalties or large sums are involved, it is likewise a denial of due process in cases in which nominal penalties and nominal sums are involved. Consequently, if petitioner's contention be sustained, this Court will become the Court not only of last but of ever continuing resort in all cases, civil as well as criminal, small as well as large, in which there is a conflict of evidence and a charge of fabrication.

We concede that if the acts or omissions of a prosecuting attorney have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the attorney may be regarded as *resulting* in a denial of due process of law. Such is the effect of this Court's decision in *Powell* v. *Alabama,* 278 U. S. 45, although, in that case, it was an omission on the part of the trial judge which was held to have had such a result.

We make the same concession concerning the acts or omissions of any one, or of any group of persons; for no matter from what source, whether it be official or otherwise, an act or omission emanates, if it operate to deprive the defendant of notice or of an opportunity to be heard, then there has been a denial of due process of law. Such is the effect of this Court's decision in *Moore* v. *Dempsey,* 261 U. S. 86, cited by petitioner.

Conversely, we contend that it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied. *Frank* v. *Mangum, supra; Powell* v. *Alabama, supra; Moore* v. *Dempsey, supra.* Nor does it make a particle of difference from what source the act or omission complained of emanates, for it is not the act or omission itself but its effect upon the hearing accorded by the court to the defendant that results in, or does not result in, a denial of due process of law.

Petitioner attempts to differentiate this case from all previous cases by pointing out that here the State itself is charged with being a party to the alleged fraud. It is stated that the prosecuting attorney was acting as an agent and officer of the State and that consequently his fraudulent acts must be regarded as having been acts of the State.

Petitioner does not contend that the State authorized the prosecuting attorney to suborn perjury or to work a fraud upon petitioner or upon the trial court. Indeed, as petitioner well knows, the State of California not only did not authorize such things, but it made the doing of them, if, indeed, they were done, crimes against the State (California Penal Code, §§ 127, 128, 137, 653), grounds for removing the prosecuting attorney from office and grounds for disbarring him from the practice of law in the courts of the State. If the prosecuting attorney did such things, he did them not with the consent of the State but against the positive prohibition of the State. The State itself was injured. The State itself was a victim of the fraud.

However, even if it be admitted that the alleged fraudulent act of the prosecuting attorney ascended to his principal, the State, it can not be held that such fraudulent act denied due process of law to petitioner unless it be held that, after ascending to the principal, such fraudulent act descended to the other arm of the Government and became the act of the trial court.

This is so, because the functions of a prosecuting attorney and of a trial court are entirely different and are held apart by constitutional mandate. The function of a prosecuting attorney is to prosecute, to act as accuser, to be a partisan, to present the evidence on one side of the case. He has no power to adjudge, to sentence, or, by his order, to deprive anyone of life, liberty or property. He is not a part of the tribunal but merely a pleader before the tribunal. The trial court is the tribunal. Its function is to hear the evidence on both sides of the case, to decide which evidence is the more credible, and to pronounce judgment in accordance with such findings of fact. The court must be impartial between the accuser and the accused, and, above all, it must hear the accused before depriving him of life, liberty or property.

Petitioner contends that the trial court, instead of being a party to the alleged fraud, was a victim of it. By making such a contention petitioner completely answers his own argument. *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, and *Raymond* v. *Traction Co.,* 207 U. S. 20, are not in point for the reason that in each the act complained of was the final process by means of which property was to be taken without due process of law. Were petitioner held by virtue of an order of the prosecuting attorney, those cases would be in point.

It is only where due process of law has been denied that the due process of law clause of the Fourteenth Amendment places any obligation upon the State to supply a corrective process. The State of California has heard petitioner's complaint a number of times, and in each instance it has received careful consideration. In some instances, that is, where the complaint has been made to the courts, as such, the courts have carefully pointed out that they had no jurisdiction to interfere and that the only remedy rested with the Executive. In the other instances, that is, where applications for executive clemency have been made, a full hearing has been given and the executive has gone to great lengths to explain why executive relief was being denied.

We respectfully submit that petitioner has failed to raise a federal question and that, consequently, leave to file the petition should be denied.

Per Curiam.

Thomas J. Mooney asks leave to file petition for an original writ of *habeas corpus.* He states that he is unlawfully restrained of his liberty by the State of California under a commitment pursuant to a conviction, in February, 1917, of murder in the first degree and sentence of death subsequently commuted to life imprisonment. He submits the record of proceedings set forth in his petition for a writ of *habeas corpus* presented to the District

Court of the United States for the Northern District of California and dismissed upon the ground that the petitioner had not exhausted his legal remedies in the state court. Applications to the Judges of the Circuit Court of Appeals for the Ninth Circuit for allowance of an appeal to that Court from the judgment of dismissal have severally been denied.

Petitioner charges that the State holds him in confinement without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The grounds of his charge are, in substance, that the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. He alleges that he could not by reasonable diligence have discovered prior to the denial of his motion for a new trial, and his appeal to the Supreme Court of the State, the evidence which was subsequently developed and which proved the testimony against him to have been perjured. Petitioner urges that the "knowing use" by the State of perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process of law. Petitioner further contends that the State deprives him of his liberty without due process of law by its failure, in the circumstances set forth, to provide any corrective judicial process by which a conviction so obtained may be set aside.

In support of his serious charges, petitioner submits a chronological history of the trials, appeals and other judicial proceedings connected with his conviction, and of his applications for executive clemency. He sets forth the evidence which, as he contends, proves the perjury of the witnesses upon whose testimony he was convicted and the knowledge on the part of the prosecuting authorities of that perjury and the suppression by those authorities of impeaching evidence at their command. He also submits what he insists are admissions by the State that the testimony offered against him was perjured and that his conviction was unjustified. In amplification of these statements, he asks leave to incorporate in his petition, by reference, the voluminous details of the various proceedings as they were presented with his petition to the District Court.

In response to our rule to show cause why leave to file the petition should not be granted, the respondent has made return by the Attorney General of the State. With this return, he submits an appendix of exhibits setting forth the consent filed by the Attorney General with the Supreme Court of the State on July 30, 1917, that the judgment of conviction be reversed and the cause remanded for a new trial, the subsequent opinions of that Court upon the cases presented to it, the statements of Governors of the State on applications for executive clemency made on behalf of this petitioner and of one Billings (who had been jointly indicted with petitioner and was separately tried and convicted), and the reports of Justices of the Supreme Court of the State, and communications addressed by them, to the Governors of the State in connection with such applications.

The return does not put in issue any of the facts alleged in the petition. The return is in the nature of a demurrer. It submits that the petitioner "has failed to raise a Federal question and that, consequently, leave to file the petition should be denied." Reviewing decisions relating to due process, the Attorney General insists that the petitioner's argument is vitiated by the fallacy "that the acts or omissions of a prosecuting attorney can ever, *in and by themselves,* amount either to due process of law or to a denial of due process of law." The Attorney General states that if the acts or omissions of a prosecuting attorney "have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* in a denial of due process of law." And, "conversely," the Attorney General contends that "it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied."

Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature, through its courts, or through its executive or administrative officers." *Carter* v. *Texas,* 177 U. S. 442, 447; *Rogers* v. *Alabama,* 192 U. S. 226, 231; *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 233, 234.

Reasoning from the premise that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. *Frank* v. *Mangum,* 237 U. S. 309, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 90, 91.

We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of *habeas corpus* is available in that State. Constitution of California, Art. I, § 5; Art. VI, § 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. *Robb* v. *Connolly,* 111 U. S. 624, 637. In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose.

The decisions of the Supreme Court of California in relation to petitioner's conviction have dealt with the questions presented to that Court within the limitations of particular appellate procedure. When there was submitted to that Court the consent of the Attorney General to the reversal of the judgment against petitioner and to the granting of a new trial, the Court pointed out that no motion had been made by the defendant and that his appeal was awaiting hearing. *People* v. *Mooney,* 175 Cal. 666; 166 Pac. 999. When, again in advance of the hearing of his appeal, the defendant made his motion solely upon the ground of the Attorney General's consent, the Court held that its jurisdiction on appeal was limited to a determination whether there had been any error of law in the proceedings of the trial court and that the Court was confined to the record sent to it by the court below. *People* v. *Mooney,* 176 Cal. 105; 167 Pac. 696. On the appeal, the Court thus dealing with the record before it, found that the verdict was supported by the testimony presented and that no ground appeared for reversal. *People* v. *Mooney,* 177 Cal. 642; 171 Pac. 690. When, later, the defendant moved to set aside the judgment, and sought a certificate of probable cause on his appeal from an order denying his motion, the Court held that the general averments against the fairness of the trial were insufficient, but the Court did not place its denial of the application entirely upon that ground. The Court concluded that the proceeding by way of motion to set aside the judgment after it had become final and a motion for a new trial had been denied, and the time therefor had expired, was "in the nature of an application for a writ of *coram nobis,* at common law." The Court thought that such a writ did not lie to correct any error in the judgment of the Court nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. The Court, adopting the opinion of the court below, concluded that the judgment could not be set aside because it was predicated upon perjured testimony or because material evidence was concealed or suppressed; that the fraud in such a case was not such fraud as was "extrinsic to the record" and that it was only in cases of extrinsic fraud that the relief sought could be had. It was apparently in relation to such an application that the Court said that the injured party was "without remedy." *People* v. *Mooney,* 178 Cal. 525; 174 Pac. 325. And it was with respect to that proceeding, that the writ of certiorari was denied by this Court. *Mooney* v. *California,* 248 U. S. 579. The subsequent communications from the Justices of the Supreme Court in connection with applications for executive clemency were of an advisory character and were not judicial judgments under the requirements of the Constitution of the United States.

We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. Despite the many proceedings taken on behalf of the petitioner, an application for the prerogative writ now asserted to be peculiarly suited to the circumstances disclosed by his petition has not been made to the state court. Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus,* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. *Davis* v. *Burke,* 179 U. S. 399, 402; *Urquhart* v. *Brown,* 205 U. S. 179, 181, 182; *U. S. ex rel. Kennedy* v. *Tyler,* 269 U. S. 13, 17. See, also, *Bryant* v. *Zimmerman,* 278 U. S. 63, 70.

Accordingly, leave to file the petition is denied, but without prejudice.

Leave denied.

LERNER *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL.*

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

No. 292. Argued January 11, 1935.—Decided February 4, 1935.

Under General Order in Bankruptcy No. XXXII, as amended, a creditor opposing a discharge must file his specification of the grounds of his opposition on the day when the creditors are required to show cause; an extension of time beyond that date can not be granted by the court. P. 119.

70 F. (2d) 938, reversed.

73 F. (2d) 56, affirmed.

CERTIORARI, 293 U. S. 543, 550, to review two conflicting decisions upon the power to extend the time within which creditors must file specifications of their opposition to discharges in bankruptcy.

Mr. Emil Hersh for Lerner.

Messrs. Edgar L. Wood and *John C. Warner,* filed a brief on behalf of the First Wisconsin National Bank.

Messrs. Walter J. Mattison and *Ben Z. Glass* filed a brief on behalf of Rakita et al., respondents in No. 292.

Mr. Howard Myers, with whom *Mr. Saul S. Myers* was on the brief, for the Lawyers County Trust Co.

Mr. Meyer Marlow, with whom *Mr. Selig C. Brez* was on the brief, for Reichert et al.

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* Together with No. 496, *Lawyers County Trust Co.* v. *Reichert et al.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These causes require consideration of General Order in Bankruptcy No. XXXII, as amended, effective April 24, 1933, 288 U. S. 632. This Order, as it stood before that day, and the amendments then adopted, follow. Deleted words are within the brackets; words added are italicized.

"XXXII. Opposition to Discharge or Composition *or extension.*

"A creditor opposing [the] *an* application [of a bankrupt] for [his] discharge, or for the confirmation of a composition *or extension proposal,* shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall *at the same time* file a specification in writing of the grounds of his opposition [within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge]."

Whether, under the amended order, Bankruptcy Courts may permit a creditor opposing an application for discharge to file written specifications showing the grounds of his opposition after "the day when creditors are required to show cause," is the question for determination.

In No. 292 the Circuit Court of Appeals, Seventh Circuit, held that when good cause is shown, such an extension may be granted. In No. 496 the Circuit Court of Appeals, Second Circuit, ruled to the contrary. The latter court, we think, reached the proper conclusion. Reversal of the challenged judgment must follow in No. 292; affirmance in No. 496.

The purpose of the 1933 amendments to Order No. XXXII was to prevent continuation of abuses then apparent.

The so-called "Donovan Report," March 22, 1930, on "Administration of Bankrupt Estates," printed (1931) for the House Judiciary Committee, 71st Congress, 3rd Session, p. 116, stated:

"An unscrupulous creditor who desires to get something more than the others may be tempted to file a notice of appearance (a simple 4-line document) at the time of the hearing on confirmation, knowing that this will hold up the entire proceeding for at least another 10 days even if he does not follow up the notice of appearance with detailed specifications of objection. During this 10-day period he may hope to get paid off by the bankrupt. If the bankrupt refuses or is unable to strike a bargain, the creditor may then file his specifications of objection, so that the bankrupt will face another three weeks' delay, during the process of which he may be finally induced to come to terms."

Reporting on "Bankruptcy Law and Practice," (Dec. 8, 1931), Senate Document No. 65, 72nd Congress, 1st Session, (p. 16), the Attorney General asserted:

"The clerks of 72 district courts reported to us that, out of the 49,928 cases closed by them in the fiscal year 1930, 27,426 applications for discharge had been disposed of.

"In only 1,042 of these cases individual creditors at the time of the hearing before the judge on the bankrupt's application filed notices of appearance stating that they intended to oppose the discharge. Under General Order XXXII, these creditors were then required to file specifications in writing within 10 days, setting forth the grounds of this opposition, upon the filing of which the issues would be tried.

"But in 330 of these 1,042 cases the creditors did not follow up their notices of appearance by filing written specifications. Why?

"Presumably, because the creditors were either bought off by the bankrupt as already described, or because indifferent, or were unwilling to incur further expense. . . ."

By memorandum of April 3, 1933, submitted to us, Solicitor General Thacher, who had devoted much time and thought to bankruptcy proceedings, suggested certain amendments and additions to the General Orders—among them, those to No. XXXII adopted as above shown. After referring to the passages from Congressional publications, which we have quoted, he declared:

"For these reasons it is recommended with respect both to discharges and to compositions that the specifications of opposition should be filed with the appearances. Ample time is afforded by the Act to opposing parties to obtain their evidence and make up their minds. Under Section 58 creditors must be given at least 30 days' notice of all applications for discharge, and may after receipt of the notice, if they have not done so already, examine the bankrupt and other parties under Section 21 (a). Under compositions creditors may examine the bankrupt or debtor at the first meeting and at any time thereafter under Section 21 (a), and must be given at least ten days' notice of the application for confirmation."

Having considered the facts, thus brought to our attention, and those otherwise known, it seemed proper to adopt the suggested amendment to Order XXXII.

The language of the amended Order is mandatory; it is controlling in circumstances like those here presented; strict compliance should be accorded. Under Order XXXVII, and permissive provisions of the Bankruptcy Act, we think the courts may exercise discretion sufficient for the successful conduct of proceedings in varying circumstances. Thus, while an objecting creditor must file specifications showing the grounds of his opposition on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation.

No. 496 Affirmed.
No. 292 Reversed.

WILBER NATIONAL BANK OF ONEONTA, ADMINISTRATOR, *v.* UNITED STATES.

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

No. 210. Argued December 7, 1934.—Decided February 4, 1935.

1. As a general rule, the United States is not estopped by arrangements or agreements of its agents to do what the law does not sanction; and those who deal with its agents are charged with notice of the limitations of their powers. P. 123.
2. *Quaere,* how far, if at all, these general rules are subject to modification where the Government enters into transactions of a commercial nature. P. 124.
3. Assuming that the United States may be estopped in its insurance business, it is not bound to pay a policy which had lapsed and become nonreinstatable, merely because the Veterans' Bureau did not notify the insured of how a cash payment by him was allocated to premiums and other charges, or notify him of the default, such notices not being customary in the Bureau's practice; nor because the Bureau did not promptly acknowledge sums which were remitted to it as premium payments after the policy had lapsed and when reinstatement had become impossible. P. 124.

69 F. (2d) 526, affirmed.

Certiorari, 293 U. S. 541, to review the reversal of a judgment recovered against the United States in an action on a government life insurance policy.

Mr. William Wolff Smith, with whom *Mr. Frank C. Huntington* was on the brief, for petitioner.

Mr. Will G. Beardslee, with whom *Solicitor General Biggs* and *Mr. Wilbur C. Pickett* were on the brief, for the United States.

Mr. Justice McReynolds delivered the opinion of the Court.

July 1, 1927, James Patrick Mahar applied to the United States Veterans' Bureau for reinstatement of $5,000 insurance upon his life, and with the application sent check for $13.90. The allocation of this sum then suggested by him gives no indication that he thought it sufficient to meet any premium due after August 1st.

September 19, a policy in the usual form issued and was delivered. It showed payment of the monthly premium—$3.95—due July 1st, and that like payment would be necessary on the first of each succeeding month. Also:

". . . This policy takes effect on the first day of July, nineteen hundred and twenty-seven. . . ."

"Premiums are due and payable monthly in advance" and "if any premium be not paid when due, this policy shall cease and become void . . ." but that "a grace of thirty-one days without interest will be allowed during which time the policy will remain in force. . . . This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the insured satisfactory to the Director of the United States Veterans' Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest."

A letter dated July 29th acknowledging receipt of the check which accompanied the application contained the following clause:

"Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations . . ."

Neither this letter nor any other notice informed the assured how the $13.90 had been allocated, but under the statute and regulations it sufficed to pay prescribed charges, and two premiums on the $5,000 policy—July 1st and August 1st; also $2.65 for credit on the premium due September 1st.

Two remittances of $3.95 by or for the assured were made to the Bureau November 2nd and December 20th respectively. These were retained, but were not acknowledged until after the assured's death. After issuance of the policy no notice was given the assured concerning payment of premiums, default, or that the policy had lapsed or was about to do so. Apparently the only communications sent prior to his death were the receipt of July 29th, and the policy, delivered September 19th.

Nothing indicates that the Bureau ordinarily sent notices concerning premiums or lapses. We are referred to no statute or regulation which required such a notice. No officer of the Bureau is shown to have had power to reinstate lapsed policies without evidence of insurability.

Mahar became totally incapacitated October 17th, but the Bureau had no notice of this fact. He died the twenty-fourth of December. Payment under the policy was refused upon the ground that it had lapsed because of failure to pay the premium due September 1st. The grace period ended October 2nd.

Petitioner, as administrator of the estate, brought this action in the District Court, Northern District, New York (§ 445, c. 10, Title 38, U. S. C.). It alleged issuance of the policy, that all matured premiums upon the policy had been duly paid, and asked recovery.

According to the provisions of the policy it expired October 2nd. But petitioner claimed, and the District Court ruled, that because the Bureau failed to give notice concerning allocation of the sum forwarded July 1st, failed to give notice of the due dates of the premium or that the policy had or was about to lapse, and retained the two payments of $3.95 each, the United States were estopped to deny liability. It said:

"If the defendant was a private insurance company, I would have no hesitancy in declaring it estopped from claiming the policy had lapsed for non-payment of premium. . . . The same principle should be applied against the defendant in this case. ' When the United States went into the insurance business, issued policies in familiar form, and provided that, in the case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.' "

Judgment for the petitioner was reversed. The Circuit Court of Appeals held:

" The conditions of the policy relating to premium payments were not met by payment of the premium due September 1, 1927, and the insurance policy therefore expired, counting in the grace period, on October 2, 1927, unless there was a waiver by the appellee. The claim that there was such a waiver cannot be sustained. . . . The law does not permit waiving statutory requirements by the acts of employees of the government. The failure to pay the premiums prior to October 2 resulted in a lapse of the policy which may not now be held to be waived by the conduct of the government's employees."

The cause is here by certiorari granted upon an application which asserts that the questions presented are: First, whether the United States are engaged in the life and disability insurance business, and obligated to observe the same rules in respect of notices, applying premiums and obeying customs that are applicable to competing commercial companies; and Second, whether the United States, in the circumstances shown, are bound by the acts of their agents like other insurance companies and estopped to deny payments because of such acts.

Undoubtedly, the general rule is that the United States are neither bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit. Also, those dealing with an agent of the United

States must be held to have had notice of the limitation of his authority. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Sutton* v. *United States,* 256 U. S. 575, 579.

How far, if at all, these general rules are subject to modification where the United States enter into transactions commercial in nature (*Cooke* v. *United States,* 91 U. S. 389, 399; *White* v. *United States,* 270 U. S. 175, 180) we need not now inquire. The circumstances presented by this record do not show that the assured was deceived or misled to his detriment, or that he had adequate reason to suppose his contract would not be enforced or that the forfeiture provided for by the policy could be waived. *Insurance Co.* v. *Eggleston,* 96 U. S. 572; *Phoenix Insurance Co.* v. *Doster,* 106 U. S. 30. The grounds upon which estoppel or waiver are ordinarily predicated are not shown to exist.

The statutes and regulations which govern the War Risk Insurance Bureau we must assume are known by those who deal with it. When issuing a policy the Bureau, so far as shown, did not ordinarily notify the assured of the allocation of the cash payment; there was no custom to give notice of defaults. Here the insured had no right to expect such notices. His policy finally lapsed October 2nd. After that no officer of the Bureau had authority to reinstate it without proof of insurability. The policy so declared.

The assured's health began to decline in September and on October 17th he was permanently and totally disabled, but no notice of this was given. Payments of November 2nd and December 20th were sent when this disability existed. They were received by the Bureau when ignorant of the true situation, and at a time when reinstatement by affirmative action was inadmissible.

Nothing indicates intention by any officer or agent to vary the contract; and we find nothing done or omitted from which the assured or his representatives could reasonably imply such purpose or intent. The claim of estoppel or waiver is not supported by the facts shown and the questioned judgment must be

Affirmed.

JURNEY *v.* MacCRACKEN.

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

No. 339. Argued January 7, 8, 1935.—Decided February 4, 1935.

1. The power of a House of Congress to punish a private citizen who obstructs the performance of its legislative duties, is not limited to the removal of an existing obstruction but continues after the obstruction has ceased or its removal has become impossible. P. 147.

   Held in this case that the Senate had power to cite for contempt a witness charged with having permitted the removal and destruction of papers which he had been subpoenaed to produce.
2. The Act making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor (R. S. § 102) did not impair but supplemented the power of the House affected to punish for such contempt. P. 151.
3. Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. P. 151.
4. Where a proceeding for contempt is within the jurisdiction of a House of Congress, the questions whether the person arrested is guilty or has so far purged himself that he does not deserve punishment, are questions for that House to decide and which can not be inquired into by a court by a writ of *habeas corpus*. P. 152.

63 App. D. C. 342; 72 F. (2d) 560, reversed.
Supreme Court, D. C., affirmed.

Certiorari, 293 U. S. 543, to review the reversal of a judgment discharging a writ of *habeas corpus* by which the above-named respondent sought to gain his release from the custody of the above-named petitioner, the Sergeant-at-Arms of the Senate.

Mr. Leslie C. Garnett, United States Attorney for the District of Columbia, with whom *Mr. H. L. Underwood,* Assistant United States Attorney, was on the brief, for petitioner.

There can be no question of the power of the Senate to require the production of the documents subpoenaed in this case. *McGrain* v. *Daugherty,* 273 U. S. 135. It is undisputed that the respondent did not produce all the papers covered by the subpoena and in his possession or subject to his control at the time the subpoena was served upon him. In clear violation of its mandate, he permitted relevant papers to be taken away, secreted, and destroyed. This was a contempt of the Senate. The fact that respondent put it out of his power to produce the documents does not affect the right of the Senate to punish him for this contempt—indeed, it adds to the contempt—and the fact that some of the papers were thereafter secured by the Senate from other persons does not purge respondent of his contempt.

The power of the Senate to punish does not cease because the act complained of has been committed. This power of the Senate is necessary to enable it to perform its legislative function. To assert that it ceases when the act of contempt is complete is to withdraw the admitted power at the very time when its exercise is necessary. *Marshall* v. *Gordon,* 243 U. S. 521.

Any facts or arguments presented on behalf of the respondent going to show that he attempted to purge himself of his contempt must be presented to the Senate, which is the tribunal having jurisdiction of this contempt; they have no place in the *habeas corpus* proceedings. *Henry* v. *Henkel,* 235 U. S. 219, 229; *Marshall* v. *Gordon, supra; Anderson* v. *Dunn,* 6 Wheat. 204; *Kilbourn* v. *Thompson,* 103 U. S. 168; *Re Chapman,* 166 U. S. 661; *Kielley* v. *Carson,* 4 Moore P. C. 63.

The power of the Senate to punish summarily for contempt is governed by the same principles as the power of the judiciary to punish for contempt. The test is the character of the act done and its direct tendency to prevent and obstruct the discharge, in the one case of a legislative, and in the other of a judicial, duty and function. *Marshall* v. *Gordon, supra; Toledo Newspaper Co.* v. *United States,* 247 U. S. 402. Since this power is inherent in the courts and in the Senate (and House of Representatives), the Senate may entertain a proceeding to vindicate its authority and to deter other like derelictions. *Ex parte Grossman,* 267 U. S. 87, 111, 117-118. It is not limited to the statutory remedy provided (U. S. C., Title 2, § 194). Both may be availed of. *Re Chapman,* 166 U. S. 661.

The documents taken by Mr. Brittin from the files in the office of respondent were not all presented to the Senate. Such of them as were recovered after being torn up by Brittin were made available by the efforts of investigators of the Post Office Department. See Sen. Doc. No. 162, pp. 106 to 116, 73d Congress, 2d Sess.

The assertion that full compliance with the subpoena has been made ignores the facts. Immunity from contempt of the Senate cannot be claimed because an agency of the Government has frustrated the attempted total destruction of the papers and saved what otherwise would have been lost, a result in no wise due to respondent. He cannot thereby escape the consequences of this additional contempt of the Senate and its process.

The respondent concedes, as he must, that the Senate had the power to require the production of the documents subpoenaed, and that the inquiry which the Senate, through its committee, was conducting was one which it was empowered to make. Also, necessarily conceded is the power of the Senate to punish for the refusal to produce. These things were settled by this Court in *McGrain* v. *Daugherty,* 273 U. S. 135.

By leave of Court, *Hon. Hatton W. Sumners,* Chairman of the House Committee on the Judiciary, argued the cause on behalf of the House of Representatives, as *amicus curiae.**

A challenge to the existence of any power in the Houses of Congress summarily to punish for a completed act interfering with the effectiveness of their inquisitorial power, goes deep into the structure of the Government. If Congress is indeed dependent upon the other branches for the facts necessary to guide its legislative judgment, then Congress is not in fact a responsible coördinate branch of the Government. But the denial goes farther. It is a denial of all summary power from any source to punish for a completed act interfering with legislative processes. If respondent's theory were sustained, such power would not only be withheld from the legislative branch; no other agency of government could exercise summary power in behalf of that branch. Whether or not even the slow, uncertain criminal procedure would be put in operation to support the Houses of Congress, seeking to discharge a constitutional duty, would depend entirely upon the other two branches of the Government. Under such an arrangement, it could not be held that Congress is a responsible, coördinate branch of the Government. Congress cannot be held responsible for not doing properly that which it does not have the power properly to do.

Punishment for interference with governmental processes is not punishment for a crime in the ordinary sense. It is a sort of consolidated power of government; of

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* The substance of Mr. Sumners' oral argument is taken from a copy which was kindly furnished by him at the request of the Reporter.

quick, direct action, originating out of necessity, which goes with certain duties assigned to the judicial and legislative branches of government as a protective and effectuating agency. If contempt were a crime in the ordinary sense, the individual proceeded against would be entitled under his constitutional guaranty to trial by jury. The legislative branch could not proceed at all; courts could not proceed except in the ordinary way.

The sole concern of this extraordinary governmental power is for governmental efficiency. Necessity initiates it, justifies it, and fixes its limits. This Court has provided the yard-stick. In *Anderson* v. *Dunn,* 6 Wheat. 204, 232, it says: "Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed.'" So measured, when there is an equality of need among the branches of the Government, there must be allowed an equality of power. To hold that a branch of the Government, manned by a personnel chosen directly by the people, answerable directly to the people, and removable directly by the people, may not be intrusted with enough power of itself properly to protect itself and properly to discharge its constitutional responsibility, is an indictment of the scheme of representative government.

The House of Commons was never a part of the English judiciary. It drew no power or privilege of Parliament from that source. The House of Lords, when exercising judicial functions, did not do so as a part of the legislature. It is true that during the confusion of powers and the shifting of power back and forth among the King and Lords and Commons, each when powerful enough moved across the line of its natural jurisdiction. In isolated instances during those times the House of Commons attempted to exercise at least quasi judicial power; but suitors never resorted to the House of Commons. It was never recognized as a judicial tribunal and its attempts in that direction were always challenged, and were abandoned more than a century before we wrote our Constitution. Even the judicial power of the House of Lords had practically ceased to exist at that time; it passed to the great law officers of the Government. Even the power to impeach had fallen into disuse. Since 1715 there have been only two cases of impeachment, according to the great English authority, Sir Erskine May. The development of Cabinet Government directly responsible to the House of Commons, the removal of judges by joint address, and the subjecting of all public officials to the jurisdiction of ordinary courts, removed the necessity for this power and with it went the power.

When we wrote our Constitution, most of these powers and privileges of Parliament had lost the support of necessity and fallen away, leaving the fiction instead of the fact of their existence. The privilege of judging of the election of its own members has since passed from the House of Commons to the judiciary. But this is significant:, This power summarily to proceed against those who interfered with the discharge of legislative duties was as completely possessed and exercised by the Houses of Parliament at the time we wrote our Constitution as it had ever been. Not only was that true, but as the scope and difficulty of governmental responsibilities had increased, the importance and the frequency of exercise of the inquisitorial powers of Parliament had continued to increase. Those parliamentary powers and privileges which had ceased to be sustained by necessity fell away, while the powers, including this summary power, which were sustained by an increasing necessity, became more vigorous and more frequently exercised in proportion to that increasing necessity. That tendency has continued since our separation from Great Britain. As the affairs of government become more complex and as the forces with which government must deal in protecting the general public interest become stronger, better organized and more shrewdly advised, the necessity for a strong inquisitorial agency of government must increase. Access to documents is indispensable.

This power of the House of Commons to punish for a completed act which interfered with the effectiveness of its process came attached to the legislative branch into our Constitution, by adoption of that to which it was attached. The contemporaneous practices of Congress recognize this; and this Court, in *Anderson* v. *Dunn,* held to the limitation of judicial interference which obtained under the unwritten constitution. The effect of *Kilbourn* v. *Thompson* and subsequent opinions, leaves the former judicial and practical construction undisturbed insofar as the inquisitorial powers of Congress are concerned.

Did the writing of our Constitution make any material change in the general line of cleavage formerly established under our unwritten Constitution between the legislative and judicial branches of our government? The great struggles of English constitutional history had been to bring about a governmental arrangement under which these branches would possess each for itself an independent power adequate for the discharge of its duties and with the incidental purpose of fixing inescapable responsibility for their discharge. The facts of history leave no doubt on that point, nor do they leave any doubt that it was our purpose to preserve that arrangement. Did we succeed in doing so? Parliament enacted bills of divorce and attainder and some others which are semi-judicial. These powers were not denied to Congress under the written Constitution. They were denied to the Federal Government.

The Houses of Parliament passed private bills semi-judicial in their nature, but each session of Congress we pass many private bills. Evidence is taken, witnesses are examined, argument had, judgment given, and money paid out of the Treasury. Yet the passage of these bills does not make the Houses of Congress part of the judiciary. The enactment of this character of legislation makes neither the Parliament nor the Congress a part of the judiciary.

Powers may be delegated to this Court to appoint inferior officers. The exercise of that power would not make this Court a part of the Executive branch of the Government.

The Senate sits in the trial of impeachment. That does not make it a part of the judiciary. The Senate sits in conference with the President on the appointment of executive and other officers. That does not make the Senate a part of the Executive.

We did not create a new Constitution as a result of the Revolution. All the pre-Declaration-of-Independence conventions and resolutions show, whether from small groups or from such sources as the Boston Convention and the Continental Congress, the demand of the Colonies was not for a new Government or for a new Constitution. The complaint was that King George and his Parliament were violating our Constitution which had come down to us through the centuries as our heritage from our ancestors. We fought not to free ourselves from a Constitution, but to preserve it. Ours was not a true revolution. It was a territorial secession and a resort to arms to preserve our existing Constitution. When we wrote our Constitution we naturally brought forward in the main our former unwritten Constitution. On this point an analytical comparison of the unwritten and the written Constitutions, the facts of our history and the weight of probabilities agree.

Whether the test of necessity laid down by this Court is to be applied for the Houses of Congress by the courts, or by the Houses of Congress for themselves, and answer given by them to the people for the method of exercise, may sometime become important; but in either case, it ought to be agreed that exercise of summary power by any branch of the Government ought always to fall within the limitations of necessity as laid down by this Court in *Anderson* v. *Dunn.*

With respect to making effective their procedure in getting facts upon which to base official action, the necessities of the legislative and judicial branches of the Government in all respects are identical. Their procedure is identical. Their need for protective and effectuating power is identical. If it be true that Congress is a responsible coördinate branch of the Government, it is difficult to conceive upon what political philosophy or notion of our system one of the coördinate branches, the judiciary, should be asked to deny to another coördinate branch a power to aid in doing its work, which power the branch of the Government of which the request is made finds necessary in the doing of an identical thing, of an identical importance, in exactly the same way, and by the same methods.

The power of the national legislature to guard and make respected and effective its own processes and the power of the judiciary by its intervention to stop the exercise of that power are directly in issue in this case. The possession of power by each of these branches to punish summarily those who interfere with its efforts to get the facts necessary to discharge a governmental duty, is not a blending or confusion of powers, but their separation. Such an arrangement gives to each the necessary power efficiently to do its work and thereby fastens upon each inescapable responsibilty for properly doing its work. Such an arrangement also tends to the preservation of interdepartmental harmony and mutual respect and helpful-ness. Without such an arrangement there cannot be responsibility. Without responsibility, there cannot be efficiency.

If the respondent's contention is sustained, a witness summoned *duces tecum* before the Senate, for instance, could assault the process server. That would be a completed act. He could not only refuse to respect the summons, but he could destroy the documents summoned, after service. He could bring them into the presence of the Senate and in its presence destroy the documents, and that destruction, being a completed act, would relieve him from all power of the Senate, coercive or otherwise. The Senate could only go to the other branches of the Government and tell them about it.

If the same limitation rested upon the power of this Court which respondent asks the court to declare with respect to the Houses of Congress, a document vital to a litigation could be destroyed after service of subpoena, possibly in the court room, and yet the Court could do nothing but appeal to the District Attorney. And if he were persuaded to act, punishment would still depend upon persuading the Judge, the grand jury, and each of 12 petty jurors. Doubtless there are many interests in this country that would like to see that limitation put upon the power of the courts, as well as upon the Houses of Congress.

It is necessary to protect the interests of the private citizen against governmental oppression, and it is also necessary to preserve a sufficient strength in government to protect the interests of the people. Government, in order to be respected and to be able to protect the weak, must be strong enough to compel respect for its mandates.

In a definite sense, under the test of necessity provided by the Court, this is a fact case. The Houses of Parliament, before the Constitution was written, insisted upon this power as a matter of necessity, and public opinion agreed. They were experts on the question of need. The same is true with reference to the judiciary during that period. Since the writing of our Constitution, our judges, our members of Congress, British judges, and members of the British Parliament, by practice and formal action give their testimony that this power is a necessity.

Consider the place of the Senate in our Government, its relation to the people and the vast powers intrusted to it by the Constitution. And yet this Court is asked to hold that in a matter, however important, when the examination of documents is necessary, an individual who could help the Senate if he would, may be guilty of every conceivable act of contempt and interference, may paralyze its inquisitorial machinery, and that there is no power by certain and speedy punishment to establish respect and compel obedience and coöperation. If that were to be held, upon what basis could the Congress claim to be a responsible coördinate branch of the Government, or upon what foundation of fact could the people hold it to that responsibility?

Mr. Frank J. Hogan, with whom *Messrs. Edmund L. Jones,* and *Duke M. Patrick* were on the brief, for respondent.

The acts complained of were past and completed acts.

The resolution and warrant and the other proceeding in the Senate, including the debate leading to the adoption of "the mode of procedure and rules" for the trial of the case, reveal the intention of the Senate to try a private citizen for a completed (alleged) offense, for the sole purpose of inflicting punishment as such.

The administration of punishment as such for a past and completed act is criminal rather than civil in character. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441.

Not only is punishment for crime a judicial function; not only, under our Constitution, is the judicial power sharply separated from the legislative and executive; but it is contrary to the spirit of our institutions to treat anything as a crime unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed, as punishment, by any branch of the Government except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law, unbiased as to facts, and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment. He is not to be indicted, tried, judged and sentenced by a purely political body of our Government, where, after hearing the same evidence and being, presumably, governed by the same rules of law, partisan reasons may result in a division on the questions of guilt, and infliction of punishment based almost entirely on party lines; a body responsible to no higher authority for its ignoring of evidence or its disregard of settled law; from which, if the Senate's present position be sound, there is no appeal; against which no bill of impeachment can be brought.

Nor will it alter the character of the transaction to say that, even though designed and intended as a punitive measure, it would also have remedial effects. In the first place, the primary and not the incidental object is the one which controls the nature of the punishment. *Gompers* v. *Bucks Stove & Range Co., supra.* In the second place, the record shows that under the circumstances it could not have had a remedial effect. The offense with which respondent was charged, when tested by any standard, constituted a criminal contempt.

In vain do we search the Constitution for any provision authorizing either House of Congress to try and imprison a private citizen for any offense.

By § 5 of Art. I, a House may punish its own members for violating its rules or disturbing its proceedings; and that is all. But there are other provisions which vest the entire judicial power of the United States in the federal courts exclusively (Art. III, § 1; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 328); and others which command that the trial of crimes, except in cases of impeachment, shall be by jury; that in all criminal prosecutions the accused shall enjoy the right of a trial by an impartial jury; and that no person shall be deprived of life, liberty or property without due process of law.

In *Anderson* v. *Dunn,* 6 Wheat. 204, the first case on the subject, the sole question presented was whether the House of Representatives could take cognizance of contempts committed against themselves *under any circumstances.* This Court answered that question in the affirmative; but the case is no authority for the existence of a broad power, which, when formally exercised, cannot be the subject of judicial inquiry. The extent of the implied power, when any exists, was declared to be "the least possible power adequate to the end proposed," (6 Wheat. 231), which, said Chief Justice White in *Marshall* v. *Gordon,* 243 U. S. 521, "was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify."

The opinion in *Anderson* v. *Dunn* was criticized and limited in the next case on the subject, *Kilbourn* v. *Thompson,* 103 U. S. 168. There the contention was again made that the power of Congress or either House to punish a person not a member for contempt was a broad and unreviewable power. The Court noticed that the argument in favor of the existence of such a power rested, first, on its exercise by the House of Commons of England, from which it was said we derived our system of parliamentary law; and, secondly, upon the necessity of such a power to enable the two Houses of Congress to perform their duties and exercise their express powers under the Constitution.

In answering these arguments, this Court pointed out that such power could not possibly be implied from the powers which the Constitution confers expressly without doing violence to the letter and spirit of the Constitution itself, the source of all federal power whatsoever. Among other things, the Court discussed the difference between our legislative system and the English Parliament, observing that that difference had been judicially noticed and applied by the English Courts themselves in *Kielley* v. *Carson,* 4 Moore (P. C.) 63. The conclusion was that while, under certain circumstances, either House of Congress has power to deal with a contempt committed by a person not a member, the exercise of the power is limited to cases where it is necessary to the proper performance of constitutional functions, and that judicial inquiry into the circumstances is contemplated by our constitutional form of Government and necessary for its preservation.

The Court there characterized the division of our Government into three grand departments—executive, legislative, and judicial—as one of the chief merits of our system, and declared it essential to the working of the system that persons entrusted with power in one of the branches shall not be permitted to encroach upon the powers confided to the others. It pointed out that the power of Congress itself, when acting through the concurrence of both branches, is a power dependent solely on the Constitution, and that such powers as are not conferred by that instrument, either by express grant or by fair implication from such grant, are reserved to the States or the people; that no general power of inflicting punishment was conferred upon Congress by that instrument, and that any such implication was repugnant to other express provisions, such as the due process clause of the Fifth Amendment, which had repeatedly been construed by this Court and others of the highest authority as requiring in such cases a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. To make what the Court evidently regarded as a manifestly clear proposition doubly so, it was observed that of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in response to an express constitutional provision to that effect; and, in declaring that the judicial power shall be vested in the Supreme Court and the inferior courts to be ordained by Congress, the Constitution in effect declares that no judicial power is vested in Congress or either branch of it, save in the cases specifically enumerated.

In *Marshall* v. *Gordon,* 243 U. S. 521, this Court applied these controlling principles to a situation essentially like the case at bar. In that case, decided as one of first impression, the Court said that the power of the House of Commons to punish directly for a variety of contempts rested upon an assumed blending of legislative and judicial powers which would be destructively incompatible with our tripartite form of Government. It declined to accept the argument that either House of Congress had such authority. The implied power "rests solely upon the right of self-preservation to enable the public powers given to be executed." The power "does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to *prevent* acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to *compel* in order that legislative functions may be performed." Reviewing the history of the subject since the adoption of the Constitution, this Court in that case was unable to discover a single instance where, in the exertion of the power to compel testimony, restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty of punishment for the refusal remaining controlled by the general criminal law, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration.

In the present case it is patent that the Senate now asserts on the ground of necessity the existence of practically the full power belonging to the House of Lords, though this Court has distinctly held that it has no such power by express grant or by analogy to that body.

We submit that the decision in *Marshall* v. *Gordon, supra,* a decision neither weakened nor destroyed in any subsequent case, clearly holds that while each House of Congress may have all power, by removal from its halls, and by coercive imprisonment, necessary to enable it to perform its constitutional duties, it is absolutely without power itself to impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offenses, punishments must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

This is not to say that there is no power to continue to deal with contemptuous conduct to prevent its continuance or immediate obstructive recurrence. The power so to deal, and the limitation thereof, are made crystal clear in the Chief Justice's opinion in the *Marshall* case. In *Kilbourn* v. *Thompson,* 103 U. S. 168, 182 *et seq.,* this Court gave emphatic and unqualified approval to the decision of the Privy Council in the English case of *Kielley* v. *Carson,* 4 Moore (P. C.) 63. In *Marshall* v. *Gordon, supra,* this Court again refers at length to *Kielley* v. *Carson,* and gives unqualified approval to the principal point there decided, namely, that the ancient power of the British Houses of Parliament to inflict punishment, as such, for contempts or other offenses, did not exist in such legislative bodies as the Houses of Congress of the United States.

The opinion in the *Marshall* case concedes that "when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority," "jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power." But no tenable argument can be made to uphold the contention that, after the papers which had been taken from respondent's office by Givven had been returned and produced before and delivered to the Committee, the Senate, or any one else, could legitimately and fairly conclude that there was "necessity," in proceedings to punish in order to prevent immediate recurrence of respondent's act.

Congress has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder; to keep order in the halls of Congress, and to that end to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law; and, as to witnesses, to force a witness to attend before either House, or any committee thereof, and to testify, or produce, under proper subpoena, material documents, and, as a means to that end, to coerce him by imprisoning him until he does attend and testify or produce.

For the offense committed by the past refusal to testify or produce, the penalty or punishment remains controlled by the general criminal law (see 243 U. S., p. 544).

Existing law (§§ 102–104 and 859, Rev. Stats.), enacted by both Houses, and approved by the Executive, would seem ample to provide for protection. But if anything be lacking, Congress may supply it by law. See *Marshall* v. *Gordon, supra,* p. 548.

McGrain v. *Daugherty,* 273 U. S. 135, solely concerned the power to arrest a citizen and bring him before the bar of the Senate to answer questions pertinent to an inquiry being properly conducted by the Senate. In it the principles established in the *Kilbourn* and *Marshall* cases were in no sense qualified.

The cases involving proceedings under the general criminal law to punish for conduct amounting to contempt, do not controvert, but admit, the accuracy of the rule contended for by respondent. *In re Chapman,* 166 U. S. 661; *Sinclair* v. *United States,* 279 U. S. 263. The *Chapman* case particularly recognizes and applies the basic difference between punishment as such and punishment which is merely an incident to a coercive measure. And this is twice pointed out in *Marshall* v. *Gordon,* 243 U. S. 521, at pages 542 and 547.

If, as petitioner contends, the Senate has the power to administer punishment as such, then, we ask, Why is this punishment confined (as petitioner concedes) to imprisonment only? Why has not the Senate the power to punish by fine or by both fine and imprisonment? If the Senate may impose a sentence for the definite period of ten days, why can it not impose one of ten months or two years? And lastly, why may not the imprisonment extend beyond the session? The answer is: Because the power is remedial and coercive only.

Marshall v. *Gordon, supra,* and *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, are clear illustrations of the fundamental difference between the legislative and judicial power to inflict punishment, as punishment, for contempt. *Ex parte Grossman,* 260 U. S. 87, recognizes and applies the difference between civil contempt and criminal contempt as pointed out in the case of *Gompers* v. *Bucks Stove & Range Co., supra.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition for a writ of *habeas corpus* was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District with directions to discharge the prisoner from custody. 63 App. D. C. 342; 72 F. (2d) 560. This Court granted certiorari because of the importance of the question presented.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The Resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an enquiry which it had the constitutional power to make; that the Committee [1] had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain* v. *Daugherty,* 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena *duces tecum,* or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional aver-

[1] Pursuant to Senate Resolution 349, 72nd Congress, Second Session.

ments essential to the decision of the question presented are, in substance, these: The Senate had appointed the Special Committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail." MacCracken had been served, on January 31, 1934, with a subpoena *duces tecum* to appear "instanter" before the Committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he was a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the Committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the Committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the Committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1, he personally permitted Givven, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized

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him to take therefrom papers which did not relate to air mail contracts. Givven, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice-president of Northwest Airways, Inc., without MacCracken's knowledge, requested and received from his partner, Lee, permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the Committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a wastepaper basket.

Upon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege.[2] Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the Committee all the papers then remaining in the files. On February 3, (after a request therefor by MacCracken) Givven restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by

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[2] Upon the conclusion of the hearing on February 2, the Committee made to the Senate a report (No. 254) setting forth the facts elicited. Thereupon the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant-at-Arms to take MacCracken into custody before the bar of the Senate; "to bring with him the correspondence . . . referred to and then and there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound. . . ." The warrant was served on February 2, 1934; MacCracken was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On that day (in view of Resolution No. 172) he was released from custody under Resolution No. 169; and the proceedings under Resolution No. 169 are not here involved.

Brittin were later produced.[3] It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States "to the best of his ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 . . . all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punish-

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[3] But the brief for MacCracken, the respondent, states: "By February 6th every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate." The reference in the brief is to the fact (to which attention was called by counsel for Jurney) that, after MacCracken and Brittin had testified, post office inspectors, acting for the Committee, searched the sacks of waste papers taken from Brittin's office; and succeeded in collecting most of the pieces of the papers which Brittin destroyed. By pasting these pieces together they were able to restore for the Committee most of the papers removed from the Northwest Airways, Inc., files. (Senate Document No. 162, 73rd Cong., 2nd Sess., pp. 106–116.)

able unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn* v. *Thompson,* 103 U. S. 168, there was no legislative duty to be performed; or because, as in *Marshall* v. *Gordon,* 243 U. S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795;[4] and since then it has been exercised on several occasions.[5] It was asserted, before the Revolution, by the colonial

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[4] Robert Randall and Charles Whitney were taken into custody by the House of Representatives, on December 28, 1795, on charges of attempting to bribe some of its members. Whitney was discharged on January 7, 1796, before trial. Randall, however, on January 6, was found guilty of a contempt and of a breach of the privileges of the House, was reprimanded by the Speaker, and was committed to the custody of the Sergeant-at-Arms until further order of the House. On January 13, his petition to be discharged from custody was granted, upon payment of fees. 5 Annals, 4th Cong., 1st Sess., 166–195, 232, 200–229, 237, 243.

[5] In 1832, Samuel Houston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees. 8 Debates, 22nd Cong., 1st Sess., 2512–2620, 2810–3022. In 1865, A. P. Field was taken into custody for assaulting a member and was reprimanded by the Speaker. 70 Globe, 38th Cong., 2nd Sess., 991. So too, Charles C. Glover, in 1913. Cong. Rec., 63rd Cong., 1st Sess., 281–283, 499–503, 1431–1453. In 1870, Patrick Wood, for a similar offence, was imprisoned for three months by order of the House. 94 & 95 Globe, 41st Cong., 2nd Sess., 4316–17, 4847, 5253, 5301. In 1795, Sen. James Gunn, whose challenge of a member of the House was considered a breach of privilege, escaped with an apology. 5 Annals, 4th Cong., 1st Sess., 786–790, 795–798. See Shull, Legislative Contempt—An Auxiliary Power of Congress (1934) 8 Temple L. Quart. 198.

assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.[6] In *Anderson* v. *Dunn,* 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall* v. *Gordon, supra,* upon which MacCracken relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offence; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the estab-

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[6] See Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691, 700–719; Clarke, Parliamentary Privilege in the American Colonies, Essays in Colonial History Presented to Charles McLean Andrews (1931), pp. 124, *et seq.;* May, Law and Usage of Parliament (5th ed., 1863), pp. 83–97. Since the American Revolution, it has been held that colonial assemblies of the British Empire, have, in the absence of express grant, and "without any usage, any acquiescence, or any sanction of the Courts of Law," no power to adjudicate upon, or punish for, contempts, *Kielley* v. *Carson,* 4 Moore P. C. 63; even when the contempt is committed in the presence of the Assembly by one of its own members. *Doyle* v. *Falconer,* L. R. 1 P. C. 328; *Barton* v. *Taylor,* 11 App. Cas. 197; compare *Whitcomb's Case,* 120 Mass. 118, 122. But upon some colonial assemblies contempt powers as broad as those of the British House of Commons have been conferred. Compare *Dill* v. *Murphy,* 1 Moore P. C. (N. S.) 487; *The Speaker of the Legislative Assembly of Victoria* v. *Glass,* L. R. 3 P. C. 560; *Fielding* v. *Thomas,* (1896) App. Cas. 600.

lished and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means.[7] Compare *Ex parte Nugent,* Fed. Cas. No. 10,375; *Stewart* v. *Blaine,* 1 MacArthur 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power.[8] The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn* v. *Thompson, supra;* and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes. *Marshall* v. *Gordon, supra.*

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[7] The many instances in which the Houses of Congress have punished contumacious witnesses for contempt are collected and discussed in Eberling, Congressional Investigations (1928). See, too, Dimock, Congressional Investigating Committees (1929); Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; compare May, *op. cit., supra,* pp. 407, 408. Witnesses found guilty of prevaricating before investigating committees have been imprisoned by the House of Commons under circumstances indicating that there was no thought of inducing further testimony, but only of punishing for the past offence. See case of Charles Woolfen, 112 Comm. Jour. 354, 372, 377; of Acton, Sheriff of London, Petyt, Miscellanea Parliamentaria (1680) p. 108; of Randolph Davenport, *Id.,* p. 120.

[8] See remarks of Sen. Charles Pinckney in the case of the Editor of the Aurora, 10 Annals, 6th Cong., 1st Sess., 69; of Rep. Barbour and Rep. Poindexter in the case of Colonel Anderson, 32 Annals, 15th Cong., 1st Sess., 624, 654; of Rep. Polk in the case of Samuel Houston, 8 Debates, 22nd Cong., 1st Sess., 2512; of Sen. Sumner in the case of Thaddeus Hyatt, 53 Globe, 36th Cong., 1st Sess., 1100; see, too, Jefferson's Manual, §§ 293–299.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, R. S. § 102, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair* v. *United States,* 279 U. S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.[9] That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman,* 166 U. S. 661, 671–672: "We grant that Congress could not divest itself or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compare *Ex parte Hudgings,* 249 U. S. 378, 382.[10] As was said in *In re Chapman, supra,* "the same act may be an offence against one jurisdiction and an offence against another; and indictable statutory offences may be punished as such while the offenders may likewise be sub-

[9] See remarks of Rep. Orr, 43 Globe, 34th Cong., 3rd Sess., 404, 405.

[10] Samuel Houston was in fact indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. See 2 Ops. Atty. Gen. 655.

jected to punishment for the same acts as contempts, the two being *diverso intuito* and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for *habeas corpus* that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of *habeas corpus* is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597; *Henry* v. *Henkel,* 235 U. S. 219; *Matter of Gregory,* 219 U. S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

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

HELVERING, COMMISSIONER OF INTERNAL REVENUE, v. GRINNELL, EXECUTOR.

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

No. 268. Argued January 16, 1935.—Decided February 4, 1935.

Property does not *pass* under a general power of appointment exercised by will, within the meaning of § 302 (f), Revenue Act of 1926, where the person named as appointee elects to renounce the appointment and take as remainderman under another will, which created the power. P. 155.

70 F. (2d) 705, affirmed.

Certiorari, 293 U. S. 543, to review the reversal of an order of the Board of Tax Appeals. The Board sustained the Commissioner in assessing a deficiency in a federal estate tax because of failure to include in gross estate the value of property which he thought had passed under the exercise by the testatrix of a general power of appointment.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key* and *John MacC. Hudson* were on the brief, for petitioner.

Mr. Bernhard Knollenberg, with whom *Messrs. Allen Evarts Foster* and *Harry J. Rudick* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

In 1876, John O. Stone died a resident of New York. He left a will by which he created for the benefit of his daughter, the decedent, Annie Stone, a trust fund, the income from which was to be paid to her during her life. The will provided that upon her death her share of the estate should go and be applied to such persons and such uses as she might appoint by last will and testament; but in default of such appointment, her share of the estate should go and belong to her children or issue, respectively, by right of representation; or, in default of such issue, to her next of kin. Surviving John O. Stone, were his widow and three daughters—namely, this decedent, and Ellen J. Stone and Sarah J. Grinnell. These constituted his only heirs at law and next of kin. The widow died many years before the death of Annie Stone. Annie Stone, the decedent, died September 24, 1927, unmarried, without issue, and leaving as her sole next of kin her two sisters just named. Her will provided "that what property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, . . ." After the death of Annie Stone, the two sisters in writing renounced their right to receive the property under this paragraph of her will and elected to take the property under the provisions of the will of their father, John O. Stone.

The Commissioner of Internal Revenue declared a tax deficiency of several thousand dollars in the federal estate tax on the estate of Annie Stone, upon the theory that the property derived from the estate of her father was required to be included in her gross estate in virtue of the fact that she had exercised a power of appointment in respect thereof. The Board of Tax Appeals, on review, sustained the commissioner. The order of the Board of Tax Appeals based on this holding was reversed by the court of appeals, 70 F. (2d) 705, upon the ground that the property did not *pass* under the exercise of the power; and consequently, an essential condition of § 302 of the act of 1926 was not present.

Section 302, c. 27, 44 Stat. 9, 70, 71, provides:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; . . ."

The crucial words are "property passing under a general power of appointment exercised by the decedent by will." Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative.

The contention of the government is that the tax is imposed "upon the power to transmit or the transmission of property by death; the shifting of the economic benefits in property is the real subject of the tax. . . . the property in question passed to the sisters under the general power of appointment exercised by the decedent by will within the meaning of the statute." But this involves the obviously self-destructive conclusion that an unsuccessful attempt to effectuate a thing required by the statute is the same as its consummation. The tax here does not fall upon the mere shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method—namely, by their "*passing* under a general power of appointment," and not otherwise. Acceptance of the government's contention would strip the italicized word of all meaning.

The government relies upon *Chase Nat. Bank* v. *United States,* 278 U. S. 327, and *Tyler* v. *United States,* 281 U. S. 497. In neither of these cases was the court concerned with the meaning of the act. In the first case (p. 334) the court said the tax was plainly imposed by the explicit language of the statute, and that there was no question as to its construction. The sole question for determination was as to the constitutional validity of the act. The same is true in respect of the second case. Neither case sheds any light upon the question here involved, namely, the meaning and application of the statutory provision.

The court below leaned confidently upon the decision of the New York Court of Appeals in the *Matter of Lansing,* 182 N. Y. 238; 74 N. E. 882. That well considered case and this in principle cannot be distinguished. We think the reasoning of the New York court as to the meaning and application of the state law equally applies to the federal statute here in question. There, as here, the contention of the taxing authorities (there under the state act, here under the federal act) was that the appointee named in the will of the donee of the power took her property thereunder and not under the will of the creator of the power, notwithstanding the property had been given to her by the will of the latter subject to the power of appointment. But the state court answered that the power gave the appointee nothing and took nothing away from her; that she had the right of election and could refuse to take under the appointment and still hold the property, since her title without was as good as it was with the power; that she treated the exercise of the power as a mere attempt and not as an effective execution of it; and that it sufficiently appeared that she elected to reject title from that source.

"Her rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. . . . Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." [pp. 243–244.]

The opinion, p. 244, points out that the power might have been exercised so as to have left the appointee with no title at all; but that in fact it was exercised so as to leave her the same title that she would have had if the power had not been exercised. The same is true here.

"An appointee under a power," the court continued, "has the right of election, the same as a grantee under a deed. . . . He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where it was before." [p. 245.]

We granted the writ of certiorari in this case because of an alleged conflict with *Wear* v. *Commissioner,* 65 F. (2d) 665, and *Lee* v. *Commissioner,* 61 App. D. C. 33; 57 F. (2d) 399. The reasoning and conclusions of those courts and of the court below cannot be reconciled. We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right, and we hold accordingly.

Judgment affirmed.

FORREST *v.* JACK, RECEIVER.

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

No. 214. Argued December 11, 1934.—Decided February 4, 1935.

1. The liability of stockholders for the debts of national banks is based on Title 12 U. S. C. § 64. P. 161.
2. As a general rule, the person registered as owner on the books of the bank is liable, but the actual owner may be held though not registered. P. 162.
3. Upon the death of the owner, his personal representative is exempt but the liability attaches to his estate. *Ib.* § 66. *Id.*
4. No cause of action arises to enforce the liability until assessment has been made by the Comptroller. *Id.*
5. The acts of the Comptroller may not be trammeled, controlled or prevented by state laws. *Id.*
6. In the absence of federal enactment supplying the procedure for enforcing the liability against decedents' estates, the state laws governing claims against such estates are applicable insofar as they are not inconsistent with such enforcement. P. 163.
7. Property that appertained to a decedent's estate is not liable under § 66 on account of assessments made after complete administration, final distribution of all property and extinguishment of the estate. *Matteson* v. *Dent,* 176 U. S. 521, distinguished. *Id.*

8. National bank shares belonging to a decedent's estate in Utah and registered in his name, were transferred in the administration to his widow, without change of registration; the administration was completed, all property distributed, and the estate extinguished, according to the Utah laws. Long afterwards the bank became insolvent and the shares were assessed by the Comptroller. *Held:*

(1) That the administrator, before his discharge, was not required by the Utah law to retain or pay into court any money or property in anticipation of the assessment, then but a possible future liability, and was not guilty of devastavit. P. 163.

(2) The widow, as actual owner of the shares, became liable to assessment, under Title 12 U. S. C., § 64. *Id.*

(3) Real estate that had belonged to the decedent and passed to the widow, and was conveyed by her, without consideration, before the assessment, never became liable to it. *Id.*

71 F. (2d) 264, reversed.
District Court, affirmed.

Certiorari, 293 U. S. 542, to review the reversal of a judgment dismissing an action brought by a receiver of a national bank to recover an assessment on shares made by the Comptroller of the Currency.

Mr. James F. Pierce for petitioner.

Mr. George P. Barse, with whom *Messrs. Will L. Hoyt* and *F. G. Awalt* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

The respondent, receiver of an insolvent national bank, brought this action in the federal court for the district of Utah against the petitioner to recover an assessment made by the Comptroller of the Currency. That court held him not entitled to recover. The Circuit Court of Appeals reversed. 71 F. (2d) 264.

August 17, 1917, Henry Forrest died testate owning six shares of the Nephi (Utah) National Bank stock registered in his name. By his will he gave $1,000 to his niece and the rest of his property to his widow for life, and whatever thereof she might have at death in equal shares to their son, who is the petitioner here, and their daughter. The will was probated in the district court of Juab county, Utah, and petitioner was appointed administrator with the will annexed. Before decree of distribution he and the daughter transferred all their rights to their mother.

March 11, 1920, the court made an order reciting that the estate had been closed, and approved and settled the administrator's final account, and on the next day it entered its decree directing that the property belonging to the estate be distributed to the widow. The administrator made distribution as ordered. The property so transferred included the bank stock, other personal property and real property. Shortly after the distribution, the widow deeded to her daughter some of the real estate and to the petitioner the balance which is still held by him and worth more than $2,000. Respondent says, and we assume, that these conveyances were made without consideration. As petitioner knew, the stock was not transferred on the books of the bank but continued to stand in the name of his father.

After distribution the bank paid a dividend to its stockholders and sent petitioner a check payable to the estate covering the amount applicable to the six shares. He deposited the check in his mother's account in the bank, informed its officers that the stock belonged to her, and suggested that thereafter checks for dividends be made to her. July 4, 1931, she died, having no property other than the bank stock. November 17, 1931, petitioner applied to the court to be discharged as his father's administrator. November 18, having found the certificates covering the six shares among his mother's effects, he delivered them to the bank to be held for her estate. December 1, the court granted his application for discharge. The bank closed the same day. The Comptroller appointed respondent receiver and, March 8, 1932, made an assessment of $100 on each share of the stock. Petitioner refused to pay the assessment on the shares formerly owned by his father.

The complaint asserts devastavit in that the petitioner as administrator failed to pay into court or to retain property sufficient to cover the assessment, or to transfer the stock to a solvent person, and disposed of the entire estate except the stock. It also alleges that the real property deeded petitioner by his mother, having been conveyed to him without consideration, is subject to a lien for the amount of the assessment. The case was tried without a jury. At the close of the evidence, respondent moved for judgment against petitioner personally and, if that be denied, for transfer of the case to the equity side and a decree against the real property. Petitioner moved for judgment. The court denied respondent's motion and granted that of petitioner. The Circuit Court of Appeals held petitioner had not committed devastavit, but that, as the stock stood on the books of the bank in the name of the deceased, his estate remained liable and that petitioner held the real property subject to the assessment. It remanded the case to the district court, directed its transfer to equity, and that decree be entered in conformity with its opinion.

Title 12, U. S. Code, § 64, provides that "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. . . ." And see § 63. Section 66 provides that "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The liability of stockholders is based upon the statute, § 64.[1] As a general rule, the person in whose name the stock stands on the books of the bank is liable,[2] but the actual owner may be held although the stock has not been registered in his name.[3] The liability does not altogether cease on the death of the owner but, as limited and defined by § 66, attaches to his estate.[4] The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living. No cause of action arises until the assessment is made by the Comptroller and, so far as concerns the need and amount, his findings are conclusive.[5] He acts under federal authority, and in respect of determinations, orders and assessments may not be trammeled, controlled or prevented by state laws.[6]

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[1] *McClaine* v. *Rankin*, 197 U. S. 154, 161. *Christopher* v. *Norvell*, 201 U. S. 216, 225. *United States* v. *Knox*, 102 U. S. 422, 424. *Keyser* v. *Hitz*, 133 U. S. 138, 151. *McDonald* v. *Thompson*, 184 U. S. 71, 73–74. *Studebaker* v. *Perry*, 184 U. S. 258, 261.

[2] *Whitney* v. *Butler*, 118 U. S. 655, 660. *Richmond* v. *Irons*, 121 U. S. 27, 58. *Matteson* v. *Dent*, 176 U. S. 521, 530.

[3] *Early* v. *Richardson*, 280 U. S. 496, 499. *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162, 168. *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242, 252. *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606, 619. *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479, 483. *Bowden* v. *Johnson*, 107 U. S. 251, 261. *National Bank* v. *Case*, 99 U. S. 628, 631.

[4] *Matteson* v. *Dent*, 176 U. S. 521, 524. *Zimmerman* v. *Carpenter*, 84 Fed. 747, 751. *Drain* v. *Stough*, 61 F. (2d) 668, 669.

[5] *Kennedy* v. *Gibson*, 8 Wall. 498, 505. *Casey* v. *Galli*, 94 U. S. 673, 677. *National Bank* v. *Case*, 99 U. S. 628, 634–635. *United States* v. *Knox*, 102 U. S. 422, 425. *Bushnell* v. *Leland*, 164 U. S. 684. *McDonald* v. *Thompson*, 184 U. S. 71, 72, 76. *McClaine* v. *Rankin*, 197 U. S. 154, 159, 160. *Rankin* v. *Barton*, 199 U. S. 228, 232.

[6] *Rankin* v. *Barton*, 199 U. S. 228, 232. *Christopher* v. *Norvell*, 201 U. S. 216, 225. Cf. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284.

In the absence of federal enactments relating to procedure for enforcement of the liability imposed by § 66, collection is to be made in accordance with state laws governing claims against estates of deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority.[7] There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, § 66, against estates of deceased stockholders. There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.

In this case, the Comptroller's assessment was made more than eleven years after complete distribution and long after decedent's widow as distributee became the actual, though not the registered, owner of the stock, and liable under § 64. The decree of March 11, 1920, closed the estate. The fact that the administrator was not formally discharged until December 1, 1931, about the time the bank failed, is without significance here, as the Comptroller's assessment was not made until March 8, 1932. As the estate had ceased to exist before the bank became insolvent, the Circuit Court of Appeals rightly held that petitioner as administrator was not required by Utah law (R. S., 1933, § 102–9–26) to retain or pay into court any property or money to cover possible future liability in respect of the stock that had been decreed and distributed to the widow. There is nothing to support the allegation of devastavit.

Section 102–9–28 provides: " When the accounts of the administrator or executor have been settled and an order

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[7] *McClaine* v. *Rankin*, 197 U. S. 154, 158. *McDonald* v. *Thompson*, 184 U. S. 71. *Matteson* v. *Dent*, 176 U. S. 521, 528. *Davis* v. *Weed*, 7 Fed. Cas. 186, 187. Cf. *Yonley* v. *Lavender*, 21 Wall. 276. *Security Trust Co.* v. *Black River National Bank*, 187 U. S. 211, 227, *et seq.* *Williams* v. *Cobb*, 242 U. S. 307.

made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim. . . ." Viewed in the light of that provision, it is plain that the distribution fully extinguished the estate. It follows that petitioner's real estate that had belonged to decedent never became liable for the assessment.

In *Matteson* v. *Dent,* 176 U. S. 521, relied on by the court below and by respondent, this court, affirming the supreme court of Minnesota (70 Minn. 519, 73 N. W. 416; 73 Minn. 170, 75 N. W. 1041) held the estate not to have been extinguished when the bank became insolvent or when the assessment was made. The facts of that case were similar to those now before us. The estate of a deceased stockholder of a national bank was, after administration, fully distributed without a transfer of the stock on the books of the bank. Later, because of its insolvency, the Comptroller closed the bank and made an assessment against its stockholders. He brought suit and obtained judgment against distributees under and in accordance with the General Statutes of Minnesota, 1894, § 5918, which declares: "The next of kin of a deceased person are liable to an action by a creditor of the estate, to recover the distributive shares received out of such estate, or so much thereof as may be necessary to satisfy his debt . . ." That this statute utterly differs from that of Utah (§ 102–9–28) clearly appears from the opinions of the Minnesota supreme court. In the first one it said (p. 522): "The claim here in question was a contingent claim, which did not become absolute until after the time to file claims had expired, and the estate was distributed to the widow, heirs and next of kin. Under these circumstances, the plaintiff may maintain an action under G. S., 1894, c. 77, [which includes

§ 5918] against the distributees to recover of them the amount of the liability, not exceeding the amount of the distributive share received by each." On the second appeal, the court overruled the contention that the liability of each distributee was limited to the amount of the bank stock he received from the estate. And this court, following and interpreting these decisions and affirming the judgment, held that, although the property had been allotted and delivered to the persons thereunto entitled under the decree of the probate court, the estate had not been extinguished but continued to exist subject to the liability defined in § 66. As by Minnesota law—contrary to that of Utah—decedent's estate after distribution continued to be subject to the enforcement of claims, that case does not support respondent's contention here.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

SEABURY, RECEIVER, *v.* GREEN, ADMINISTRATRIX, ET AL.

CERTIORARI TO THE COURT OF COMMON PLEAS FOR SUMTER COUNTY, SOUTH CAROLINA.

No. 434. Argued December 11, 12, 1934.—Decided February 4, 1935.

1. The liability of a decedent's estate to be assessed as stockholder of a national bank for the debts of the bank, depends upon the federal law, Title 12 U. S. C., §§ 64, 66; and a ruling of a state court against such liability necessarily depends upon a construction of that law and is reviewable under § 237 (b) of the Judicial Code. P. 168.
2. For want of capacity, a minor is not subject to assessment on national bank shares sought to be distributed to him as part of a decedent's estate, though in form they were transferred to his name on the books of the bank. The estate continues to be liable as stockholder under Title 12 U. S. C., § 66. P. 168.

3. Under Title 12 U. S. C., § 66, a decedent's estate is liable for assessments on national bank shares left by the decedent and which have not been validly assigned by final distribution or otherwise, including assessments made after the stockholder's death; and the liability is not limited to property actually in the hands of the personal representative when the bank became insolvent and when the assessment was made, but may be enforced against property which has been distributed and is held by distributees. P. 168.
4. Discharge of the executor did not, in this case, extinguish the estate. P. 169.
5. The enforcement of liability imposed by § 66, *supra,* may not be thwarted or impeded by state law. P. 169.

173 S. C. 235; 175 S. E. 639, reversed.

Certiorari, 293 U. S. 549, to review the reversal of a judgment recovered by the Receiver of a national bank on an assessment made by the Comptroller of the Currency.

Messrs. Raymon Schwartz and *George P. Barse,* with whom *Mr. F. G. Awalt* was on the brief, for petitioner.

Mr. Samuel Want for respondents.

Mr. Justice Butler delivered the opinion of the Court.

March 17, 1927, Moses Green, of Sumter County, South Carolina, died testate. He left three sons, a daughter and a deceased son's three minor children. His will was established in probate court; the executor qualified and entered upon his duties. The residuary estate contained 20 shares of stock of the City National Bank of Sumter, which were distributed by the executor and transferred on the books of the bank: four shares to each of testator's children and four to the three minors. The executor was discharged. The bank continued for several years thereafter to carry on as a going concern. Then it closed because of insolvency and was put in the hands of a receiver, the petitioner. The Comptroller made an assessment of $100 a share. No payment having been made on account of the four shares in the names of the minors, an administratrix de bonis non with the will annexed was appointed. She refused to pay the assessment. The undivided interest in real estate received by the distributees under the testator's will is worth more than $2,000, the par value of the 20 shares, and the minors' interest is worth more than $400.

Claiming under Title 12, U. S. C., §§ 64 and 66, petitioner brought this suit in the common pleas court of Sumter County against the administratrix, the sons and daughter, the minors and their guardian. He made no demand and asserted no claim against the executor. The complaint prayed judgment against the administratrix for $400 with interest and that the property taken under the will and held by the other defendants be subjected to the claim. The trial court, following *Rutledge* v. *Stackley,* 162 S. C. 170; 160 S. E. 429, held the minors not personally liable because legally incapable of assuming the obligation; that if living the testator would be, and therefore his estate is, liable and that petitioner is entitled to judgment against the administratrix; that the property taken by the minors under the will should be subjected to the payment of the debt and, if not sufficient, the property distributed to and held by the testator's sons and daughter. It gave judgment for petitioner in accordance with these rulings. The administratrix and minors appealed. The supreme court reversed. 173 S. C. 235; 175 S. E. 639. It held the will did not direct distribution of bank stock to the minors, but the executor allotted it to them in what he considered an orderly and authorized division of the estate; that, as they could not assume the obligation, their property is not liable, and that, as the transfer to them was not directed by the will and the executor had no power to bind the estate, it was not liable. In support of its conclusion the court suggested that during administration there existed against testator's estate no claim in favor of the bank's creditors; that all debts of the estate were paid and that the executor was discharged without objection. And it said "we can see no reason why a claim which did not exist during the orderly administration of the estate should now be brought up years after the estate closed. . . . It does not seem that either the act of Congress or the State Statute imposing liability on stockholders in banks is sufficient to cover the very peculiar facts existing in this case."

Respondent maintains that no federal question is involved. To the extent the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina, the assumption is so plainly without foundation as to suggest that it must have been inadvertently made. The court's ruling that the estate is not liable for the assessment necessarily depends upon its construction of § 66. The judgment is reviewable here under § 237 (b), Judicial Code.

For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a part of the testator's estate. *Early* v. *Richardson,* 280 U. S. 496, 499. Cf. *McNair* v. *Darragh,* 31 F. (2d) 906. And the estate continued to be liable as a stockholder under § 66. The liability was not by the Congress intended to be limited to property, actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment, made after the stockholder's death, just as it is liable for decedent's indebtedness arising before he died. *Zimmerman* v. *Carpenter,* 84 Fed. 747, 751. Cf. *Matteson* v. *Dent,* 176 U. S.

521. The obligation continues unimpaired until valid assignment of the shares by final distribution of the estate, if not by an earlier transfer. *Forrest* v. *Jack,* decided this day, *ante,* p. 158. Our attention has not been called to any South Carolina statute purporting to, and the state supreme court did not hold that any law of the State does, bar the enforcement of the assessment on the ground it was not made before the discharge of the executor. The decree of the court by which he was discharged, while having the effect of vacating the office, did not operate to extinguish the estate, and so the administratrix de bonis non with the will annexed became the personal representative of the testator and is liable as the testator would be if he were living and owned the stock. As suggested in *Forrest* v. *Jack, supra,* the enforcement of liability imposed by § 66 may not be thwarted or impeded by state law. The state court failed to enforce that liability. It should have held that petitioner is entitled to judgment against the administratrix for the indebtedness owing by the estate on account of the four shares standing in the names of the minors, and that the judgment be enforced against property owned by testator when he died and now held by his children and grandchildren. *Matteson* v. *Dent, supra. McNair* v. *Howle,* 123 S. C. 252, 268; 116 S. E. 279. *Columbia Theological Seminary* v. *Arnette,* 168 S. C. 272, 277, *et seq.*; 167 S. E. 465.

Reversed.

WILOIL CORPORATION *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 439. Argued January 14, 1935.—Decided February 4, 1935.

1. If goods carried from one State have reached their destination in another and there are held in original packages for sale, the latter State has power to tax them, without discrimination, as it does

other property within its jurisdiction; the tax may be laid on the property itself or upon the sale and delivery of it. P. 175.

2. A state tax on distributors of gasoline of so much per gallon sold, is not repugnant to the commerce clause as applied to a case where the vendor, under local contracts for sale of gasoline in tank cars—original packages—to be delivered to the purchasers locally on their rail sidings, was at liberty to take it from local or from outside sources and chose to consign it to the purchasers from another State. P. 174.

3. In such a case, the interstate transportation is merely incidental, and the burden on interstate commerce, if any, is indirect. P. 175.

316 Pa. 33; 173 Atl. 404, affirmed.

Appeal from a judgment affirming a recovery by the State in an action to collect a tax. See 37 Dauphin Co. Rep. 63.

Mr. J. Smith Christy for appellant.

The State Supreme Court was in error as to the effect of the contract.

When a federal right is involved, this Court will examine both fact and law to ascertain whether or not that right has been violated, regardless of the state court's action.

Assuming, however, for the purpose of argument, that appellant was not bound to perform according to the terms of the contract, and at its election could have shipped gasoline from points in Pennsylvania, nevertheless the fact remains that it did ship from Wilmington, Delaware, to Philadelphia, which was interstate commerce and continued to be so until the goods were received by the purchaser on its private siding. *Western Union* v. *Foster,* 247 U. S. 105, 113; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265–272; *Federal Trade Comm'n* v. *Pacific States Paper Assn.,* 273 U. S. 52.

Citizenship does not enter into the determination of the question of interstate commerce. *Bacon* v. *Illinois,* 227 U. S. 504.

Banker Bros. Co. v. *Pennsylvania,* 222 U. S. 210, is clearly overruled as to the instant case by *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. Distinguishing: *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290; *Minnesota* v. *Blasius,* 290 U. S. 1; *Federal Compress Co.* v. *McLean,* 291 U. S. 17.

The contracts of sale were honestly entered into and with no intent to defraud the State of the tax.

Mr. John Y. Scott, Deputy Attorney General of Pennsylvania, with whom *Mr. Wm. A. Schnader,* Attorney General, was on the brief, for appellee.

The fact that appellant secured the liquid fuels in Wilmington for the purpose of performing its agreement with its purchasers was incidental. Since the agreement of appellant was to sell and deliver liquid fuels in Philadelphia when required by the purchasers, it was obviously immaterial to those purchasers where appellant procured the liquid fuels. The agreement did not contemplate that they be procured in Wilmington or in any other particular place. The contract could have been as well performed had appellant procured the liquid fuels in Pennsylvania. Taxation of the sale and delivery of the liquid fuels by appellant to its purchasers, therefore, only remotely and incidentally affected interstate commerce. Cf. *Ware & Leland* v. *Mobile County,* 209 U. S. 405.

It is impossible to distinguish the present case from *Banker Bros. Co.* v. *Pennsylvania,* 222 U. S. 210.

Appellant seeks to distinguish the *Banker Bros.* case by pointing out that there the cars were shipped originally from a point outside Pennsylvania to Banker Brothers Company, and that the company itself then made delivery in Pennsylvania to the ultimate purchaser. Not only were those facts not made the basis of the decision of this Court, but they were barely mentioned in the opinion. It is apparent that the Court did not regard them of any particular importance.

That the tax imposed by the Act here involved is not a tax on property but a tax on transactions is clear.

Similar tax statutes have been regarded and treated by this Court as imposing excise taxes and not property taxes: *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218; *Helson & Randolph* v. *Kentucky,* 279 U. S. 245.

Therefore, the tax was here imposed upon a transaction which was wholly intrastate and not upon the goods. The movement of the goods in interstate commerce was only incidental to that transaction.

Mr. Justice Butler delivered the opinion of the Court.

This case, coming before the court of common pleas of Dauphin county upon the appeal of the company from determinations of state taxing authorities, is an action by the Commonwealth against appellant to recover a tax under § 4 of the Liquid Fuels Act of 1931. P. L. 149. By that act a tax of three cents a gallon is imposed "upon all liquid fuels used or sold and delivered by distributors within this Commonwealth," and distributors are made liable for the payment of the tax. They may add the amount of the tax to the price and are required on all delivery slips or bills to "state the rate of the tax separately from the price of the liquid fuels." Appellant maintained below, and it insists here, that, construed to impose the tax in question, the statute is repugnant to the commerce clause of the Federal Constitution, Art. I, § 8, cl. 3. The trial court held otherwise and gave judgment for the amount claimed. The supreme court affirmed. 316 Pa. 33; 173 Atl. 404.

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3¢ tax," and were subject to, and received, appellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was consignee's private siding in Philadelphia or Essington. Appellant prepared and sent to the buyer an invoice covering each shipment, showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment, is negatived by other circumstances. The contracts were executory and related to unascertained goods. Section 19, Rule 4 (2), Act of May 19, 1915, P. L. 543, 548. It does not appear that when they were made appellant had any fuels of the kinds covered, or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price, and such billing may be merely price-fixing and not an indication of the source or place of shipment. The reference to the tax in the orders and invoices would have been unnecessary if delivery were not to be made in Pennsylvania; for if made at Wilmington, the transactions would not have been within the provision of the taxing act. Upon these considerations, the state supreme court held that the liquid fuels in question were by appellant "sold and delivered" to purchasers in Pennsylvania. And see *Dannemiller* v. *Kirkpatrick*, 201 Pa. 218, 224; 50 Atl. 928. *Frank Pure Food Co.* v. *Dodson*, 281 Pa. 125; 126 Atl. 243. *Charles E. Hires Co.* v. *Stromeyer*, 65 Pa. Super. Ct. 241, 243. The ruling is not challenged by appellant and is binding upon it here.

These contracts did not require or necessarily involve transportation across the state boundary. The precise question is whether the mere fact that appellant caused the fuels to be shipped from Delaware for delivery in tank cars—deemed original packages (*Askren* v. *Continental Oil Co.*, 252 U. S. 444, 449)—on purchasers' sidings, as agreed, makes imposition of the tax repugnant to the commerce clause. There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham*, 8 Wall. 123, 137. The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein. And, if that section may not be constitutionally construed to tax the shipments here in question, then equally free from the burden must be liquid fuel transported by rail or truck from Pennsylvania sources to places of delivery in that State over any route not wholly therein.

Our decisions show that, if goods carried from one State have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. *Woodruff* v *Parham, supra; Brown* v. *Houston,* 114 U. S. 622, 632; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519–522; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. And as that rule applies whether the burden falls directly or indirectly (*Banker Bros. Co.* v. *Pennsylvania,* 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property. Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412–413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources. We need not consider whether deliveries to purchasers ended the interstate commerce involved, including all incidents that in other connections might constitute an essential part of that which is covered by the commerce clause. Cf. *Federal Trade Comm'n* v. *Pacific Paper Assn.,* 273 U. S. 52, 63. Upon the principle applied here recently in *Minnesota* v *Blasius,* 290 U. S. 1, the liquid fuels were taxable in Pennsylvania.

Affirmed.

PENNSYLVANIA *v.* WILLIAMS ET AL., RECEIVERS.

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

No. 394. Argued January 14, 1935.—Decided February 4, 1935.

1. A bill of complaint brought by a shareholder for the appointment of receivers to liquidate an insolvent building and loan association, allegations of diversity of citizenship and requisite jurisdictional amount being unchallenged, is within the jurisdiction of the federal District Court. Jud. Code, § 24; 28 U. S. C., § 41 (1). P. 180.
2. Whether a shareholder of the insolvent corporation, rather than a judgment creditor, may properly bring the suit, and whether under the state law the present shareholder has the status of a creditor, are questions which go to the propriety of the action of the court as a court of equity and not to its jurisdiction as a federal court. P. 181.
3. Objection to the equity jurisdiction of the District Court may be waived by the parties by consent or by failure to make it seasonably. P. 181.
4. The authority of the federal District Court to hear and make disposition of a cause within its jurisdiction is not subject to collateral attack nor to diminution or control by state statutes; and error in the exercise of that jurisdiction can be remedied only by appeal. P. 182.
5. A shareholder in an insolvent Pennsylvania building and loan association brought a bill of complaint in the federal District Court for that State, alleging diversity of citizenship and the requisite jurisdictional amount and praying for the appointment of receivers to liquidate the business and for an injunction restraining creditors and others from interfering with or taking possession of the property. Statutes of Pennsylvania provided a procedure for the liquidation of such associations, under the direction of a Secretary of Banking and substantially similar to receivership proceedings in the federal courts. There was no contention that the state procedure was inadequate or would not be diligently and honestly followed. *Held*, upon the petition of the Commonwealth invoking its discretion, the District Court should have relinquished its jurisdiction in favor of the state administration of the corporate assets by the state officer. Pp. 182, 186.

6. The public interest requires that federal courts of equity exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. P. 185.
7. A federal court of equity should be slow in the exercise of jurisdiction when it involves an unnecessary interference by injunction with the lawful action of state officers. P. 185.
8. In the present case, the District Court may retain jurisdiction only for the purpose of directing the surrender of the assets and property with all convenient speed to the state officer, the receivers to retain only sufficient of the assets to pay their reasonable fees and any obligations lawfully incurred by them, and for the purpose of promptly discharging the receivers and settling their accounts, whereupon the suit should be dismissed. P. 186.

72 F. (2d) 509, reversed.

Certiorari, 293 U. S. 547, to review a judgment affirming a judgment of the District Court, 4 F. Supp. 779, denying the Commonwealth's petition for leave to intervene in a proceeding for the liquidation of an insolvent building and loan association and for an order directing the federal court receivers to surrender the assets to the state Secretary of Banking.

Mr. Wm. A. Schnader, Attorney General of Pennsylvania, with whom *Mr. Harold D. Saylor,* Deputy Attorney General, was on the brief, for petitioner.

Mr. Gordon A. Block, with whom *Messrs. Grover C. Ladner* and *Abraham L. Freedman* were on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, directed to the Court of Appeals for the Third Circuit, to resolve questions of public importance growing out of the rival claims of a federal district court and the Department of Banking of the Commonwealth of Pennsylvania; each asserts authority to liquidate the business and affairs of an insolvent building and loan association, organized under the laws of Pennsylvania.

On February 9, 1933, a New York shareholder in Mortgage Building and Loan Association, a Pennsylvania corporation, on behalf of himself and other shareholders filed a bill of complaint in the district court for eastern Pennsylvania, naming the Association as defendant, and alleging that it was the result of the merger of several building and loan associations, in one of which the plaintiff in the suit was a shareholder, and that he had refused to participate in the merger and had demanded of the Association cancellation and payment of his shares. The bill alleged the insolvency of the Association and a threatened race of diligence by its creditors to satisfy their claims from the assets of the corporation, and prayed the appointment of receivers for the corporation, the liquidation of its business and assets, and the usual injunction restraining creditors and others from interfering with or taking possession of its property. Thereupon, on the same day, and on the appearance of the defendant corporation, which interposed no objection, the district judge appointed temporary receivers. No notice of the application was given to the corporation's creditors or other shareholders, or to the Department of Banking of the Commonwealth. On the following day the corporation filed its answer, admitting the material allegations in the bill of complaint and joining in its prayer.

On that day the Secretary of Banking informally requested the district judge not to make the appointment of the receivers permanent and to allow the property of the defendant to be surrendered to the Secretary, to be liquidated and administered in accordance with the state statutes. On March 27, 1933, the Commonwealth filed its petition in the district court, asking leave to intervene in the pending equity proceeding and for an order directing the receivers to surrender the assets of the defendant association to the State Secretary of Banking. In addition to the matters already stated, the petition alleged the further facts, which are admitted or established: that the Association, organized as a building and loan association, is subject to the supervision of the State Department of Banking, as provided by the Banking Act of June 15, 1923, P. L. 809; that the statutes of the Commonwealth afford a complete, comprehensive and economical scheme for liquidation by the Secretary of Banking of such a building and loan association, when insolvent or in a financially unsound condition; that § 21 of the statute, providing that the Secretary, after notice and hearing, may, with the consent of the Attorney General, take possession of the business and property of a building and loan association when it appears to be in an "unsafe or unsound condition to continue business," specifically authorizes the Secretary to take possession of the property of the association when it is "in the hands of a receiver appointed by any court"; that upon taking such possession the Secretary is required, by § 22, to issue and file his certificate to that effect; that pursuant to the requirements of the statute, the Secretary, after the prescribed hearing, had found the defendant insolvent and in the hands of a receiver and that, with the consent of the Attorney General, he had on February 17, 1933, duly made and filed his certificate, "taking possession" of the property and appointing a special deputy as agent to assist in liquidating the defendant's business and property.

The district court denied the petition of the Commonwealth and later appointed the temporary receivers, with another, as permanent receivers, who are respondents here. It treated the case as though it were one of the rival claims of a state and a federal court to jurisdiction over the same subject matter and property, see *Harkin* v. *Brundage,* 276 U. S. 36, and held that the jurisdiction of the district court had attached when the bill of complaint was filed and that it was the duty of the court, under the laws and the Constitution of the United States, to retain that jurisdiction and to proceed with the liquidation to the exclusion of the state authorities. 4 F. Supp. 779. The Court of Appeals for the Third Circuit affirmed upon like grounds. 72 F. (2d) 509.

The Attorney General of the Commonwealth argues here, as he did in both courts below: (a) that the federal court is without jurisdiction to direct the liquidation in a suit brought against the corporation by a shareholder, since both parties are subject to and bound by the local law, which provides for liquidation of a domestic corporation exclusively through the agency of a state supervisory officer; and (b) that, in any event, the court in its discretion should have refused the appointment of receivers or, having appointed them, it should have granted the petition of the Commonwealth and directed the receivers to surrender the property of the association to the state official.

1. The statutes of the United States, as incorporated in the Judicial Code, c. 231, § 24, 36 Stat. 1087, 1091; 28 U. S. C. § 41 (1), provide that district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and . . . is between citizens of different states." We do not doubt that the allegations in the present bill of complaint are sufficient to establish the jurisdiction of the district court as a federal court; that is to say, it properly invokes the power and the authority, conferred upon the district court by the Constitution and statutes of the United States, to entertain the suit. The bill alleges diversity of citizenship and the requisite jurisdictional amount, both of which allegations stand unchallenged, see *Philadelphia, Wilmington*

& Baltimore R. Co. v. Quigley, 21 How. 202, 214; *Deputron* v. *Young,* 134 U. S. 241, 251; *Healy* v. *Ratta,* 292 U. S. 263, 271, and prays relief which a federal court of equity is competent to give, see *Duignan* v. *United States,* 274 U. S. 195, 199.

Although, as will presently appear, the district judge in the exercise of his discretion might appropriately have given notice, to the officers of the Department of Banking, of the application for the appointment of receivers, such notice was not prerequisite to the exercise of its jurisdiction. See *Harkin* v. *Brundage, supra; Re Metropolitan Railway Receivership,* 208 U. S. 90; cf. *Marin* v. *Augedahl,* 247 U. S. 142.

The objection that the suit was brought by a shareholder of the insolvent corporation rather than by its judgment creditor, see *Burnrite Coal Briquette Co.* v. *Riggs,* 274 U. S. 208, as well as the opposing contention that under Pennsylvania law the present shareholder has the status of a creditor, see *Nice Ball Bearing Co.* v. *Mortgage Building & Loan Association,* 310 Pa. 560; 166 Atl. 239, need not now be considered. Even if valid it does not go to the jurisdiction of the district court as a federal court, but only to the propriety of its action as a court of equity. See *Smith* v. *McKay,* 161 U. S. 355, 358, 359; *Blythe* v. *Hinckley,* 173 U. S. 501, 507; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 500; *Twist* v. *Prairie Oil & Gas Co.,* 274 U. S. 684, 690. Unlike the objection that the court is without jurisdiction as a federal court, see *Mansfield, Cold Water & Lake Michigan Ry. Co.* v. *Swan,* 111 U. S. 379, 382, the parties may waive their objections to the equity jurisdiction by consent, *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380; *Re Metropolitan Railway Receivership, supra,* 109, 110, or by failure to take it seasonably, *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 535, 536; *Southern Pacific R. Co.* v. *United States (No. 1),* 200 U. S. 341, 349. Even if the present objection be regarded as valid and as one which, in some circumstances, the court should take *sua sponte* at any stage of the proceedings, despite the waiver by the parties, compare *Harkin* v. *Brundage, supra,* 52; *Lewis* v. *Cocks,* 23 Wall. 466, 470, the district court was not without jurisdiction as a federal court, for these are questions which it is competent to decide. It was therefore invested with authority to hear and make disposition of the cause, which is not open to collateral attack, see *Bryan* v. *Kennett,* 113 U. S. 179, 198; *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 496, or subject to diminution or control by state statutes. See *United States* v. *Howland,* 4 Wheat. 108, 115; *Neves* v. *Scott,* 13 How. 268, 272; *Mississippi Mills* v. *Cohn,* 150 U. S. 202, 204–206; *Mason* v. *United States,* 260 U. S. 545, 557. Error in the exercise of that jurisdiction can be remedied only by appeal. See *Smith* v. *McKay, supra,* 358, 359.

2. The question remains whether, in the special circumstances of the case, the district court rightly retained its jurisdiction. The relief prayed in the bill of complaint is equitable in its nature, and the prayer was addressed to the sound discretion which is the controlling guide of judicial action in every phase of a suit in equity. The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury, from the waste of the assets of the insolvent corporation which would ensue from a race of creditors to secure payment of their claims by forced sale of the corporate property. By local statutes elaborate provision is made for accomplishing the same end, through the action of a state officer, in substantially the same manner and without substantially different results from those to be attained in receivership proceedings in the federal courts.[1]

[1] The Pennsylvania Banking Act of 1923, P. L. 809, as amended by the Acts of 1927, P. L. 762; 1931, P. L. 193, 563; 1932, P. L. 7, provides for the regulation and supervision of financial institutions,

There is no allegation or contention that the procedure thus provided is inadequate, or that it will not be diligently and honestly followed. In such circumstances the discretion of the district court, invoked by the petition of the commonwealth, should have been exercised to relinquish the jurisdiction in favor of the statutory administration of the corporate assets by the state officer.

The question is not the ordinary one of comity between a federal and a state court, each asserting jurisdiction over the same subject matter and the same property, and where there are shown no special reasons addressed to the discretion of the court first acquiring jurisdiction for relinquishing its jurisdiction in favor of the other. Compare *McClellan* v. *Carland,* 217 U. S. 268, 281, 282;

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including building and loan associations. Section 21 authorizes the Secretary to take possession of the business and property of a building and loan association if its condition is "unsafe or unsound," or if the association has violated the law or an order of the Secretary; he can take possession only after notice and hearing and after securing the approval of the Attorney General. Section 22 requires the Secretary to file a certificate in his office and in that of the prothonotary of the court having jurisdiction (by § 19 the Court of Common Pleas of Dauphin County or of the county in which the corporation is located), stating that he has taken possession of the business and property of the association. The association may, under § 23, obtain court review of the action, by application within ten days for a show cause rule. The Secretary, after giving notice to all persons holding assets of the association (§ 25), and after taking an inventory of the assets (§ 26), may either suspend or continue the business pending determination of whether or not to liquidate the affairs of the association (§ 27). By § 28 the Secretary is authorized to surrender possession upon the resumption of business by the association or the sale of its assets to a successor or independent corporation. Although the authority of the Secretary is not derived from the action of any court, § 29 gives him, "except as herein otherwise provided," the status and powers of a receiver of a court of equity. The court having jurisdiction is given, by § 30, power to enforce orders of the Secretary. Under § 31 his possession continues until liquidation, resumption of

Hyde v. *Stone*, 20 How. 170, 175; *Chicot County* v. *Sherwood*, 148 U. S. 529, 534; *In re Chetwod*, 165 U. S. 443, 460, with *Harkin* v. *Brundage*, *supra*; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Kansas City Pipe Line Co.* v. *Fidelity Title & Trust Co.*, 217 Fed. 187 (C. C. A. 8th); *First National Bank of Memphis* v. *Horuff*, 65 F. (2d) 318 (C. C. A. 5th). Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See *Amos* v. *Trust Co. of Florida*, 54 F. (2d) 286, 288 (C. C. A. 5th).

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business by the association, surrender under § 28, the substitution of liquidating trustees elected by shareholders or appointed by the court as provided in § 50, or payment of the creditors in full. The Secretary is authorized to compromise claims (§ 34) and to prosecute or defend suits (§ 35). During his possession, no lien shall attach or execution issue against the property of the corporation, and no pledgee shall, without permission of the Secretary or order of the court, sell the collateral or pledge (§ 36). Before liquidation, the Secretary must give notice to creditors and depositors (§ 41) and have an inventory and appraisement made by disinterested persons (§ 38). By § 45 the Secretary must submit a final or partial account of claims allowed or rejected, and any party in interest may file objections in the court; if no account is submitted within one year, a court order directing its submission may be obtained. Section 46 provides that the account is binding and conclusive, except as to those parts to which objection has been made in court, and directs distribution in accordance therewith. If the account were partial, its confirmation is not conclusive on claims specified in subsequent accounts (§ 47). The court is to hear and determine matters in controversy (§ 48). Expenses of administration are to be paid out of the association's funds and are subject to the approval of the court (§ 49). Section 50 provides for the election of liquidating trustees by the shareholders, or appointment by the court in default of election, if a balance remains after the final account has been filed and the creditors paid in full.

A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, see *Greathouse* v. *Dern,* 289 U. S. 352, 359, 360, or deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant, see *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 338, would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. *Fenner* v. *Boykin,* 271 U. S. 240, 243, 244; *Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 527; *Matthews* v. *Rodgers,* 284 U. S. 521, 525; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission of Kentucky,* 290 U. S. 264, 273. It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state. See *Rogers* v. *Guaranty Trust Co., supra,* 130, 131; compare *Burnrite Coal Briquette Co.* v. *Riggs, supra,* 212, 213; *Canada Malting Co.* v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 419–423; *Langnes* v. *Green,* 282 U. S. 531, 541. There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers. *Matthews* v. *Rodgers, supra,* 525.

Here, upon presentation of the application for appointment of receivers, which would involve such an interference, the district judge might appropriately have required notice of the application to be given to the state officers. It was his duty to do so if satisfied that the delay involved in adopting that course would not result in the sacrifice of any vital interest of the insolvent corporation, its creditors or its stockholders. On the showing that their interests would be adequately protected by liquidation under the direction of the Secretary of Banking, the district judge should have denied the application for the appointment of receivers or, if he had already appointed them, should have discharged the receivers, and directed the surrender of the property in their possession to the Secretary in order that the liquidation might proceed under the state statutes.

That course should be pursued now. For that purpose the decree will be reversed and the cause remanded. The district court will direct that all assets and property in the possession of the receivers be, with all convenient speed, surrendered to the Secretary of Banking, the receivers retaining only sufficient of the assets of the defendant association to pay their reasonable fees and any obligations lawfully incurred by them. Jurisdiction will be retained by the district court only for that purpose and for the purpose of promptly discharging the receivers and settling their accounts, after which the suit will be dismissed. See *Harkin* v. *Brundage, supra,* 57, 58.

Reversed.

GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, *v.* OMINSKY ET AL., RECEIVERS.

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

No. 395. Argued January 14, 1935.—Decided February 4, 1935.

Upon the authority of *Pennsylvania* v. *Williams, ante,* p. 176, *held* that the federal District Court for Pennsylvania had jurisdiction of a suit brought by nonresident shareholders for the appointment of receivers to liquidate an insolvent building and loan association

and for an injunction, but that, in the exercise of a proper discretion, upon the showing made by the state Secretary of Banking, it should have relinquished its jurisdiction in favor of that officer.
72 F. (2d) 517, reversed.

Certiorari, 293 U. S. 548, to review a decree affirming a decree of the District Court appointing permanent receivers to liquidate an insolvent building and loan association and enjoining others from interfering with the property.

Mr. Wm. A. Schnader, Attorney General of Pennsylvania, with whom *Mr. Harold D. Saylor,* Deputy Attorney General, was on the brief, for petitioner.

Messrs. Oscar Brown and *Grover C. Ladner,* with whom *Mr. Charles Polis* was on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, directed to the Court of Appeals for the Third Circuit, which was granted to resolve the questions of public importance also involved in No. 394, *Pennsylvania* v. *Williams,* just decided, *ante,* p. 176.

On March 31, 1933, certain citizens of New Jersey, shareholders in the Christian A. Fisher Building & Loan Association, a Pennsylvania corporation, filed their bill of complaint against the Association in the district court for eastern Pennsylvania. The bill alleged the requisite diversity of citizenship and jurisdictional amount; that the Association was insolvent; that its assets might be dissipated and sacrificed in the efforts of creditors to realize payment of their claims from its property, and prayed the appointment of receivers and an injunction. Thereafter, the Secretary of Banking, acting under the Banking Act of the Commonwealth of Pennsylvania of June 15, 1923, P. L. 809, after due hearing, found the Association to be insolvent; and on April 8, 1933, he issued and filed his certificate, taking possession of the association and appointing a special deputy agent to assist in the liquidation of its business and property. The state Secretary of Banking, petitioner here, was substituted as defendant in the pending suit and filed an answer, in which he set up the action taken by him and prayed that the bill of complaint be dismissed. After a hearing upon bill and answer, the district judge entered his decree appointing permanent receivers, respondents here, and enjoining all persons from taking possession of, or interfering with, the property of the defendant. The decree was affirmed by the Court of Appeals for the Third Circuit. 72 F. (2d) 517.

For reasons stated at length in *Pennsylvania* v. *Williams, supra,* we conclude that the district court acquired jurisdiction of the cause upon the filing of the bill of complaint in that court. See also No. 431, *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader, Attorney General,* decided this day, *post,* p. 189. But we think that, upon the bare showing in a shareholder's bill that the defendant corporation was insolvent, the court would have been well within the exercise of a proper discretion had it declined the appointment of receivers and directed a dismissal of the bill for want of equity. In any event, the allegations of the answer, that the possession and control of the assets of the defendant by the Secretary of Banking, pursuant to statute, will result in the preservation of the assets of the defendant and the proper distribution of funds realized from their liquidation, are not challenged. The considerations which should have induced the district court, in the proper exercise of its discretion, to relinquish jurisdiction in *Pennsylvania* v. *Williams, supra,* should have led to the same result here.

The decree will be reversed and the cause remanded. The district court will direct that all assets and property in the possession of the receiver be, with all convenient speed, surrendered to the Secretary of Banking, the receivers retaining only sufficient of the assets of the defendant association to pay their reasonable fees and any obligations lawfully incurred by them. Jurisdiction will be retained by the district court only for that purpose and for the purpose of promptly discharging the receivers and settling their accounts, after which the suit will be dismissed.

Reversed.

PENN GENERAL CASUALTY CO. *v.* PENNSYLVANIA EX REL. SCHNADER, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 431. Argued January 11, 14, 1935.—Decided February 4, 1935.

1. Whether, in a suit involving the possession and control of property which is the subject of a suit pending in a federal District Court, a state court has given proper effect to the proceedings and order of the federal court, is a federal question reviewable on appeal. P. 194.
2. It is an established principle, applicable to both federal and state courts, that where these courts have concurrent jurisdiction of suits in rem or quasi in rem, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation. P. 195.
3. When the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction is first invoked by the filing of the bill is treated as in constructive possession of the property and as authorized to proceed with the cause, at least where process subsequently issues in due course. P. 196.
4. The jurisdiction conferred on the federal district courts by the Constitution and laws of the United States cannot be restricted by state legislation. P. 197.

5. Where the object of a suit in a state court is the liquidation by a state officer of an insolvent domestic insurance company, and there is no showing that the interests of creditors and shareholders will not be adequately protected by this procedure, the case is a proper one for the federal District Court, in the exercise of judicial discretion, to relinquish its jurisdiction, though previously acquired, in favor of the administration by the state officer. *Pennsylvania* v. *Williams, ante,* p. 176. P. 197.
6. Although the federal District Court first acquired jurisdiction of a suit to liquidate an insolvent insurance corporation, a state court may properly exercise its jurisdiction to authorize a state officer to make application to the District Court to relinquish its jurisdiction in favor of the state administration. P. 198.

316 Pa. 1; 173 Atl. 637, reversed.

Certiorari, 293 U. S. 547, to review a judgment of the Supreme Court of Pennsylvania which affirmed a decree directing the state Insurance Commissioner to take possession of and liquidate the property of an insolvent domestic insurance company. Prior to the institution of proceedings in the state court, a suit for the appointment of receivers and for an injunction was filed in the federal District Court, which the state supreme court held was without jurisdiction.

Mr. Joseph W. Henderson, with whom *Messrs. Thomas F. Mount* and *George M. Brodhead, Jr.,* were on the brief, for petitioner.

Mr. Wm. A. Schnader, Attorney General of Pennsylvania, with whom *Mr. Harold D. Saylor,* Deputy Attorney General, was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, directed to the Supreme Court of Pennsylvania, to resolve questions of public importance growing out of the conflicting claims, of the federal district court and of the Insurance Commissioner of the Commonwealth of Pennsylvania, to jurisdiction over the liquidation of the business and affairs of appellant, an insolvent Pennsylvania insurance corporation.

The case was heard in the state supreme court upon an agreed statement of facts, deemed "necessary to a determination of the question involved in the appeal," which was filed in the state trial court. It purports to outline the substance of proceedings had in that court and in the federal district court. The question is stated to be whether the state court, "in view of the prior pendency of the suit . . . in the Federal court, had jurisdiction to enter the decree from which this appeal is taken." The records of the pleadings and proceedings in those courts are not included in the record and are not before us.

Appellant was organized under the Insurance Company Law of May 17, 1921, P. L. 682. On September 14, 1933, appellant's officers and directors appeared at a hearing before the Insurance Commissioner at which the president of the company was ordered to return to it assets which he had improperly withdrawn from the company, with consequent serious impairment of its financial condition. On October 14, 1933, a further hearing was held before the Attorney General of the state, at which it appeared that the company was in an unsafe and unsound condition.

On November 17, 1933, a shareholder of the insurance company filed his bill of complaint against the company in the district court for eastern Pennsylvania. At this time negotiations, conducted by the Commissioner with the stockholders of the company, for its rehabilitation were pending. The complaint alleged that the stockholder was a resident of West Virginia; that the requisite jurisdictional amount was involved; that officers of the company had misappropriated and wasted its assets; that the company was insolvent and in a financially unsafe and unsound condition. The bill prayed the appointment of receivers, the liquidation of its property and business, and the usual injunction. Upon the filing of the bill, subpoena was issued and was served on the corporation on November 22, 1933.

On December 8, 1933, while the suit in the district court was pending, the Attorney General of the state, acting pursuant to § 502 of the Insurance Department Act of May 17, 1921, P. L. 789, filed a suggestion with the Court of Common Pleas of Dauphin County, alleging that the company was in a financially unsound condition; that the conduct of its business would be detrimental and hazardous to its policyholders, creditors and the public; that certain officers of the company had made illegal investments of the funds of the company and had appropriated to their own use other assets of the company. He prayed for an order, that the defendant show cause why the business of the company should not be closed, its charter vacated, and its assets taken into possession of the Insurance Commissioner for liquidation under his direction, and for an injunction. On the same day the Court of Common Pleas granted the order to show cause and enjoined the company from transacting any business and from disposing of its property until further order of the court. The order to show cause was served upon the company on December 11, 1933.

On December 14, 1933, the company filed an answer in the suit pending before the federal district court, substantially admitting the alleged withdrawal of assets and illegal investment, and denying the other allegations of the complaint, and alleging the pendency of the proceedings in the Court of Common Pleas.

On the same day the Court of Common Pleas entered a further order restraining the company and its officers or agents from transacting any business and from disposing of its property and restraining all persons other than the Insurance Commissioner and his agents from taking possession of it. On the following day the federal district court entered an order which recited the pendency of the proceedings in the Court of Common Pleas and restrained the company and its officers or agents from permitting anyone to receive or take possession of its property and enjoining all persons from interfering with it in any way. On that day both the last mentioned restraining order of the Court of Common Pleas and that of the federal district court were served on the company.

After further proceedings the Court of Common Pleas entered its final decree, March 14, 1934, that the company be dissolved and directing the acting Insurance Commissioner to take possession of and to liquidate the business and property of the casualty company in accordance with the provisions of the state Insurance Department Act. No final hearing has been held and no receiver has been appointed in the suit pending in the district court, but because of the restraining order of that court the company has refused to comply with the demand of the Commissioner for the surrender of its property in conformity with the decree of the state court.

On appeal from the Court of Common Pleas, the state supreme court treated the case as one involving only a conflict of jurisdiction between the state court and the federal court. It viewed the comprehensive statutory scheme of the Commonwealth for liquidating insurance companies by the Insurance Commission as binding on the company and its shareholder. It therefore thought that there could be no controversy between them which would be a proper subject of suit in the federal courts and that this was sufficient to preclude the exercise of jurisdiction of the federal court. It accordingly affirmed the decree. 316 Pa. 1; 173 Atl. 637.

The state court and the federal court have thus reached an impasse: each asserts the right to exercise its jurisdiction with respect to substantially the same subject matter, the liquidation of the business and assets of the insolvent corporation; each asserts its authority to enjoin interference, by the state officer on the one hand, and by any person except the state officer on the other; and each is unable to perform its function without acquiring possession and control of the property. In the state of the record before us, we confine our review to the single question of this conflict of jurisdiction considered and decided by the state court.

Section 502 of the Insurance Department Act authorizes the Commissioner to liquidate an insurance company when its condition is such that further transaction of its business will be hazardous; such liquidation is permitted only on an order or decree of the Court of Common Pleas, granted on application of the Attorney General of the state. Upon such application the court is authorized by § 505 to enjoin the company from transacting any business and from disposing of its property, and after a hearing to direct the Insurance Commissioner to take possession of the property and to liquidate it pursuant to the statute. By §§ 506, 507, the order of the court vests the Commissioner with the title to the property and supersedes the authority of any receiver appointed by any other state court.

It is plain that the state court, in the absence of the suit pending in the district court, would have acquired jurisdiction to proceed with the cause and to grant the relief sought. But the question now presented is whether its authority to proceed is affected by the pendency of the suit in the district court, which the state supreme court, on the record before it, treated as exercising a conflicting jurisdiction. The federal question, reviewable on appeal, is whether the state court has given proper effect to the proceedings and the order of the federal court. *Buck* v. *Colbath,* 3 Wall. 334, 340; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.,* 120 U. S. 141, 142; *Moran* v. *Sturges,* 154 U. S. 256, 267; *Central National Bank* v. *Stevens,* 169 U. S. 432, 456; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.,* 177 U. S. 51; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 44, 54.

Where the judgment sought is strictly *in personam,* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See *Buck* v. *Colbath, supra,* 342; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, and cases cited at pages 230–231. But if the two suits are *in rem* or quasi *in rem,* requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see *Peck* v. *Jenness,* 7 How. 612, 625; *Taylor* v. *Carryl,* 20 How. 583, 595; *Freeman* v. *Howe,* 24 How. 450, 459; *Buck* v. *Colbath, supra,* 341; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra,* 61, and to protect the judicial processes of the court first assuming jurisdiction, *Wabash R. Co.* v. *Adelbert College, supra,* 54; *Palmer* v. *Texas,* 212 U. S. 118, 129, 130, the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation. *Leadville Coal*

Co. v. *McCreery,* 141 U. S. 475, 477; *Porter* v. *Sabin,* 149 U. S. 473, 480; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra; Wabash R. Co.* v. *Adelbert College, supra; Palmer* v. *Texas, supra; Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88, 89; *Harkin* v. *Brundage,* 276 U. S. 36.

Where the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction attaches. If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property *pendente lite,* the time of acquiring actual possession may perhaps be the decisive factor. Compare *Moran* v. *Sturges, supra,* 284; *Harkin* v. *Brundage, supra,* 43. But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property, and as authorized to proceed with the cause. *Harkin* v. *Brundage, supra,* 43–45. Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course. *Palmer* v. *Texas, supra,* 129; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra,* 60; compare *Smith Purifier Co.* v. *McGroarty,* 136 U. S. 237, 240. The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual possession and to determine priority of service of process in the two suits.

In the present case there are outstanding injunctions by both courts restraining any interference with the property in the hands of the insolvent corporation, and neither the Insurance Commissioner nor the district court has taken possession. The suits relate to substantially the same subject matter. Each sought relief by injunction against creditors, marshalling and conservation of the corporate assets and their liquidation and distribution among the creditors and shareholders. The jurisdiction invoked by the two suits was concurrent, see *Harkin* v. *Brundage, supra,* 45, and since the bill was filed in the district court before the application of the Attorney General to the state court, the jurisdiction of the district court first attached; it has asserted this jurisdiction by its injunction order. Hence, it alone can rightfully assert control over the property and proceed with litigation which affects that control, *Palmer* v. *Texas, supra,* 129, 130; *Wabash R. Co.* v. *Adelbert College, supra,* 54, and it alone can determine how far it will permit any other court to interfere. *People's Bank* v. *Calhoun,* 102 U. S. 256, 262; see *Riggs* v. *Johnson County,* 6 Wall. 166. Its authority as a federal court to entertain the suit is not restricted by the procedure established by local statutes for the liquidation of insurance companies. The jurisdiction conferred on the district courts by the Constitution and laws of the United States cannot be affected by state legislation. See No. 394, *Pennsylvania* v. *Williams,* decided this day, *ante,* p. 176.

Although the district court has thus acquired jurisdiction, the end sought by the litigation in the state court is the liquidation of a domestic insurance company by a state officer. In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the district court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer. See No. 394, *Pennsylvania* v. *Williams, supra.*

The authority of the Insurance Commissioner to proceed with the liquidation under state law, it is true, rests on the decree of the state court entered after the district court had acquired jurisdiction. But even though the jurisdiction of the district court had attached, the state court was not without power to designate the Insurance Commissioner as the vehicle of the state authority to control the property whenever that could lawfully be done. While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction, see *Peck* v. *Jenness, supra,* 624, 625; *Wabash R. Co.* v. *Adelbert College, supra,* 54; *Harkin* v. *Brundage, supra,* 43, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See *Leadville Coal Co.* v. *McCreery, supra,* 477. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. *Yonley* v. *Lavender,* 21 Wall. 276; *Heidritter* v. *Elizabeth Oil-Cloth Co.,* 112 U. S. 294, 304; *Byers* v. *McAuley,* 149 U. S. 608. If it has appointed a receiver, it may and should give him directions for the surrender of the property to the court having prior jurisdiction, or it may make suitable orders permitting him to take possession and proceed with the liquidation when the court having jurisdiction over the property relinquishes it. See *Harkin* v. *Brundage, supra,* 57. The confirmation by the Court of Common Pleas of the right of the Insurance Commissioner to liquidate the company did not infringe the authority of the district court to make appropriate disposition of the property. But it did confer on the Commissioner the requisite authority to ask the district court to relinquish its jurisdiction in favor of the state administration.

Since the district court had first acquired jurisdiction to liquidate the property of the insurance company, and had authority to proceed with the cause for that purpose, the supreme court of the commonwealth erred in affirming so much of the decree of the Court of Common Pleas as directed the Insurance Commissioner to take possession of the business and property of the company, and so far as it affirmed the order of that court which enjoined the company from surrendering its books, records and assets to any person other than the Commissioner, and enjoined others from taking possession of them. The decree must accordingly be reversed and the cause remanded for further proceedings not inconsistent with this opinion, but without prejudice to an application by the Commissioner to the district court for an order relinquishing its jurisdiction over the property of the company and vacating its injunction against surrender of it to the Commissioner for liquidation under the Insurance Department Law of the state. See No. 394, *Pennsylvania* v. *Williams, supra.*

Reversed.

DOMENECH, TREASURER OF PUERTO RICO, v. NATIONAL CITY BANK OF NEW YORK.

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

No. 386. Argued January 15, 16, 1935.—Decided February 4, 1935.

1. The system of national bank laws extends to Puerto Rico, *ex proprio vigore* and by force of the congressional declaration (U. S. C., Title 48, § 734) that the federal laws which are "not locally inapplicable," except the internal revenue laws, shall have the same force and effect there as in the United States. P. 205.
2. A tax on a branch of a national bank is a tax on the bank. P. 204.
3. Puerto Rico, being a dependency of the United States, may not tax an agency of the United States, such as a national bank, except by the clear and explicit consent of Congress; and the general power of taxation conferred on the insular government cannot be construed as a consent. Pp. 204–205.

4. Revised Statutes, § 5219, as amended, U. S. C. Supp., Title 12, § 741, defining and limiting the permitted taxation of national banks and their shares by States, applies to Puerto Rico. P. 205.
5. This section applies to taxation by Puerto Rico of a local branch of a bank having its principal place of business in a State, notwithstanding that, in such case, the permission granted by it to tax shares may not be availed of by Puerto Rico. P. 205.
6. A tax imposed by Puerto Rico upon the branches maintained there by a New York national bank, based upon the amount of its capital (other than real property) employed in the Island, *held* not permitted by R. S., § 5219, and invalid. P. 206.
7. The fact that § 25 of the Federal Reserve Act, as amended, refers to branches of national banks in dependencies or insular possessions in common with those in foreign countries, as "foreign branches," is not indicative of an intention to subject them to general taxation by the dependencies or possessions. P. 204.

71 F. (2d) 13, affirmed.

Certiorari, 293 U. S. 549, to review a judgment reversing a judgment of the U. S. District Court for Puerto Rico against the national bank in a suit to recover taxes paid under protest to the Treasurer of Puerto Rico.

Mr. William Cattron Rigby, with whom *Mr. Benjamin J. Horton,* Attorney General of Puerto Rico, and *Mr. Nathan R. Margold* were on the brief, for petitioner.

Mr. Earle T. Fiddler, with whom *Mr. John A. Garver* was on the brief, for respondent.

By leave of Court, *Messrs. F. G. Awalt, George P. Barse,* and *John F. Anderson* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae.*

Mr. Justice Roberts delivered the opinion of the Court.

The respondent, a national banking association whose principal office and place of business is in New York, applied for and obtained authority to operate branches in Puerto Rico, pursuant to § 25 of the Federal Reserve Act as amended.[1] In 1932 the bank, as required by local law, filed with the petitioner a sworn statement of assets as a basis of assessment for taxation. By request, but under protest, it attached a memorandum stated to be for information only, in which was set forth the amount of its total assets, the sum of its capital, surplus, and undivided profits, the percentage the latter was of the former, and the value of the assets in Puerto Rico. The Treasurer considered the same percentage of the assets in Puerto Rico fairly represented the capital there employed. The amount thus ascertained was $2,439,200, which he divided into three items,—real property and buildings, $732,560; other personal property, $1,611,400; and tangible personal property, $95,240. Applying the statutory rate to $2,439,200, he fixed the tax at $62,122.98. Upon appeal the Board of Equalization sustained the Treasurer's action. The bank voluntarily paid $17,700.24, the amount attributable to real property and buildings, but paid under protest the balance of $44,422.74 demanded in respect of the personal property, and brought suit in the United States District Court for Puerto Rico to recover the amount. Judgment in favor of the Treasurer was reversed by the Circuit Court of Appeals. We granted a writ of certiorari,[2] because the case involves the application and scope of Acts of Congress and their effect upon the taxing power of insular possessions of the United States.[3]

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[1] *Infra*, Note 7.

[2] 293 U. S. 549.

[3] See Rule 38, Par. 5 (b): "Where a circuit court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court."

Respondent concedes the competence of the Island government to tax generally,[4] but asserts that R. S. 5219 as amended[5] prohibits a levy on the capital of a national bank. The further point is made that § 320 of the Political Code of Puerto Rico,[6] to which the petitioner refers

[4] The Organic Act for Puerto Rico (March 2, 1917, c. 145, § 3, 39 Stat. 951, 953, as amended by the Act of February 3, 1921, c. 34, § 2, 41 Stat. 1096) provides: "No export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; . . ." Express authority to levy income taxes was added by the amending Act of March 4, 1927, c. 503, § 1, 44 Stat. 1418, U. S. C. Tit. 48, § 741.

[5] R. S. 5219, as amended, U. S. C. Supp. Tit. 12, § 548, so far as material, is:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

. . . . .

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations . . ."

. . . . .

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

[6] "The assessment of every corporation, joint stock and limited liability company not incorporated in Porto Rico but engaged in the

as his authority, does not justify the imposition of the tax in question. This the petitioner denies, and adds that the point was not presented below, and cannot, therefore, be mooted here. In addition to contending that § 5219 never extended to Puerto Rico, he claims that in any event the section was rendered inoperative in the Island by § 25 of the Federal Reserve Act as amended.[7]

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transaction of business therein, other than banks and banking institutions having a share capital, shall be made in the manner . . . All the shares of stock in banks and banking institutions, whether of issue or not, existing by authority of the United States or of any State of the United States, or of Porto Rico, or otherwise, and located and doing business within Porto Rico, shall be assessed by the Treasurer of Porto Rico to the owners thereof in the municipal districts where such banks are located, and not elsewhere. In the assessment of all Insular and municipal taxes that have been or may hereafter be, duly imposed by law in such municipality, whether such owners are residents of said municipality or not, all such shares shall be assessed at their fair market value on the fifteenth day of January, first deducting therefrom the proportionate part of the value of real estate belonging to the bank; and the persons or corporations who appear from the records of the bank to be owners of shares at the close of business on the day next preceding the fifteenth day of January of each year shall be taken and deemed to be the owners thereof for the purposes of this section. Every such bank shall pay to the Treasurer of Porto Rico, at the time in each year when other taxes assessed in the municipality become due, the amount of the tax so assessed in such year upon the shares in such bank. If such tax is not paid, the bank shall be liable for the same . . ." (Compilation of Revised Statutes and Codes of Porto Rico of 1911, par. 2972, p. 559.)

[7]Act of December 23, 1913, c. 6, § 25, 38 Stat. 273, as amended by Acts of September 7, 1916, c. 461, 39 Stat. 752, and September 17, 1919, c. 60, § 3, 41 Stat. 286; U. S. C. Tit. 12, § 601.

"Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

" First. To establish branches in foreign countries or dependencies or insular possessions of the United States . . ."

We find it unnecessary to determine whether the tax was authorized by § 320 of the Political Code, since we are of opinion that R. S. 5219 forbids its collection.

Taxation of a bank's branch is taxation of the bank itself.[8] The system of national banks was intended to be co-extensive with the territorial limits of the United States, and while the consent to taxation given by § 5219 refers in terms only to the states, it extends also to territorial governments and sets the limits of their exercise of the power.[9] The form of taxation here imposed is not permitted by the section.[10] The organization of a national bank in Puerto Rico is within the contemplation of the National Banking Act; but if there were doubt concerning the proposition, it finds support in legislation extending applicable laws of the United States to the Island.[11] Although the maintenance of branch banks is prohibited by the National Banking Act save under narrowly limited conditions,[12] their establishment in foreign countries, dependencies and insular possessions is authorized.[13] Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived

[8] *McCulloch* v. *Maryland,* 4 Wheat. 316, 317–318; 424–5.

[9] *Talbott* v. *Silver Bow County,* 139 U. S. 438, 443, 446, 448.

[10] *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664.

[11] Compare *Talbott* v. *Silver Bow County, supra.* 23 Ops. Atty. Gen. 169. And compare 36 Ops. Atty. Gen. 59. Section 9 of the Organic Act of March 2, 1917, c. 145, 39 Stat. 954, U. S. C. Tit. 48, § 734: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: . . ."

[12] R. S. 5155; Act of February 25, 1927, c. 191, 44 Stat. 1224, 1228; Act of June 16, 1933, c. 89, 48 Stat. 162, 189–190.

[13] *Supra,* Note 7.

from the United States. But like a state, though for a different reason, such an agency may not tax a federal instrumentality. A state, though a sovereign, is precluded from so doing because the Constitution requires that there be no interference by a state with the powers granted to the federal government.[14] A territory or a possession may not do so because the dependency may not tax its sovereign. True the Congress may consent to such taxation; but the grant to the Island of a general power to tax should not be construed as a consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice. Not only do we find no such statutory consent but we are confronted by R. S. 5219, which *proprio vigore* extends to territories, and the Congressional declaration that it, like other statutes of the United States shall, if not locally inapplicable,[15] apply to Puerto Rico.

The petitioner insists that this section is locally inapplicable for two reasons. The first is that the section was intended to apply only to taxation by the state, territory, or governmental agency within whose borders the bank has its principal place of business. The argument is that Puerto Rico cannot avail itself of the consent to the taxing of respondent's shares, or the dividends thereon, since the shares have no situs except New York, which is, in contemplation of law, the association's home. The position is that the section must be available in its entirety or else wholly inapplicable. We think otherwise. If Puerto Rico can and does collect taxes of any of the types mentioned in R. S. 5219, the mere fact that the situation prevents resort to one of the other kinds thereby

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[14] *McCulloch* v. *Maryland, supra; Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 106.

[15] *Supra*, Note 11.

permitted does not make the statute a nullity in the Island. The record discloses that there has been assessed and collected a tax on the bank's local real estate, as permitted by paragraph 3 of R. S. 5219, and in addition an income tax upon the local income,[16] as permitted by paragraph 1 (c). These seem to afford appropriate and equitable methods of taxation in respect of the association's local branches and business.

Secondly, petitioner says § 25 of the Federal Reserve Act as amended,[17] exhibits an intention on the part of Congress that for purposes of taxation branches in dependencies or insular possessions shall be treated as if they were branches established in foreign countries. The argument is that as all are mentioned several times in the section as "foreign branches," and since confessedly the United States cannot limit or control the method or manner of taxation of foreign branches, the purpose was not to do so with respect to those in an insular possession.

We think the contention unsound. It does not follow from the lack of power of the United States in the one case that it did not intend to exercise its undoubted power in the other.

We are of opinion that § 5219 prohibits the imposition of the tax in question.[18]

The judgment is

Affirmed.

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[16] The tax in question was collected under the Act of Puerto Rico, No. 74, Laws of Puerto Rico, 1925, pp. 400–550. For a discussion of the implied authority of the Island to impose an income tax prior to the passage of the Act of March 4, 1927 (*supra*, Note 4) see *Domenech* v. *Havemeyer*, 49 F. (2d) 849, 850.

[17] *Supra*, Note 7.

[18] Compare *National City Bank* v. *Domenech, Treasurer*, 47 Puerto Rico 29. *National City Bank* v. *Posados, Collector*, Supreme Court of the Philippine Islands, September 21, 1934.

DOUGLAS ET AL. v. CUNNINGHAM ET AL.

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

No. 519. Argued January 18, 1935.—Decided February 4, 1935.

1. Section 25 of the Copyright Act provides that an infringer shall be liable for "such damages as the copyright owner may have suffered due to the infringement," or "in lieu of actual damages . . . such damages as to the court shall appear to be just," and that in assessing such damages the court may, in its discretion, allow, in the case of a newspaper, one dollar for every infringing copy; but that in any event, the damages shall not exceed $5,000 nor be less than $250, except for infringements occurring after actual notice to the defendant. *Held*, in a suit based upon the publication of an infringing article in an edition of a newspaper which totaled 384,000 copies, an award of $5,000 in lieu of actual damages was within the discretion of the trial court and was not subject to revision by the Circuit Court of Appeals. P. 210.
2. This construction is required by the language and the purpose of the statute. P. 210.

72 F. (2d) 536, reversed.

CERTIORARI, 293 U. S. 551, to review a judgment reversing, as to the amount of damages and costs, a judgment of the District Court in a suit for infringement of copyright.

Mr. Cedric W. Porter, with whom *Mr. George P. Dike* was on the brief, for petitioners.

Mr. Edmund A. Whitman for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioners brought a suit in equity against the respondents in the District Court for Massachusetts, charging infringement of copyright, praying an injunction, an accounting and award of profits, and damages, or "in lieu of actual damages or profits such damages as to this court shall appear to be just and proper within the provisions of the Act of Congress in such cases made and provided." The respondents answered and the cause came on for hearing. Admissions in the pleadings, concessions by the respondents, and evidence taken, disclose the relevant facts.

Douglas wrote an original story which was accepted, copyrighted and published by The American Mercury, Inc. The rights in the story under the copyright were assigned to Douglas. Thereafter Cunningham wrote for the Post Publishing Company, and the latter published in some 384,000 copies of a Sunday edition of the Boston Post, an article which was a clear appropriation of Douglas's story. Testimony was presented with respect to the value of the story, but at the close of the trial the petitioners admitted inability to prove actual damages. The Publishing Company acted innocently in accepting the article from Cunningham, and the latter testified that he had procured the material for it from an acquaintance, believed the facts related to him were actual happenings, and was ignorant of Douglas's production. The trial judge ruled that no actual damage had been shown, but in lieu thereof granted the petitioners $5,000 and a counsel fee. Upon appeal the Circuit Court of Appeals sustained an assignment of error which asserted the judge had abused his discretion in making the award, reversed the decree, and set the damages at $250.

The sole question presented by the petition for certiorari is whether consistently with § 25 (b) of the Act of 1909,[1] an appellate court may review the action of

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[1] Act of March 4, 1909, c. 320, § 25, 35 Stat. 1081, as amended by Act of August 24, 1912, c. 356, 37 Stat. 489; U. S. C. Tit. 17, § 25. "If any person shall infringe the copyright in any work protected

a trial judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed by the section. We granted the writ of certiorari[2] because the decision of the Circuit Court of Appeals was upon an important question of federal law and probably in conflict with our decisions.[3]

The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement.

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under the copyright laws of the United States such person shall be liable:

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated [here follow limitations with respect to the amount of damages to be awarded for certain infringements not material in the present case] and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ."

There follows a schedule of which item "Second" is: "In the case of any work enumerated in section 5 of this title [§ 5 includes periodicals and newspapers] except a painting, statue or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees."

[2] 293 U. S. 551.

[3] See Rule 38, par. 5 (b) (c).

This court has twice construed § 25 (b) in the light of its history and purpose. *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100; *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than $250, and no matter how many copies are made, cannot be more than $5000. In the *Westermann* and *LaSalle* cases it was held that not less than $250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just. The question now presented is whether it can be unjust, according to the legislative standard, to use the prescribed measure,—$1 per copy,—up to the maximum permitted by the section. As the *Westermann* case shows, the law commits to the trier of facts, within the named limits, discretion to apply the measure furnished by the statute provided he awards no more than $5,000. He need not award $1 for each copy, but, if upon consideration of the circumstances he determines that he should do so, his action can not be said to be unjust. In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute. The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

CLARK, COMMISSIONER OF INSURANCE, RECEIVER, *v.* WILLIARD ET AL., TRUSTEES, ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA.

No. 361. Argued January 11, 1935.—Decided February 4, 1935.

1. Every State has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. P. 213.
2. A State may provide that the local assets of foreign and domestic corporations shall remain subject to be attached by creditors after the corporations have become insolvent and have been dissolved. P. 213.
3. This policy does not offend the full faith and credit clause of the Constitution though it permit local creditors to secure and enforce liens on the local assets of a foreign corporation after the laws of its home State have dissolved it and transferred all of its property to a statutory liquidator for the purpose of making equal distribution among all of its creditors. *Converse* v. *Hamilton,* 224 U. S. 243, distinguished. Pp. 214–215.
4. A point not made in the court below nor in the petition for certiorari will not be considered as a ground for reversal. P. 216.

97 Mont. 503; 34 P. (2d) 982, affirmed.

Certiorari, 293 U. S. 546, to review a judgment entered by the Supreme Court of Montana after an earlier hearing and remand of the case by this Court. See 292 U. S. 112.

Mr. Edmond M. Cook, with whom *Messrs. Reuel B. Cook* and *M. S. Gunn* were on the brief, for petitioner.

Mr. H. Leonard DeKalb, with whom *Mr. Louis P. Donovan* was on the brief, for respondents.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Louis H. Pink,* on behalf of the Superintendent of Insurance of New York; *Mr. Otto Kerner,* Attorney General of Illinois, and *Mr. Matthias Concannon,* on behalf of the Director of Insurance of Illinois; and *Messrs. Allen May, James P. Aylward,* and *Albert A. Ridge,* on behalf of the Superintendent of Insurance of Missouri, all supporting the contentions of petitioner.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

What is before us is another chapter of a controversy that was here at the last term. *Clark* v. *Williard,* 292 U. S. 112.

The controversy is the outcome of conflicting claims to the Montana assets of an Iowa corporation. On the one side is the petitioner, the Insurance Commissioner of Iowa, claiming as official liquidator. On the other side are the respondents, judgment creditors of the corporation, armed with an execution which they insist upon the right to levy. If the petitioner prevails, there is equal distribution; if the respondents prevail, the race is to the swift.

When the case was here before, the Supreme Court of Montana had given priority to the judgment creditors, placing its ruling upon the ground that the petitioner, the foreign liquidator, was not a successor to the corporation, but a chancery receiver, with a title, if any, created by the Iowa decree. 94 Mont. 508; 23 P. (2d) 959. We held that under the statutes of Iowa the liquidator was the successor to the corporation, and not a mere custodian, and that in ruling to the contrary the Supreme Court of Montana had denied full faith and credit to the statutes of a sister state. 292 U. S. 112, 121. The question was then an open one whether there was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to later executions at the suit of local creditors. As to that question the Supreme Court of Montana would speak the final word. 292 U. S. 112, 123. The decree was accordingly vacated and the cause remitted to the state court to the end that the local policy might be made known through the one voice that could declare it with ultimate authority.

The Supreme Court of Montana has reconsidered the conflicting claims of liquidator and creditors in the light of that decision. It has held (the Chief Justice and an Associate Justice dissenting) that the local policy of the state permits attachments and executions against insolvent corporations, foreign and domestic; that the writs will not be halted though the effect of the levy may be waste or inequality; and that this rule will prevail against a statutory successor, clothed with title to the assets, just as much as against the corporation itself or the trustees upon dissolution or a chancery receiver. *Mieyr* v. *Federal Surety Co.*, 97 Mont. 503; 34 P. (2d) 982. A writ of certiorari brings the case to us again.

Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. *Green* v. *Van Buskirk*, 5 Wall. 307, 312; 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 671; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 628. Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States. United States Constitution, Article IV, § 1.

If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere. If title had been conveyed to an assignee for the benefit of creditors by a common law assignment or by insolvency proceedings, claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow. So much, again, is settled by unimpeachable authority. *Security Trust Co.* v. *Dodd, Mead & Co., supra; Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 579, 580; *Cole* v. *Cunningham,* 133 U. S. 107; *Oakey* v. *Bennett,* 11 How. 33, 44; *Ockerman* v. *Cross,* 54 N. Y. 29; *Warner* v. *Jaffray,* 96 N. Y. 248, 255; *Barth* v. *Backus,* 140 N. Y. 230; 35 N. E. 425; *Ward* v. *Connecticut Pipe Mfg. Co.,* 71 Conn. 345; 41 Atl. 1057; *Gilbert* v. *Hewetson,* 79 Minn. 326; 82 N. W. 655. The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession. Cf. *Disconto Gesellschaft* v. *Umbreit, supra; City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112; *Cooper* v. *Philadelphia Worsted Co.,* 68 N. J. Eq. 622, at p. 629; 60 Atl. 352.

This is not to say that any uniform policy prevails among the states when liquidators and creditors thus compete with one another. The diversity of practice was pointed out, with citation of the precedents, when the case was here before. 292 U. S. 112, at p. 122. Some states prefer a rule of equal distribution and compel the local suitor to yield to the statutory successor (*Martyne* v. *American Union Fire Ins. Co.,* 216 N. Y. 183; 110 N. E. 502), though at times with precautionary conditions.

292 U. S. 112, at p. 129; *People* v. *Granite State Provident Association,* 161 N. Y. 492; 55 N. E. 1053. Other states give the local creditor a free hand, with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process. *Lackmann* v. *Supreme Council,* 142 Cal. 22; 75 Pac. 583; *Shloss* v. *Metropolitan Surety Co.,* 149 Ia. 382; 128 N. W. 384; *Zacher* v. *Fidelity Trust Co.,* 109 Ky. 441; 59 S. W. 493. Choice is uncontrolled, as between one policy and the other, so far as the Constitution of the Nation has any voice upon the subject. Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompany such recognition according to Montana law. For failure to give adherence to that principle we reversed and remanded when the case was last before us. Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile.

Converse v. *Hamilton,* 224 U. S. 243, holds nothing to the contrary. A statutory liquidator of a Minnesota corporation brought suit in Wisconsin against defendants there residing to enforce their personal liability as stockholders in accordance with a Minnesota statute. The only question was whether the liquidator so appointed had capacity to sue. In the view of the court, capacity and title were established by the laws of Minnesota. United States Constitution, Article IV, § 1. The ruling did not affect the power of Wisconsin to subject the proceeds of the cause of action or any other assets to the claims of local creditors. Nothing in the case suggests that creditors of the Minnesota corporation were suing in Wisconsin or that there was threat of suit thereafter. The problem now here was left untouched and unconsidered.

The petitioner makes a point that the property or part of it subjected to the levy was not of such a nature as to have a situs in Montana or to be amenable to process issuing from her courts. No such point was made in the record of the proceedings in the court below. No such point was made in this court in the petition for certiorari to bring the case here for review. It will not be considered now. *Gunning* v. *Cooley,* 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 182; *Helvering* v. *Taylor,* 293 U. S. 507.

The decree should be affirmed, and it is so ordered.

Affirmed.

JENNINGS, RECEIVER, ET AL. *v.* UNITED STATES FIDELITY & GUARANTY CO.

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

No. 338. Argued January 16, 17, 1935.—Decided February 4, 1935.

1. National banks are subject to state laws in so far as these are consistent with the policy and provisions, express or implied, of the National Bank Act or other federal statutes. P. 219.
2. Under § 2 of the Bank Collection Code, as adopted in Indiana, the relation between a bank forwarding a check for collection and the collecting bank is that of principal and agent, until the agent has finished the business of collection. P. 219.
3. In the absence of tokens of a contrary intention, the better common-law doctrine is that the agency of a collecting bank is brought to an end by the collection of the paper, the bank being from then on in the position of a debtor, with liberty, like debtors generally, to use the proceeds as its own. P. 219.
4. A collecting bank need not collect in cash if another way has the sanction of law or custom to which the parties may be held to have impliedly consented. P. 220.
5. Under § 9 of the Bank Collection Code of Indiana, a collecting bank, as agent, is not under a duty to collect for cash but may collect by having the collection item set off against checks owed by itself, in a local clearing-house transaction in the customary way;

and thereafter the liability of the bank to the forwarder or owner is that of a debtor. P. 221.

6. A national bank in Indiana became insolvent after collecting a check by a local clearing wherein the check was set off against checks of greater amount owed by the bank itself. *Held* that in the absence of wrongdoing, there is no ground for impressing the bank's assets with a constructive trust in favor of its principal; and neither is there ground for an implied trust, since the money proceeds of the transaction did not come into the bank as an identifiable fund but merely went to reduce its liabilities, and to infer that a trust was transferred from the proceeds to an equivalent portion of the bank's cash resources would be without warrant in the intention of the parties. Pp. 221–224.

7. A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence. P. 224.

8. As applied to a national bank, § 13 of the Indiana Bank Collection Code, purporting to make the owners of paper which the bank has collected but for which they have not been satisfied, preferred claimants, in the event of the bank's failure, upon all of its assets, irrespective of whether the funds representing their paper can be traced or identified as part of such assets or as intermingled with or converted into other assets of the bank,—is inconsistent with the system of equal distribution established by federal law (R. S., § 5236) and is therefore invalid. P. 225.

71 F. (2d) 618, reversed.

Certiorari, 293 U. S. 543, to review the affirmance of a judgment of the District Court, 4 F. Supp. 569, in an action, brought originally in an Indiana court, by the payee of a check, against a national bank and its receiver, to impress a trust upon its assets.

Messrs. John F. Anderson and *George P. Barse*, with whom *Mr. F. G. Awalt* was on the brief, for petitioners.

Mr. Arthur L. Gilliom, with whom *Mr. Samuel O. Pickens* was on the brief, for respondent.

By leave of Court, *Messrs. F. G. Awalt* and *George P. Barse* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae*.

Mr. Justice Cardozo delivered the opinion of the Court.

A trust has been impressed upon the assets of a national bank in the hands of a receiver for the proceeds of a check collected through a clearing house before the closing of the bank by the Comptroller of the Currency. The question is whether the trust may be upheld.

On December 29, 1931, the Commercial Trust Company of Gary, Indiana, as maker, delivered to the respondent, United States Fidelity and Guaranty Company, a check to the order of respondent in the sum of $2,196.89 upon the Gary State Bank of Gary, Indiana, as drawee. The check, duly endorsed by the payee, was deposited in a bank in Indianapolis, and thereafter was transmitted for collection to the National Bank of America at Gary, Indiana, being received for that purpose on December 31, 1931. At that time both the collecting bank (the National Bank of America) and the drawee bank (Gary State Bank) were members of the Gary Clearing House Association. In accordance with banking custom the National Bank of America delivered to the local clearing house whatever checks in its possession were payable by the member banks (a total of $10,425.45) including the foregoing item of $2,196.89, and received in return the checks drawn on itself ($11,470.19). The outcome was a debit balance of $1,044.74, which it paid on the same day by a draft, thereafter duly honored, to the order of the clearing house. At the same time it delivered to the forwarding bank in Indianapolis a draft for $3,660.83, which covered along with other items the check for $2,196.89, collected from the drawee in the manner just described. Before the draft so transmitted could be honored, its maker, the collecting bank, had been forced to close its doors (January 4, 1932), and the Comptroller of the Currency was in possession of the business.

This action, which was begun in a state court in Indiana and was thereupon removed to a United States District Court, was brought by the United States Fidelity and Guaranty Company, payee of the check for $2,196.89, against the collecting bank and Jennings, its receiver, to impress a trust upon the assets to the extent of the proceeds of collection, and for payment accordingly. The District Court held that the payee was entitled to a preference over the general creditors of the insolvent bank, and entered a decree for the face amount of the check with interest. 4 F. Supp. 569. Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the decree was modified as to the interest, and as modified affirmed. 71 F. (2d) 618. A writ of certiorari brings the case here.

There was in force in Indiana in 1931 a statute known as the Bank Collection Code (Indiana Acts, 1929, c. 164 [1]), which is applicable to national banks in so far as it is consistent with the policy or provisions, express or reasonably implied, of the National Bank Act or of other federal acts of paramount authority. *Lewis* v. *Fidelity & Deposit Co. of Maryland,* 292 U. S. 559, 566; *First National Bank* v. *Missouri,* 263 U. S. 640, 656. Under that code (§ 2), the relation between the forwarding bank and the collecting bank is that of principal and agent until the agent has completed the business of collection. Whether a fiduciary relation continues even afterwards, upon the theory that the proceeds of the collection until remitted to the forwarder are subject to a trust, depends upon the circumstances. In the absence of tokens of a contrary intention, the better doctrine is, where the common law prevails, that the agency of the collecting bank is brought

[1] The Code is stated to have been adopted in as many as eighteen states. It was framed by counsel for the American Bankers Association in an endeavor to promote uniformity of banking practice in the collection of commercial paper.

to an end by the collection of the paper, the bank from then on being in the position of a debtor, with liberty, like debtors generally, to use the proceeds as its own. *Commercial Bank of Pennsylvania* v. *Armstrong,* 148 U. S. 50; *Marine Bank* v. *Fulton Bank,* 2 Wall. 252; *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 501; *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co.,* 242 Mass. 181, 185, 186; 136 N. E. 333; *Freeman's National Bank* v. *National Tube Works Co.,* 151 Mass. 413, 418; 24 N. E. 779; *Manufacturers' National Bank* v. *Continental Bank,* 148 Mass. 553, 558; 20 N. E. 193; *First National Bank of Richmond* v. *Wilmington & W. R. Co.,* 77 Fed. 401, 402; *Philadelphia National Bank* v. *Dowd,* 38 Fed. 172, 183; *Merchants' Bank* v. *Austin,* 48 Fed. 25, 32.[2] "One who collects commercial paper through the agency of banks must be held impliedly to contract that the business may be done according to their well known usages, so far as to permit the money collected to be mingled with funds of the collecting bank." *Freeman's National Bank* v. *National Tube Works Co., supra.* There is a contention for the respondent that the rule at common law has been modified by statute. We shall consider later on whether the change, if any, is material upon the record now before us.

At the closing of its doors on January 4, 1932, the collecting bank at Gary had finished the business of collection, and had arrived at the stage when it was subject to a duty, either as trustee or as debtor, to make remittance of the proceeds. In the method of collection there had been no departure from the ruling of this court in *Federal Reserve Bank* v. *Malloy,* 264 U. S. 160, that an agent bank is at fault when it accepts anything but cash in the absence of custom or agreement for the acceptance

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[2] The decisions to the contrary are criticized in *Hecker-Jones-Jewell Co.* v. *Cosmopolitan Trust Co., supra,* and additional decisions are collected by Scott, Cases on Trusts, pp. 67, 68.

of a substitute. To preclude the extension of that ruling to collections through a clearing house, the Bank Collection Code makes provision in § 9 for media of payment that are to be deemed equivalent to currency. There may now be acceptance of a bank draft, or settlement through a clearing house in the customary manner, without involving the agent in liability for damages if the draft is dishonored or the credit subsequently revoked.[3] On the other hand, when credit ceases to be provisional, or when the accepted instrument is paid, the collecting bank is liable as debtor, if not otherwise, to the same extent as if payment had been made in cash over the counter. One duty—the duty to collect—is at an end, and another—the duty to remit—has arisen in its place.

To say that a collecting agent may be held to the liability of a debtor "as if" payment had been made in cash is not to say that the two methods of collection are

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[3] § 9. "Where ordinary care is exercised, any agent collecting bank may receive in payment of an item without becoming responsible as debtor therefor, whether presented by mail, through the clearing house or over the counter of the drawee or payor, in lieu of money, either (a) the check or draft of the drawee or payor upon another bank or (b) the check or draft of any other bank upon any bank other than the drawee or payor of the item or (c) such method of settlement as may be customary in a local clearing house or between clearing banks or otherwise: *Provided,* That whenever such agent collecting bank shall request or accept in payment an unconditional credit which has been given to it on the books of the drawee or payor or on the books of any other bank, such agent collecting bank shall become debtor for such item and shall be responsible therefor as if the proceeds were actually received by it in money."

The time within which credit, when once given, may be revoked is defined by § 3: "A credit given by a bank for an item drawn on or payable at such bank shall be provisional, subject to revocation at or before the end of the day on which the item is deposited in the event the item is found not payable for any reason. Whenever a credit is given for an item deposited after banking hours such right of revocation may be exercised during the following business day."

equivalent for every other purpose. More particularly it does not mean that they are equivalent for the purpose of identifying a *res* to be subjected to a trust. The distinction is made definite by the controversy before us. What happened in the clearing house was this, that a check for $2,196.89, due to the collecting bank as agent or fiduciary, was used to cancel or extinguish liability upon a check or checks of equal amount due from it as principal, all with the sanction of statute and with the tacit assent of the forwarder or owner. At the close of the day there was not a dollar in the treasury of the agent that could be identified as part of the proceeds of collection or as a substitute therefor. If the money had been paid over the counter with the understanding that it was accepted as a special deposit (*Blakey* v. *Brinson,* 286 U. S. 254, 262, 263; *People* v. *City Bank of Rochester,* 96 N. Y. 32; *Genesee Wesleyan Seminary* v. *United States Fidelity & Guaranty Co.,* 247 N. Y. 52, 55; 159 N. E. 720), the doctrine of a continuing trust would charge the agent with a duty to set the proceeds of collection apart from other assets, and hold them intact for transmission to the forwarder. Nothing of the kind was done. Nothing of the kind was required or expected to be done. On the contrary, the statute gave notice to the agent that instead of establishing a trust, it was at liberty to set off what was due to it in one capacity against what was owing by it in another, being liable, however, as debtor when the set-off became final.

We are not concerned at this time with a constructive trust in the strict sense, a trust *ex maleficio,* which may be fastened upon a wrongdoer irrespective of intention. Pomeroy, Equity Jurisprudence, vol. 1, § 155; vol 3, §§ 1044, 1046. There was no wrongdoing here, but conduct wholly regular, with the result that any trust existing must be one implied in fact. In that situation there is no basis for a holding that a trust was transferred from the proceeds of collection to an equivalent part of the cash resources of the agent, the beneficial interest of the principle being unaffected by the set-off. Cf. *Knatchbull* v. *Hallett,* 13 Ch. Div. 696; *National Bank* v. *Insurance Co.,* 104 U. S. 54, 68; *Schuyler* v. *Littlefield,* 232 U. S. 707. To draw such an inference, far from promoting intention, would ignore and override it. By a permitted course of dealing the proceeds of the check, instead of being deposited upon collection in the vaults of the collecting agent, were specifically appropriated to the discharge of other obligations. There was not even a partial or proportionate payment that could have found its way into the vaults, for the balance at the close of the operations of the day was adverse to the collector and in favor of the clearing house. These being the facts, there is no room in our view for the use of those presumptions that affect the conduct of a wrongdoer who draws upon a mingled fund made up of his own moneys and another's. *Knatchbull* v. *Hallett, supra; National Bank* v. *Insurance Co., supra.* The presumption collapses when there is neither trust nor wrong.

For the purposes of this case we do not need to determine whether the Bank Collection Code has changed the preëxisting rule whereby in the absence of tokens of a contrary intention a bank ceases to be an agent and is turned into a debtor when collection is complete, without reference to the form or manner of the payment. If we assume for present purposes that a trust will attach under the statute when the proceeds of the collection are in the hands of the collector, the assumption will not hold where there are no proceeds of collection that have ever come into his hands, or where such proceeds as there were have been so mingled and confused that it is impossible to follow them. Currency paid over the counter and deposited in a vault is a thing that can be identified and so subjected to a trust whenever in equity and conscience a trust should be implied. Not only that, but a trust so created will not fail though other dollars may have taken the place of those originally received, for dollars are fungibles and any one of them will be accepted as a substitute for another. *Knatchbull* v. *Hallett, supra.* But the situation is very different when what has been received by the collecting agent is not a thing at all, but a reduction of liabilities by set-off or release. *Blakey* v. *Brinson, supra; People* v. *Merchants & Mechanics Bank,* 78 N. Y. 269, 272, 273; *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co., supra,* p. 187; *City Bank* v. *Blackmore,* 75 Fed. 771; *Anheuser-Busch Brewing Association* v. *Clayton,* 56 Fed. 759; *Farmers National Bank* v. *Pribble,* 15 F. (2d) 175, 176; *Dickson* v. *First National Bank,* 26 F. (2d) 411; *Schilling* v. *Rowe,* 64 F. (2d) 188, 190; *Allied Mills* v. *Horton,* 65 F. (2d) 708, 710; *Smith* v. *Zemurray,* 69 F. (2d) 5, 6, 7; *First National Bank of St. Petersburg* v. *Miami,* 69 F. (2d) 346; *Wisdom* v. *Keen,* 69 F. (2d) 349.[4] A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence.

The truth of this statement, though obvious enough upon its face, finds point and confirmation when the benefit, if any, accruing to the debtor is viewed as of the time of insolvency or later. What was done by the collecting bank through a settlement in the clearing house has not increased the assets available for distribution in the hands of the receiver. What was done through that settlement has had no effect after insolvency except to diminish liabilities. The dividend that would be due upon the debts canceled through the set-off if they were now

[4] Many cases are collected in Bogert, Failed Banks, Collection Items and Trust Preferences, 29 Mich. Law Review 545, 551, 552.

to be revived is the measure of any benefit accruing to the creditors. Decisions of other courts, to the extent that they give support for a different conclusion are built, as we think, upon an inadequate analysis, and do not win our approval.[5] It is the benefit to the creditors, not the loss to the respondent, that marks the gain to the fund now held by the receiver. If the respondent is permitted to prove against the assets on a parity with other creditors, the share thus allotted will correspond accurately to whatever accretion has resulted from the act of set-off and cancellation in the operations of the clearing house.

One other section of the Bank Collection Code is still to be considered. This is § 13, which has to do, as its caption indicates, with the procedure following insolvency. What is regulated in that section is not the relation between a bank and its correspondents during the normal course of business. What is regulated is the relation and the remedy when insolvency has set in and business is suspended.[6] Then for the first time a trust comes into

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[5] For a collection of the cases, see 82 A. L. R. 97.

[6] "Sec. 13. (1) When the drawee or payor, or any other agent collecting bank shall fail or be closed for business by the state bank commissioner or by action of the board of directors or by other proper legal action, after an item shall be mailed or otherwise entrusted to it for collection or payment but before the actual collection or payment thereof, it shall be the duty of the receiver or other official in charge of its assets to return such item, if same is in his possession, to the forwarding or presenting bank with reasonable diligence.

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"(3) Where an agent collecting bank other than the drawee or payor shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank which has being through the action of the statute, a trust coëxtensive in its subject matter with all the assets of the bank, irrespective of their nature, and yet a trust for a special class, the owners of negotiable instruments whose debts remain unsatisfied after payment of the paper has been collected by the agent. Cf. *Spradlin* v. *Royal Manufacturing Co.*, 73 F. (2d) 776. "Such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank." A trust so created, to arise upon insolvency, is a preference under another name. As applied to a national bank, the preference is plainly inconsistent with the system of equal distribution established by the federal law. R. S. § 5236; 12 U. S. C. § 194; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283, 284; *Easton* v. *Iowa,* 188 U. S. 220, 229; *Cook County National Bank* v. *United States,* 107 U. S. 445; *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245; *Lewis* v. *Fidelity & Deposit Co. of Maryland, supra.* The power of the nation within the field of its legitimate exercise overrides in case of conflict the power of the states.

The decree is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

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been requested or accepted so as to constitute such failed collecting or other bank debtor therefor, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank."

OLD COMPANY'S LEHIGH, INC. *v.* MEEKER, RECEIVER, ET AL.

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

No. 340. Argued January 17, 1935.—Decided February 4, 1935.

1. The payee of a promissory note sent it for collection to a national bank, named in the note as the place of payment and in which the maker had a deposit account in excess of the note. Two days before maturity, the maker delivered to the bank his check upon the account for the sum due on the note, and received back the note, which was surrendered as paid. Both knew that the bank was then insolvent, and on the next business day it was closed by the Comptroller of the Currency. *Held* that there was no ground for impressing a trust on the assets of the bank in favor of the payee. See *Jennings* v. *U. S. Fidelity & Guaranty Co., ante,* p. 216. P. 229.
2. The provision of the Uniform Bank Collection Code, adopted in New York, to the effect that, in the event of a bank's insolvency, the claims of those whose paper the bank has collected but for which it has not paid them, shall be preferred, is invalid as applied to a national bank. *Jennings* v. *U. S. Fidelity & Guaranty Co., ante,* p. 216. P. 230.

71 F. (2d) 280, affirmed.

Certiorari, 293 U. S. 546, to review the affirmance of a decree dismissing the bill in a suit against an insolvent national bank, its receiver, and the maker of a promissory note, brought by the payee to impress a trust upon its assets.

Mr. Israel H. Mandel, with whom *Mr. Joseph G. M. Browne* was on the brief, for petitioner.

Mr. George P. Barse, with whom *Messrs. John F. Anderson, Humphrey J. Lynch,* and *F. G. Awalt* were on the brief, for respondents.

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy here, like the one in No. 338, decided herewith, *ante*, p. 216, grows out of an attempt by the owner of negotiable paper to impress a trust upon the assets of an insolvent national bank to which the paper had been forwarded for the purpose of collection.

The complaint, which is in three counts, is brought before us by a motion to dismiss, which is equivalent to a demurrer.

According to the first cause of action, plaintiff, a New Jersey corporation, the petitioner in this court, was the owner of a promissory note for $3,000, made by R. G. Brewer, Inc., to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking act. This note the plaintiff deposited on January 12, 1933, in a bank in Philadelphia, which forwarded it through other banks to the bank in Mamaroneck for collection from the maker. R. G. Brewer, Inc., the maker, had an account at the First National Bank of Mamaroneck with a credit balance on the books of the bank in excess of the amount owing on the note. On January 14, 1933, it delivered to the bank a check upon that account for $3,015, and received back the note, which was surrendered as paid. On January 16, 1933, the next business day, the Mamaroneck bank, being insolvent, was closed by the Comptroller of the Currency without remitting or accounting for any proceeds of collection. The plaintiff claims the benefit of a trust upon the assets in the hands of the receiver.

The second cause of action is the same as the first with these additional allegations: The bank in Mamaroneck knew itself to be insolvent on January 14, 1933, when the plaintiff's promissory note was accepted for collection.

R. G. Brewer, Inc., whose treasurer (R. G. Brewer) was a director and managing officer of the bank, also knew of the insolvency and of the impending liquidation. What was done in the acceptance of the check and the surrender of the note two days before maturity was the product, so it is charged, of a conspiracy to release the Brewer corporation from liability and thus defraud the plaintiff.

The third cause of action goes upon the theory that the note was not discharged or canceled but is in the possession of the receiver, who should be directed to return it.

The Circuit Court of Appeals affirmed a judgment of dismissal as to the first and second causes of action, holding the plaintiff to be a general creditor without title to a preference. As to the third cause of action, the allegations were found sufficient on their face to put the parties to their proofs, and to that extent only the dismissal was reversed. 71 F. (2d) 280. A writ of certiorari brings the case here. The third cause of action is not before us, the receiver having acquiesced in the judgment of the court below. The causes of action to be considered are the first and second.

What was done by the Mamaroneck bank on January 14, 1933, did not involve in its doing the creation of a special deposit or an augmentation of the assets. What was done had no effect except to diminish liabilities by reducing the indebtedness due to a depositor. *Jennings* v. *United States Fidelity & Guaranty Co., ante,* p. 216. The petitioner insists that the transaction must be viewed as if Brewer, the depositor, had withdrawn $3,015 in coin or other currency, and had paid it back to the bank to apply upon the note. But that is not what happened. The bank, aware of its insolvency, might have been unwilling to pay out the coin, even if Brewer had demanded it, when the effect of the payment would have been to prefer one creditor over others. R. S. § 5242; 12 U. S. C. § 91; *National Security Bank* v. *Butler,* 129 U. S. 223;

McDonald v. *Chemical National Bank,* 174 U. S. 610, 618; *Roberts* v. *Hill,* 24 Fed. 571. Brewer, equally aware of the insolvency, might have been unwilling to return the coin if once he held it in his grasp and had the power to retain it. Moreover, the note had not matured, and there was no duty to pay or to collect in advance of its maturity. We indulge in nothing more than guesswork when we assume that the transaction would have been carried through at all if bank or depositor had insisted that it receive another form. Cf. *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co.,* 242 Mass. 181, 187; 136 N. E. 333. Form is closely knit to substance when a bank, at the end of its resources, is about to close its doors.

The argument is made that the agent for collection was guilty of a wrong in accepting payment through the medium of a check upon itself with knowledge at the time that insolvency was imminent. If this be so, the wrong does not avail to charge a trust upon the assets whereby the plaintiff will have a preference over the creditors at large. A cause of action for damages may exist, upon which the plaintiff, making proper proof, will be entitled to a dividend. There may also be a cause of action for the return of the canceled note, or for a dividend upon the value if return is found to be impossible. Liabilities such as these have their origin and measure in the loss suffered by the claimant, the owner of the paper transmitted for collection. They do not correspond to equivalent increments of value in the assets that are left in the hands of the receiver.

By an amendment of the Negotiable Instruments Law (Consolidated Laws of New York, c. 38; Article 19A, §§ 350 to 350 (1)), New York has adopted the Uniform Bank Collection Code, which has already been considered by this court in a case arising in Indiana. *Jennings* v.

United States Fidelity & Guaranty Co., supra. Section 350(1) of the code is to the effect that in the event of insolvency a creditor in the situation of the plaintiff shall be entitled to a preference. As applied to a national bank the preference is unlawful. *Jennings* v. *United States Fidelity & Guaranty Co., supra.*

The decree should be affirmed, and it is so ordered.

Affirmed.

ADAMS, RECEIVER, *v.* CHAMPION, TRUSTEE IN BANKRUPTCY.

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

No. 374. Argued January 17, 1935.—Decided February 4, 1935.

1. A suit by a trustee in bankruptcy to recover, under § 60 (b) of the Bankruptcy Act, property, or the value of property, which the debtor transferred to a creditor, is maintainable at law; but if prosecuted in equity without objection the same relief may be decreed. P. 234.
2. A national bank accepted a pledge of securities as collateral for an existing debt, with reasonable cause to believe that a preference would be effected, within the meaning of § 60 (b) of the Bankruptcy Act. The debtor became a bankrupt within four months; and, while the bankruptcy proceedings were pending but before the trustee had made any demand upon it based on § 60 (b), the bank disposed of the securities for fair value to some of its depositors, receiving payment, not in cash, but by accepting their checks drawn on itself and charging them against their accounts. Some months later the trustee sued the bank to avoid the preferences and, after a protracted litigation, he obtained a decree for the value of the securities. Although the bank had become insolvent and was placed in the hands of a receiver six months before the decree was entered, the receiver had not been made a party. Afterwards, the trustee sought an order requiring the receiver to pay the amount claimed, as a preferred charge upon the bank's assets. *Held:*

(1) That the acceptance of the securities and their subsequent disposition for fair value, before the trustee in bankruptcy had

elected to avoid the preferences, were not wrongful acts on the part of the bank, and the bank was not chargeable as a trustee *ex maleficio*. P. 235.

(2) The bank, when it accepted payment for the securities by cancelling to an equivalent extent debts due by it to the depositors who acquired them, was under no present duty to set up a trust of the proceeds, and as it had then a solvent, going business, and made the transfer without fraudulent or obstructive purpose, there is no reason why the transaction should be treated retrospectively as something other than it was meant to be. P. 236.

(3) When the transfer was avoided, the bank became chargeable like any common law debtor with a duty of restitution to the extent of the value of the property disposed of. P. 237.

(4) The assets of the bank in the hands of the receiver are not subject to a trust in favor of the trustee in bankruptcy. P. 238.
70 F. (2d) 956, reversed.

Certiorari, 293 U. S. 547, to review the affirmance of a decree imposing a trust on the funds of an insolvent national bank at the suit of a trustee in bankruptcy.

Mr. John F. Anderson, with whom *Messrs. F. G. Awalt* and *George P. Barse* were on the brief, for petitioner.

Mr. Harry C. Heyl submitted for respondent.

By leave of Court, *Messrs. F. G. Awalt* and *George P. Barse* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae.*

Mr. Justice Cardozo delivered the opinion of the Court.

A trustee in bankruptcy asserts a claim against the receiver of a national bank for the value of property received by the bank as an unlawful preference. The receiver admits the validity of the claim if it is placed upon the same level as the claims of creditors at large. The trustee insists that the claim must have priority on the ground that the avails of the unlawful preference are subject to a trust.

In September, 1928, the bankrupt, John Fitzgerald, had overdrawn his deposit account with the Farmers National Bank of Pekin, Illinois, and was also indebted to the bank upon promissory notes. In response to a demand for collateral security he delivered to the bank notes of other persons, as well as a certificate of stock, the whole of the face or par value of about $35,000. Most of the securities so delivered have been returned to the trustee and are not in controversy now. Four items only are the subject of this suit.

The bank received from Fitzgerald on September 7, 1928, a certificate for ten shares of its own stock, a promissory note of Charles Graff for $3,000, a promissory note of W. C. Sommer for $1,000, and notes or bonds of Veesaert for $5,000, reduced later by $1,597.31 paid upon account. Within a period of four months (on October 26, 1928), creditors of Fitzgerald filed a petition in bankruptcy, an adjudication following in November of that year. No election was made by the trustee in bankruptcy to reclaim the collateral as an unlawful preference till July 20, 1929, or if there was an earlier election, it is not shown by the record. In the meantime the bank, which continued as a going concern until January, 1932, had disposed of three of the contested items of security as follows: On February 9, 1929, after having credited the bankrupt with a dividend of $30, it sold the ten shares of its own stock to one Cullinan, a depositor. The price was $3,000, by concession the fair value. Payment was effected by charging the deposit account of the purchaser with what was owing for the shares. On April 12, 1929, the bank collected $3,183.78 upon the note of Charles Graff by charging that amount against the deposit balance to his credit. On April 16, 1929, it collected $1,059.98 upon the note of W. C. Sommer by a charge against his balance. Nothing was received upon the Veesaert bonds, the fourth contested item, till December,

1930. The bank then had a payment on account to the extent of $1,597.31, the payment being made by the deposit of a check to its credit in the First National Bank of Chicago, Illinois. The balance in that account was afterwards reduced to $776.57, which latter amount, together with the bonds themselves, the receiver stands ready to transfer to the trustee.

The election by the trustee to reclaim the collateral securities in behalf of the estate was announced, as we have seen, on July 20, 1929, and was manifested by the beginning of a suit for appropriate relief. No charge was made that the transaction was voidable for any actual fraud. The suit was under § 60b of the National Bankruptcy Act (11 U. S. C. § 96) upon the ground that the effect of the transaction was to prefer one creditor over others, and that the creditor, the bank, had reasonable cause to believe that such effect would follow.* Under *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, an action at law could have been maintained for the recovery of the property or its value. Without objection, however, the suit was tried in equity. Cf. *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 235. It ended on June 24, 1932, in a decree invalidating the transactions of September 7, 1928, as constituting a forbidden preference, and directing the return of the securities, or the value of such as had been converted into money.

During the years of litigation the bank had suffered reverses, and on January 8, 1932, it was closed by the

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* "If a bankrupt shall . . . have made a transfer of any of his property, and if, at the time of the transfer, . . . and . . . within four months before the filing of the petition in bankruptcy . . . the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. . . ." § 60b; 11 U. S. C. § 96.

Comptroller of the Currency. The receiver appointed by the Comptroller was not a party to the suit to invalidate the preference. After the entry of a decree, the trustee in bankruptcy petitioned for an order instructing the receiver that the four contested items were a preferred charge upon the assets, and that payment should be made accordingly. The District Court granted the relief prayed for, and upon appeal to the Court of Appeals for the Seventh Circuit the order was affirmed. 70 F. (2d) 956. A writ of certiorari issued from this court.

If we except a small item conceded by the receiver, we think the reasons are inadequate for the imposition of a trust in the nature of a preference upon the funds of this insolvent bank.

1. For convenience the first of the contested items, the proceeds of the stock certificate, will be considered by itself, the conclusion appropriate for this item being typical of the conclusion appropriate for the others.

The acceptance by the bank of the certificate delivered by Fitzgerald on September 7, 1928, was not a wrongful act whereby the bank forthwith became subject to the duties and liabililties of a trustee *ex maleficio*. One who acquires a security with reasonable cause to believe that the effect will be a preference does not from that alone become a party to a fraud. *Van Iderstine* v. *National Discount Co.,* 227 U. S. 575, 582; *Watson* v. *Adams,* 242 Fed. 441, 444, 445; *Dean* v. *Davis,* 242 U. S. 438, 444; *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356; *Carson* v. *Federal Reserve Bank,* 254 N. Y. 218, 234; 172 N. E. 475. If bankruptcy is averted altogether, or postponed beyond four months, the security will stand, though a preference was intended at the time of its acceptance. So also a change of assets or liabilities before bankruptcy arrives may mean the difference between a preference and a ratable division. *Haas* v. *Sachs,* 68 F. (2d) 623; *Irving Trust Co.* v. *Townsend,* 65 F. (2d) 406, 408; *Mansfield*

Lumber Co. v. *Sternberg,* 38 F. (2d) 614, 617; *Rogers* v. *Page,* 140 Fed. 596, 606; *In re Henry C. King Co.,* 113 Fed. 110, 111; *Rubenstein* v. *Lottow,* 223 Mass. 227, 229, *et seq.;* 111 N. E. 973. The bank took the risk that in future and indeterminate contingencies it might be compelled to return what it accepted or the value. At the outset it was not a trustee *ex maleficio* or otherwise. It was a bailee and nothing more.

If a trust was not created in September, 1928, through the acceptance of a security which has turned out to be a preference, none was in existence on February 9, 1929, when part of that security, the certificate of stock, was delivered to a purchaser. True, by that time the debtor was in bankruptcy, but the other uncertainties, for anything here shown, were as indefinite as ever. The accurate determination of assets and liabilities had still to wait upon the process of proof and liquidation. At most the security was voidable, not void, and the trustee up to that time had made no move to avoid it. A suit would have been a sufficient election, even though not preceded by a demand (*Eau Claire National Bank* v. *Jackman,* 204 U. S. 522, 534, 535; *Stephens* v. *Pittsburgh Plate Glass Co.,* 36 F. (2d) 953), but as yet there had been no suit, nor statement that a suit was coming. To turn the bank into a wrongdoer in the absence of actual fraud, to charge it with all the liabilities growing out of a constructive trust, there was need of some act of avoidance that would put the brand of guilt upon it. Cf. *Boyd* v. *Dunlap,* 1 Johns. Ch. 478, 482, per Kent, Ch. We hear of no such act till July, 1929, when the trustee in bankruptcy brought suit to declare the preference a nullity.

The sale of the stock certificate to Cullinan on February 9, 1929, must be approached and considered in the light of the relation then existing. There was then no trust *ex maleficio,* whereby the bank was chargeable as a wrongdoer for parting with the shares. There was no trust implied in fact, unless it be the fiduciary obligation assumed by a bailee to act with prudence and fidelity in the disposition of the pledge. The trustee does not assert that this obligation has been violated. On the contrary he concedes that the price was equal to the value. With its duty thus defined and measured, the bank agreed with Cullinan to accept payment of the price by canceling to an equivalent extent the debt due him as a depositor. Cf. *Jennings* v. *United States Fidelity & Guaranty Co., ante,* p. 216; *Old Company's Lehigh, Inc.* v. *Meeker, ante,* p. 227. We do not need to consider whether effect would be given to such an agreement according to its form if the bank at that time had been under a present duty to set up a trust as to the proceeds to the use of the bankrupt or of the trustee as his successor. For the purposes of this case we assume, though we do not hold, that a trust in that event would attach to the cash assets in the vaults to an equivalent amount. A different result follows when there is neither trust to be set up nor wilful wrong to be repaired. The bank, when it parted with the certificate, had a solvent, going business, and did not make the transfer with any fraudulent or obstructive purpose. There is no reason in such circumstances why the transaction should be treated retrospectively as something other than it was meant to be. *Jennings* v. *United States Fidelity & Guaranty Co., supra.* Equity fashions a trust with flexible adaptation to the call of the occasion.

Other remedies were at hand sufficient for the needs of justice. When the preference was avoided, the bank became chargeable like any common law debtor with a duty of restitution to the extent of the value of the property disposed of. There might even be a duty, if the proceeds were intact, to make return *in specie*. But what is here sought is very different. By a process of analysis a unitary transaction, the cancellation of a debt to a depositor, is treated as if split up into two parts, a fictitious withdrawal by the depositor of coin or other currency, and its return to the bank to be applied upon the purchase. The money so returned is then subjected to a trust and though mingled with other money is viewed as retaining its identity so long as any portion of the fund is discovered to be intact. These fictions and presumptions may serve well enough in their application to one whose act is against equity and conscience at the time of its commission. They may be implements of justice in cases of theft or actual fraud. So, at least, we now assume. In circumstances less flagrant, they will be used more charily. They will not be so applied as to impose a trust by relation upon moneys that have entered into " the stream of the firm's general property " (Holmes, J., in *National City Bank* v. *Hotchkiss,* 231 U. S. 50, 57), and are distinguishable no longer.

For nearly three years after the sale of this stock, the situation stood unchanged. An adequate remedy against the bank through the recovery of an ordinary money judgment belonged to the trustee continuously, and this whether the award of the value was to be at law or in equity. *Schoenthal* v. *Irving Trust Co., supra; Buffum* v. *Peter Barceloux Co., supra.* There was no attempt during those years to separate the proceeds of the sale from other assets through an injunction or a receivership, nor any hint of a desire to charge a trust upon the proceeds. Not till the suit was at an end and the bank was in the hands of the Comptroller of the Currency did the respondent shift his theory and turn a debt into a trust. By that time new duties had arisen, new interests had intervened. The assets of the bank were now held by the receiver upon a trust for equal distribution. Cf. *Wisdom* v. *Keen,* 69 F. (2d) 349, 350; *Fera* v. *Wickham,* 135 N. Y. 223, 230; 31 N. E. 1028; *Gerseta Corp.* v. *Equitable Trust Co.,* 241 N. Y. 418, 425; 150 N. E. 501. The shift had come too late.

2. What has been said as to the sale of the stock certificate to Cullinan applies with equal force to the second and third of the contested items, the Graff and Sommer notes.

The collections on these notes were made in April, 1929. They were made, not in cash received over the counter, but by cancellation of a debt owing to the makers upon their deposit balance in the bank. There was neither trust, nor claim of trust, until the bank had suspended, and was in the hands of a receiver.

3. The fourth contested item, the collection on the Veesaert bonds, differs from the others in that the payment was received after the trustee in bankruptcy had elected to avoid the preference and had sued for that relief.

The payment was made as we have seen, by the deposit of $1,597.31 in the First National Bank of Chicago, Illinois.

The balance in that account was reduced in 1931 to $776.57. What became of the difference ($820.74) there is nothing to inform us. Evidence is lacking that it was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today. The receiver consents that this item of $776.57, the balance in the Chicago bank, be paid to the respondent as a preferred charge upon the fund.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

NORMAN *v.* BALTIMORE & OHIO RAILROAD CO.*

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

UNITED STATES ET AL. *v.* BANKERS TRUST CO. ET AL., TRUSTEES.

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

Nos. 270, 471 and 472. Argued January 8, 9, 10, 1935.—Decided February 18, 1935.

1. A bond for the future payment of a stated number of dollars in gold coin of the United States " of or equivalent to the standard of weight and fineness existing " on the date of the bond, or for payment in gold coin of the United States " of the standard of weight and fineness prevailing " on the date of the bond, is not a contract for payment in gold coin as a commodity, or in bullion (cf. *Bronson* v. *Rodes,* 7 Wall. at p. 250), but is a contract for payment in money. Pp. 298–302.
2. Such " gold clauses " are intended to afford a definite standard or measure of value, and thus to protect against depreciation of the currency and discharge of the obligations by payment of a lesser value than that prescribed. P. 302.
3. In determining whether the Joint Resolution of June 5, 1933, exceeded the power of Congress by undertaking to nullify such " gold clause " stipulations in preëxisting money contract obligations, and by providing that such obligations shall be discharged, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, the Resolution must be considered in its legislative setting, with other measures *in pari materia* (p. 297), and in the light of the following principles, which have heretofore been laid down by this Court, viz:

(a) The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the ag-

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* No. 270, *Norman* v. *Baltimore & Ohio R. Co.;* Nos. 471 and 472, *United States* v. *Bankers Trust Co.;* No. 531, *Nortz* v. *United States, post,* p. 317; and No. 532, *Perry* v. *United States, post,* p. 330, popularly called the " Gold Clause Cases," were disposed of in three opinions (*post,* pp. 291, 323, and 346). Mr. Justice Stone filed a concurring opinion in the *Perry* case, *post,* p. 358. The dissenting opinion, *post,* p. 361, applies to all of the cases.

gregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. P. 303.

(b) The Constitution means to provide the same currency of uniform value in all the States; and therefore the power to regulate the value of money was withdrawn from the States and vested in Congress, exclusively. P. 302.

(c) Congress has power to enact that paper currency shall be equal in value to the representative of value determined by the coinage acts, and impress upon it such qualities as currency for purchases and for payment of debts as accord with the usage of sovereign governments. P. 304.

(d) The authority to impose requirements of uniformity and parity is an essential feature of the control of the currency; and Congress is authorized to provide a sound and uniform currency for the country and secure the benefit of it to the people by appropriate legislation. P. 304.

(e) The ownership of gold and silver coin is subject to those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. Hence, the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin. P. 304.

(f) Private contracts must be understood as having been made subject to the possible exercise of the rightful authority of the Government; and their impairment, resulting from such exercise, is not a taking of private property for public use without compensation, or a deprivation of it without due process of law. Pp. 304–305.

4. In the exercise of the constitutional authority of Congress to regulate the currency and establish the monetary system of the country, existing contracts of private parties, States or municipalities, previously made, and valid when made, but which interfere with the policy constitutionally adopted by Congress, may be set aside, not only through the indirect effect of the legislation, but directly, by express provision. Pp. 306–309.

5. Whether the gold clauses of the contracts here in question may be deemed to interfere with the monetary policy of Congress, depends upon an appraisement of economic conditions and upon determi-

nations of questions of fact, as to which Congress is entitled to use its own judgment. P. 311.

6. The Court may inquire whether the action of Congress, invalidating such clauses, was arbitrary or capricious; but if that action has reasonable relation, as an appropriate means, to a legitimate end, the decision of Congress as to the degree of necessity for its adoption is final. P. 311.

7. Congress was entitled to consider the great volume of obligations with gold clauses, because of its obvious bearing upon the question whether their existence constituted a substantial obstruction to the congressional policy. P. 313.

8. Taken literally, as calling for actual payment in gold coin, these promises were calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin, in direct opposition to the policy of Congress. P. 313.

9. Congress has power, in its control of the monetary system, to endeavor to conserve the gold resources of the Treasury, to insure its command of gold in order to protect and increase its reserves, and to prohibit the exportation of gold coin or its use for any purpose inconsistent with the needs of the Treasury. P. 313.

10. Treated as "gold value" clauses, such stipulations are still hostile to the policy of Congress, and subject to prohibition, for the following reasons:

(a) Although, at the date of the Joint Resolution, the dollar had not yet been devalued, devaluation (reduction of the weight of the gold dollar as the standard of value, which occurred later) was then in prospect and a uniform currency was intended. P. 314.

(b) Congress could constitutionally act upon the gold clauses in anticipation of this devaluation, if the clauses interfered with its policy. P. 315.

(c) It may be judicially noticed that the bonds issued by States, municipalities, railroads, other public utilities and many industrial corporations contain such gold clauses. P. 315.

(d) If States, municipalities, railroads, public utilities, industrial corporations, etc., receiving all their income in the devalued currency were obliged to pay their gold clause obligations in amounts of currency determined on the basis of the former gold standard, it is easy to see that this disparity of conditions would cause a dislocation of the domestic economy. P. 315.

265 N. Y. 37; 191 N. E. 726, affirmed.

Dist. Ct. U. S. (unreported), affirmed.

Writs of certiorari were granted (293 U. S. 546, 548) to review two decisions sustaining the power of Congress to invalidate "gold clauses" in private money contracts.

In the first case, an action on a coupon from a railroad bond, the Court of Appeals of New York sustained the trial court in limiting the recovery to the face of the coupon, dollar for dollar, in currency.

In the second case, a proceeding under § 77 of the Bankruptcy Act, a federal District Court made a like ruling with respect to certain other railroad bonds. In this case two appeals were taken to the Circuit Court of Appeals, one allowed by that court and the other by the District Judge. While they were pending, this Court granted writs of certiorari on the petition of the United States and the Reconstruction Finance Corporation, which had both intervened in the District Court.

Mr. Emanuel Redfield for Norman, petitioner. *Mr. Dalton Dwyer* was with him on the brief, from which the following summary is extracted:

The gold clause implies payment in equivalent of gold if payment in gold becomes impossible. Its purpose is to guard against a depreciated currency.

Congress has power to coin money and regulate the value thereof. To coin money is to give the impression a governmental authority. "To regulate the value thereof" would mean to state the character of that coin in terms of its exchange value and to give it a content of a nominal amount. To regulate the value of money does not imply that every obligation payable in money is susceptible of regulation by Congress. In *Fox* v. *Ohio,* 5 How. 410, the Court indicated this difference and denied that the money powers of Congress included the right to control private transactions within the States.

There is no power in Congress directly to enlarge or diminish an obligation. Such powers belong to the States, if they exist at all. Congress desiring to tamper with the content of the gold unit, finds the outstanding gold-clause obligations inconvenient, because they are so many. Therefore, to suit its convenience, they are abolished. If only one million dollars of such obligations had existed, the inconvenience would not have been deemed substantial, and they would have been allowed to exist.

These gold obligations were no part of the monetary system. They were economic transactions in a price system. The money unit and medium were mere incidents of the transaction.

The proposition that contracts payable in gold or its equivalent would control the value of the currency, i. e., prevent a raising or lowering of the content, is refuted by the fact that the object of the parties is to fix a more accurate measure of the value of their exchange.

The use of any standard as the measure of the intent of the parties does not, by "prophetic discernment," hinder the monetary functions of the Government. Surely, if the value of wheat were used as the standard, the power to regulate money would not be affected. If parties receive an equivalent of any measure in paper money or credits, whether that measure be gold or wheat, the currency is not affected. The bargain is merely performed according to their intent.

The *Legal Tender Cases* are distinguishable. This Court there held that the paper had the characteristics of money and that acceptance of it could be compelled as payment of an obligation. The compulsion was directed at the mode of payment, not the extent of the obligation.

The obligation of the gold clause is not the nominal face amount, but the equivalent of the gold coin in legal tender. Thus understood, the integrity of the obligation and the power of legal tender to discharge it in dollars, are preserved. See *Trebilcock* v. *Wilson,* 12 Wall. 687; *Gregory* v. *Morris,* 96 U. S. 619. The *Legal Tender Cases* did not decide that the power to compel acceptance of paper currency in discharge of an obligation implied a power to diminish an obligation that was measured in a special way. This Court repeatedly implied the contrary.

This Court has before passed upon legislation masquerading as an aid to an express constitutional power. *Mugler* v. *Kansas,* 123 U. S. 623, 661; *McCullough* v. *Maryland,* 4 Wheat. 316, 423; *Hammer* v. *Dagenhart,* 245 U. S. 251; *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311; *First Employers' Liability Cases,* 207 U. S. 463; *United States* v. *DeWitt,* 9 Wall. 41; *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Hill* v. *Wallace,* 259 U. S. 44; *Blumenstock Bros.* v. *Curtis,* 252 U. S. 436; *Trade Mark Cases,* 100 U. S. 82; *United States* v. *Fox,* 95 U. S. 670; Kent's Commentaries, 12th ed., vol. 1, p. 254, Mr. Justice Holmes; Field, J. dissent, *Legal Tender Cases,* 12 Wall. 651; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *McCray* v. *United States,* 195 U. S. 27, 63, 64; McReynolds, J., dissent, *Rupert* v. *Caffey,* 251 U. S. 264, 304; *Lambert* v. *Yellowley,* 272 U. S. 581, 597.

The use of gold as a measure of value is not an evil. Any object could be used as such a measure. Yet no one can insist that a contract calling for a payment measured by the value of any commodity is subject to action by Congress. This, we submit, is of greater moment when one considers that under the "Gold Reserve Act of 1934," the coining of gold has been withdrawn and gold as a circulating medium of exchange has been abolished. Now, it is only a base for values. It is now the same as the standard weights and measures kept in seclusion in Washington. Could any one assert that Congress could pass a law under its power to regulate weights and measures, stating that a contract for the delivery of a bushel of wheat could be discharged by the delivery of only half a bushel?

Bankruptcy laws are express laws that impair the obligations of contracts. That power is specific for that purpose, and includes the power to regulate the relation of debtor and creditor by the process of composition. If this specific power exists for those purposes, it can hardly be said that the power over money includes an implied power to compose and regulate the obligations between creditor and debtor.

Assuming an emergency exists, an emergency cannot grant a power. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

If this legislation purports to be based upon an emergency, it is defective because there is no time limit set in the law as the duration of the emergency. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Worthen* v. *Thomas,* 292 U. S. 426.

Should it be argued that the power is derived from the power of Congress to borrow money, petitioner submits in reply the very arguments set forth above regarding the alleged money power. Furthermore, repudiation can not be an aid to borrowing credit. *Lynch* v. *United States,* 292 U. S. 571, 580.

Should it be held that the gold clause legislation is sustained by the money powers of Congress, a new field of unlimited centralized control will be opened. The same power might apply to any form of financial transactions,— to wages of child labor, suspension of mortgage payments, etc. This would wipe out the dual form of our indestructible union consisting of indestructible States. *Texas* v. *White,* 7 Wall. 700.

The Joint Resolution deprives petitioner of his property without due process of law and without just compensation. The Fifth Amendment is a limitation upon the powers of Congress. *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 154; *Adair* v. *United States,* 208 U. S. 161, 172; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *Adkins* v.

Children's Hospital, 261 U. S. 525, 545, 546, 561; *Fairbanks* v. *United States,* 181 U. S. 283, 289; Day, J., dissent, *Wilson* v. *New,* 243 U. S. 332, 366; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 327; *Milliken* v. *United States,* 283 U. S. 15; *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Sturges* v. *Crowninshield,* 4 Wheat. 122.

The Federal Government is one of enumerated delegated powers. If no power to impair contracts is granted, it is difficult to see how the power can be derived. The only power specifically mentioned in the Constitution to impair contracts, is the provision for bankruptcy laws. This fact alone indicates that if the power to impair contracts were intended for the Federal Government, specific mention would have been made of it. The prohibition against state action, however, was specifically made because the omission in the Constitution to prohibit the States might have been deemed a permission for such legislation under the sovereign powers of the States which are inherent. See *Calder* v. *Bull,* 3 Dall. 386, 388; The Federalist, No. 44; Cooley, Story on the Constitution, 4th ed., vol. 2, § 1399, p. 261.

The due process clause covers Acts of Congress impairing the obligation of contracts. *Sinking Fund Cases,* 99 U. S. 700, 718. See also *United States* v. *Northern Pacific Co.,* 256 U. S. 51, 64; *Choate* v. *Trapp,* 224 U. S. 665, 674.

Impairment of contracts, incident to the exercise of a power of Congress, may be unobjectionable, if the exercise be found reasonable. *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *New York* v. *United States,* 257 U. S. 591, 601. Aliter, if unreasonable: *Blodgett* v. *Holden,* 275 U. S. 142, 147. Distinguishing: *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603. Cf. *New York Central R. Co.* v. *Gray*, 239 U. S. 583.

If Congress exercised the power to cancel the obligation of gold clauses, because it deemed it necessary for a better regulation of the monetary system, the property of petitioner was taken for a public use, and adequate and just provision should have been made to compensate him for his loss in being required to take, dollar for dollar, in depreciated currency. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Ochoa* v. *Hernandez*, 230 U. S. 139.

Merely to state that a thing obstructs the exercise of a power does not take it out of the class of cases where compensation must be paid. Here actually is no obstruction. There was merely a condition of inconvenience that rendered dollar devaluation inopportune. Therefore, the nullification of the obligation was not a regulation but an out and out taking for an alleged public need. See *Osborn* v. *Nicholson*, 13 Wall. 654.

Petitioner was deprived of the equal protection of the laws. The purpose and effect were to transfer property from the class called creditors to those termed debtors.

Mr. Frederick H. Wood for the Baltimore & Ohio R. Co. From the brief:

The gold clause is a "gold coin," not a "gold value" clause, but is equally within the Resolution whether interpreted as the one or the other.

An instrument so framed or interpreted is not one for the payment of a sum certain, but one for the payment of an indeterminate sum ascertainable only at date of payment, and is not negotiable. Negotiable Instruments Law of New York, Art. 3, § 20 (2); Laws of Maryland, 1898, c. 119, § 20 (2); Uniform Negotiable Instruments Law, Art. I, § 1 (2). It is dischargeable only in the coin specified and not in that amount of other money which at the time of payment will buy such coin. *Bronson* v. *Rodes,* 7 Wall. 229; *Trebilcock* v. *Wilson,* 12 Wall. 687; *The Emily Souder,* 17 Wall. 666; *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379. Distinguishing: *Gregory* v. *Morris,* 96 U. S. 619; *Feist* v. *Société Intercommunale Belge d'Electricité,* L. R. (1934) A. C. 161; *The Brazilian Loans,* P. C. I. J., Series A, No. 20.

The Congress has an authority with respect to the national monetary system and the currency not confined by the limitations of any one specific grant in the Constitution. The exertion of this authority may be supported by the "resulting" or "composite" powers arising through the combination or aggregation of any or all of the specific grants of power. *The Legal Tender Cases,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421; *McCulloch* v. *Maryland,* 4 Wheat. 316, 407–12. See *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711–712; *The Insular Cases,* 182 U. S. 244, 288, 300; 195 U. S. 138, 140, 143, 149; 258 U. S. 298, 305; *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668; *Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Selective Draft Cases,* 245 U. S. 366, 377; *McGrain* v. *Daugherty,* 273 U. S. 135, 161.

The sovereign character of the National Government must be given weight in determining the scope of the powers granted to it over the monetary system and the currency. In construing the great clauses of the Constitution the Court has frequently been guided by the fact that the primary purpose was to create a sovereign nation as distinguished from a mere federation of States.

Congress is empowered to provide the people with a national monetary system and a national currency suitable to their needs, and to secure to them the full and unimpaired benefits thereof through the adoption of any measures appropriate either to the accomplishment of such purpose or for the removal of obstructions thereto.

Congress is empowered to declare of what the currency shall consist, to give to every unit and description thereof the character and qualities of money having a legally defined value, to regulate the value of such money and to make every unit legal tender at its face value for the discharge of all money obligations, whether previously existing or subsequently incurred.

An unqualified grant of power " to regulate the value " of money necessarily comprehends the regulation of its value when used for the performance of any of its functions as money, and hence includes the power to control the use of money as a standard of value. The word " regulate " means " to control " or " to govern." *Second Employers' Liability Cases,* 223 U. S. 1, 47, 48. The word "value" connotes equivalency according to a standard.

The express power to regulate the value of foreign coin is obviously a power to regulate its use in this country as a standard of value.

The power includes the power to determine and regulate the value of the several units of the currency in terms of each other and to prohibit the attempted use of one kind of money as a commodity for the purpose of realizing in another kind of money a value greater than the stated value of the first. Cf. *Ling Su Fan* v. *United States,* 218 U. S. 302.

The comprehensiveness of this power is evidenced by the previous decisions of this Court arising under the power of Congress over the monetary system and currency; also by the decisions of this Court in respect of the related power to create national banks; also by the decisions arising under the commerce clause, one of the clauses upon which the power of Congress over the monetary system and currency is based.

Private individuals may not " by prophetic discernment," through contracts previously entered into, any more than by contracts subsequently made, withdraw from the control of Congress any part of its legislative field or limit or obstruct the exercise of its powers therein.

Gold clause obligations, at all times a latent threat to the stability of the monetary system and currency, had, at the time of the adoption of the Resolution, become a plain obstacle to the maintenance of a stable monetary system and currency, which it was within the power of the Congress to remove both to meet the then existing emergency and to prevent its recurrence.

Gold clause obligations constituted an obstruction to the adjustment of the value of the dollar in the interest of our foreign commerce.

In the last analysis, those who challenge the validity of the Resolution would deny to Congress the choice of means by which to effect such change in the monetary system as was believed by it to be required by the needs of the people and their commerce, both foreign and domestic.

As related to the subsequent devaluation of the dollar, the Resolution was a valid exercise of all of the powers of the Congress over the monetary system and the currency.

Attorney General Cummings, orally, on behalf of the United States in these and the two following cases: * . . .

Underlying these four cases are certain fundamental constitutional considerations which I think are determinative of the entire matter. . . .

Although it may seem trite to do so, I draw attention to what, for want of a better term, may be called the " presumption of constitutionality."

This doctrine has been laid down in innumerable cases, some of which are cited in our briefs, but nowhere, I think,

* Mr. Cummings' address, stenographically reported, has been printed in full by the Government Printing Office. Omissions from the present report are marked by dots. He also closed the argument in all of the cases.

is it more effectively stated than in the *Legal Tender Cases,* in which this Court said:

"A decent respect for a coördinate branch of the Government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress, all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule."

But this doctrine, I apprehend, goes still further, and carries with it the proposition that this Court will accord great weight to the findings and reasons set forth by the Congress for enacting the legislation which it has passed.

The next cardinal principle is that, in selecting the means to carry out the purpose of the Congress, the Congress has wide discretion. Unless it is shown that the exercise of that discretion has been clearly arbitrary or capricious or unreasonable, this Court will not interfere with it.

I have adverted to these considerations not because they are not recognized, but because they are so well recognized that they are taken as a matter of course. We are inclined, I fear, to pay them a sort of lip service and then pass on to the consideration of matters of a more controversial character. Therefore, we are apt to find ourselves in the position of ignoring certain fundamental matters which are so obvious that they are, at times, forgotten or overlooked. These doctrines to which I have referred are not only necessary and vital doctrines, essential to our form of Government, but they surcharge the whole atmosphere of constitutional discussion. . . . In these pending cases we have before us not only the resolutions of the Congress and its declarations and findings, but we have also the instructions, the declarations, and the findings of the President of the United States, as well as his public statements, his message to the Economic Conference of July 3, 1933, and, in addition to that, we have the findings, declarations, and instructions of the Secretary of the Treasury.

The matters to which I have referred, it seems to me, under the peculiar circumstances which are presented here, carry an authority and a persuasiveness which our friends upon the other side have nowhere successfully met. I think their briefs may be searched in vain for any well-considered and sustained argument showing that the course pursued was unreasonable or arbitrary, or that adequately meets the allegations, findings, and declarations to which I have just referred.

Therefore, I think that it is fair to assert that these considerations assume, in the pending cases, an unusual and an almost unprecedented importance.

Now, of course, if the Court please, the conditions which existed on the sixth day of March, 1933, are so fresh in our memories and have been so completely covered in the elaborate briefs which have been presented, that it seems quite unnecessary to refer to them again or at length.

The fact remains, however, and it is enough to say, that an emergency of the highest importance confronted the Nation. Banks, sound and unsound, were failing or closing upon every hand; gold coin, gold certificates, and, indeed, all other forms of currency, were being hoarded by millions of dollars, and, perhaps, by millions of people. Gold was taking flight either into foreign currencies or into foreign lands; and foreign trade had been brought to a standstill. International finance was completely disorganized. The whole situation was one of extreme peril. Price levels were falling. Industries were closing. Millions of people were out of work. Failures and bankruptcies were reaching enormous and, indeed, unparalleled proportions; and, with constant acceleration, our people, confessedly, were slipping toward a lower level of civilization. I undertake to say that no man of imagination could have witnessed that distressing spectacle of painful retrogression without acute apprehension and profound sorrow.

Now, in addition to that, we had the experiences of other nations; we had their example. There was not a nation on the face of the earth that was not in distress.

At that time—and the time I refer to was the 6th day of March 1933—the Swiss franc, the Dutch guilder, and the United States dollar were the only coins that had not been devalued or depreciated. Country after country was going off the gold standard, and thirty countries had passed drastic legislation with regard to finance, foreign commerce, and the regulation of money. Embargoes, trade restrictions, and quotas were characteristic of the day and of the time.

So, as I say, we were confronted by an industrial and monetary and financial crisis of the most terrifying character. Amongst the various measures which were adopted to meet the situation were those which are in the group within which falls the Joint Resolution of the 5th of June 1933, which is so seriously under attack here today.

At the risk of being a little bit wearisome, permit me briefly to refer to these measures. [Here the Attorney General explained the various Acts of Congress enacted and Executive Orders and Orders of the Secretary of the Treasury promulgated between March 6, 1933, and January 31, 1934.] . . .

Thus, it is apparent that the Congress acted in this matter four times during the period to which I have referred—on March 9, 1933, the Emergency Banking Act; May 12, the Agricultural Adjustment Act; June 5, the Joint Resolution; and January 30, 1934, the Gold Reserve Act.

During this period the President of the United States acted upon five important occasions (and upon sundry other occasions of not such major significance); on March

6, the bank holiday; on March 9, the extension of the bank holiday; on April 5, the gold hoarding order; on August 28, additional gold hoarding orders; and on the 31st of January, the devaluation of the dollar.

Thus, in a hectic period of eleven months, a sweeping change was effected in the financial and monetary structure of our country. Our system was completely reorganized. Gold and gold bullion were swept into the Treasury of the United States; gold certificates were placed where they were readily within the control of the Government of the United States; foreign exchange was regulated; banks were being reopened; gold hoarding was brought under control; parity was maintained; and a complete transition was effected from the old gold-coin standard to the gold-bullion standard, with the weight of the dollar fixed at an endurable amount.

Now, I undertake to suggest that no one can consider this series of acts without sensing their continuity and realizing their consistent purpose.

Moreover, these measures must be read as a whole, and read against the background of utter national need. I think they tell the story of a nation finding its way out of financial chaos into a safer and sounder position.

Moreover, it must be remembered that in these matters two great branches of our Government, the legislative and the executive, were acting in perfect harmony and for a common end. It was a sweeping change, adopted by an overwhelming majority of the Congress, and promptly approved by the President of the United States; and appealing to both as essential to the happiness and prosperity and welfare of our country.

I contend, and later shall undertake to show, that to admit the validity of the claims of those who are appearing here in behalf of the holders of gold certificates, and in behalf of the gold-bond obligations, would mean the break-down and the wreckage of the structure thus carefully erected.

Moreover, it would create a preferred class who, because of a contract of a special character, are able to take themselves outside, as it were, of the financial structure of their own country.

To admit such claims to the extent of $100,000,000,000, an unthinkable sum, would be to write up the public debts and the private debts of our country by $69,000,000,000 and, overnight, reduce the balance of the Treasury of the United States by more than $2,500,000,000. It would add $10,000,000,000 to the public debt. The increased interest charges alone would amount to over $2,500,000,000 per annum, and that sum is twice the value of the combined wheat and the cotton crops of this country in the year 1930. The stupendous catastrophe envisaged by this conservative statement is such as to stagger the imagination It would not be a case of "back to the Constitution." It would be a case of "back to chaos." . . .

The primary difficulty, as I see it, with the argument in behalf of the gold obligations, and one which vitiates it entirely, is that the question is approached without reference to this background, and is based merely upon the supposed sanctity and inviolability of contractual obligations. That our Government is endowed with the power of self-preservation I make no doubt, and that a written understanding must yield to the public welfare has been so often reiterated that it is not necessary to dwell upon it any further.

There were some priceless words used by Mr. Justice Butler in *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, 261, when he said:

"It is also well established by the decisions of this Court that such liberty [meaning liberty of contract] is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national Government was created."

But that is not exactly the case here. Those who insist upon the strict letter of the bond are insisting upon it in a matter dealing with gold, and gold lies at the basis of our financial structure. Gold is the subject of national legislation. Gold is the subject of international concern. Gold is not an ordinary commodity. It is a thing apart, and upon it rests, under our form of civilization, the whole structure of our finance and the welfare of our people. Gold is affected with a public interest. These gold contracts, therefore, deal with the very essence of sovereignty, for they require that the Government must surrender a portion of that sovereignty. To put it another way, these gold contracts have invaded the federal field. It is not a case of federal activity reaching out into a private area. So obsessed are our opponents by the idea of the sanctity of contracts that they are even prepared to assert their validity when they preëmpt the federal field. To me this seems a monstrous doctrine. These claimants are upon federal territory. They are squatters in the public domain, and when the Government needs the territory they must move on.

And so say the authorities. In dealing with currency and its metallic basis, the Government is exercising a prerogative of sovereignty and is dealing with a subject matter affected with a public interest. . . .

The contention that the Joint Resolution constitutes a taking of property without just compensation is clearly without foundation. The provision of the Fifth Amendment which bears upon that proposition relates to the taking of private property by the Government for a public use; and the Resolution, as applied to gold clauses in private contracts, is not a taking of property in a constitutional sense, but merely frustrates a purpose contained in a private obligation found to be incompatible with the exercise of national power.

Frustration, it is said in one of the leading decisons, if I recall correctly—"frustration and appropriation are essentially different things."

Now, this doctrine is supported by so many authorities that it is a work of supererogation to refer to them—The *Legal Tender Cases, Louisville & Nashville R. Co.* v. *Mottley* [219 U. S. 467], and hosts of others, which appear in our various briefs.

This leaves for consideration only the question whether that portion of the Fifth Amendment is affected or is involved in this controversy which deals with the deprivation of property without due process of law.

I think it is clear, and I think I shall make it even more apparent as I proceed, that the Joint Resolution was enacted pursuant to the exercise of functions derived from the Constitution. Now, it has been held that under certain circumstances the United States may—I am now using the language of the books—consistently with the Fifth Amendment, impose restrictions upon private property for all permitted purposes which result in a depreciation of its value. That language, I think, is found in *Calhoun* v. *Massie,* 253 U. S. 170.

Again, it is said that this may be done for a legitimate governmental purpose, *Sinking Fund Cases* (99 U. S. 700), since preëxisting contracts do not limit the sovereign right of the Government. *Calhoun* v. *Massie; Louisville & Nashville R.* v. *Mottley; Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372.

This principle has been expressed in varying language. I think that it is absolutely accurate to say that the sound conclusion is that private contracts may not fetter governmental action within the powers entrusted to it by the Constitution. That is the doctrine of the *Schubert* case, 224 U. S. 603, *Sproles* v. *Binford*, 286 U. S. 374, *Veazie Bank* v. *Fenno*, and many others. It is in the first two of these cases that there appears that happy and suggestive phrase, "prophetic discernment."

The guarantee of due process in the Fifth Amendment demands no more than that the means selected by the Congress, as this Court has said, be for the attainment of ends within its power, and have a real and substantial relation to the attainment of such ends. And so, as seems inevitable in so many constitutional arguments, we go back to the case of *McCulloch* v. *Maryland*. And later we come to the *Ling Su Fan* case; and, if we want a more recent authority, we turn our hopeful eyes toward the decision in the *Nebbia* case, 291 U. S. 502.

The Joint Resolution was a bona fide exercise of constitutional power. It was not a mere arbitrary interference with private rights or with contract rights under the cloak of the currency power.

Now, that being true, any supposed collateral purposes or motives of the Congress, to which reference was made in argument here, and repeatedly in the briefs, are, to use the language of the Court, " matters beyond the scope of judicial inquiry." I think the quotation is from the *Magnano* case. See also the statements made in the *McCray* case, 195 U. S. 27, and also in the *Kentucky Distilleries* case, in an opinion written, I believe, by Mr. Justice Brandeis.

In view of the foregoing, it is not necessary to discuss the irrelevant and unsubstantial allegation that the purpose of the legislation was to transfer wealth from one class of our citizens to another. . . .

Now, of course, the primary power upon which the Joint Resolution rests is that portion of article I, § 8, of the Constitution, which grants to the Congress the power " to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures."

The power also rests upon the constitutional authority "to regulate commerce with foreign nations and among the several States," and "to borrow money on the credit of the United States," and upon that "composite power" which has been referred to in that language, or in similar language, in many of our cases. . . .

I have never been impressed, and I am not now impressed, by the significance of *Bronson* v. *Rodes,* 7 Wall. 229, in connection with this controversy. And yet, by some peculiar form of common consent, it seems to stand at the threshold of the monetary discussion. It did not pass upon any constitutional question whatsoever. It explicitly, in its own language, set forth that it did not pass upon any constitutional question. It recognized the existence of the dual monetary system. It recognized the fact that greenbacks were not payable for all forms of public obligations. It recognized that these two forms of currency were circulating simultaneously and fluctuating violently, as measured in terms of each other. And, therefore, the Court found that the debts referred to in the Legal Tender act did not apply to the kinds of debts specified in the case of *Bronson* v. *Rodes.*

Then came, of course, one year later, in 1869, I believe, the well-known case of *Hepburn* v. *Griswold,* 8 Wall. 603. I think *Hepburn* v. *Griswold* is far more interesting than *Bronson* v. *Rodes,* because *Hepburn* v. *Griswold* did deal with questions that are pertinent here, and dealt with them in such a fashion that the Court later set aside that decision in the *Legal Tender Cases,* 12 Wall. 457.

Following *Bronson* v. *Rodes,* are a group of cases—*Butler* v. *Horwitz, Dewing* v. *Sears, The Emily Souder, Gregory* v. *Morris,* and *Trebilcock* v. *Wilson*—all aside, as I see it, from the essentials involved here. . . .

But in the *Legal Tender Cases,* following the *Hepburn v. Griswold* case, there are some observations which are exceedingly interesting. There is a wealth of learning to be found not only in the opinions, but in the elaborate briefs of counsel who appeared in those historic cases.

Now, in the *Legal Tender Cases* if there is anything clear it is that the Court passed on two questions: first, whether the Congress had power to make paper money a legal tender for any debt; and, second, if it had this power, was such power limited to debts created after the passage of the Legal Tender statute? . . .

Here, then, was a decision making it perfectly apparent that, in exercising its Constitutional power in the matter of making paper money legal tender, the Congress had as much power to deal with existing debts as it had to deal with debts created after the passage of the act. This, as I see it, if the Court please, is the most important contribution made to our present-day discussion by any of the cases of that era.

Now, let me pursue that matter just a bit further. In reaching its conclusion, the majority opinion contends that the only obligation was to pay money which the law recognizes as money when payment is made. But Mr. Justice Strong, who wrote the opinion of the Court, disposed of many of the arguments made in the present case. Where an attempt is made to identify money contracts with other types of contracts the Court speaks of these comparisons as "a false analogy"; and, on page 549, says:

"There is a wide distinction between a tender of quantities or of specific articles and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender acts impaired the obligation of contracts."

Moreover, in considering the argument that the contract to pay simply in dollars was a contract to pay in the sort of dollars that had been established by law at the time the contract was made, the Court disposed of that suggestion on pages 549 and 550, saying:

" Nor can it be truly asserted that Congress may not by its action indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless." . . .

Now, of course, the next important case is *Juilliard* v. *Greenman,* 110 U. S. 421, where the power of the Congress was more fully developed and confirmed with reference to the matter of currency, and where it was declared that this power existed in time of peace as well as in time of war.

And then we have the *Ling Su Fan* case, to which I have referred before, which is of controlling significance.

I think it is clear that when the Supreme Court, in the *Legal Tender Cases,* extended the power over contracts to those which existed prior to the passage of the Legal Tender Acts as well as those that arose subsequently, it established a principle which, carried to its logical conclusion, sustains the power of the Congress as exercised in the Joint Resolution of June 5, 1933.

In fact, we seriously urge upon this Court the suggestion that to sustain the contention of those who appear here in opposition to the validity of the Joint Resolution would constitute an unfortunate recurrence to the mistaken principles of *Hepburn* v. *Griswold.* It would turn back the pages of history more than sixty years.

In the *Mottley case,* decided in 1911, this Court took strong ground on the fundamental proposition of the right to brush aside interference with the exercise of a constitutional power.

In the *Blaisdell case* [290 U. S. 398], the Chief Justice said:

" Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

I stand upon that language, and upon the language laid down in the other cases to which I have referred. I stand not only upon these cases and upon the *Nebbia* case, but upon the fundamental proposition that the Congress has plenary power, in a whole range of subjects, no matter what private parties may endeavor to do, and no matter how completely they may attempt to thwart the exercise of constitutional authority.

We have found it entirely possible to prohibit lotteries, no matter what contractual obligations may have been set up with reference to them.

The cases which deal with intoxicating liquors reached the same result. The same observation may be made with reference to zoning laws; the maintenance of nuisances; and the regulation of the rates and services of utilities—all along the line there is a recognition of this essential power of the Government.

So I contend, both upon authority and upon reason, that the Joint Resolution of June 5, 1933, was a valid exercise of constitutional power, not limited by the Fifth Amendment or by any other clause of restriction in the Constitution. . . .

It is my belief that the word " regulate " as used in the Constitution has never been completely and carefully analyzed in all of its implications. How far does the term " regulate " carry us? Manifestly it reaches to the regulation of value, and value, itself, is a relative thing. Value appears only in relation to the value of other things.

And, moreover, the word " regulate " implies a continuing power, and is the same term that is used with reference to commerce, and connotes the power of adjustment. It implies the power of making the condition accord more fully with reality and with justice.

But when you come to the power "to fix the standard of weights and measures," the Constitution abandons the word "regulate" and uses the word "fix."

All these things, philosophically or semiphilosophically considered, have some relationship to these sudden and violent fluctuations in commodity prices which so completely disarrange important equities; and to the proposition that, as a matter of essential justice, the dollar we borrow should be, in purchasing power, substantially the dollar we are expected to repay. What that relationship is I do not assume to suggest, what the future may develop with regard to this aspect of the constitutional question I do not know. These things will follow in due course.

But I am moved to mention these matters, because on the 14th page of the appendix to the plaintiff's brief in the *Perry* case, there is a chart, which is designed to show the terrible losses suffered by the claimant in that case. So far as I recall, that is the only proof he has submitted to indicate that he has suffered any loss whatsoever.

This table is made up in peculiar fashion. It is constructed by charting commodity prices in the United States of America; and then the price of the gold dollar is calculated in the discount thereof in terms of foreign coinage—in terms of the gold coinage of France, Belgium, Holland, and Switzerland. Having found the rate of discount at which the gold dollar is depressed below these standards, the results are reduced to percentages, and these percentages are then subtracted from the range of commodity prices in this country in order to show the loss sustained.

In other words, it is a synthetic chart, having no relation to any known problem whatsoever. It attempts to trace the history of a dollar that has ceased to exist. . . .

The gold clause attempts to override the legal tender and parity provisions established by law. If valid, it further would have the effect of making certain that, whatever may be the policy of the Congress, the coins and currency of the United States shall *not* have equal value in the discharge of all classes of debts.

The gold clause is a serious obstacle to the maintenance of parity. The conventional method of maintaining parity is by the redemption of currency in gold coin.

The startling withdrawals of gold coin for hoarding and the flight into foreign currencies and into foreign countries which took place in February and during the first few days of March 1933 made it impossible to continue such redemption. The Government's stock was being rapidly depleted. During the period to which I have just referred $476,100,000 in gold had been withdrawn from the Federal Reserve banks and the United States Treasury, of which $311,000,000 was for export, or to be earmarked for foreign accounts. Simultaneously there was a great demand for money of all kinds for domestic hoarding.

At that time the outstanding gold obligations amounted to $100,000,000,000, and the available gold supply of this country was only $4,000,000,000, and in the entire world only $11,000,000,000.

Moreover, there were conditions of equity that had to be borne in mind. To have permitted, after the 9th of March, the conversion of gold certificates and United States notes into gold would have been to prefer the demand claims of the gold creditors, foreign and domestic, so long as the supply should last.

And to have prohibited the conversion of such demand obligations and yet to have continued the conversion of time obligations—calling for gold in each instance—would have been to prefer time obligations, both public and private. Either alternative would have been to deny equal treatment to creditors with equal claims to consideration.

All of the foregoing suggestions bear on the question of maintaining parity after the suspension of gold redemption. Why, parity could not have been maintained under the previously existing system, if outstanding gold certificates and United States notes had been redeemed in anything except gold coin. To have redeemed them in currency at the higher rate demanded by these claimants would have immediately brought back the double standard of currency which had wrought such havoc in times gone by.

It is, therefore, apparent that to maintain parity under the existing conditions, gold certificates and United States notes had to be treated upon an absolute equality with other forms of currency, and by that same token it was necessary to abrogate the gold clause in gold obligations.

There is another reason why the gold clause is an obstruction to the power to regulate the value of money. One method of regulating the value of money is by lessening the gold content of the dollar. I do not understand that any responsible person seriously disputes the right upon the part of the Government to lessen the gold content of the dollar. Nevertheless, that power could not have been actually used if it had entailed the redemption or payment of $100,000,000,000 of obligations at the rate of $169,000,000,000. . . .

Let me pause for a moment to emphasize the proposition that the only alternative open to the Congress was a reduction in the gold content of the dollar, accompanied by a denunciation of gold clauses. In choosing this alternative, the Government acted in the public interest, and it cannot fairly be contended that it acted arbitrarily, capriciously, or unfairly or unjustly, or for any improper purpose.

There can be no doubt that the gold clause was a hindrance to the borrowing power. Such obligations, if permitted to exist, would have preëmpted or, at least, measurably restricted, the sources from which borrowed money is obtained. There is no doubt that the gold clause likewise interfered with international obligations and negotiations; and with foreign exchange and foreign commerce. If it had been impossible to break the prewar tie to the gold dollar we would have been denied the privilege, open to all other civilized governments, of dealing effectively with our own currency.

No adequate reason has been advanced why the holders of interest-bearing time obligations should be preferred over holders of demand obligations, as, clearly, these forms of understandings are of equal solemnity. The holders of $20,000,000,000 of federal gold obligations, with an annual interest charge of $700,000,000, could, in a relatively short time, have drained all of the available gold out of the Treasury. This would have been tantamount—and I say it deliberately—to delivering the destiny of our gold reserves into private hands, and by that same token delivering the destiny of America into private hands.

Oh, I have found in the briefs of learned counsel upon the other side many suggestions indicative of the proposition that our Government acted hastily, and even in bad faith. But The Hague Court, in the opinion in the *Royal Dutch Shell* case, rendered on the 15th day of February 1934, had no such misgivings as seem to afflict counsel in this case. In that court it was said:

" There cannot be any question about violation of public order, as the measure " (that is the Joint Resolution they are talking about) " according to its purpose set forth in the preamble has been enacted as required by urgent necessity and public interest " (meaning American public interest) " and not at all in order to injure the creditor."

Apparently the contentions of our opponents in this matter deal with questions of ethics and economics and morals and good faith. But who shall say that all of these considerations plead for the claimants? I hesitate to venture upon the high ground of ethics and morality so completely occupied by those who argue for the sanctity of the written word, and who assert that it should be maintained at all hazards. That field has been pretty thoroughly occupied by counsel for the bondholders. Such arguments make me feel a stranger in this preëmpted territory.

But, after all, is the morality all on one side? Are there not certain essentials of justice which the written word may defeat and which it is the higher purpose of the law to preserve? . . .

Should the claims of the owners of these gold obligations be approved, it would create a privileged class which, in character, in immunity, and in power, has hitherto been unparalleled in the history of the human race. I feel the walls of this courtroom expand; I see, waiting upon this decision, the hopes, the fears, and the welfare of millions of our fellow citizens.

These measures which are under attack were thoroughly considered and carefully worked out. They represent the overwhelming sentiment of the Congress. They represent the considered judgment of the President. What is attacked here is the joint work of the legislative branch of the Government and the executive branch of the Government, operating in complete and wholesome accord. Those who contest the wisdom of these results, their propriety, their legality, their necessity, or their essential justice have a heavy burden to carry.

The validity of our contention in this case rests, however, upon wider and even more compelling considerations. The authority to coin money and regulate the value thereof is an attribute of sovereignty which cannot be restrained by private contract nor subordinated to the tenor of individual obligations.

That the United States of America is a sovereign nation and possesses the essentials of sovereignty has been repeatedly declared by this Court. This of necessity must be so. When the Constitution, by § 8 of Article I, confided the power over the currency to the Congress, it did so in representative terms, similar to those used in the same article setting forth the other essential attributes of sovereignty.

I like that old expression which will be found in the Legal Essays of Thayer, on page 75 in the edition of 1908. There is meat in this rather homely expression:

"The Constitution, in giving to Congress the power to coin money, is not, just then, concerned with the technicalities of law or political economy; it is disposing of one of the '*jura majestatis*' in brief and general terms, in phrases which are the language of statesmen."

In the case of *Juilliard* v. *Greenman* the Court speaks of this power as one which accords "with the usage of sovereign governments."

Any lingering doubt upon this subject is dispelled by reading § 10 of Article I of the Constitution, which takes from the States all power over the currency. The state governments were emptied of such power. All the scattered sovereignties of the different States went over *en bloc* to the Government of the United States, and they were not lost in transit.

I think it may safely be said—at least, it may reasonably be argued—that the state governments succeeded to the powers of the Crown, the King, and Parliament in the control over currency, and exercised this power sometimes wisely and sometimes recklessly. Those who framed the Constitution of the United States realized this situation, and, knowing what had happened in the colonies, took pains to see that this power, just like the power of the sword, this great attribute of sovereignty, should reside in one single authority. Hence the Constitution not only affirmatively grants this power to the Congress of the United States, but forbids its exercise by the various States.

In sweeping terms the Federal Government was given the power to collect taxes to provide for the common defense and the general welfare; to coin money; to declare war; to maintain armies; to provide a Navy; and, in general, to deal in these sovereign matters on an equality with the other members of the family of nations.

These enumerated grants in § 8 of Article I of the Constitution are set forth in representative terms, which, taken together, imply all the essentials of a comprehensive federal power over the whole subject of the medium of exchange, standards of measure and value, coinage of money, and the control of credit.

Of course, I am not arguing here for any inherent sovereign power. But I am maintaining that, in certain matters, in which currency is included, the Government of the United States has the same type of sovereign power which was accorded to the Crown in the *Mixed Money Case,* and which has not, so far as I am aware, been successfully controverted in any court in any country since that time.

The history of money is fascinating. It has been tied up with the progress of the human race. There has never been an important era in which the destinies of men were at hazard, where the problem of currency was not involved. Every drama in the international field involves some aspect of the money question.

In the earliest days, of course, the currency was crude in form. It developed as civilization went on. Finally we come to the period referred to in the *Mixed Money Case,* where its characteristics were beginning to be understood. We then come to the early colonial days, with their chaos and their disorder, and their conflict in matters of currency. And, following this, these sovereign powers of the States, which had in so many instances been unwisely used, were turned over to the Federal Government, and, for the first time on this continent, the control of currency was confided to a central authority.

It was then a little-understood subject—and, I must say, it is a little-understood subject now. We have passed through many vicissitudes—the Greenback Era; the period of the *Legal Tender Cases*; the experience with the double currency standard; until we reached a more or less settled status, which many people fatuously believed was the final status. The gold standard, as it was then known, survived the panic of the Cleveland administration, but it did not survive the vicissitudes of the World War. The problem moved out into international areas. Governments began to send representatives to conferences to discuss this mutually vexing problem of gold.

It would be idle to deny that things are still in a formative stage. Indeed, great things are afoot. The London Economic Conference of 1933 did not achieve its objective, but it had for one of its purposes the problem of the stabilization of the currencies of the world.

On the third of July, 1933, the President of the United States cabled to the Economic Conference dealing with this subject and, in the course of his message, confirmed the proposition that our broad purpose is permanent stabilization of every national currency.

Oh, we have not seen the last of international economic and monetary conferences. Already these events may be dimly seen on the horizon. I do not know when it will be. That is written in the inscrutable bosom of time. But the day will come when the United States of America will be conferring with the other nations of the earth, with a view to the stabilization of currencies, the fixing of standards, and making those arrangements which are essential amongst civilized nations if we are to dwell together in any reasonable degree of harmony and prosperity.

Let nothing be said here that makes our Nation enter such a conference on crutches, a cripple amongst the nations of the earth.

Mr. Justice Holmes once very wisely said—I think it was in the *Holland* case—

"It is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."

If the Court please, other nations, impelled by the requirements of necessity and acting for the public welfare, have devalued their currencies, abandoned the gold standard, and abrogated gold contracts by specific laws enacted for that purpose. Without challenge and without question they have done precisely what the Congress of the United States has done. Belgium, France, Germany, Rumania, Mexico, Norway, and Sweden have enacted such laws. It is an essential attribute of sovereignty.

I ask this Court to lay down in unequivocal language the proposition that, in matters of currency, the courses of action open to other governments are not denied to this country, and that, in employing these sovereign powers, we act upon an equality with all the other nations of the earth.

Mr. Stanley Reed made the oral arguments for the Reconstruction Finance Corporation.

Summary of the brief for the United States and the Reconstruction Finance Corporation, on which were the *Attorney General, Mr. Stanley Reed, Solicitor General Biggs,* and *Assistant Solicitor General MacLean:*

An act of the legislature is presumed to be constitutional. [Citing many cases.]

In choosing the means to carry out its powers the Congress has an extremely wide discretion and its judgment will not be overturned unless clearly arbitrary and capricious. *McCulloch* v. *Maryland,* 4 Wheat. 316, 418; *United States* v. *Fisher,* 2 Cranch 358; *Legal Tender Cases,* 12 Wall. 457; *Farmers' and Mechanics' National Bank* v.

Dearing, 91 U. S. 29, 33; *Juilliard* v. *Greenman,* 110 U. S. 421; *Ex parte Curtis,* 106 U. S. 371; *Northern Securities Co. v. United States,* 193 U. S. 197; *Ling Su Fan* v. *United States,* 218 U. S. 302; and *Board of Trustees of University of Illinois* v. *United States,* 289 U. S. 48.

The importance of the gold clause is due to the overwhelming amount of obligations calling for payment in gold coin issued and outstanding on June 5, 1933, the best estimates placing the amount at approximately $100,000,000,000.

Congress was justified in declaring that gold clauses are contrary to public policy and inconsistent with our present monetary system. The gold clause had its origin in a period when there was in existence a dual monetary system;—that is, two kinds of money, United States coins and circulating notes, were permitted to circulate, fluctuating in value one against the other. *Bronson* v. *Rodes,* 7 Wall. 229, was decided during this period. The dual monetary system went out of existence after the resumption of specie payments in 1879.

The recent monetary and financial crisis called for the exercise of Congressional power over coinage and currency. In 1933 the dollar, the Swiss franc and the Dutch guilder were the only monetary units of commercially important countries which were not devalued or depreciated substantially below prewar parities. A number of countries have placed restrictions upon the export of gold and suspended the redemption of currency in gold coin. Between 1929 and 1933 the wholesale commodity price index of the United States Department of Labor declined by nearly 40% and our national income had shrunk about 50%. During February and until March 6, 1933, when the banking holiday was proclaimed, $476,100,000 in gold was withdrawn from the Federal Reserve Banks and the Treasury.

Monetary legislation enacted by Congress in this situation included the Emergency Banking Act of 1933, authorizing the regulation and prohibition of the withdrawal, export, and hoarding of gold; the Act of May 12, 1933, making all forms of money legal tender for all debts and authorizing a reduction in the gold content of the dollar; and the Gold Reserve Act of 1934, amending the Act of May 12, 1933, directing the Secretary of the Treasury to melt down all gold coins, and authorizing redemption of currency only in gold bullion and only for the settlement of international balances and the maintenance of the parity of all forms of money. The President and the Secretary of the Treasury issued Orders pursuant to the Emergency Banking Act of 1933; and on January 31, 1934, the President issued a Proclamation reducing the gold content of the dollar to 15 5/21 grains nine-tenths fine.

Gold clauses, if enforceable, would have obstructed the exercise of the monetary and other powers of the Federal Government, whether such clauses are construed to call for payment in gold coin itself or in an asserted equivalent in currency. The gold clause would nullify the power of the Congress to make all forms of coins and currency of the United States legal tender for all payments. It is an obstruction to the power of the Congress to regulate the value of money by changing the gold content of the dollar. The effect of the clause, if interpreted to call for an asserted equivalent in currency, is to increase gold-clause debts in direct and invariable proportion to the change in the statutory value of gold. In the present situation the increase would be 69.32%. The increase in interest payments on outstanding private gold-clause obligations would be about $2,600,000,000 annually. This potential increase in the debt burden is particularly significant in the light of the already existing burden of long term debt service, which had grown from 9.2% of the national income in 1929 to 21.1% in 1932. In the case of carriers, utilities and industries whose income is and must be in dollars, the added burden of an enforceable gold clause would bring widespread bankruptcy. Non-enforcement of gold clauses results in no real loss to creditors. Because of the drastic decline in the price level, a coupon holder who now received \$16.93 on a \$10 coupon could purchase twice as much as could have been purchased with the \$10 during 1921–1929.

The gold clause, construed as calling for payment in gold coin, is incompatible with legislation to protect the currency reserves and to provide for more effective use of gold. The gold reserves of this country have been subject to sudden, violent and unpredictable withdrawals. Such withdrawals, coupled with increased demands for currency for hoarding and export, caused the reserve ratio of the Federal Reserve System to fall from 65.6% on February 1, 1933, to 45.1% on March 4, 1933. The Gold Reserve Act of 1934, providing for withdrawal and melting down of gold coin, conformed to the postwar practice of foreign countries and the recommendations of economists and bankers.

Gold clauses are an obstruction to the power of Congress to borrow money; for pending a change in the gold content of the dollar, bonds would be issued which might incur for the taxpayers a debt greatly in excess of the amount received for the bonds. It would be impractical to eliminate the gold clause from future issues only, since investors would prefer the old issues, public or private, to such an extent as to require prohibitive rates on the new.

Gold clauses, by interfering with a change in the gold content of the dollar, obstruct the power of Congress to regulate foreign exchange and foreign commerce.

The Joint Resolution is within the delegated powers of Congress. The power over the currency includes the power to reduce the gold content of the dollar, as was done in 1834, and so to subject creditors to a corresponding loss. *Legal Tender Cases,* 12 Wall. 457, 551–2. Congress may require creditors to accept irredeemable paper money in discharge of debts contracted when only gold and silver coin were legal tender. *Legal Tender Cases, supra; Juilliard* v. *Greenman,* 110 U. S. 421. Congress may legislate to assure uniformity in the value of all forms of money. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *National Bank* v. *United States,* 101 U. S. 1; *Ling Su Fan* v. *United States,* 218 U. S. 302. The power to borrow money affords broad scope for legislation. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180; *Weston* v. *Charleston,* 2 Pet. 449; *Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313; *United States* v. *Fisher,* 2 Cranch 358. Congress may protect our foreign trade against the adverse effect of depreciated foreign currencies. *Hampton & Co.* v. *United States,* 276 U. S. 394. In its international relations the Federal Government possesses the full attributes of sovereignty. *Burnet* v. *Brooks,* 288 U. S. 378, 396; *Legal Tender Cases, supra,* p. 555; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711.

Congress is empowered to declare unenforceable private agreements whose purpose and effect are to usurp, frustrate or obstruct the exercise of its powers. The Fifth Amendment does not forbid such legislation. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 229; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603; *Calhoun* v. *Massie,* 253 U. S. 170; *New York* v. *United States,* 257 U. S. 591; *Sproles* v. *Binford,* 286 U. S. 374; *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 567; *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253.

The gold hoarding orders, independently of the Joint Resolution of June 5, 1933, require that the claim on the bonds be limited to the face amount thereof. A free domestic gold market did not exist, in consequence of these orders, from the time of the banking holiday in March, 1933, to the present. The gold clause should be interpreted as calling simply for payment in gold coin. *Bronson* v. *Rodes,* 7 Wall. 229; *Trebilcock* v. *Wilson,* 12 Wall. 687; *The Emily Souder,* 17 Wall. 666; *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379. The following cases are distinguishable: *The Vaughan and Telegraph,* 14 Wall. 258; *United States* v. *Erie Ry. Co.,* 107 U. S. 1; *Gregory* v. *Morris,* 96 U. S. 619; *Feist* v. *Société Intercommunale Belge d'Electricité,* [1934] A. C. 161; Cases of *Serbian and Brazilian Bonds,* P. C. I. J., Series A, Nos. 20–21. Payment in gold coin is impossible and illegal because of the gold hoarding orders, and should be excused. *The Tornado,* 108 U. S. 342; *Western Hardware & Manufacturing Co.* v. *Bancroft Charnley Steel Co.,* 116 Fed. 176 (C. C. A. 7th); *Browne* v. *United States,* 30 Ct. Cl. 124; *International Paper Co.* v. *Rockefeller,* 161 App. Div. 180. *Moore & Tierney, Inc.* v. *Roxford Knitting Co.,* 250 Fed. 278 (N. D. N. Y.). *Metropolitan Water Board* v. *Dick Kerr & Co.,* [1918] A. C. 119; *Shipton, Anderson & Co.* v. *Harrison,* 3 K. B. 676 (1915). *Manigault* v. *Springs,* 199 U. S. 473; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 511; *Board of Commissioners* v. *Young,* 59 Fed. 96 (C. C. A. 6th); *Northern Pac. Ry. Co.* v. *St. P. & Tacoma Lumber Co.,* 4 F. (2d) 359 (C. C. A. 9th); *Operators' Oil Co.* v. *Barbre,* 65 F. (2d) 857 (C. C. A. 10th); Restatement of the Law of Contracts, § 458 of c. 14; Williston on Contracts, § 1938. Recovery is properly limited to the face amount of the bonds. Since if gold coin were paid to the creditors it would be worth to them only its face amount, payment of a greater sum would be a windfall, not indemnity for loss. *Wicker* v. *Hoppock,* 6 Wall. 94; *United States* v. *Behan,* 110 U. S. 338.

If the gold clause is interpreted to call for an equivalent in currency, the equivalent is the amount of currency which would purchase the stipulated gold coin. *The Vaughan and Telegraph, supra; Gregory* v. *Morris, supra.* In the existing restricted gold market, equivalence is on a dollar-for-dollar basis. Even if the statutory price of gold, unreflected in a free domestic market, is the proper measure of equivalence, it is inapplicable here, for the bonds matured on May 1, 1933, when the gold dollar was at its old parity. *Hicks* v. *Guinness,* 269 U. S. 71; *Effinger* v. *Kenney,* 115 U. S. 566, 575; *Feist* v. *Société Intercommunale Belge d'Electricité, supra.*

Power over coinage and currency is an attribute of sovereignty. *Cohens* v. *Virginia,* 6 Wheat. 264, 380; *Juilliard* v. *Greenman, supra; Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Burnet* v. *Brooks,* 288 U. S. 378; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Georgia* v. *Chattanooga,* 264 U. S. 472, 480; *Ling Su Fan* v. *United States,* 218 U. S. 302, 310; Story on the Constitution (5th ed.), Vol. 2, p. 59; *Mixed Money Case,* Sir John Davies' Report 48, 51, 55; Thayer, Legal Essays, p. 75; *Martin* v. *Hunter,* 1 Wheat. 326. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. *Legal Tender Cases, supra.*

Mr. Edward J. White for the Trustees of the Missouri Pacific R. Co., petitioners. Points from brief:

The Joint Resolution was valid under § 8, Art. I, of the Constitution; also under the general welfare clause. *Massachusetts* v. *Mellon,* 262 U. S. 448; Alexander Hamilton, Report on Manufacturers, 1791; Story, Constitution, 5th ed., §§ 975, 978, 992. See *Heisler* v. *Colliery Co.,* 260 U. S. 245.

Emergency is the occasion for the exercise of the power.

Under the general welfare clause, Congress has a large discretion as to the means to be employed in the exercise of any power granted it. *Northern Securities Co.* v. *United States,* 193 U. S. 343; *Fairbank* v. *United States,* 181 U. S. 287; *Logan* v. *United States,* 144 U. S. 282; *Legal Tender Cases,* 12 Wall. 538.

The declared object in the Preamble to "promote the general welfare," and the broad grant of power in Art. I, § 8, should be held to include all means adopted by Congress to attain the ends in view which are not expressly prohibited by the Constitution.

In this bankruptcy proceeding the court possessed the power to impair the existing obligations of contracts.

The inhibition against the impairment of contract obligations applies only to the States and is not a limitation upon the power of Congress.

Whether *malum in se* or *malum prohibitum,* no illegal contract can furnish the basis for a legal remedy.

Messrs. James H. McIntosh and *Edward W. Bourne,* with whom *Messrs. Clifton P. Williamson* and *Thomas W. White* were on the brief, for Bankers Trust Co. et al., respondents. The following summary is from the brief:

By promising to pay a specified sum "in gold coin of the present standard of weight and fineness" the obligor undertakes to pay a specified amount of money in coin having a specified bullion content, or, if that is not available, to pay the equivalent in current money. The opinion of the lower court that the agreement constituted a promise to pay in gold "as a mere commodity" was clearly wrong. *Thompson* v. *Butler,* 95 U. S. 694; *Bronson* v. *Rodes,* 7 Wall. 229, 252. The parties intended to fix a standard or measure of value, if the debt should not be paid in the exact coin agreed upon. They contemplated that, when the time came to pay, there might be gold dollars of a new standard. They must have known that, if such were introduced, "gold coin of the present standard" would pass from circulation. They intended that, in any such contingency, the Railway Company could discharge its debt by paying the equivalent in gold value of the May 1, 1903, dollar—and, correlatively, that it must pay the equivalent so long as the equivalent could be measured in terms of current money. In other words, if the new standard gold dollar of 15 5/21 grains had been coined, a tender of 1,000 new standard gold dollars in coin would not have paid a bond. The new dollars now circulating are the equivalent of a new coin dollar of 15 5/21 grains, both by statute and in market value. How, then, can 1,000 of the new dollars now circulating pay a debt which they could not satisfy if they were in gold coin of the present so-called standard?

The gold clause or its equivalent has been in use time out of mind and has been used not merely in money contracts between private persons, but in money contracts of this Government.

This use has not been confined to this country. Some of the cases next to be cited illustrate its use abroad, and the language of the Treaty of Versailles, Art. 262, is identical with the clause involved in this case, except that the Treaty uses the date and these bonds used the word " present," to fix the time.

This Court has repeatedly enforced gold clause contracts according to their true intent; and other courts of the highest distinction have construed and enforced them as a measure of value. *Gregory* v. *Morris,* 96 U. S. 619; *Serbian Loan Case,* and *Brazilian Loan Case,* Publications de la Cour Permanente de Justice Internationale, Series A, Nos. 20, 21, pp. 5–89, 91–155. The effect of the two decisions last cited was to require each of the two Governments to pay about five times as many French paper francs, or new French gold francs, as they would have been required to pay if the court had not held that the gold clause meant a "gold standard of value." To the like effect, *Feist* v. *Société Intercommunale Belge d'Elec-*

tricité, L. R. (1934) A. C. 161, which involved bonds of a Belgian corporation promising to pay in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1st, 1928. The conclusions reached by the Permanent Court and by the House of Lords represent the accepted view everywhere except in Germany, whose courts profess to see a difference between a "gold coin" clause and a "gold value" clause. See 44 Yale L. J., pp. 56–57.

The Joint Resolution of June 5, 1933, contains an implied admission that the gold clause prescribes a measure of recovery.

These contracts were lawful when made, and were made for a proper purpose, in terms which this Court for nearly half a century before the issue of these bonds had recognized as legal and repeatedly approved as binding. *Bronson* v. *Rodes,* 7 Wall. 229; *Gregory* v. *Morris,* 96 U. S. 619; *Butler* v. *Horwitz,* 7 Wall. 258; *Bronson* v. *Kimpton,* 8 Wall. 444; *Dewing* v. *Sears,* 11 Wall. 379; *Trebilcock* v. *Wilson,* 12 Wall. 687; *United States* v. *Erie R. Co.,* 106 U. S. 327; 107 U. S. 1; *The Telegraph* v. *Gordon,* 14 Wall. 258; *The Emily B. Souder* v. *Pritchard,* 17 Wall. 666; *Thompson* v. *Butler,* 95 U. S. 694.

In every one of the cases involving a promise to pay in gold coin, this Court insisted upon the entry of judgment either for gold coin or for its equivalent in currency.

The *Legal Tender Cases* did not overrule *Bronson* v. *Rodes* nor weaken its authority on this question, because those cases referred only to contracts payable in money, simply. *Knox* v. *Lee,* 12 Wall. 457, 459; *Juilliard* v. *Greenman,* 110 U. S. 421, 449; *Trebilcock* v. *Wilson,* 12 Wall. 687.

Preliminary to a discussion of the Joint Resolution of June 5, 1933, and its validity, we remind the Court " that a legislative declaration of facts that are material only as to the ground for enacting a rule of law . . . may not be held conclusive by the courts." *Block* v. *Hirsh,* 256 U. S. 135, 154; that provisions of Bills of Right are limitations upon all the powers of Government, *Hurtado* v. *California,* 110 U. S. 516, 531–532; that "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325; that "The good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 561.

The Joint Resolution directly involves two constitutional grants of power,—(1) the power to "coin money, regulate the value thereof," and (2) the power to "borrow money on the credit of the United States"; and one limitation of power, namely, the limitation imposed by the Fifth Amendment. It also directly involves an encroachment by the Federal Government on the sovereign power of the States.

No one constitutional power can be construed to override another. The power to borrow money is as important as the power to coin money and regulate the value thereof. Hence what Congress has done in the exercise of the one power it cannot undo in the exercise of the other power. When, during the war and at other times, Congress borrowed money on the credit of the United States and promised to pay it back in dollars "of the present standard of value," it was exercising a power which the Constitution gave it; therefore how could Congress afterwards say the contracts it then made in the exercise of its power to borrow money are now contrary to public policy?

If it were true that such contracts, so made under the borrowing power, really interfered with the power of Congress to coin money and regulate the value thereof—that the two powers conflicted and that the coinage power limited the borrowing power—this would mean that no Congress ever had, or could have, the power to issue bonds containing a promise to repay the money borrowed in coin or dollars of any agreed standard of value. If this were true, then the Congress of 1863 and 1864 had no power to finance the last campaigns of the Civil War by issuing bonds payable " in gold coin of the present standard of value "; and every Congress which has issued bonds since February 4, 1910, has made a promise it had no power to make (c. 25, 36 Stat. 192; 31 U. S. C., § 768), and neither the present Congress nor any future Congress can ever issue bonds containing a binding obligation to repay the debt measured by the standard of value which prevailed when the debt was contracted.

Thus the wholly unwarranted scope which the Congress gives to the power to " coin money, regulate the value thereof," would, if it were the true scope of that power, make the borrowing power of Congress, which is at least equally important, an ineffective thing.

Similarly, the power to regulate the value of money cannot be used in direct violation of the limitations imposed upon Congress by the Fifth Amendment. If by this Resolution Congress were really exercising the power to regulate the value of money, and the legitimate exercise of that power indirectly or incidentally impaired the obligations of gold clause contracts, a different question would be presented. But the Resolution is not, and does not purport to be, a regulation of the value of money, nor is its effect on these contracts indirect or incidental. On the contrary, its sole purpose and its effect are, not to regulate the value of money, but directly and immediately, not indirectly nor incidentally, to change these contracts by destroying their most valued obligation. Thus the Resolution not only undertakes to restrict the expressed and vastly important power of Congress to borrow money on the credit of the United States, but it directly violates the limitation of power imposed by the Fifth Amendment.

Moreover, by this Resolution the Federal Government directly encroaches upon the sovereign power of the States by interfering with their power to borrow money on whatever terms they choose to make; by changing the terms of the contracts which they have made in borrowing money; by impairing their credit; and by interfering with and hindering their future financing. States, and municipalities under the authority of the States, have made gold clause contracts in vast sums. They have done this in the exercise of their sovereign power to borrow money for state and municipal purposes on whatever terms they chose to make. The Federal Government has no authority to interfere with them in this exercise of their sovereign power. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 585.

This Resolution is not, and does not purport to be, an emergency measure. Besides, if this were an emergency measure, it would end with the emergency, and then the Railway Company would have to pay these bondholders what it agreed to pay. But it purports to be legislation for all time.

This Resolution says these gold clause contracts "obstruct the power of Congress to regulate the value of money." Gold clause contracts have been in common use since before the adoption of the Constitution. During all this time Congress has regulated the value of money.

It is obvious that the act of regulating the value of money is not obstructed by the existence of gold clause contracts. A medium of exchange can be abandoned and a new medium substituted, irrespective of the existence or amount of outstanding gold clause contracts. The substitution of a new medium may change the number of units payable on the contracts, but that is merely one effect of the change in medium, not an obstruction to the change. There has been merely a nominal increase in the units of currency payable,—an increase in the number of units but not an increase in the value to be paid when measured by the standard agreed upon in the bonds. See *Brazilian Loans Case, supra,* p. 117.

When Congress authorized the devaluation of the dollar in 1933, its declared purpose was to increase nominal prices, which was the same thing as reducing the real value of currency and of fixed obligations to pay a fixed number of dollars, simply. The devaluation was expected to increase the nominal prices of wheat, cotton, and other farm products, and, we assume, also of silver, land, and other forms of property. And it was certain to have the automatic effect of increasing the nominal value of gold exactly in proportion to the devaluation.

Congress, proceeding on the theory that a devaluation of the dollar would increase prices correspondingly, saw that the nominal value of gold clause contracts would rise in proportion to the devaluation, thus preserving the real value of those obligations. What Congress wanted to do was to devalue the dollar for the purpose of correspondingly raising prices and reducing the real value of all debts. The gold clause in contracts prevented Congress from reducing the real value of those obligations. The gold clause did not obstruct the power of Congress to devalue the dollar; it merely limited the effect as to contracts which contained the gold clause.

Congress has no power to regulate the nominal, or even the real, effects of an exercise of one of its powers, either before or after. It may consider before it exercises a power what the results of its exercise of power may be, but it cannot change the situation before it acts, in order to prevent results of its action which it considers undesirable. If it could do this, it could change or regulate everything, including both debts and prices.

Nor are gold clause contracts " inconsistent with the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

This policy is the policy of having every dollar which is authorized by law, and is in circulation, on a parity with every other dollar that is authorized by law and is in circulation at the same time. Parity in the payment of debts is established by legal tender laws. Parity in the markets is maintained by redemption, convertibility, and acceptance of the circulating money by the Government in payment of duties and imposts. But parity means equality between dollars circulating at the same time.

Since the establishment of the new gold dollar, Congress has maintained all circulating dollars on a parity with the new gold dollar. Gold clause contracts have not obstructed this in any way. All the dollars now circulating have an equal power to pay gold clause contracts. The same number of new dollars is required to pay a gold bond today, no matter what kind of new dollars may be used. A law which provides for paying a bond with a less number of the new dollars than the bond itself requires, simply impairs the obligation of the bond.

The policy of maintaining the equal power of every dollar in the markets and in the payment of debts does not mean that the policy of Congress is to control the "purchasing power of the dollar"; the policy involves only the relation of circulating dollars to each other. Whatever the dollar, its purchasing power varies, and must vary. If Congress had authority to regulate the purchasing power of money, it could fix all prices and all wages without limit.

The making of agreements to pay in gold coin of the standard established by the United States, or its equivalent in value, could not have been against public policy when these contracts were made; nor was the existence of those contracts against public policy on June 5, 1933, when the Joint Resolution was passed. No change in conditions, no emergency, could make existing contracts, which use the standard of value provided by law as their basis, against public policy.

No conditions could ever arise which would make it public policy for a great nation to deny the binding force of its own obligations, lawfully issued under a paramount power and validly outstanding. Conditions might arise which would compel an honorable nation to admit, after every possible effort to meet its obligations, that it could not do so. But what conditions could justify an announcement by a sovereign nation that its promise to pay back the equivalent of what it had borrowed was a promise it would not keep and that it would not do what it had agreed to do?

Under our dual system of government, no conditions could ever arise which would make it federal public policy to change the contracts, impair the credit and restrict the borrowing power of the States.

Nor can conditions ever arise which will make it a matter of public policy to impair a whole class of valid private money obligations, by whomsoever owed.

All these inconsistencies in the Joint Resolution are due to distorting the scope of the " power to coin money, regulate the value thereof." The true scope of that power is to establish a " suitable medium of exchange " and a " sound and uniform currency," which neither requires nor permits the impairment of a particular class of contracts.

Although Congress does have the power to issue paper money as well and to make it legal tender, it does not derive that authority from the coinage power. *Juilliard* v. *Greenman,* 110 U. S. 421, 448. " Regulate " means to " fix " and change from time to time. " Value " means " monetary value," not purchasing power in a particular transaction or power to discharge a particular class of debts. *Fox* v. *Ohio,* 5 How. 410, 433.

The full scope of the so-called money power was stated in *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, in which Chief Justice Chase said that the Congress could " satisfy the wants of the community in respect of a circulating medium " and " secure a sound and uniform currency."

The power to issue paper money and to make it legal tender is primarily an incident of the borrowing power. *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421.

The impairment of the real value of money contracts does not have any tendency whatever to provide such a " sound and uniform currency."

The power to " coin money, regulate the value thereof " is a very different thing from a power to regulate money contracts. Money is a medium of exchange, a mere instrument for use in commerce. Money contracts are property created through the use of the medium. The devaluation of the dollar is authorized because Congress has control over the medium itself. One result of a devaluation is that it impairs all outstanding contracts made in a fixed number of dollars, simply. But that does not mean that all contracts must be made in a fixed number of dollars, simply; nor does it mean that Congress has the power to eliminate from money contracts any clause providing a standard of value. The scope of the power is over the medium of exchange, not over contracts made in the medium.

If the Joint Resolution is sustained, it means, and must mean, that no one, neither the Government itself, States, municipalities, nor private persons, can make a money contract according to any fixed standard of value, even if established by law, and lawfully provide therein that the contract shall be performed in the same fixed standard of value in which it was made; it means, and must mean, that Congress has power at all times to impair or destroy at will all money contracts.

This is not only contrary to this Court's decisions in *Bronson* v. *Rodes, supra*, and in the long line of gold clause cases that followed it, but it is inconsistent with the whole idea of any fixed standard at all. It is an appropriate function of government to provide a standard of value as an aid to commerce; for a standard of value is indispensable to business prosperity and to the maintenance of regular and profitable trade and commerce. *United States* v. *Marigold,* 9 How. 559, 566.

Obviously, the object, purpose and effect of this Joint Resolution are not to coin money or regulate the value thereof, nor to do anything which the Constitution authorizes Congress to do. On the contrary, it is a plain, unqualified and direct attempt to violate the obligations of contracts which the Government itself made with authority of Congress in the exercise of its borrowing power; to encroach upon the sovereign power of the States by interfering with their power to borrow money on whatever terms they choose to make, by changing the terms of the contracts which they have made in borrowing money, by impairing their credit, and by interfering with and hindering their future financing; and to take the property of one class of persons and give it to another class without compensation and without due process of law. It is not a case where legislation passed by Congress within its constitutional powers incidentally affects private rights. It is a case where Congress undertakes directly and solely to legislate about contracts, to change their terms and impair their value. See *Osborn* v. *Nicholson,* 13 Wall. 654, 662.

To provide that these bonds can be discharged upon payment of the nominal amount in any kind of dollars, whatever their gold value, is to take the property of one private person and give it to another private person.

The Fifth Amendment protects the integrity of every contract, " whether the obligor be a private individual, a municipality, a State, or the United States." *Lynch* v. *United States,* 292 U. S. 571, 579.

We have said nothing about Congress having no powers except the powers the people expressly gave it in the Constitution and the powers implied from the powers expressly granted. We have said little or nothing about the reluctance of the people, because of their jealousy for their personal liberty and their apprehensions for the security of their private property, to grant to Congress the limited powers they finally did grant, and then only upon conditions which brought about the prompt adoption of the first ten Amendments. These and other kindred facts, such as the Tenth Amendment, which are fundamental and are at the threshold of every discussion relating to constitutional power, are so familiar to this Court that we do not know of anything we could say on any one of them that might help a decision of this case.

The security of private property is one of the chief concerns of the Constitution. No person shall be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation. And yet our opponents here ask the Court to sustain the validity of a Resolution of Congress, the sole object, purpose and direct effect of which is to deprive persons of their property without due process of law and to take private property for private, not public, use without any compensation. Surely this cannot be done if the Government is a government of limited powers and the language of the Constitution means what it so plainly says.

Mr. Edwin S. S. Sunderland filed a brief on behalf of the Guaranty Trust Co. et al., Trustees under the First and Refunding Mortgage of Missouri Pacific R. Co., interveners.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. H. W. O'Melveny, Walter K. Tuller,* and *Louis W. Myers,* and by *Mr. Paul Bakewell, Jr.,* in support of the proposition that the Joint Resolution of June 5, 1933, is unconstitutional and void.

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

These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the " gold clauses " of private contracts for the payment of money. 48 Stat. 112.

This Resolution, the text of which is set forth in the margin,[1] declares that " every provision contained in or

[1] " JOINT RESOLUTION.

" To assure uniform value to the coins and currencies of the United States.

" Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

" Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

" *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy." Such provisions in obligations thereafter incurred are prohibited. The Resolution provides that "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

In No. 270, the suit was brought upon a coupon of a bond made by the Baltimore and Ohio Railroad Company under date of February 1, 1930, for the payment of $1,000 on February 1, 1960, and interest from date at the rate

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"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

"'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p. m."

of $4\frac{1}{2}$ per cent. per annum, payable semi-annually. The bond provided that the payment of principal and interest "will be made . . . in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The coupon in suit, for $22.50 was payable on February 1, 1934. The complaint alleged that on February 1, 1930, the standard weight and fineness of a gold dollar of the United States as a unit of value "was fixed to consist of twenty-five and eight-tenths grains of gold, nine-tenths fine," pursuant to the Act of Congress of March 14, 1900 (31 Stat. 45); and that by the Act of Congress known as the "Gold Reserve Act of 1934" (January 30, 1934, 48 Stat. 337), and by the order of the President under that Act, the standard unit of value of a gold dollar of the United States " was fixed to consist of fifteen and five-twenty-firsts grains of gold, nine-tenths fine," from and after January 31, 1934. On presentation of the coupon, defendant refused to pay the amount in gold, or the equivalent of gold in legal tender of the United States which was alleged to be, on February 1, 1934, according to the standard of weight and fineness existing on February 1, 1930, the sum of $38.10, and plaintiff demanded judgment for that amount.

Defendant answered that by Acts of Congress, and, in particular, by the Joint Resolution of June 5, 1933, defendant had been prevented from making payment in gold coin "or otherwise than dollar for dollar, in coin or currency of the United States (other than gold coin and gold certificates)" which at the time of payment constituted legal tender. Plaintiff, challenging the validity of the Joint Resolution under the Fifth and Tenth Amendments, and Article I, § 1, of the Constitution of the United States, moved to strike the defense. The motion was denied. Judgment was entered for plaintiff for $22.50, the face of the coupon, and was affirmed upon appeal. The Court of Appeals of the State considered the federal question and decided that the Joint Resolution was valid. 265 N. Y. 37; 191 N. E. 726. This Court granted a writ of certiorari, October 8, 1934.

In Nos. 471 and 472, the question arose with respect to an issue of bonds, dated May 1, 1903, of the St. Louis, Iron Mountain & Southern Railway Company, payable May 1, 1933. The bonds severally provided for the payment of "One Thousand Dollars gold coin of the United States of the present standard of weight and fineness," with interest from date at the rate of four per cent. per annum, payable "in like gold coin semi-annually." In 1917, Missouri Pacific Railroad Company acquired the property of the obligor subject to the mortgage securing the bonds. In March, 1933, the United States District Court, Eastern District of Missouri, approved a petition filed by the latter company under § 77 of the Bankruptcy Act. In the following December, the trustees under the mortgage asked leave to intervene, seeking to have the income of the property applied against the mortgage debt and alleging that the debt was payable "in gold coin of the United States of the standard of weight and fineness prevailing on May 1, 1903." Later, the Reconstruction Finance Corporation and the United States, as creditors of the debtor, filed a joint petition for leave to intervene, in which they denied the validity of the gold clause contained in the mortgage and bonds. Leave to intervene specially was granted to each applicant on April 5, 1934, and answers were filed. On the hearing, the District Court decided that the Joint Resolution of June 5, 1933, was constitutional and that the trustees were entitled, in payment of the principal of each bond, to $1,000 in money constituting legal tender. Decree was entered accordingly and the trustees (respondents here) took two appeals to the United States Circuit Court of Appeals.[2]

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[2] One appeal was allowed by the District Judge and the other by the Circuit Court of Appeals.

While these appeals were pending, this Court granted writs of certiorari, November 5, 1934.

The Joint Resolution of June 5, 1933, was one of a series of measures relating to the currency. These measures disclose not only the purposes of the Congress but also the situations which existed at the time the Joint Resolution was adopted and when the payments under the "gold clauses" were sought. On March 6, 1933, the President, stating that there had been "heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding" and "extensive speculative activity abroad in foreign exchange" which had resulted "in severe drains on the Nation's stocks of gold," and reciting the authority conferred by § 5 (b) of the Act of October 6, 1917 (40 Stat. 411), declared "a bank holiday" until March 9, 1933. On the same date, the Secretary of the Treasury, with the President's approval, issued instructions to the Treasurer of the United States to make payments in gold in any form only under license issued by the Secretary.

On March 9, 1933, the Congress passed the Emergency Banking Act. 48 Stat. 1. All orders issued by the President or the Secretary of the Treasury since March 4, 1933, under the authority conferred by § 5 (b) of the Act of October 6, 1917, were confirmed. That section was amended so as to provide that during any period of national emergency declared by the President, he might "investigate, regulate or prohibit," by means of licenses or otherwise, "any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof." The Act also amended § 11 of the Federal Reserve Act (39 Stat. 752) so as to authorize the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States " any or all gold coin, gold bullion, and gold certificates " owned by them, and that the Secretary should pay therefor " an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." By Executive Order of March 10, 1933, the President authorized banks to be reopened, as stated, but prohibited the removal from the United States, or any place subject to its jurisdiction, of " any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury." By further Executive Order of April 5, 1933, forbidding hoarding, all persons were required to deliver, on or before May 1, 1933, to stated banks " all gold coin, gold bullion and gold certificates," with certain exceptions, the holder to receive " an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." Another Order of April 20, 1933, contained further requirements with respect to the acquisition and export of gold and to transactions in foreign exchange.

By § 43 of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 51), it was provided that the President should have authority, upon the making of prescribed findings and in the circumstances stated, "to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies," and it was further provided that the "gold dollar, the weight of which is so fixed, shall be the standard unit of value," and that "all forms of money shall be maintained at a parity with this standard," but that "in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum."

Then followed the Joint Resolution of June 5, 1933. There were further Executive Orders of August 28 and 29, 1933, October 25, 1933, and January 12 and 15, 1934, relating to the hoarding and export of gold coin, gold bullion and gold certificates, to the sale and export of gold recovered from natural deposits, and to transactions in foreign exchange, and orders of the Secretary of the Treasury, approved by the President, on December 28, 1933, and January 15, 1934, for the delivery of gold coin, gold bullion and gold certificates to the United States Treasury.

On January 30, 1934, the Congress passed the "Gold Reserve Act of 1934" (48 Stat. 337) which, by § 13, ratified and confirmed all the actions, regulations and orders taken or made by the President and the Secretary of the Treasury under the Act of March 9, 1933, or under § 43 of the Act of May 12, 1933, and, by § 12, with respect to the authority of the President to fix the weight of the gold dollar, provided that it should not be fixed "in any event at more than 60 per centum of its present weight." On January 31, 1934, the President issued his proclamation declaring that he fixed " the weight of the gold dollar to be 15 5/21 grains nine tenths fine," from and after that date.

We have not attempted to summarize all the provisions of these measures. We are not concerned with their wisdom. The question before the Court is one of power, not of policy. And that question touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to "gold clauses" in existing contracts. The Resolution must, however, be considered in its legislative setting and in the light of other measures *in pari materia*.

First. The interpretation of the gold clauses in suit. In the case of the *Baltimore and Ohio Railroad Company,* the obligor considers the obligation to be one " for the payment of money and not for the delivery of a specified number of grains or ounces of gold"; that it is an obligation payable in money of the United States and not less so because payment is to be made " in a particular kind of money "; that it is not a " commodity contract " which could be discharged by " tender of bullion." At the same time, the obligor contends that, while the Joint Resolution is constitutional in either event, the clause is a " gold coin " and not a " gold value " clause; that is, it does not imply " a payment in the ' equivalent ' of gold in case performance by payment in gold coin is impossible." The parties, runs the argument, intended that the instrument should be negotiable and hence it should not be regarded as one " for the payment of an indeterminate sum ascertainable only at date of payment." And in the reference to the standard of weight and fineness, the words " equal to " are said to be synonymous with " of."

In the case of the bonds of the *St. Louis, Iron Mountain & Southern Railway Company,* the Government urges that by providing for payment in gold coin the parties showed an intention " to protect against depreciation of one kind of money as compared with another, as for example, paper money compared with gold, or silver compared with gold "; and, by providing that the gold coin should be of a particular standard, they attempted " to assure against payment in coin of lesser gold content." The clause, it is said, " does not reveal an intention to protect against a situation where gold coin no longer circulates and all forms of money are maintained in the United States at a parity with each other"; apparently, " the parties did not anticipate the existence of conditions making it impossible and illegal to procure gold coin with which to meet the obligations." In view of that impossibility, asserted to exist both in fact and in law, the

Government contends that "the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin," but, "as only one term of the promise in the gold clause is impossible to perform and illegal," the remainder of the obligation should stand and thus the obligation "becomes one to pay the stated number of dollars."

The bondholder in the first case, and the trustees of the mortgage in the second case, oppose such an interpretation of the gold clauses as inadequate and unreasonable. Against the contention that the agreement was to pay in gold coin if that were possible, and not otherwise, they insist that it is beyond dispute that the gold clauses were used for the very purpose of guarding against a depreciated currency. It is pointed out that the words "gold coin of the *present* standard" show that the parties contemplated that when the time came to pay there might be gold dollars of a new standard, and, if so, that "gold coin of the present standard" would pass from circulation; and it is taken to be admitted, by the Government's argument, that if gold coins of a lesser standard were tendered, they would not have to be accepted unless they were tendered in sufficient amount to make up the "gold value" for which, it is said, the contract called. It is insisted that the words of the gold clause clearly show an intent "to establish a measure or standard of value of the money to be paid if the particular kind of money specified in the clause should not be in circulation at the time of payment." To deny the right of the bondholders to the equivalent of the gold coin promised is said to be not a construction of the gold clause but its nullification.[3]

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[3] As illustrating the use of such clauses as affording a standard or measure of value, counsel refer to Article 262 of the Treaty of Versailles with respect to the monetary obligations of Germany, which were made payable in gold coins of several countries, with the stated

The decisions of this Court relating to clauses for payment in gold did not deal with situations corresponding to those now presented. *Bronson* v. *Rodes,* 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379; *Trebilcock* v. *Wilson,* 12 Wall. 687; *Thompson* v. *Butler,* 95 U. S. 694; *Gregory* v. *Morris,* 96 U. S. 619. See, also, *The Vaughan and Telegraph,* 14 Wall. 258; *The Emily Souder,* 17 Wall. 666. The rulings, upholding gold clauses and determining their effect, were made when gold was still in circulation and no act of the Congress prohibiting the enforcement of such clauses had been passed. In *Bronson* v. *Rodes, supra,* p. 251, the Court held that the legal tender acts of 1862 and 1863, apart from any question of their constitutionality, had not repealed or modified the laws for the coinage of gold and silver or the statutory provisions which made those coins a legal tender in all payments. It followed, said the Court, that "there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature." Accordingly, the contract of the parties for payment in one sort of dollars, which was still in lawful circulation, was sustained. The case of *Trebilcock* v. *Wilson, supra,* was decided shortly after the legal tender acts had been held valid. The Court again concluded (pp. 695, 696) that those acts applied only to debts which were payable

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purpose that the gold coins mentioned "shall be defined as being of the weight and fineness of gold as enacted by law on January 1, 1914." Reference is also made to the construction of the gold clause in the bonds before the House of Lords in *Feist, appellant, and Société Intercommunale Belge d'Electricité, respondents,* L. R. (1934) A. C. 161, 173, and to the decisions of the Permanent Court of International Justice in the cases of the Serbian and Brazilian loans (Publications of the Permanent Court of International Justice, Series A, Nos. 20/21) where the bonds provided for payment in gold francs.

in money generally, and that there were "according to that decision, two kinds of money, essentially different in their nature, but equally lawful." In that view, said the Court, "contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement."

With respect to the interpretation of the clauses then under consideration, the Court observed, in *Bronson* v. *Rodes, supra,* p. 250, that a contract to pay a certain number of dollars in gold or silver coins was, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." The Court thought that it was not distinguishable, in principle, "from a contract to deliver an equal weight of bullion of equal fineness." That observation was not necessary to the final conclusion. The decision went upon the assumption "that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather than as contracts to deliver certain weights of standard gold." *Id.* p. 251.

In *Trebilcock* v. *Wilson, supra,* where a note was payable "*in specie,*" the Court said (pp. 694, 695) that the provision did not "assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain"; that the words "*in specie*" were "merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law"; that they meant "that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States." And in *Thompson* v. *Butler, supra,* pp. 696, 697, the Court adverted to the statement made in *Bronson* v. *Rodes,* and concluded that "notwithstanding this, it is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations." Compare *Gregory* v. *Morris*, *supra*.

We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. When these contracts were made they were not repugnant to any action of the Congress. In order to determine whether effect may now be given to the intention of the parties in the face of the action taken by the Congress, or the contracts may be satisfied by the payment dollar for dollar, in legal tender, as the Congress has now prescribed, it is necessary to consider (1) the power of the Congress to establish a monetary system and the necessary implications of that power; (2) the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority; and (3) whether the clauses in question do constitute such an interference as to bring them within the range of that power.

Second. The power of the Congress to establish a monetary system. It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421. We need only consider certain postulates upon which that conclusion rested.

The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, § 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *McCulloch* v. *Maryland,* 4 Wheat. 316, 404–407; *Knox* v. *Lee, supra,* pp. 532, 536; *Juilliard* v. *Greenman, supra,* p. 438. The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard* v. *Greenman, supra,* pp. 439, 440.

The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the Federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the States. The States cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. *Knox* v. *Lee, supra,* p. 545. Another postulate of the decision in that case is that the Congress has power " to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof." *Id.*, p. 553. Or, as was stated in the *Juilliard* case, *supra*, p. 447, the Congress is empowered " to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments." The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide " a sound and uniform currency for the country," and to " secure the benefit of it to the people by appropriate legislation." *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549.

Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan* v. *United States*, 218 U. S. 302, 310. Those limitations arise from the fact that the law " gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value. Hence the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin,—" to prevent its outflow from the country of its origin." *Id.*, p. 311.

Dealing with the specific question as to the effect of the legal tender acts upon contracts made before their passage, that is, those for the payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts,—in rendering them " fruitless or partially fruitless." The Court pointed out that the exercise of the powers of Congress may affect "apparent obligations" of contracts in many ways. The Congress may pass bankruptcy acts. The Congress may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo, which may operate seriously upon existing contracts. And the Court reasoned that if the legal tender acts "were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law." The conclusion was that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract "can extend to the defeat" of that authority. *Knox* v. *Lee, supra,* pp. 549–551.

On similar grounds, the Court dismissed the contention under the Fifth Amendment forbidding the taking of private property for public use without just compensation or the deprivation of it without due process of law. That provision, said the Court, referred only to a direct appropriation. A new tariff, an embargo, or a war, might bring upon individuals great losses; might, indeed, render valuable property almost valueless,—might destroy the worth of contracts. "But whoever supposed" asked the Court, "that, because of this, a tariff could not be changed or a non-intercourse act, or embargo be enacted, or a war be declared." The Court referred to the Act of June 28, 1834, by which a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of the measure was that all creditors were subjected to a corresponding loss, as the debts then due "became solvable with six per cent. less gold than was required to pay them before." But it had never been imagined that there was a taking of private property without compensation or without due process of law. The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional. *Id.*, pp. 551, 552.

The question of the validity of the Joint Resolution of June 5, 1933, must be determined in the light of these settled principles.

Third. The power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority. The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of States and municipalities, or of their political subdivisions, that is, to such engagements as are within the reach of the applicable national power. The Government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. See *Perry* v. *United States*, decided this day, *post*, p. 330.

The contention is that the power of the Congress, broadly sustained by the decisions we have cited in relation to private contracts for the payment of money generally, does not extend to the striking down of express contracts for gold payments. The acts before the Court in the legal tender cases, as we have seen, were not deemed to go so far. Those acts left in circulation two kinds of money, both lawful and available, and contracts for payments in gold, one of these kinds, were not disturbed. The Court did not decide that the Congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way of the execution of the policy of the Congress in relation to the currency. Mr. Justice Bradley, in his concurring opinion, expressed the view that the Congress had that power and had exercised it. *Knox* v. *Lee, supra*, pp. 566, 567. And, upon that ground, he dissented from the opinion of the Court in *Trebilcock* v. *Wilson, supra*, p. 699, as to the validity of contracts for payment "*in specie*."[4] It is significant that Mr. Justice Bradley, referring to this difference of opinion in the legal tender cases, remarked (in his concurring opinion) that "of course" the difference arose "from the different construction given to the legal tender acts." "I do not understand," he said, "the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie."

Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship or loss. Creditors who have not stipulated for gold payments may suffer equal hardship or loss with creditors who have so stipulated. The former, admittedly, have no constitutional grievance. And, while the latter may not suffer more, the point is pressed that their express stipulations for gold payments constitute property, and that creditors who have not such stipulations are without that property right. And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Con-

[4] Mr. Justice Miller also dissented in *Trebilcock* v. *Wilson*, 12 Wall., pp. 699, 700, upon the ground "that a contract for gold dollars, in terms, was in no respect different, in legal effect, from a contract for dollars without the qualifying words, specie, or gold, and that the legal tender statutes had, therefore, the same effect in both cases."

gress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 357.

This principle has familiar illustration in the exercise of the power to regulate commerce. If shippers and carriers stipulate for specified rates, although the rates may be lawful when the contracts are made, if Congress through the Interstate Commerce Commission exercises its authority and prescribes different rates, the latter control and override inconsistent stipulations in contracts previously made. This is so, even if the contract be a charter granted by a State and limiting rates, or a contract between municipalities and carriers. *New York* v. *United States,* 257 U. S. 591, 600, 601; *United States* v. *Village of Hubbard,* 266 U. S. 474, 477, *note.* See, also, *Armour Packing Co.* v. *United States,* 209 U. S. 56, 80–82; *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U. S. 372, 375.

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 229, 230, the Court raised the pertinent question,—if certain kinds of private contracts directly limit or restrain, and hence regulate, interstate commerce, why should not the power of Congress reach such contracts equally with legislation of a State to the same effect? "What sound reason," said the Court, "can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

Applying that principle, the Court held that a contract, valid when made (in 1871) for the giving of a free pass by an interstate carrier, in consideration of a release of a claim for damages, could not be enforced after the Congress had passed the Act of June 29, 1906, 34 Stat. 584. *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467.[5] Quoting the statement of the general principle in the legal tender cases, the Court decided that the agreement must necessarily be regarded as having been made subject to the possibility that, at some future time, the Congress "might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value." The Court considered it inconceivable that the exercise of such power "may be hampered or restricted to any extent by contracts previously made between individuals or corporations." "The framers of the Constitution never intended any such state of things to exist." *Id.,* p. 482. Accordingly, it has been "authoritatively settled" by decisions of this Court that no previous contracts or combinations can prevent the application of the Anti-Trust Acts to compel the discontinuance of combinations declared to be illegal. *Addyston Pipe & Steel Co.* v. *United States, supra; United States* v. *Southern Pacific Co.,* 259 U. S. 214, 234, 235. See, also, *Calhoun* v. *Massie,* 253 U. S. 170, 176; *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 509; *Stephenson* v. *Binford,* 287 U. S. 251, 276.

The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made,

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[5] Compare *New York Central & Hudson R. R. Co.* v. *Gray,* 239 U. S. 583; *Calhoun* v. *Massie,* 253 U. S. 170, 176.

when they interfere with the carrying out of the policy it is free to adopt. The exercise of this power is illustrated by the provision of § 5 of the Employers' Liability Act of 1908 (35 Stat. 65, 66) relating to any contract the purpose of which was to enable a common carrier to exempt itself from the liability which the Act created. Such a stipulation the Act explicitly declared to be void. In the *Second Employers' Liability Cases,* 223 U. S. 1, 52, the Court decided that as the Congress possessed the power to impose the liability, it also possessed the power "to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." And this prohibition the Court has held to be applicable to contracts made before the Act was passed. *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603. In that case, the employee, suing under the Act, was a member of the "Relief Fund" of the railroad company under a contract of membership, made in 1905, for the purpose of securing certain benefits. The contract provided that an acceptance of those benefits should operate as a release of claims, and the company pleaded that acceptance as a bar to the action. The Court held that the Employers' Liability Act supplied the governing rule and that the defense could not be sustained. The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. The reason is manifest. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by "prophetic discernment" to bring within the range of their agreements. The Constitution recognizes no such limitation. *Id.,* pp. 613, 614. See, also, *United States* v. *Southern Pacific Co., supra; Sproles* v. *Binford,* 286 U. S. 374, 390, 391; *Radio Commission* v. *Nelson Brothers Co.* 289 U. S. 266, 282.

The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority they cannot stand.

Fourth. The effect of the gold clauses in suit in relation to the monetary policy adopted by the Congress. Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch* v. *Maryland, supra,* pp. 421, 423; *Juilliard* v. *Greenman, supra,* p. 450; *Stafford* v. *Wallace,* 258 U. S. 495, 521; *Everard's Breweries* v. *Day,* 265 U. S. 545, 559, 562.

The Committee on Banking and Currency of the House of Representatives stated in its report recommending favorable action upon the Joint Resolution (H. R. Rep. No. 169, 73d Cong., 1st Sess.):

"The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the present emergency. These gold clauses render ineffective the power of the Government to create a currency and determine the value thereof. If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a particular form of the circulating medium, particularly when it is the medium upon which the entire credit and currency structure rests."

And the Joint Resolution itself recites the determination of the Congress in these words:[6]

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the

[6] See Note 1.

declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?

The Congress in the exercise of its discretion was entitled to consider the volume of obligations with gold clauses, as that fact, as the report of the House Committee observed, obviously had a bearing upon the question whether their existence constituted a substantial obstruction to the congressional policy. The estimates submitted at the bar indicate that when the Joint Resolution was adopted there were outstanding seventy-five billion dollars or more of such obligations, the annual interest charges on which probably amounted to between three and four billion dollars. It is apparent that if these promises were to be taken literally, as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin. If there were no outstanding obligations with gold clauses, we suppose that no one would question the power of the Congress, in its control of the monetary system, to endeavor to conserve the gold resources of the Treasury, to insure its command of gold in order to protect and increase its reserves, and to prohibit the exportation of gold coin or its use for any purpose inconsistent with the needs of the Treasury. See *Ling Su Fan* v. *United States, supra.* And if the Congress would have that power in the absence of gold clauses, principles beyond dispute compel the conclusion that private parties, or States or municipalities, by making such contracts could not prevent or embarrass its exercise. In that view of the import of the gold clauses, their obstructive character is clear.

But, if the clauses are treated as "gold value" clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition. It is true that when the Joint Resolution was adopted on June 5, 1933, while gold coin had largely been withdrawn from circulation and the Treasury had declared that "gold is not now paid, nor is it available for payment, upon public or private debts,"[7] the dollar had not yet been devalued. But devaluation was in prospect and a uniform currency was intended.[8] Section 43 of the Act of May 12, 1933 (48 Stat. 51), provided that the President should have authority, on certain conditions, to fix the weight of the gold dollar as stated, and that its weight as so fixed should be "the standard unit of value" with which all forms of money should be maintained "at a parity." The weight of the gold dollar was not to be reduced by more than 50 per centum. The Gold Reserve Act of 1934 (January 30, 1934, 48 Stat. 337), provided that the President should not fix the weight of

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[7] Treasury Statement of May 26, 1933.

[8] The Senate Committee on Banking and Currency, in its Report of May 27, 1933, stated: "By the Emergency Banking Act and the existing Executive Orders gold is not now paid, or obtainable for payment, on obligations public or private. By the Thomas amendment currency was intended to be made legal tender for all debts. However, due to the language used doubt has arisen whether it has been made legal tender for payments on gold clause obligations, public and private. This doubt should be removed. These gold clauses interfere with the power of Congress to regulate the value of the money of the United States and the enforcement of them would be inconsistent with existing legislative policy." Sen. Rep. No. 99, 73d Cong., 1st sess.

the gold dollar at more than 60 per cent. of its present weight. The order of the President of January 31, 1934, fixed the weight of the gold dollar at 15 5/21 grains nine-tenths fine as against the former standard of 25 8/10 grains nine-tenths fine. If the gold clauses interfered with the congressional policy and hence could be invalidated, there appears to be no constitutional objection to that action by the Congress in anticipation of the determination of the value of the currency. And the questions now before us must be determined in the light of that action.

The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their "gold bonds" must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their "gold bonds" and must now receive payments for their products in the existing currency. It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interefere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.

The judgment and decree, severally under review, are affirmed.

No. 270. Judgment affirmed.
Nos. 471 and 472. Decree affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissent. See *post*, p. 361.

NORTZ *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 531. Argued January 10, 1935.—Decided February 18, 1935.

1. A demurrer to a petition in the Court of Claims admits facts well pleaded, but not allegations amounting to conclusions of law. P. 324.
2. A gold certificate certifying that there have been deposited in the Treasury of the United States a stated number of dollars payable to the bearer on demand, and which is legal tender for public and private debts, is not a warehouse receipt or a contract for a certain amount of gold as a commodity, but is currency. P. 326.
3. *Quaere,* Whether the issue of a gold certificate creates an express contract upon which the United States may be sued in the Court of Claims under Jud. Code, § 145. P. 327.
4. The Court of Claims cannot entertain a claim for nominal damages. P. 327.
5. Congress has complete authority over the currency system, including authority to provide that all gold bullion, gold coin, and gold certificates outstanding shall be taken over by the Government. P. 328.
6. Assuming that the holder of a gold certificate, who, prior to the devaluation of the dollar, was required under the Emergency Banking Act and Treasury orders to deliver the certificate to the Treasury, was entitled by its terms to receive the amount of the certificate in gold coin of the then existing standard of weight and fineness, it cannot be said that, in being obliged to accept payment, dollar for dollar, in legal tender currency not redeemable in gold, he suffered any actual loss, since, if the gold coin had in fact been paid him, he could not have held it or dealt in it (having no license) but would have been compelled to surrender it to the Treasury for the same number of currency dollars. P. 328.
7. In a suit in the Court of Claims for damages claimed to have been caused by refusal of the Government, on January 17, 1933, to pay a gold certificate in gold coin, and substitution of other currency, dollar for dollar, an allegation that gold was of a value of $33.43 per ounce necessarily involves a conclusion of law; since under applicable legislative requirements there was not on that

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* See note, p. 240.

date a free market for gold in the United States or any market for the gold coin claimed, or any right for persons unlicensed to dispose of it abroad. P. 329.

Question answered "No."

Response to questions propounded by the Court of Claims arising out of a claim based on gold certificates.

Mr. Otto C. Sommerich opened the argument for the plaintiff; *Mr. Angus MacLean,* the Assistant Solicitor General, followed for the United States; and *Mr. Raymond T. Heilpern* closed for the plaintiff.

Summary of argument from the brief of *Messrs. Otto C. Sommerich, Raymond T. Heilpern,* and *Maxwell C. Katz,* for the plaintiff.

The gold certificates were express contracts of the United States in its corporate or proprietary capacity, whereby the Government agreed, upon presentation of the certificates, to redeem them in gold in the amount specified.

Since, under § 314, Title 31, U. S. C., the dollar consisted of 25.8 grains of gold, nine-tenths fine, it is apparent that plaintiff was entitled to receive, for each dollar of gold certificates tendered, 25.8 grains of gold, nine-tenths fine. *Bank of Boston* v. *United States,* 10 Ct. Cls. 519; aff'd, 96 U. S. 30; *State Nat. Bank of Boston* v. *United States,* 24 Ct. Cls. 488. It must be borne in mind that, at the time of the presentation of the certificates by petitioner, the gold content of the dollar had not been deflated and that § 314 was still in effect.

That both the Legislative and Executive branches of the Government deemed gold certificates to be the equivalent of gold, is clearly shown by the Emergency Banking Act of March 9, 1933, and the orders issued thereunder. Gold bullion, gold coin, and gold certificates are all classed in one group, and residents of this country were required to surrender them all. If Congress and the Executive Department had not assumed that the owner of the gold certificate had the contract right to demand in exchange a specified amount of gold, why did the defendant think it necessary to compel the citizen to surrender this gold certificate?

Under Jud. Code, § 145, the Court of Claims has jurisdiction of all claims founded upon any contract, express or implied, with the Government.

Congress could not, even in the emergency prevailing during 1933, by virtue of its plenary power to regulate the currency system of the United States, deprive plaintiff of his contract right to have his gold certificate redeemed in gold, without providing just compensation. *Lynch* v. *United States,* 292 U. S. 571; *Sinking Fund Cases,* 99 U. S. 700.

The Fifth Amendment operates, even in the great emergency created by war, to protect a citizen of this country from confiscation of his contract rights without just compensation. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106.

We do not deny that Congress had authority to compel all residents of this country to deliver to the Government all gold bullion, gold coins, and gold certificates in their possession. But it was not within the province of Congress to determine what should be just compensation, that being a judicial question.

The courts have uniformly held that the taking of property by the Government gives rise to an implied promise to pay the fair value thereof, to be determined judicially. *United States* v. *Pacific R. Co.,* 120 U. S. 227; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *Langford* v. *United States,* 101 U. S. 341; *United States* v. *Russell,* 13 Wall. 623; *United States* v. *Lynah,* 188 U. S. 445; *Olson* v. *United States,* 292 U. S. 246.

That a contract calling for the payment of a specified sum in gold cannot be satisfied by the delivery merely of currency of a similar face amount, even though such currency has been legally declared by Congress to be legal tender, has been frequently held. *Bronson* v. *Rodes,* 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258; *Bronson* v. *Kimpton,* 8 Wall. 444; *Trebilcock* v. *Wilson,* 12 Wall. 687; *Gregory* v. *Morris,* 96 U. S. 619.

The United States Government is not responsible for a consequential injury flowing from its lawful acts; but, in the case at bar, the legislation involved a definite repudiation by the Government of its existing agreement.

The question of the economic necessity for the banking and currency legislation passed by the last Congress is not involved in this suit.

The petition herein alleged that, on January 17, 1934, the date of plaintiff's tender, and for some time prior and subsequently thereto, an ounce of gold was of the value of at least $33.43. A statement in a pleading as to the value of an article is a statement of fact. *Prendergast* v. *N. Y. Telephone Co.,* 262 U. S. 43, 47. Therefore, by demurring to the petition, the Government has conceded the value of gold so stated. The truth of the allegation is, moreover, sustained by published records and transactions.

In October 1933, pursuant to the announced policy of the President, the Government purchased gold, both here and abroad, its purchases here, however, being confined to gold newly mined in the United States. Such purchases, beginning on October 25th, were made by the Reconstruction Finance Corporation, and later by the New York Federal Reserve Bank, at prices ranging between $33.36 an ounce on October 25, 1933, and $34.45 an ounce on January 19, 1934. The price paid by the Government on January 17, 1934, the date of plaintiff's tender, was $34.45. These statements are based upon the reports contained in the "Financial Chronicle."

Gold has an intrinsic value and is bought and sold in the world markets. It is patently absurd to contend that though gold in London, or any other place outside of the United States, and newly mined gold, has a value in excess of $30.00 an ounce, the gold in this country held by its residents is worth no more than $20.67 an ounce. Neither Legislative nor Executive fiat can accomplish such a feat.

The attempt to disregard the actual market price of gold and to fix an arbitrary value much lower, is an attempt on the part of the Government to repudiate its agreement and condemn property without payment of just compensation.

During the Great War the Government commandeered the total output of many factories manufacturing products needed for war purposes. Could it have made out a right to fix the prices it would pay for the things commandeered, by asserting that those things could not lawfully be sold to any other buyer and that the price offered by the Government was the sole price obtainable? Cf. *New River Collieries Co.* v. *United States,* 262 U. S. 341; *Olson* v. *United States,* 292 U. S. 246.

Summary of the brief for the United States; which bore the names of *Attorney General Cummings, Solicitor General Biggs, Assistant Solicitor General MacLean, Assistant Attorney General Sweeney,* and *Messrs. Alexander Holtzoff* and *Harry LeRoy Jones.*

Gold certificates, even if regarded as contracts, are not warehouse receipts for a specified quantity of gold, but are monetary obligations (12 Stat. 709, 711; Cong. Globe, 37th Congress, 3rd Session, Part 1, p. 458).

On January 17, 1934, when the plaintiff tendered his certificates, contractual obligations to pay a specified number of dollars could be lawfully liquidated by payment of the amount in any legal tender currency, and hence the defendant's obligation to the plaintiff, if contractual, has been fully satisfied. The Joint Resolution of June 5, 1933, made all coins and currencies of the United States legal tender for all debts, public and private. *Legal Tender*

Cases, 12 Wall. 457. *Bronson* v. *Rodes,* 7 Wall. 229, and similar cases are distinguishable.

The plaintiff has sustained no damage, since even if he had received gold coin on January 17, 1934, he would have been compelled to surrender it, in view of the Act of March 9, 1933, and the Order of the Secretary of the Treasury of December 28, 1933.

The plaintiff may not claim just compensation for a taking of private property, since his petition sets forth a cause of action on an express contract. In any event, he has already received just compensation, since if he had been paid gold coin, he could not have disposed of it for any greater sum.

The Emergency Banking Act of March 9, 1933, is not rendered invalid by the fact that Congress provides what compensation shall be paid for gold certificates delivered pursuant to its terms. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, is inapplicable. The compensation provided and paid was just. Moreover, where the thing taken and the compensation given was money, it would have been inappropriate for Congress, which is empowered to regulate the value of money, not to have determined the amount to be paid.

The Government was exercising its undoubted sovereign power to retire one form of currency and issue another in place thereof, both being legal tender for the same amount. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. *Legal Tender Cases, supra.*

Abrogation of contract rights is not a taking of private property for public use. To frustrate a contract is not to appropriate it. *Omnia Commercial Co.* v. *U. S.,* 261 U. S. 502, 508, 513.

The Court of Claims has no jurisdiction, as gold certificates are money, or a medium of exchange, and do not constitute contracts of the United States in its corporate or proprietary capacity. *Ling Su Fan* v. *U. S.,* 218 U. S. 302, 310; *Horowitz* v. *U. S.,* 267 U. S. 458.

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

The facts certified by the Court of Claims may be thus summarized: Plaintiff brought suit as owner of gold certificates of the Treasury of the United States of the nominal amount of $106,300. He alleged that defendant, by these gold certificates and under the applicable acts of Congress, had certified that there had been deposited in the Treasury of the United States $106,300 in gold coin which would be paid to the claimant, as holder, upon demand; that at the time of the issue of these certificates, and to and including January 17, 1934, a dollar in gold consisted of 25.8 grains of gold, .9 fine; that claimant was entitled to receive from defendant one ounce of gold for each $20.67 of the gold certificates; that on January 17, 1934, he duly presented the certificates and demanded their redemption by the payment of gold coin to the extent above mentioned; that on that date, and for some time prior and subsequent thereto, an ounce of gold was of the value of at least $33.43, and that claimant was accordingly entitled to receive in redemption 5104.22 ounces of gold of the value of $170,634.07; that the demand was refused; that in view of the penalties imposed under the order of the Secretary of the Treasury, approved by the President, on January 15, 1934, supplementing the order of December 28, 1933, and the laws and regulations under which those orders were issued, which the claimant alleged were unconstitutional as constituting a deprivation of property without due process of law, claimant delivered the gold certificates to defendant under protest and received in exchange currency of the United States in the sum of $106,300 which was not redeemable in gold; and that in consequence claimant was damaged in the sum of $64,334.07, for which, with interest, judgment was demanded.

Defendant demurred to the petition upon the ground that it did not state a cause of action against the United States.

The questions certified by the Court are as follows:

"1. Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, nine-tenths fine, and the market price thereof on January 17, 1934, was in excess of the currency so received?

"2. Is a gold certificate, Series of 1928, under the facts stated in question 1 an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

"3. Do the provisions of the Emergency Banking Act of March 9, 1933, and the Order of the Secretary of the Treasury dated December 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question 1 to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?"

Defendant's demurrer, which admitted the facts well pleaded in the petition, did not admit allegations which amounted to conclusions of law in relation to the nature of the gold certificates or the legal effect of the legislation under which they were issued, held, or to be redeemed. *Dillon* v. *Barnard,* 21 Wall. 430, 437; *United States* v. *Ames,* 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Co.,* 139 U. S. 569, 577, 578; *Equitable Life Assurance Society* v. *Brown,* 213 U. S. 25, 43.

Gold certificates were authorized by § 5 of the Act of March 3, 1863 (12 Stat. 709, 711), which provided that the Secretary of the Treasury might receive "deposits of gold coin and bullion" and issue certificates therefor "in denominations of not less than twenty dollars each, corresponding with the denominations of the United States notes." The coin and bullion so deposited were to be retained in the treasury for the payment of the certificates on demand. It was further provided that "certificates representing coin in the treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed twenty per centum beyond the amount of coin and bullion in the treasury." See R. S., § 254; 31 U. S. C. 428. Section 12 of the Act of July 12, 1882 (22 Stat. 165) contained a further provision authorizing the Secretary of the Treasury "to receive deposits of gold coin" and to issue certificates therefor, also in denominations of dollars as stated. The Act of March 14, 1900 (31 Stat. 45) prescribed that the dollar "consisting of twenty-five and eight-tenths grains of gold nine-tenths fine, . . . shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity." Section 6 of that Act also authorized the Secretary of the Treasury to receive deposits of gold coin and to issue gold certificates therefor, and provided that the coin so deposited should be held by the treasury for the payment of such certificates on demand and should be "used for no other purpose." And the latter clause appears in the amending Acts of March 4, 1907 (34 Stat. 1289) and of March 2, 1911 (36 Stat. 965). See 31 U. S. C. 429.

The Act of December 24, 1919 (41 Stat. 370) made gold certificates, payable to bearer on demand, "legal tender in payment of all debts and dues, public and private." And § 2 of the Joint Resolution of June 5, 1933 (48 Stat. 113), amending the Act of May 12, 1933 (48 Stat. 52) provided that "all coins and currencies of the United States . . . heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues."

Gold certificates under this legislation were required to be issued in denominations of dollars and called for the payment of dollars.[1] These gold certificates were currency. They were not less so because the specified number of dollars were payable in gold coin, of the coinage of the United States. Being currency, and constituting legal tender, it is entirely inadmissible to regard the gold certificates as warehouse receipts.[2] They were not contracts

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[1] The form of the gold certificates here in question is stated to be as follows:

" This certifies that there have been deposited in the Treasury of

THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS

in gold coin payable to the bearer on demand.

" This certificate is a legal tender in the amount thereof in payment of all debts and dues public and private."

On the reverse side appear the following words:

" THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS."

[2] The description of gold certificates in the reports of the Secretary of the Treasury, to which allusion was made in the argument at bar, could in no way alter their true legal characteristics. Reports for 1926, p. 80; 1930, pp. 29, 604, 607; 1933, p. 375.

for a certain quantity of gold as a commodity. They called for dollars, not bullion.

We may lay on one side the question whether the issue of currency of this description created an express contract upon which the United States has consented to be sued under the provisions of § 145 of the Judicial Code, 28 U. S. C. 250. Compare *Horowitz* v. *United States*, 267 U. S. 458, 461.[3] We may assume that plaintiff's petition permits an alternative view. Plaintiff urges as the gist of his contention that, by the Acts of Congress, and the orders thereunder, requiring the delivery of his gold certificates to the Treasury in exchange for currency not redeemable in gold, he has been deprived of his property, and that he is entitled to maintain this action to recover the just compensation secured to him by the Fifth Amendment. But, even in that view, the Court of Claims has no authority to entertain the action, if the claim is at best one for nominal damages. The Court of Claims "was not instituted to try such a case." *Grant* v. *United States*, 7 Wall. 331, 338; *Marion & R. V. Ry. Co.* v. *United States*, 270 U. S. 280, 282. Accordingly, we inquire whether the case which the plaintiff presents is one which would justify the recovery of actual damages.

By § 3 of the Emergency Banking Act of March 9, 1933 (48 Stat. 2), amending § 11 of the Federal Reserve Act (39 Stat. 752), the Secretary of the Treasury was authorized, whenever in his judgment it was necessary

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[3] The point was not determined in *United States* v. *State Bank*, 96 U. S. 30, upon which plaintiff relies. The Court there decided that "where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party." The Court said that the basis of the liability was "an implied contract" by which the United States might well become bound in virtue of its corporate character. Its sovereignty was "in no wise involved."

"to protect the currency system of the United States," to require all persons "to pay and deliver to the treasurer of the United States any or all gold coin, gold bullion, and gold certificates" owned by them. Upon such delivery, the Secretary was to pay therefor "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." Under that statute, orders requiring such delivery, except as otherwise expressly provided, were issued by the Secretary on December 28, 1933, and January 15, 1934. By the latter, gold coin, gold bullion, and gold certificates were required to be delivered to the treasurer of the United States on or before January 17, 1934. It was on that date that plaintiff made his demand for gold coin in redemption of his certificates and delivered the certificates under protest. That compulsory delivery, he insists, constituted the "taking of the contract" for which he demands compensation.

Plaintiff explicitly states his concurrence in the Government's contention that the Congress has complete authority to regulate the currency system of the country. He does not deny that, in exercising that authority, the Congress had power "to appropriate unto the Government outstanding gold bullion, gold coin and gold certificates." Nor does he deny that the Congress had authority "to compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession." These powers could not be successfully challenged. *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421; *Ling Su Fan* v. *United States,* 218 U. S. 302; *Norman* v. *Baltimore & Ohio R. Co.,* decided this day, *ante,* p. 240. The question plaintiff presents is thus simply one of "just compensation."

The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury. Plaintiff does not bring himself within any of the stated exceptions. He did not allege in his petition that he held a federal license to hold gold coin; and the first question submitted to us by the Court of Claims negatives the assumption of such a license. Had plaintiff received gold coin for his certificates, he would not have been able, in view of the legislative inhibition, to export it or deal in it. Moreover, it is sufficient in the instant case to point out that on January 17, 1934, the dollar had not been devalued. Or, as plaintiff puts it, "at the time of the presentation of the certificates by petitioner, the gold content of the United States dollar had not been deflated" and the provision of the Act of March 14, 1900, *supra,* fixing that content at 25.8 grains, nine-tenths fine, as the standard unit of money with which "all forms of money issued or coined by the United States" were to be maintained at a parity, was "still in effect." The currency paid to the plaintiff for his gold certificates was then on a parity with that standard of value. It cannot be said that, in receiving the currency on that basis, he sustained any actual loss.

To support his claim, plaintiff says that on January 17, 1934, "an ounce of gold was of the value at least of $33.43." His petition so alleged and he contends that the allegation was admitted by the demurrer. But the assertion of that value of gold in relation to gold coin in this country, in view of the applicable legislative requirements, necessarily involved a conclusion of law. Under those requirements, there was not on January 17, 1934, a free market for gold in the United States, or any market available to the plaintiff for the gold coin to which he claims to have been entitled. Plaintiff insists that gold had an intrinsic value and was bought and sold in the world markets. But plaintiff had no right to resort to such markets. By reason of the quality of gold coin, " as a legal tender and as a medium of exchange," limitations attached to its ownership, and the Congress could prohibit its exportation and regulate its use. *Ling Su Fan* v. *United States, supra.*

The first question submitted by the Court of Claims is answered in the negative. It is unnecessary to answer the second question. And, in the circumstances shown, the third question is academic and also need not be answered.

Question No. 1 is answered " No."

MR. JUSTICE MCREYNOLDS, MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissent. See *post*, p. 361.

PERRY *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 532. Argued January 10, 11, 1935.—Decided February 18, 1935.

1. A provision in a Government bond for payment of principal and interest " in United States gold coin of the present standard of value " must be fairly construed; and its reasonable import is an assurance by the Government that the bondholder will not suffer loss through depreciation of the medium of payment. P. 348.
2. The Joint Resolution of June 5, 1933, insofar as it undertakes to nullify such gold clauses in obligations of the United States and provides that such obligations shall be discharged by payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, is unconstitutional. P. 349.
3. Congress cannot use its power to regulate the value of money so as to invalidate the obligations which the Government has there-

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* See note, p. 240.

tofore issued in the exercise of the power to borrow money on the credit of the United States. Pp. 350 *et seq.*

4. There is a clear distinction between the power of Congress to control or interdict the contracts of private parties, when they interfere with the exercise of its constitutional authority, and a power in Congress to alter or repudiate the substance of its own engagements when it has borrowed money under its constitutional authority. P. 350.

5. By virtue of the power to borrow money "*on the credit of the United States,*" Congress is authorized to pledge that credit as assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. P. 351.

6. When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. P. 352.

7. The right to make binding obligations is a power of sovereignty. P. 353.

8. The sovereignty of the United States resides in the people; and Congress cannot invoke the sovereignty of the people to override their will as declared in the Constitution. P. 353.

9. The power given Congress to borrow money on the credit of the United States is unqualified and vital to the Government; and the binding quality of the promise of the United States is of the essence of the credit pledged. P. 353.

10. The fact that the United States may not be sued without its consent, is a matter of procedure which does not affect the legality and binding character of its contracts. P. 354.

11. Section 4 of the Fourteenth Amendment, declaring that "The validity of the public debt of the United States, authorized by law, . . . shall not be questioned," is confirmatory of a fundamental principle, applying as well to bonds issued after, as to those issued before, the adoption of the Amendment; and the expression "validity of the public debt" embraces whatever concerns the integrity of the public obligations. P. 354.

12. The holder of a Liberty Bond, which was issued when gold was in circulation and when the standard of value was the gold dollar of 25.8 grains, nine-tenths fine, and which promised payment in gold of that standard, claimed payment after the Government, pursuant to legislative authority, had withdrawn all gold coin

from circulation, had prohibited its export or its use in foreign exchange, except for limited purposes under license, and had reduced the weight of gold representing the standard dollar to 15-5/21 grains and placed all forms of money on a parity with that standard. The Joint Resolution of June 5, 1933, had enacted that such bonds should be discharged by payment, dollar for dollar, in any coin or currency which, at time of payment, was legal tender for public and private debts. The bondholder, having been refused payment in gold coin of the former standard or in an equal weight of gold, demanded currency in an amount exceeding the face of the bond in the same ratio as that borne by the number of grains in the former gold dollar to the number in the existing one,—or $1.69 of currency for every dollar of the bond. The Treasury declined to pay him more than the face of the bond in currency, and he sued in the Court of Claims. *Held:*

(a) The fact that the Government's repudiation of the gold clause of the bond is unconstitutional does not entitle the plaintiff to recover more than the loss he has actually suffered and of which he may rightfully complain. P. 354.

(b) The Court of Claims has no authority to entertain an action for nominal damages. P. 355.

(c) The question of actual loss cannot be determined without considering the economic condition at the time when the Government offered to pay the face of the bond in legal tender currency. P. 355.

(d) Congress, by virtue of its power to deal with gold coin, as a medium of exchange, was authorized to prohibit its export and limit its use in foreign exchange; and the restraint thus imposed upon holders of such coin was incident to their ownership of it and gave them no cause of action. P. 356.

(e) The Court cannot say that the exercise of this power was arbitrary or capricious. P. 356.

(f) The holder of a bond of the United States, payable in gold coin of the former standard, so far as concerns the restraint upon the right to export the gold coin or to engage in transactions of foreign exchange, is in no better case than the holder of gold coin itself. P. 356.

(g) In assessing plaintiff's damages, if any, the equivalent in currency of the gold coin promised can be no more than the amount of money which the gold coin would be worth to the plaintiff for the purposes for which it could legally be used. P. 357.

(h) Foreign dealing being forbidden, save under license, and the domestic market being, not free, but lawfully restricted by Congress, valuation of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins; and this would involve a consideration of the purchasing power of the currency dollars. P. 357.

(i) Plaintiff has not attempted to show that, in relation to buying power, he has sustained any loss; on the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands, would appear to constitute not a recoupment of loss in any proper sense, but an unjustified enrichment. P. 357.

Question answered " No."

Response to questions certified by the Court of Claims in an action on a Liberty Loan Gold Bond.

Mr. John M. Perry, pro se. Mr. Hersey Egginton was with him on the brief.

The gold clause prescribes, not the method of payment but the measure of the obligation.

The Joint Resolution of June 5, 1933, is a direct violation of § 4 of the Fourteenth Amendment, expressly limiting the delegated powers of Congress, and making the public debt of the United States inviolable at the hands of Congress.

A legislative interpretation of this provision was adopted by the first Congress meeting after its ratification, in the Act of March 18, 1869 (16 Stat. 1). It has never been necessary to apply the prohibition of this portion of § 4, for the reason that, since its adoption and until recently, no attempt has ever been made by Congress to attack the validity of the public debt. The Joint Resolution of June 5, 1933, is a complete repudiation of the gold clause in some 18 billion dollars of outstanding bonds of the United States, and is necessarily a direct violation of § 4.

The history of this part of the Amendment shows that it was inserted for the specific purpose of protecting for all time the public debt, intended to be payable in gold coin or its equivalent, from being made payable, dollar for dollar, in legal tender currency. See, Phanor J. Elder, Cornell Law Quarterly, Dec. 1933, pp. 1–19; Thorpe, Const. Hist., U. S., vol. 3, p. 297; Cong. Globe, May 23, 1866, pp. 2768, 2769; May 29, 1866, p. 2869; June 4, 1866, pp. 2938, 2940, 2941; June 8, 1866, pp. 3040, 3042; June 13, 1866, pp. 3148, 3149; Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (1914), pp. 315, 316; Dunning, Political History of the U. S. During Reconstruction (1880), pp. 93, 99, 109.

Under the rule of *Shreveport* v. *Cole,* 129 U. S. 36, the Amendment must be construed to operate prospectively.

No provision of the Federal Constitution authorizes Congress to enact that portion of the Joint Resolution of June 5, 1933, which purports to abrogate the gold clause in the claimant's Liberty Bond.

Every federal power must be express, or implied from some power or group of powers; and any attempted exercise of power not delegated violates the Tenth Amendment. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326. The doctrine of inherent sovereignty does not apply to the Federal Government. *Kansas* v. *Colorado,* 206 U. S. 46. Nor does the Constitution specifically authorize the Federal Government to alleviate national emergencies. *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Ward* v. *Maryland,* 12 Wall. 418; The Federalist, No. 41. While a general scaling down of public indebtedness by making "gold clauses" inoperative and allowing the United States to pay in inflated currency might be a means of relieving the financial burden of the Government, neither the appropriateness of, nor the necessity for, federal action can create a federal power. *Kansas* v. *Colorado,* 206 U. S. 46; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Ward* v. *Maryland,* 12 Wall.

418; *Keller* v. *United States,* 213 U. S. 138; *Linder* v. *United States,* 268 U. S. 5; *Lynch* v. *United States,* 292 U. S. 571. Furthermore, it is constitutional heresy to claim that an Act unconstitutional in normal times becomes constitutional because Congress deems that an emergency exists. The reverse of this doctrine has been firmly established ever since the Civil War. *Ex parte Milligan,* 4 Wall. 2; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Lynch* v. *United States,* 292 U. S. 571.

No provision in the Constitution authorizes Congress to provide for the general relief of debtors. The power to establish "uniform laws on the subject of bankruptcies" cannot be said to authorize all measures for the relief of debtors. That power is limited to laws "for the benefit and relief of creditors and their debtors, in cases in which the latter are unwilling or unable to pay their debts." Story, Const., § 1102 *et seq.; United States* v. *Fox,* 95 U. S. 670; *United States* v. *Pusey,* Fed. Cas. No. 16,098; *In re Reiman,* Fed. Cas. No. 11,673.

The attempted abrogation of the gold clause is not an exercise of the power "to borrow money on the credit of the United States." Here, if nowhere else, lies a fundamental distinction between the present statute and the Legal Tender Acts of 1862 and 1863. Those Acts were finally sustained as an exercise of the borrowing and currency powers on the theory that the Government was borrowing on the legal tender currency. At the same time a medium of exchange was provided. These powers were, therefore, used in direct support of each other. See, *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421. If this Joint Resolution had only invalidated the gold clauses contained in the obligations of private persons, corporations, States, and municipalities, it might have been argued that Congress was exercising authority necessarily incident to the borrowing power in that it was destroying obligations which affected or interfered with that power.

See, *Veazie Bank* v. *Fenno,* 8 Wall. 533. Even this argument is necessarily refuted by the fact that Congress has included in the Joint Resolution "obligations of the United States."

The attempted abrogation does not come within the scope of the power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." The three cases which have in some measure defined the extent of the coinage power, hold in general that it authorizes the establishment of a sound and uniform national currency. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421. These cases, however, do not decide that Congress may control obligations which are not currency.

Nor has it ever been decided that Congress may control obligations not currency on the theory that such obligations affect the value of money. The power is limited to the issuance and the direct regulation of the kind, amount and value of currency. Congress has no general power to regulate and control the kind, quality, amount, production, or prices of all property. Contract obligations, including obligations to pay money, have always been recognized to be property within the meaning of this rule. It has never even been suggested that the currency power gives Congress authority to fix the value of any obligation that does not circulate as money, on the theory that the value of money is regulated thereby.

The fact that the currency power must be held to be limited to the direct regulation of the media of exchange becomes more apparent when § 10 of Art. I is considered. This clause has been held merely to prevent the States from issuing currency and not to prevent the issuance of "Bills of Credit" which do not circulate as media of exchange. Its purpose has uniformly been said to be that of making effective the affirmative power over currency granted to Congress. *Ogden* v. *Saunders,* 12 Wheat. 213;

Craig v. *Missouri,* 4 Pet. 410; *Briscoe* v. *Kentucky Bank,* 11 Pet. 257; *Darrington* v. *Alabama Bank,* 13 How. 12; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Houston & T. C. R. Co.* v. *Texas,* 177 U. S. 66.

The abrogation would deprive the claimant of his property without due process of law. That part of the Resolution is unreasonable, arbitrary and capricious; it is not reasonably appropriate to any legitimate legislative end; the purpose of its enactment is not comprehended within the objectives of the powers delegated to Congress.

Congress itself has left no doubt that the enactment was intended as an exercise of the currency power. The preamble of the Joint Resolution must be considered as an official statement of the facts upon which the specific exercise of power is based and as a declaration of the objects sought to be attained thereby.

The purpose of the gold clause was to provide a measure of the obligation, and its only possible effect is to fix the amount of legal tender currency payable in satisfaction thereof. How such provisions "obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar," and how their abrogation will "assure a uniform value to the coins and currencies of the United States," is difficult to comprehend. There was not then, nor can there be under existing circumstances, any disparity between the value of the kinds of currency lawfully in circulation, and Congress was untrammeled in its power to issue other forms of currency, to increase or decrease the amount of money in circulation, to change the standard, to declare what is and what shall be legal tender, to prohibit the circulation of unauthorized forms of currency, or otherwise regulate the value of money.

Furthermore, the second paragraph of the preamble of the Joint Resolution is misleading. It is there inferred that this statute is a regulation of the "holding of or dealing in gold," which, it is stated, "affect the public interest and are therefore subject to proper regulation and restriction; . . ." We do not deny that the " holding of or dealing in gold " may " affect the public interest " and for that reason be " subject to proper regulation and restriction." *Ling Su Fan* v. *United States,* 218 U. S. 302. But the " holding of or dealing in gold " had already been prohibited. A further regulation, not abrogating or in some measure altering the former prohibitions, could be of no effect and could only have been intended to disguise the real purpose of the Joint Resolution.

Insofar as it purports to abrogate the gold clause in claimant's bond, the Joint Resolution cannot be considered a regulation of the value of money. The ordinary means by which the value of the currency may be, and has been, regulated is by changing the base at which it had previously been stabilized, or by issuing more currency, thus creating a greater supply. Congress has also issued a new form of currency stabilized at a new base, different from preëxisting standards. The present statute does not and did not, at the time of its enactment, do any of these things. Gold payments were then, and have since remained, suspended. The outstanding currencies, thus, if stabilized at all at that time, must be considered to have been stabilized in terms of one dollar obligations, and these currencies were and are legal tender, dollar for dollar, in the payment of dollar obligations. The Joint Resolution stated, in effect, that both gold and gold-value obligations were payable, dollar for dollar, in this same currency. This Resolution, therefore, purported simultaneously to standardize the unit of currency in terms of dollar, gold dollar, and gold-value obligations. That this is unreasonable, arbitrary, and capricious and cannot be considered to be a regulation of the value of currency may easily be shown.

Claimant's bond by its tenor may be satisfied by the payment of legal tender money in a sum equal to the gold-value of its face amount. Ordinarily the gold-value in legal tender currency is no greater than the face amount of the instrument. When, however, gold payments have been suspended, gold-value obligations, although they may still be satisfied by payment in legal tender currency, remain at par with gold, but, ordinarily, are at a premium in terms of irredeemable currency. This was the situation when the Joint Resolution was enacted. See index of wholesale commodity prices on a gold basis, contained in The Annalist Weekly, Dec. 14, 1934, p. 817. If this statute were given effect, an ordinary one dollar obligation and a similar gold-value obligation could both be satisfied by the payment of the same unit of currency. This Joint Resolution was, therefore, an attempt simultaneously to stabilize the unit of currency at two obligations for the payment of money, which obligations were definitely different in value. Manifestly this cannot be considered to be a regulation of the value of money within the currency power. Gold-value contracts do not affect the value of money in any greater measure than do other money obligations or commodity contracts. Any regulation increasing or decreasing the amount that obligees may recover from the obligors of gold-value contracts, has no more effect on the value of the medium of exchange than would a regulation increasing or decreasing the rights of obligees of any other classes of contracts to pay money, or for that matter, the rights of promisees of agreements for the delivery of commodities. No one would contend that Congress has the power to lessen the obligation of all contracts on the theory that it is thereby regulating the value of money.

The only possible effect that gold-value contracts may have on the value of money is by affecting the demand for money. It is undoubtedly true that if the supply of currency and the rate of circulation were constant, then the value of money would fluctuate directly as the demand. The effect upon that demand of the payment in gold-value of federal obligations upon the retirement of such obligations, spread over the years of their respective maturities, would, however, be negligible.

In every contract to be performed in the future, one or the other of the parties thereto must bear the risk of loss due to fluctuation in value of the subject of the contract. In the ordinary contract for the payment of money, the risk of loss arising from an increase in the value of money rests upon the debtor; that resulting from its decrease upon the creditor. Yet it is not to be contended that Congress has power to shift these risks on the theory that it is regulating the value of money. The logical extension of this doctrine would be to hold that Congress could forbid persons from protecting themselves against risk of loss in any situation, an obvious impossibility; and further, since this risk must fall on someone, that Congress could, *ex post facto,* choose the person upon whom it should fall. The Federal Government, by its own insertion of the gold clause in claimant's Liberty Bond, has voluntarily assumed the risk ordinarily borne by the creditor. It now seeks to transfer to its creditor the loss caused by its own act of devaluation, the very contingency which it itself contemplated when it issued the bond.

Claimant further contends that the Joint Resolution, insofar as it purports to abrogate the gold clause in the Liberty Bond, will not accomplish, or have a reasonable relation to, any proper legislative object.

The purpose of the Joint Resolution, in this respect, was not to execute or make effective any of the powers granted to Congress, but, under the guise of an exercise of the currency power, to commit an act of repudiation. This practice was condemned in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; dissenting opinion, *Sinking-Fund Cases,* 99 U. S. 700, 739.

Even if that part of the Joint Resolution which purports to abrogate existing gold clause obligations might in any way be considered to be an exercise of the power "to coin money, regulate the value thereof," it must, to the extent that the gold clause in claimant's Liberty Bond is affected, deprive him of his property without due process of law and be a violation of the Fifth Amendment.

The claimant in any event is entitled to recover just compensation for the taking of his property for public use.

That part of the Resolution which attempts to fix the just compensation for such taking at "dollar for dollar" in legal tender would in any event be utterly void, as an attempted exercise of judicial power by the legislature. The judicial measure of that just compensation is the value of the property as of the date of taking.

The value of the property on the date of taking is the same as the damages claimed for the breach of the express contract, for the date of breach of contract and the date of taking is the same. In any case, neither the breach of the express contract nor the taking and appropriation by defendant of claimant's property were complete until the claimant's bond had been called for redemption and defendant had refused to pay according to the tenor of the bond. Both of these events happened on May 24, 1934, when the bond was presented to the Treasury Department for payment. The just compensation is, therefore, equal in amount to the relief asked for in the petition.

The Court of Claims has jurisdiction.

Mr. Angus MacLean, Assistant Solicitor General, opened the argument for the United States in this case. *Attorney General Cummings* made a closing argument for this and the two preceding cases. Those who were with them on the Government's brief were *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Alexander Holtzoff* and *Harry LeRoy Jones.* The brief is here summarized:

Justification of the gold clause was removed when the dual monetary system was ended by the parity provisions. *Bronson* v. *Rodes,* 7 Wall. 229, 251–253.

The gold clause is an obstruction to the power of Congress to maintain the parity of all coins and currencies of the United States. Besides the holders of some $20,000,000,000 of gold-clause, interest-bearing obligations of the Federal Government, there were holders of more than $5,000,000,000 of currency issued or guaranteed by the United States; gold clauses were contained in or made with respect to all of this currency. When the Government found it necessary to suspend redemption of currency in gold, one group of creditors would have been preferred to another if gold-clause creditors had been allowed to enforce the asserted obligation of their bonds.

The gold clause is an obstruction to the power of Congress to regulate the value of money. If the gold clause had not been abrogated in Government as well as private obligations, investments like those of the claimant would have reaped a harvest by the artificial demand created for Government bonds. If the gold clause in Government bonds were sustained and construed to entitle the holders to $1.69 on every dollar face amount of the bond, a ten-thousand-dollar gold-clause bond would in 1934 purchase 2.87 times as much as the $10,000 invested in such bond in 1918.

The gold clause is an obstruction to the power of Congress to borrow money. Bonds in which the gold clause was allowed to remain would adversely affect the market for other types of bonds and thereby impair the borrowing power of the Government.

The gold clause is an interference with the powers of the Federal Government over international relations, foreign exchange transactions, and foreign commerce.

There does not appear to be any serious doubt as to the power of Congress to prohibit gold clauses in future obligations. *Hepburn* v. *Griswold,* 8 Wall. 603, 615.

The Joint Resolution, in its application to outstanding Government bonds, does not violate the due process clause of the Fifth Amendment. On June 5, 1933, there was no disparity in value in the United States between the gold dollar and other coins and currency of the United States. That being true, the claimant's argument fails.

The Legal Tender Cases are conclusive that §§ 1 and 2 of the Joint Resolution do not violate the Fifth Amendment. The decision in those cases was understood by the Court, and has since been understood, to sustain the constitutionality of the Legal Tender Acts as applied to public as well as private debts. 12 Wall. 529, 530, 539, 540, 635; and *Savage's Case,* 8 Ct. Cl. 545, affirmed 92 U. S. 382.

Public as well as private obligations may be affected as a result of action taken within the Federal police power or some other paramount power. *Lynch* v. *U. S.,* 292 U. S. 571, 579; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435; and *Horowitz* v. *U. S.,* 267 U. S. 458. The cases which have upheld such action by the State Legislatures, as applied to state obligations, go far to establish the propriety of similar action by Congress. *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548; *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U. S. 57; *Stone* v. *Mississippi,* 101 U. S. 814; *Butchers Union Co.* v. *Crescent City,* 111 U. S. 746; *C., B. & Q. R. Co.* v. *Drainage Commr's,* 200 U. S. 561, 592; and *Chicago & Alton R. Co.* v. *Tranbarger,* 238 U. S. 67. Legislative powers cannot be expressly contracted away. *Newton* v. *Commr's,* 100 U. S. 548; *Illinois Central Ry.* v. *Illinois,* 146 U. S. 387; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 436; *Denver & R. G. R. Co.* v. *Denver,* 250 U. S. 241; *Stone* v. *Mississippi,* 101 U. S. 814; *N. Y. & N. E. R. Co.* v. *Bristol,* 151 U. S. 556; *Boyd* v. *Alabama,* 94 U. S. 645; *Straus* v. *American Publishers' Assn.,* 231 U. S. 222, 243; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463; *North American Co.* v. *United States,* 171 U. S.

110, 137; James Parker Hall, in American Law and Procedure, Volume XII, Constitutional Law, pages 242, 243.

One Congress can no more convey or contract away the legislative powers entrusted by the Constitution so as to restrict the exercise of those powers by a subsequent Congress than can a State Legislature. *Lynch* v. *United States,* 292 U. S. 571, 579; *North American Co.* v. *United States,* 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463.

From the point of view of justice and equity, claimant is receiving for his bond all that he is entitled to receive from the Government. The purchasing power of the dollar on June 5, 1933, and on April 15, 1934, when claimant's bond was called, and at the present time, is far greater than the purchasing power of the dollar that the Government received when it issued the Liberty Bonds. The Annalist, Weekly Index of Wholesale Commodity Prices, December 14, 1934.

The Joint Resolution does not violate § 4 of the Fourteenth Amendment. The word "validity" in § 4 refers to the essential existence of the obligation, as is shown by the legislative history. Nowhere in the cases involving the Legal Tender Acts as applied to public or private obligations is any reference made to this section. The word "debt," as used in the section, is not to be construed as including every provision contained in, or made with respect to, an obligation of the United States. The gold clause is a provision aside from the basic "debt." *Bronson* v. *Rodes,* 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379; and *Maryland* v. *Railroad Co.,* 22 Wall. 105, 108. Historians who have considered § 4 limit its concept of public debt to that public debt existing at the time of the adoption of the Amendment. Burdick, The Law of the American Constitution, § 228; Dunning, Essays on the Civil War and Reconstruction (1931), 118; Eriksson & Rowe, American Constitutional

History (1933), 301; Flack, The Adoption of the Fourteenth Amendment (1908), 133; Magruder, The Constitution (1933), 328; Story, Constitution, 5th ed., § 1965; Watson, The Constitution of the United States (1910), 1657; 2 Blaine, "Twenty Years of Congress," 190; Guthrie, The Fourteenth Amendment (1898), 17; 44 Yale L. J., 53, 85. In any event, it can scarcely be contended that the limitation placed upon Congress by § 4 of the Fourteenth Amendment is more stringent than the limitation placed upon the States in the impairment-of-contracts clause.

The Joint Resolution may not be attacked as a taking of private property without just compensation. The claimant confuses the due process and the just compensation clauses of the Fifth Amendment. To frustrate a contract is not to appropriate it. *Omnia Commercial Co.* v. *U. S.*, 261 U. S. 502, 508, 513. Even if there was a taking, it was accomplished by the Joint Resolution on June 5, 1933. There was no drop in the market price of the claimant's bond upon the passage of the Resolution. There is no allegation that the bond depreciated in value either on that date or thereafter. The Government has provided just compensation if any is due; the claimant is entitled to be put in as good a position pecuniarily as if his property had not been taken, but is not entitled to more. *Olson* v. *U. S.*, 292 U. S. 246, 255. The relative market value of gold-clause and non-gold-clause obligations was not affected by the Joint Resolution. Moreover, if the claimant had, on June 5, 1933, received gold coin for his bond, he would have been required by the Orders then in force to deliver the coin to the United States in exchange for other coin or the currency of an equivalent amount. The claimant was in no position to secure any asserted " world price " for any gold held or received by him in the United States, since the Executive Orders promulgated under the Act of March 9, 1933, prohibited the export of gold coin from the United States. Such prohibition is constitutional. *Ling Su Fan* v. *U. S.*, 218 U. S. 302. There is no basis for the contention that compensation must be made for the increased value of property accruing after the taking. *Olson* v. *U. S.*, 292 U. S. 246; *Brooks-Scanlon Corp.* v. *U. S.*, 265 U. S. 106, 123.

The United States, as a contractor, is not liable to respond in damages in the Court of Claims for any breach of its proprietary and corporate contracts due to its public and general acts as a sovereign. *United States* v. *State Bank*, 96 U. S. 30, 36; and *Horowitz* v. *U. S.*, 267 U. S. 458.

Section 1 of the Joint Resolution has the effect of withdrawing the consent of the United States to be sued on gold clauses. *Lynch* v. *U. S.*, 292 U. S. 571, 580.

Annulment of the gold clause in Government bonds is no more repudiation than in private obligations. In both it is regulation rather than repudiation, and as such is an attribute of sovereignty. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. *Legal Tender Cases, supra.*

By leave of Court, *Messrs. Edward E. Gann* and *George C. Johnson* filed a brief as *amici curiae* in support of the contentions of the United States.

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

The certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for $10,000, known as "Fourth Liberty Loan 4¼% Gold Bond of 1933–1938." This bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288), as amended, and Treasury Department circular No. 121, dated September 28, 1918. The bond provided: " The principal and interest hereof are payable in United States gold coin of the present standard of value."

Plaintiff alleged in his petition that at the time the bond was issued, and when he acquired it, a dollar in gold consisted of 25.8 grains of gold .9 fine"; that the bond was called for redemption on April 15, 1934, and, on May 24, 1934, was presented for payment; that plaintiff demanded its redemption " by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine"; that defendant refused to comply with that demand, and that plaintiff then demanded " 258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing 15 5/21 grains of gold .9 fine, or 16,931.25 dollars in legal tender currency"; that defendant refused to redeem the bond " except by the payment of 10,000 dollars in legal tender currency"; that these refusals were based on the Joint Resolution of the Congress of June 5, 1933 (48 Stat. 113), but that this enactment was unconstitutional as it operated to deprive plaintiff of his property without due process of law; and that, by this action of defendant, he was damaged " in the sum of $16,931.25, the value of defendant's obligation," for which, with interest, plaintiff demanded judgment.

Defendant demurred upon the ground that the petition did not state a cause of action against the United States.

The Court of Claims has certified the following questions:

"1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value,' entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

"2. Is the United States, as obligor in a Fourth Liberty Loan $4\frac{1}{4}\%$ gold bond, Series of 1933–1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

First. The import of the obligation. The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. *Norman* v. *Baltimore & Ohio R. Co.*, decided this day, *ante*, p. 240. The bond now before us is an obligation of the United States. The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. The Act of September 24, 1917, both in its original and amended form, authorized the moneys to be borrowed, and the bonds to be issued, "on the credit of the United States" in order to meet expenditures needed "for the national security and defense and other public purposes authorized by law." 40 Stat. 288, 503. The circular of the Treasury Department of September 28, 1918, to which the bond refers "for a statement of the further rights of the holders of bonds of said series," also provided that the principal and interest "are payable in United States gold coin of the present standard of value."

This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment.

The Government states in its brief that the total unmatured interest-bearing obligations of the United States outstanding on May 31, 1933, (which it is understood contained a " gold clause " substantially the same as that of the bond in suit,) amounted to about twenty-one billions of dollars. From statements at the bar, it appears that this amount has been reduced to approximately twelve billions at the present time, and that during the intervening period the public debt of the United States has risen some seven billions (making a total of approximately twenty-eight billions five hundred millions) by the issue of some sixteen billions five hundred millions of dollars " of non-gold-clause obligations."

Second. The binding quality of the obligation. The question is necessarily presented whether the Joint Resolution of June 5, 1933 (48 Stat. 113) is a valid enactment so far as it applies to the obligations of the United States. The Resolution declared that provisions requiring " payment in gold or a particular kind of coin or currency " were " against public policy," and provided that " every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein," shall be discharged " upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." This enactment was expressly extended to obligations of the United States, and provisions for payment in gold, " contained in any law authorizing obligations to be issued by or under authority of the United States," were repealed.[1]

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[1] And subdivision (b) of § 1 of the Joint Resolution of June 5, 1933, provided: "As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States;

There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the Government argues that "earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce"; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority,

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and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States,*" the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

The binding quality of the obligations of the Government was considered in the *Sinking-Fund Cases,* 99 U. S. 700, 718, 719. The question before the Court in those cases was whether certain action was warranted by a reservation to the Congress of the right to amend the charter of a railroad company. While the particular action was sustained under this right of amendment, the Court took occasion to state emphatically the obligatory character of the contracts of the United States. The Court said: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." [2]

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[2] Mr. Justice Strong, who had written the opinion of the majority of the Court in the legal tender cases (*Knox* v. *Lee,* 12 Wall. 457), dissented in the *Sinking-Fund Cases,* 99 U. S. p. 731, because he thought that the action of the Congress was not consistent with the Government's engagement and hence was a transgression of legislative

When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States* v. *Bank of the Metropolis,* 15 Pet. 377, 392, except that the United States cannot be sued without its consent. See, also, *The Floyd Acceptances,* 7 Wall. 666, 675; *Cooke* v. *United States,* 91 U. S. 389, 396. In *Lynch* v. *United States,* 292 U. S. 571, 580, with respect to an attempted abrogation by the Act of March 20, 1933 (48 Stat. 8, 11) of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the *Sinking-Fund Cases, supra,* and said: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would

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power. And with respect to the sanctity of the contracts of the Government, he quoted, with approval, the opinion of Mr. Hamilton in his communication to the Senate of January 20, 1795 (citing 3 Hamilton's Works, 518, 519), that "when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it."

be not the practice of economy, but an act of repudiation."

The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.[3] In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm* v. *Georgia,* 2 Dall. 419, 471; *Penhallow* v. *Doane's Administrators,* 3 Dall. 54, 93; *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 405; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obli-

[3] Oppenheim, International Law, 4th ed., vol. 1, §§ 493, 494. This is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal. Hall, International Law, 8th ed., § 107; Oppenheim, *loc. cit.;* Hyde, International Law, vol. 2, § 489.

gations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. *Lynch* v. *United States, supra,* pp. 580, 582.

The Fourteenth Amendment, in its fourth section, explicitly declares: "The validity of the public debt of the United States, authorized by law, . . . shall not be questioned." While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. Nor can we perceive any reason for not considering the expression "the *validity* of the public debt" as embracing whatever concerns the integrity of the public obligations.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

Third. The question of damages. In this view of the binding quality of the Government's obligations, we come to the question as to the plaintiff's right to recover damages. That is a distinct question. Because the Government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched. Plaintiff seeks judgment for $16,931.25, in present legal tender currency, on his bond for $10,000. The question is whether he has shown damage to that extent, or any actual damage, as the Court of Claims has no authority to entertain an action for nominal damages. *Grant* v. *United States,* 7 Wall. 331, 338; *Marion & R. V. Ry. Co.* v. *United States,* 270 U. S. 280, 282; *Nortz* v. *United States,* decided this day, *ante,* p. 317.

Plaintiff computes his claim for $16,931.25 by taking the weight of the gold dollar as fixed by the President's proclamation of January 31, 1934, under the Act of May 12, 1933 (48 Stat. 52, 53), as amended by the Act of January 30, 1934 (48 Stat. 342), that is, at 15 5/21 grains nine-tenths fine, as compared with the weight fixed by the Act of March 14, 1900 (31 Stat. 45), or 25.8 grains nine-tenths fine. But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the Government offered to pay him the $10,000, the face of his bond, in legal tender currency. The case is not the same as if gold coin had remained in circulation. That was the situation at the time of the decisions under the legal tender acts of 1862 and 1863. *Bronson* v. *Rodes,* 7 Wall. 229, 251; *Trebilcock* v. *Wilson,* 12 Wall. 687, 695; *Thompson* v. *Butler,* 95 U. S. 694, 696, 697. Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation.[4] The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933,

[4] In its Report of May 27, 1933, it was stated by the Senate Committee on Banking and Currency: "By the Emergency Banking Act and the existing Executive Orders gold is not now paid, or obtainable for payment, on obligations public or private." Sen. Rep. No. 99, 73d Cong., 1st sess.

48 Stat. 1; January 30, 1934, 48 Stat. 337. Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933, August 28, 1933, and January 15, 1934; Regulations of the Secretary of the Treasury, January 30 and 31, 1934. That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange. And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310, 311. The Court said in that case: "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use and exchange. . . . However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt that the power to coin money includes the power to prevent its outflow from the country of its origin." The same reasoning is applicable to the imposition of restraints upon transactions in foreign exchange. We cannot say, in view of the conditions that existed, that the Congress, having this power, exercised it arbitrarily or capriciously. And the holder of an obligation, or bond, of the United States, payable in gold coin of the former standard, so far as the restraint upon the right to export gold coin or to engage in transactions in foreign exchange is concerned, was in no better case than the holder of gold coin itself.

In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation. Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which "all forms of money" of the United States were to be "maintained at a parity," had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.

Plaintiff demands the "equivalent" in currency of the gold coin promised. But "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

In the view that the facts alleged by the petition fail to show a cause of action for actual damages, the first question submitted by the Court of Claims is answered in the negative. It is not necessary to answer the second question.

Question No. 1 is answered " No."

MR. JUSTICE STONE, concurring.

I agree that the answer to the first question is " No," but I think our opinion should be confined to answering that question and that it should essay an answer to no other.

I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause, *Feist* v. *Société Intercommunale Belge d'Electricité,* [1934] A. C. 161, 170–173; *Serbian and Brazilian Bond Cases,* P. C. I. J., series A., Nos. 20–21, pp. 32–34, 109–119. In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date.

I do not understand the Government to contend that it is any the less bound by the obligation than a private individual would be, or that it is free to disregard it except in the exercise of the constitutional power "to coin money" and "regulate the value thereof." In any case, there is before us no question of default apart from the regulation by Congress of the use of gold as currency.

While the Government's refusal to make the stipulated payment is a measure taken in the exercise of that power, this does not disguise the fact that its action is to that extent a repudiation of its undertaking. As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the Government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action. To that extent it has relieved itself of the obligation of its domestic bonds, precisely as it has relieved the obligors of private bonds in *Norman* v. *Baltimore & Ohio R. Co.*, decided this day, *ante*, p. 240.

In this posture of the case it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. I am not persuaded that we should needlessly intimate any opinion which implies that the obligation may so operate, for example, as to interpose a serious obstacle to the adoption of measures for stabilization of the dollar, should Congress think it wise to accomplish that purpose by resumption of gold payments, in dollars of the present or any other gold content less than that specified in the gold clause, and by the re-establishment of a free market for gold and its free exportation.

There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present they are academic. Concededly they may be transferred wholly to the realm of speculation by the exercise of the undoubted power of the Government to withdraw the privilege of suit upon its gold clause obligations. We have just held that the Court of Claims was without power to entertain the suit in *Nortz* v. *United States, ante,* p. 317, because, regardless of the nature of the obligation of the gold certificates, there was no damage. Here it is declared that there is no damage because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the Government. It would seem that this would suffice to dispose of the present case, without attempting to prejudge the rights of other bondholders and of the Government under other conditions which may never occur. It will not benefit this plaintiff, to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause.

Moreover, if the gold clause be viewed as a gold value contract, as it is in *Norman* v. *Baltimore & Ohio R. Co., supra,* it is to be noted that the Government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery.

In that case it would seem to be implicit in our decision that the prohibition, at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money.

I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds.

Mr. Justice McReynolds, Mr. Justice Van Devanter, Mr. Justice Sutherland, and Mr. Justice Butler dissent. See below.

In the four preceding "*Gold Clause Cases,*" viz., *Norman* v. *Baltimore & Ohio R. Co.*, and *United States* v. *Bankers Trust Co., ante,* p. 240; *Nortz* v. *United States, ante,* p. 317; and *Perry* v. *United States, ante,* p. 330, a single dissenting opinion was delivered, immediately after the handing down of the opinion in the *Perry* case. It is as follows:

Mr. Justice McReynolds, dissenting.

Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and I conclude that, if given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations. Acquiescence in the decisions just announced is impossible; the circumstances demand statement of our views. "To let oneself slide down the easy slope offered by the course of events and to dull one's mind against the extent of the danger, . . . that is precisely to fail in one's obligation of responsibility."

Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both. No definite delegation of such a power exists; and we cannot believe the farseeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the expected government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect. Not only is there no permission for such actions; they are inhibited. And no plenitude of words can conform them to our charter.

The Federal government is one of delegated and limited powers which derive from the Constitution. "It can exercise only the powers granted to it." Powers claimed must be denied unless granted; and, as with other writings, the whole of the Constitution is for consideration when one seeks to ascertain the meaning of any part.

By the so-called gold clause—promise to pay in "United States gold coin of the present standard of value," or "of or equal to the present standard of weight and fineness"—found in very many private and public obligations, the creditor agrees to accept and the debtor undertakes to return the thing loaned or its equivalent. Thereby each secures protection, one against decrease in value of the currency, the other against an increase.

The clause is not new or obscure or discolored by any sinister purpose. For more than 100 years our citizens have employed a like agreement. During the War between the States, its equivalent "payable in coin" aided in surmounting financial difficulties. From the housetop men proclaimed its merits while bonds for billions were sold to support the World War. The Treaty of Versailles recognized it as appropriate and just. It appears in the obligations which have rendered possible our great undertakings—public-works, railroads, buildings.

Under the interpretation accepted here for many years, this clause expresses a definite enforceable contract. Both by statute and long use the United States have approved it. Over and over again they have enjoyed the added value which it gave to their obligations. So late as May 2, 1933 they issued to the public more than $550,000,000 of their notes each of which carried a solemn promise to pay in standard gold coin. (Before that day this coin had in fact been withdrawn from circulation, but the statutory measure of value remained the gold dollar of 25.8 grains.)

The Permanent Court of International Justice interpreted the clause as this Court had done and upheld it. Cases of Serbian and Brazilian Loans, Publications P. C. I. J., Series A, Nos. 20–21 (1929). It was there declared: " The gold clause merely prevents the borrower from availing itself of a possibility of discharge of the debt in depreciated currency," and " The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it."

In *Feist* v. *Société Intercommunale Belge d'Electricité*, (1934), A. C. 161, the House of Lords expressed like views.

Gregory v. *Morris*, (1878) 96 U. S. 619, 624, 625—last of similar causes—construed and sanctioned this stipulation. In behalf of all, Chief Justice Waite there said:

" The obligation secured by the mortgage or lien under which Morris held was for the payment of gold coin, or, as was said in *Bronson* v. *Rodes*, 7 Wall. [1869] 229, ' an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight' and is not distinguishable 'from a contract to deliver an equal weight of bullion of equal fineness.' . . . We think it clear, that, under such circumstances, it was within the power of the Court so far as Gregory was concerned, to treat the contract as one for the delivery of so much gold bullion; and, if Morris was willing to accept a judgment which might be discharged in currency, to have his damages estimated according to the currency value of bullion."

Earlier cases—*Bronson* v. *Rodes,* 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379; *Trebilcock* v. *Wilson,* 12 Wall. 687; *Thompson* v. *Butler,* 95 U. S. 694—while important, need not be dissected. *Gregory* v. *Morris* is in harmony with them and the opinion there definitely and finally stated the doctrine which we should apply.

It is true to say that the gold clauses "were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by payment of less than that prescribed." Furthermore, they furnish means for computing the sum payable in currency if gold should become unobtainable. The borrower agrees to repay in gold coin containing 25.8 grains to the dollar; and if this cannot be secured the promise is to discharge the obligation by paying for each dollar loaned the currency value of that number of grains. Thus, the purpose of the parties will be carried out. Irrespective of any change in currency, the thing loaned or an equivalent will be returned—nothing more, nothing less. The present currency consists of promises to pay dollars of 15 5/21 grains; the Government procures gold bullion on that basis. The calculation to determine the damages for failure to pay in gold would not be difficult. *Gregory* v. *Morris* points the way.

Under appropriate statutes the United States for many years issued gold certificates, in the following form: " This certifies that there have been deposited in the Treasury of The United States of America One Thousand Dollars in gold coin payable to the bearer on demand. This certificate is a legal tender in the amount thereof in payment of all debts and dues public and private."

The certificates here involved—series 1928—were issued under § 6, Act Mar. 14, 1900, 31 Stat. 47, as amended. See U. S. C. Title 31, § 429.[1]

In view of the statutory direction that gold coin for which certificates are issued shall be held for their payment on demand " and used for no other purpose," it seems idle to argue (as counsel for the United States did) that other use is permissible under the ancient Act of March 3, 1863.

By various orders of the President and the Treasury from April 5 to December 28, 1933, persons holding gold certificates were required to deliver them, and accept "an equivalent amount of any form of coin or currency coined

[1] In his Annual Report, 1926, 80, 81, the Secretary of the Treasury said: " Gold and silver certificates are in fact mere ' warehouse receipts ' issued by the Government in exchange for gold coin or bullion deposited in the one case, or standard silver dollars deposited in the other case, or against gold or standard silver dollars, respectively, withdrawn from the general fund of the Treasury. . . . Gold certificates, United States notes, Treasury notes of 1890, and Federal reserve notes are directly redeemable in gold." In his letter with the Annual Report, for 1933, 375, he showed that on June 30, 1933, $1,230,717,109 was held in trust against gold certificates and Treasury notes of 1890. The Treasury notes of 1890 then outstanding did not exceed about $1,350,000. Tr. Rep. 1926, 80.

or issued under the laws of the United States designated by the Secretary of the Treasury." Heavy penalties were provided for failure to comply.

That the holder of one of these certificates was owner of an express promise by the United States to deliver gold coin of the weight and fineness established by statute when the certificate issued, or if such demand was not honored to pay the holder the value in the currency then in use, seems clear enough. This was the obvious design of the contract.

The Act of March 14, 1900, 31 Stat., c. 41, 45, 47, as amended, in effect until January 31, 1934, provided: "That the dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine, . . . shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard," and also "The Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer . . . in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than twenty dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose." See U. S. C., Title 31, §§ 314, 429.

The Act of February 4, 1910, 36 Stat., c. 25, p. 192, directed "that any bonds and certificates of indebtedness of the United States hereafter issued shall be payable, principal and interest, in United States gold coin of the present standard of value."

By Executive Orders, April 5, and April 20, 1933, the President undertook to require owners of gold coin, gold bullion, and gold certificates, to deliver them on or before May 1st to a Federal Reserve Bank, and to prohibit the exportation of gold coin, gold bullion or gold certificates. As a consequence the United States were off the gold standard and their paper money began a rapid decline in the markets of the world. Gold coin, gold certificates and gold bullion were no longer obtainable. "Gold is not now paid nor is it available for payment upon public or private debts" was declared in Treasury statement of May 27, 1933; and this is still true. All gold coins have been melted into bars.

The Agricultural Adjustment Act of May 12, 1933, 48 Stat., c. 25, pp. 31, 52, 53—entitled "An act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," by § 43 provides that "Such notes [United States notes] and all other coins and currencies heretofore or hereafter coined or issued by or under the authority of the United States shall be legal tender for all debts public and private." Also, that the President by proclamation may "fix the weight of the gold dollar . . . as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies." And further, "such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum."

The Gold Reserve Act of January 30, 1934, 48 Stat., c. 6, p. 337, 342, undertook to ratify preceding Presidential orders and proclamations requiring surrender of gold but prohibited him from establishing the weight of the gold dollar "at more than 60 per centum of its present weight." By proclamation, January 31, 1934, he directed that thereafter the standard should contain 15 5/21 grains of gold, nine-tenths fine. (The weight had been 25.8 grains since 1837.) No such dollar has been coined at any time.

On June 5, 1933, Congress passed a "Joint Resolution to assure uniform value to the coins and currencies of the United States." 48 Stat., c. 48, p. 112. This recited that holding and dealing in gold affect the public interest and are therefore subject to regulation; that the provisions of obligations which purport to give the obligee the right to require payment in gold coin or in any amount of money of the United States measured thereby obstruct the power of Congress to regulate the value of money and are inconsistent with the policy to maintain the equal value of every dollar coined or issued. It then declared that every provision in any obligation purporting to give the obligee a right to require payment in gold is against public policy, and directed that "every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

Four causes are here for decision. Two of them arise out of corporate obligations containing gold clauses—railroad bonds. One is based on a United States Fourth Liberty Loan bond of 1918, called for payment April 15, 1934, containing a promise to pay "in United States gold coin of the present standard of value" with interest in like gold coin. Another involves gold certificates, series 1928, amounting to $106,300.

As to the corporate bonds the defense is that the gold clause was destroyed by the Resolution of June 5, 1933; and this view is sustained by the majority of the Court.

It is insisted that the agreement in the Liberty Bond, to pay in gold, also was destroyed by the Act of June 5, 1933. This view is rejected by the majority; but they seem to conclude that because of the action of Congress in declaring the holding of gold unlawful, no appreciable damage resulted when payment therein or the equivalent was denied.

Concerning the gold certificates it is ruled that if upon presentation for redemption gold coin had been paid to the holder, as promised, he would have been required to return this to the Treasury. He could not have exported it or dealt with it. Consequently he sustained no actual damage.

There is no challenge here of the power of Congress to adopt such proper "Monetary Policy" as it may deem necessary in order to provide for national obligations and furnish an adequate medium of exchange for public use. The plan under review in the *Legal Tender Cases* was declared within the limits of the Constitution, but not without a strong dissent. The conclusions there announced are not now questioned; and any abstract discussion of Congressional power over money would only tend to befog the real issue.

The fundamental problem now presented is whether recent statutes passed by Congress in respect of money and credits, were designed to attain a legitimate end. Or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts and drive into the Treasury all gold within the country, in exchange for inconvertible promises to pay, of much less value.

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Considering all the circumstances, we must conclude they show that the plan disclosed is of the latter description and its enforcement would deprive the parties before us of their rights under the Constitution. Consequently the Court should do what it can to afford adequate relief.

What has been already said will suffice to indicate the nature of these causes and something of our general views concerning the intricate problems presented. A detailed consideration of them would require much time and elaboration; would greatly extend this opinion. Considering also the importance of the result to legitimate commerce, it seems desirable that the Court's decision should be announced at this time. Accordingly, we will only undertake in what follows to outline with brevity our replies to the conclusions reached by the majority and to suggest some of the reasons which lend support to our position.

The authority exercised by the President and the Treasury in demanding all gold coin, bullion and certificates is not now challenged; neither is the right of the former to prescribe weight for the standard dollar. These things we have not considered. Plainly, however, to coin money and regulate the value thereof calls for legislative action.

Intelligent discussion respecting dollars requires recognition of the fact that the word may refer to very different things. Formerly the standard gold dollar weighed 25.8 grains; the weight now prescribed is 15 5/21 grains. Evidently, promises to pay one or the other of these differ greatly in value, and this must be kept in mind.

From 1792 to 1873 both the gold and silver dollar were standard and legal tender, coinage was free and unlimited. Persistent efforts were made to keep both in circulation. Because the prescribed relation between them got out of harmony with exchange values, the gold coin disappeared and did not in fact freely circulate in this country for 30 years prior to 1834. During that time business transactions were based on silver. In 1834, desiring to restore parity and bring gold back into circulation, Congress reduced somewhat (6%) the weight of the gold coin and thus equalized the coinage and the exchange values. The silver dollar was not changed. The purpose was to restore the use of gold as currency—not to force up prices or destroy obligations. There was no apparent profit for the books of the Treasury. No injury was done to creditors; none was intended. The legislation is without special significance here. See Hepburn on Currency.

The moneys under consideration in the *Legal Tender Cases,* decided May 1, 1871, 12 Wall. 457, and March 3, 1884, 110 U. S. 421, were promises to pay dollars, "bills of credit." They were "a pledge of the national credit," promises "by the Government to pay dollars," "the standard of value is not changed." The expectation, ultimately realized, was that in due time they would be redeemed in standard coin. The Court was careful to show that they were issued to meet a great emergency in time of war, when the overthrow of the Government was threatened and specie payments had been suspended. Both the end in view and the means employed, the Court held were lawful. The thing actually done was the issuance of bills endowed with the quality of legal tender in order to carry on until the United States could find it possible to meet their obligations in standard coin. This they accomplished in 1879. The purpose was to meet honorable obligations—not to repudiate them.

The opinion there rendered declares—"The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts or to multiples thereof." What was said in those causes, of course, must be read in the light of all the circumstances. The opinion gives no support to what has been attempted here.

This Court has not heretofore ruled that Congress may require the holder of an obligation to accept payment in subsequently devalued coins, or promises by the Government to pay in such coins. The legislation before us attempts this very thing. If this is permissible, then a gold dollar containing one grain of gold may become the standard, all contract rights fall, and huge profits appear on the Treasury books. Instead of $2,800,000,000 as recently reported, perhaps $20,000,000,000, maybe enough to cancel the public debt, maybe more!

The power to issue bills and "regulate values" of coin cannot be so enlarged as to authorize arbitrary action, whose immediate purpose and necessary effect is destruction of individual rights.[2] As this Court has said, a "power to regulate is not a power to destroy." 154 U. S. 362, 398. The Fifth Amendment limits all governmental powers. We are dealing here with a debased standard, adopted with the definite purpose to destroy obligations. Such arbitrary and oppressive action is not within any congressional power heretofore recognized.

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[2] "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed where are they to be found if the property of an individual fairly and honestly acquired may be seized without compensation." Chief Justice Marshall in *Fletcher* v. *Peck,* 6 Cranch 87, 135.

The authority of Congress to create legal tender obligations in times of peace is derived from the power to borrow money; this cannot be extended to embrace the destruction of all credits.

There was no coin—specie—in general circulation in the United States between 1862 and 1879. Both gold and silver were treated in business as commodities. The Legal Tender Cases arose during that period.

Corporate Bonds—

The gold clauses in these bonds were valid and in entire harmony with public policy when executed. They are property—*Lynch* v. *United States,* 292 U. S. 571, 579. To destroy a validly acquired right is the taking of property—*Osborn* v. *Nicholson,* 13 Wall. 654, 662. They established a measure of value and supply a basis for recovery if broken. Their policy and purpose were stamped with affirmative approval by the Government when inserted in its bonds.

The clear intent of the parties was that in case the standard of 1900 should be withdrawn, and a new and less valuable one set up, the debtor could be required to pay the value of the contents of the old standard in terms of the new currency, whether coin or paper. If gold measured by prevailing currency had declined, the debtor would have received the benefit. The Agricultural Adjustment Act of May 12th discloses a fixed purpose to raise the nominal value of farm products by depleting the standard dollar. It authorized the President to reduce the gold in the standard, and further provided that all forms of currency should be legal tender. The result expected to follow was increase in nominal values of commodities and depreciation of contractual obligations. The purpose of § 43, incorporated by the Senate as an amendment to the House Bill, was clearly stated by the

Senator who presented it.[3] It was the destruction of lawfully acquired rights.

In the circumstances existing just after the Act of May 12th, depreciation of the standard dollar by the Presidential proclamation would not have decreased the amount required to meet obligations containing gold clauses. As to them the depreciation of the standard would have caused an increase in the number of dollars of depreciated currency. General reduction of all debts could only be secured by first destroying the contracts evidenced by the gold clauses; and this the Resolution of June 5th undertook to accomplish. It was aimed directly at those contracts, and had no definite relation to the power to issue bills or to coin or regulate the value of money.

To carry out the plan indicated as above shown in the Senate, the Gold Reserve Act followed—January 30, 1934. This inhibited the President from fixing the weight of the standard gold dollar above 60% of its then existing weight. (Authority had been given for 50% reduction by the Act of May 12th.) On January 31st he directed that the standard should contain 15 5/21 grains of gold. If this reduction of 40% of all debts was within the power of Congress and if, as a necessary means to accomplish that end, Congress had power by resolution to destroy the

[3] He said—" This amendment has for its purpose the bringing down or cheapening of the dollar, that being necessary in order to raise agricultural and commodity prices. . . . The first part of the amendment has to do with conditions precedent to action being taken later.

" It will be my task to show that if the amendment shall prevail it has potentialities as follows: It may transfer from one class to another class in these United States value to the extent of almost $200,000,-000,000. This value will be transferred, first, from those who own the bank deposits. Secondly, this value will be transferred from those who own bonds and fixed investments." Cong. Record, April 1933, pp. 2004, 2216, 2217, 2219.

gold clauses, the holders of these corporate bonds are without remedy. But we must not forget that if this power exists, Congress may readily destroy other obligations which present obstruction to the desired effect of further depletion. The destruction of all obligations by reducing the standard gold dollar to one grain of gold, or brass or nickel or copper or lead, will become an easy possibility. Thus we reach the fundamental question which must control the result of the controversy in respect of corporate bonds. Apparently in the opinion of the majority the gold clause in the Liberty bond withstood the June 5th Resolution notwithstanding the definite purpose to destroy them. We think that in the circumstances Congress had no power to destroy the obligations of the gold clauses in private obligations. The attempt to do this was plain usurpation, arbitrary and oppressive.

The oft repeated rule by which the validity of statutes must be tested is this—" Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

The end or objective of the Joint Resolution was not " legitimate." The real purpose was not " to assure uniform value to the coins and currencies of the United States," but to destroy certain valuable contract rights. The recitals do not harmonize with circumstances then existing. The Act of 1900 which prescribed a standard dollar of 25.8 grains remained in force; but its command that " all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard " was not being obeyed. Our currency was passing at a material discount; all gold had been sequestrated; none was attainable. The Resolution made no provision for restoring parity with the old standard; it established no new one.

This Resolution was not appropriate for carrying into effect any power entrusted to Congress. The gold clauses in no substantial way interfered with the power of coining money or regulating its value or providing an uniform currency. Their existence, as with many other circumstances, might have circumscribed the effect of the intended depreciation and disclosed the unwisdom of it. But they did not prevent the exercise of any granted power. They were not inconsistent with any policy theretofore declared. To assert the contrary is not enough. The Court must be able to see the appropriateness of the thing done before it can be permitted to destroy lawful agreements. The purpose of a statute is not determined by mere recitals—certainly they are not conclusive evidence of the facts stated.

Again, if effective, the direct, primary and intended result of the Resolution will be the destruction of valid rights lawfully acquired. There is no question here of the indirect effect of lawful exercise of power. And citations of opinions which upheld such indirect effects are beside the mark. This statute does not "work harm and loss to individuals indirectly," it destroys directly. Such interference violates the Fifth Amendment; there is no provision for compensation. If the destruction is said to be for the public benefit, proper compensation is essential; if for private benefit, the due process clause bars the way.

Congress has power to coin money but this cannot be exercised without the possession of metal. Can Congress authorize appropriation, without compensation, of the necessary gold? Congress has power to regulate commerce, to establish post roads, &c. Some approved plan may involve the use or destruction of A's land or a private way. May Congress authorize the appropriation or destruction of these things without adequate payment? Of course not. The limitations prescribed by the Constitution restrict the exercise of all power.

Ling Su Fan v. *United States,* 218 U. S. 302, supports the power of the legislature to prevent exportation of coins without compensation. But this is far from saying that the legislature might have ordered destruction of the coins without compensating the owners or that they could have been required to deliver them up and accept whatever was offered. In *United States* v. *Lynah,* 188 U. S. 445, 471, this Court said—"If any one proposition can be considered as settled by the decisions of this court it is that although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the fifth amendment of paying just compensation."

Government Bonds—

Congress may coin money; also it may borrow money. Neither power may be exercised so as to destroy the other; the two clauses must be so construed as to give effect to each. Valid contracts to repay money borrowed cannot be destroyed by exercising power under the coinage provision. The majority seem to hold that the Resolution of June 5th did not affect the gold clauses in bonds of the United States. Nevertheless we are told that no damage resulted to the holder now before us through the refusal to pay one of them in gold coin of the kind designated or its equivalent. This amounts to a declaration that the Government may give with one hand and take away with the other. Default is thus made both easy and safe!

Congress brought about the conditions in respect of gold which existed when the obligation matured. Having made payment in this metal impossible, the Government cannot defend by saying that if the obligation had been met the creditor could not have retained the gold; consequently he suffered no damage because of the nondelivery. Obligations cannot be legally avoided by prohibiting the creditor from receiving the thing promised. The promise was to pay in gold, standard of 1900, otherwise to discharge the debt by paying the value of the thing promised in currency. One of these things was not prohibited. The Government may not escape the obligation of making good the loss incident to repudiation by prohibiting the holding of gold. Payment by fiat of any kind is beyond its recognized power. There would be no serious difficulty in estimating the value of 25.8 grains of gold in the currency now in circulation.

These bonds are held by men and women in many parts of the world; they have relied upon our honor. Thousands of our own citizens of every degree, not doubting the good faith of their sovereign, have purchased them. It would not be easy for this multitude to appraise the form of words which establishes that they have suffered no appreciable damage; but perhaps no more difficult for them than for us. And their difficulty will not be assuaged when they reflect that ready calculation of the exact loss suffered by the Philippine government moved Congress to satisfy it by appropriating, in June 1934, $23,862,750.78 to be paid out of the Treasury of the United States.[4] And see Act May 30, 1934, 48 Stat. 817, appro-

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[4] AN ACT relating to Philippine currency reserves on deposit in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed, when the funds therefor are made available, to establish on the books of the Treasury a credit in favor of the Treasury of the Philippine Islands for $23,862,750.78, being an amount equal to the increase in value (resulting from the reduction of the weight of the gold dollar) of the gold equivalent at the opening of business on January 31, 1934, of the balances maintained at that time in banks in the continental United States by the priating $7,438,000 to meet losses sustained by officers and employees in foreign countries due to appreciation of foreign currencies in their relation to the American dollar.

Gold Certificates—

These were contracts to return gold left on deposit; otherwise to pay its value in the currency. Here the gold was not returned; there arose the obligation of the Government to pay its value. The Court of Claims has jurisdiction over such contracts. Congress made it impossible for the holder to receive and retain the gold promised him; the statute prohibited delivery to him. The contract being broken the obligation was to pay in currency the value of 25.8 grains of gold for each dollar called for by the certificate. For the Government to say, we have violated our contract but have escaped the consequences through our own statute, would be monstrous. In matters of contractual obligation the Government can not legislate so as to excuse itself.

These words of Alexander Hamilton ought not to be forgotten—

"When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be

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Government of the Philippine Islands for its gold standard fund and its Treasury certificate fund less the interest received by it on such balances.

Sec. 2. There is hereby authorized to be appropriated, out of the receipts covered into the Treasury under section 7 of the Gold Reserve Act of 1934, by virtue of the reduction of the weight of the gold dollar by the proclamation of the President on January 31, 1934, the amount necessary to establish the credit provided for in section 1 of this Act. Approved, June 19, 1934.

justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." 3 Hamilton's Works, 518, 519.

These views have not heretofore been questioned here. In the *Sinking-Fund Cases,* 99 U. S. 700, 719, Chief Justice Waite speaking for the majority declared: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

And in the same cause, (731, 732) Mr. Justice Strong, speaking for himself, affirmed: "It is as much beyond the power of a legislature, under any pretence, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

Can the Government, obliged as though a private person to observe the terms of its contracts, destroy them by legislative changes in the currency and by statutes forbidding one to hold the thing which it has agreed to deliver? If an individual should undertake to annul or lessen his obligation by secreting or manipulating his assets with the intent to place them beyond the reach of creditors, the attempt would be denounced as fraudulent, wholly ineffective.

Counsel for the Government and railway companies asserted with emphasis that incalculable financial disaster would follow refusal to uphold, as authorized by the Constitution, impairment and repudiation of private obligations and public debts. Their forecast is discredited by manifest exaggeration. But, whatever may be the situation now confronting us, it is the outcome of attempts to destroy lawful undertakings by legislative action; and this we think the Court should disapprove in no uncertain terms.

Under the challenged statutes it is said the United States have realized profits amounting to $2,800,000,000.[5] But this assumes that gain may be generated by legislative fiat. To such counterfeit profits there would be no limit; with each new debasement of the dollar they would expand. Two billions might be ballooned indefinitely—to twenty, thirty, or what you will.

Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling.

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[5] In a radio address concerning the plans of the Treasury, August 28, 1934, the Secretary of the Treasury, as reported by the Commercial and Financial Chronicle of September 1, 1934, stated:

"But we have another cash drawer in the Treasury, in addition to the drawer which carries our working balance. This second drawer I will call the 'gold' drawer. In it is the very large sum of $2,800,000,000, representing 'profit' resulting from the change in the gold content of the dollar. Practically all of this 'profit' the Treasury holds in the form of gold and silver. The rest is in other assets.

"I do not propose here to subtract this $2,800,000,000 from the net increase of $4,400,000,000 in the national debt—thereby reducing the figure to $1,600,000,000. And the reason why I do not subtract it is this: for the present this $2,800,000,000 is under lock and key. Most of it, by authority of Congress, is segregated in the so-called stabilization fund, and for the present we propose to keep it there. But I call your attention to the fact that ultimately we expect this 'profit' to flow back into the stream of our other revenues and thereby reduce the national debt."

McCREA *v.* UNITED STATES ET AL.

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

No. 249. Motion filed January 30, 1935.—Decided February 18, 1935.

The petitioner's own testimony supports the finding of the District Court as to the time when he abandoned the vessel on which he had been serving as a seaman; and his departure from the vessel, then or later, without informing the master whether he persisted in his demand for wages, precludes the inference that, in the circumstances described in this Court's opinion, *ante*, p. 23, the failure to pay wages was "without sufficient cause."

Rehearing denied.

This was a motion for a reargument of the cause reported *ante*, p. 23.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner has moved for reargument of the question whether the failure to pay his wages was "without sufficient cause," on the ground that this Court "misapprehended the facts shown by the record" in accepting the finding of the district court that petitioner "departed the ship without seeing the captain" on the second day after her arrival at the port of London.

In support of this contention petitioner, for the first time, invites our attention to an excerpt from the vessel's log, an exhibit in the case, which states that he was "aboard ship from 3:20 PM Feb. 29th to 9:00 AM March 1st, 1928" and that he was "last . . . seen aboard ship at 9:00 AM March 1st, 1928." It is conceded that the vessel arrived in port on Sunday, February 26, 1928, and sailed the following Friday, March 2nd. As the year was a leap year, petitioner argues that he is thus shown to have been on board on the morning of the fourth calendar day after arrival; that, as the vessel sailed the following day, it may be inferred that he did not leave until the cargo was discharged; and that the failure to pay wages before his departure on March 1st was therefore without sufficient cause.

The details of petitioner's leaving the vessel were not considered by the Circuit Court of Appeals, presumably because its decision was placed on other grounds. But in this Court respondent properly sought to sustain the decision below on the ground that the failure to pay wages was not without sufficient cause. In its brief it specifically relied on the finding of the district court that petitioner had abandoned the vessel two days after arrival, and cited the record in support of the finding. Petitioner in this Court neither challenged the finding of the district court nor assailed the sufficiency of the evidence to support it, and we are now asked, for the first time, by a motion for reargument, to weigh the evidence.

The petitioner, in his testimony in his own behalf, both on direct and cross-examination, testified at four different points in the record that he abandoned the vessel on February 28th, which was on Tuesday, two days after arrival. He identified the day of abandonment by its date, as being on Tuesday, and as being the day after his visit to the Consul's office, which was on Monday, February 27th. He was equally specific in his testimony that when he left the vessel he did not intend to return and did not in fact return. We accept his testimony as correct and as abundantly supporting the finding of the district court.

We also think, as the opinion indicates, that petitioner's departure from the vessel, whenever it occurred, without informing the master whether he persisted in his demand, precludes the inference that, in the circumstances, the failure to pay wages was "without sufficient cause." The motion is

Denied.

COONEY, GOVERNOR, ET AL. v. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

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

No. 423. Argued February 7, 8, 1935.—Decided March 4, 1935.

1. To sustain a state occupation tax on one whose business is both interstate and intrastate, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate business would not be subject to the tax; and that the one taxed could discontinue intrastate business without withdrawing from the interstate business. P. 392.
2. A state occupation tax on every corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State, of so much for each telephone instrument used, controlled and operated by it in the conduct of such business, *held* a direct burden on interstate commerce, as applied to a company furnishing both kinds of service, interstate and intrastate, and employing the same telephones, wires, etc., in both as integral parts of its system. P. 388.

7 F. Supp. 12, affirmed.

Appeal from a decree of the District Court, constituted of three judges, enjoining the enforcement of a tax, in a suit brought by the Telephone Company against the Governor and other officials of the State of Montana.

Mr. Enor K. Matson, Assistant Attorney General of Montana, with whom *Mr. Raymond T. Nagle,* Attorney General, was on the brief, for appellants.

Messrs. Elmer L. Brock and *M. S. Gunn,* with whom *Messrs. Milton Smith* and *E. R. Campbell* were on the brief, for appellee.

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

The Mountain States Telephone and Telegraph Company brought this suit to restrain the enforcement of two acts of the legislature of Montana imposing annual license taxes. The first act is Chapter 174 of the Laws of 1933 prescribing a tax, to be paid on or before January first, for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana. The tax is not to be imposed on telephone instruments where the rate charged to the customer does not exceed specified monthly amounts. The second act, Chapter 54 of the Laws of 1933–34, amended the first act with respect to the amount of the tax, the date of payment, and other particulars, and continued the first act in force as to taxes already accrued. The text of the acts is set forth in the margin.[1]

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[1] Chapter 174 of the Laws of 1933, approved March 16, 1933, provides:

"Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10¢) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20¢) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but

The acts were assailed as repugnant to both the federal and state constitutions. One of these grounds, that the acts were invalid under the commerce clause of the Fed-

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shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

" Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

" Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

" Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

" Section 5. This Act shall be in full force and effect from and after its passage and approval."

The amending act (c. 54 of the Laws of 1933–34) approved January 20, 1934, provides:

" Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

" Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

" No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, eral Constitution, was sustained by the District Court of three judges (28 U. S. C. 380) which entered a final decree permanently enjoining enforcement. 7 F. Supp. 12. The defendants, state officers, bring this appeal.

The District Court received evidence and made findings of fact substantially as follows: Plaintiff is a Colorado corporation operating a statewide telephone system in Montana; it furnishes telephone service of an interstate and intrastate character; its system extends throughout Mon-

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any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain.

"Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State."

"Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

"Section 4. This Act shall be in full force and effect from and after its passage and approval."

tana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas; its telephone instruments in Montana are an integral part of its system, and are a part of a still greater system extending throughout the United States and to many foreign countries, so that each of the telephones in Montana (except 45 not affected by the statute) is available for interstate and foreign communication by connection with many millions of telephones; the statute in question affects over 34,000 of the telephones in Montana, and, of these, more than 10,000 have actually been used in interstate and foreign commerce since the statute was enacted, and it is reasonably likely that all plaintiff's telephone instruments in Montana will be so used; plaintiff pays the usual property taxes in Montana and also the corporation license or occupation taxes, which are a percentage of its intrastate revenues; all its telephones are instrumentalities of interstate and foreign commerce and plaintiff "could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business."

Appellants contend that the taxes are imposed solely upon intrastate commerce and do not burden interstate commerce. They insist that the taxes are laid upon the intrastate business measured by the number of telephones in intrastate use. Appellants challenge the findings that all of appellee's telephones in Montana are instrumentalities of interstate and foreign commerce, and that appellee could not discontinue its intrastate business without being compelled to withdraw from its interstate and foreign business, as being unsupported by the evidence.

1. It does not appear that these acts have been construed by any decision of the state courts. Appellants cite a decision of the Supreme Court of Montana construing § 4071 of the Political Code of 1895, as amended by the laws of 1897, p. 202, which provided for a tax on tele-

phone companies doing business in the State of a certain amount per year for each instrument in use. *State* v. *Rocky Mountain Bell Telephone Co.,* 27 Mont. 394; 71 Pac. 311. In view of the terms of that statute, the court concluded that the legislature intended to impose a license tax " on each telephone instrument used in purely local or intrastate business, and that as to instruments used in interstate business it was intended to have no application whatever." *Id.,* p. 404. Compare *Ogden City* v. *Crossman,* 17 Utah 66; 53 Pac. 985. A few days later, the Supreme Court of Montana decided the case of *State* v. *Northern Pacific Express Co.,* 27 Mont. 419; 71 Pac. 404; and held that the occupation tax imposed by § 4074 of the Political Code of the State, as applied to an express company, offended against the commerce clause of the Federal Constitution. The court distinguished its ruling in the case of the *Rocky Mountain Bell Telephone Co.* because the statute there " by express terms " had discriminated " between local and interstate commerce " and the intention that " only local business " should be subject to the license tax " was clearly expressed." The court thus stated the principle which it considered to be applicable (*id.,* p. 422): " If, however, the terms of the statute are general, and the license fee a unit charged against the business of the carrier as such,—as strictly an occupation tax,—and no attempt is made by the language of the statute to discriminate between the local and interstate business, but the license is required as a condition precedent to the carrier's commencing or conducting business, then the imposition of the tax will be deemed an interference with and an attempt to regulate interstate commerce, and for that reason void." Applying that principle, the court found the tax upon the express company to be invalid as the statute did not " by its terms attempt to make any discrimination between the local and interstate business of the defendant company, and no such discrimination can be made under any fair construction of the language employed." *Id.*, p. 427. It is evident that these decisions of the state court do not aid appellants' contention.

The tax is a privilege, or occupation, tax. The terms of the acts are explicit with respect to the incidence of the tax. Chapter 174 of the Laws of 1933 provides that every corporation "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana . . . shall pay . . . a license tax . . . for each telephone instrument used, controlled and operated by it in the conduct of such business." The business is the maintaining of telephone lines and the furnishing of telephone service in the State. No distinction is made between interstate and intrastate service. The tax is then stated to be "for each telephone instrument used, controlled and operated." Again, there is no limitation as to use, control or operation in intrastate business. The tax is "based upon the number of telephone instruments owned, controlled and operated" during all or any part of the calendar year. A "telephone instrument" is defined in section two of the act as "a transmitter and receiver capable of use in the transmitting and receiving of telephone communications." The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate. The provision of the second tax act, Chapter 54 of the Laws of 1933–34, is in this respect substantially the same.

To support their contention, appellants point to the proviso, in the first act, that the tax "shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone." There is a corresponding exclusion in the second act.[2] But these are merely exempting provisions. They carve out of the statute telephone instruments for which certain monthly rates are paid. The question is not as to the instruments that are not taxed, but as to those which are taxed. All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax. It is urged that monthly rates are charged to the customer for merely local service and are distinct from toll rates or charges for long distance calls which, whether intrastate or interstate, are on a "board to board" basis. But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.

The evidence supports the findings that these telephone instruments are available for interstate and foreign communications. Appellants contend that a "potential use, or even an occasional use for interstate or foreign commerce, is too remote, indefinite and indirect to permit such instruments to be classified as instrumentalities of interstate or foreign commerce, when, in fact, such instruments are used exclusively or almost exclusively for intrastate commerce." But the telephone instruments constitute a class of facilities, which, as such, are subject to the tax, and the findings, based on evidence, show that the interstate use is actual, not merely potential; substantial, not negligible. More than 10,000 of these instruments have actually been used in interstate and foreign commerce since the tax was laid. The evidence also shows that the same telephones, the same signaling apparatus, the same

[2] See Note 1.

wires, land, buildings, central office equipment, and operating organization are used in common for all services, interstate as well as intrastate. It was in this view that the District Court held that it was not feasible to provide separate statewide systems for intrastate and interstate telephones. But, apart from that question, it appears that in the operation of this unified system, the telephone instruments are the means by which the customers command at their pleasure the service they desire whether intrastate or interstate. And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use.

2. There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce.[3] But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it.[4] And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax

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[3] *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192; *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Kehrer* v. *Stewart*, 197 U. S. 60; *Ohio Tax Cases*, 232 U. S. 576; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S 350; *People ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252; *Postal Telegraph Cable Co.* v. *Fremont*, 255 U. S. 124; *Raley & Bros.* v. *Richardson*, 264 U. S. 157; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465.

[4] *State Freight Tax Case*, 15 Wall. 232; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Adams Express Co.* v. *New York*, 232 U. S. 14; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Sprout* v. *South Bend*, 277 U. S. 163, 171; *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U. S. 338.

either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile*, 127 U. S. 640. There are "sufficient modes" in which the local business may be taxed without the imposition of a tax "which covers the entire operations." *Id.*, p. 647. See *Williams* v. *Talladega*, 226 U. S. 404, 419. Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. *Leloup* v. *Mobile, supra; Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Adams Express Co.* v. *New York*, 232 U. S. 14, 29, 31; *United States Express Co.* v. *New York*, 232 U. S. 35, 36; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647, 648. In the cases of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments "were handled in the same vehicles, and by the same men" that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Adams Express Co.* v. *New York, supra; United States Express Co.* v. *New York, supra.* In *Bowman* v. *Continental Oil Co., supra,* the question arose under a statute of New Mexico laying an annual license tax of fifty dollars for each station distributing gasoline. The Court pointed out the distinction between an excise tax on sales of gasoline where, as the subject matter was separable, full protection could be afforded by enjoining enforcement as to the interstate business, and the license tax which with its prohibition fell upon the business as a whole. The Court said: "But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void." The difficulty, continued the Court, "is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all."

In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. We do not pass upon the other questions presented.

Decree affirmed.

AKTIESELSKABET CUZCO *v.* THE SUCARSECO ET AL.

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

No. 524. Argued February 14, 1935.—Decided March 4, 1935.

1. The essential conditions of general average are a common, imminent peril and a voluntary sacrifice, or extraordinary expenses necessarily made or incurred, to avert the peril, with a resulting common benefit to the adventure. The sacrifices or expenses

fall upon the whole adventure and are assessed in proportion to the share of each in the adventure. P. 401.

2. Cargo owners who, under § 3 of the Harter Act and a "Jason clause" in the shipping contract, have contributed in general average to expenses of a general average nature made necessary by a collision caused by faulty navigation of two vessels, the one carrying their goods and another, are entitled in their own right to recover the amount of such contributions from the non-carrying vessel as damages resulting to them directly from the tort,—and this notwithstanding that one-half of the burden of such recovery will fall upon the carrying vessel in the division of liability between it and the non-carrying vessel. P. 403.

72 F. (2d) 690, affirmed.

Certiorari, 293 U. S. 552, to review a decree of the Circuit Court of Appeals reversing the District Court in a litigation in admiralty resulting from a collision between two vessels. The only question presented here was whether the cargo owners, who had made contributions in general average with the vessel on which their goods were carried, were entitled to recover the amount from the non-carrying vessel. The carrying vessel, being bound to share with the other the liability for the tort, resisted this claim of cargo.

Mr. William H. McGrann, with whom *Messrs. Cletus Keating* and *Roger B. Siddall* were on the brief, for petitioner.

Respondents maintain that there is a cause of action against the tortious colliding vessel (owners), *The Sucarseco,* for recovery in full of the contributions made by them towards the port of refuge expenses, on the theory that they were obliged by law to make the contributions; and that the obligation arose because of a tort committed by *The Sucarseco* to their property.

Petitioner contends that since no obligation was imposed by law, *i. e.,* the law of general average, upon the respondents, and since respondents contributed only because of the terms of the contract of carriage, *i. e.*, the Jason Clause, respondents can not enforce the claim against the tort-feasor who is not chargeable with privity in the contract, nor with contemplation of the consequences which might arise by reason of the special contract, nor with intention to cause a breach of such a contract.

It is settled that one may not recover a "damage" which he has sustained solely because of his contract with another, and which he would not have sustained but for that contract, from a third party who is necessarily a "stranger" to the contract. See *Robins* v. *Flint*, 275 U. S. 303; *The Federal No. 2*, 21 F. (2d) 313; *Elliott Steam Tug Co.* v. *The Shipping Controller* [1922], 1 K. B. 127, 139, 142. Distinguishing: *The Energia*, 61 Fed. 222, aff'd, 66 Fed. 604.

Under English law, a general exception of negligence in the contract of carriage is regarded as wholly extinguishing negligence, and general average contributions are then deemed to be obligatory, by force of the maritime law of general average, as if there had not been any negligence. That seems to be the purport of the decision in *The Carron Park*, 15 Pro. Div. 203. Cf. *The Ettrick*, L. R. 6 Pro. Div. 127. Under the American law, the restricted exception (such as a Jason Clause) does not extinguish the negligence, *i. e.*, does not alter the law of general average, but permits of adjustment (contributions) between the parties concerned. *The Irrawaddy*, 171 U. S. 187, and *The Jason*, 225 U. S. 32.

The English and American laws relating to adjustment of collision damages also differ substantially. In a "both to blame" case, the damages are divided in a ratio of the comparative negligence under the English law, and the owner of cargo damaged on one vessel may recover from the other vessel only such part as is equivalent to the degree of fault of the other (non-carrying) vessel. *The*

Umona, 1914 P. 141; Roscoe, Measure of Damages in Maritime Collisions, 3d ed., pp. 20–22. Under American law, the damages are divided equally (each bears one-half), but the cargo-owner on the carrying vessel may recover his total *physical* damage from the non-carrying vessel (and none directly from the carrier, because of the Harter Act). *The Chattahoochee,* 173 U. S. 540; *Ralli* v. *Societa Anonima,* 222 Fed. 994, 999.

Respondents' claim for refund of their general average contributions is derivative only, and not directly recoverable from *The Sucarseco;* and they are entitled to recover back from petitioner only a proportionate share of petitioner's recovery from *The Sucarseco* of the items to which they contributed.

Respondents are entitled only to an accounting from their carrier.

The expenses in dispute are primarily recoverable by petitioner from *The Sucarseco.*

Under the principle of *restitutio in integrum,* these expenses incurred and paid by petitioner are recoverable by petitioner directly from the joint tort-feasor, *The Sucarseco,* the owners of which are primarily liable to petitioner. *The Baltimore,* 8 Wall. 377, 385; *Williamson* v. *Barrett,* 13 How. 101, 110; *The Conqueror,* 166 U.S. 110, 125; *The Margaret J. Sanford,* 37 Fed. 148, 152.

Such rights as respondents may have are derivative from the primary right of petitioner. That limitation results from the nature of the relationship.

The analogy of a general average situation to one of marine insurance has heretofore been applied by the courts in considering cargo's position *vis-a-vis* the carrier. *Pool Shipping Co.* v. *United States,* 33 F. (2d) 275; *Ralli* v. *Societa,* 222 Fed. 994.

Authorities on the law of general average emphasize the insurance relationship, and the analogy. Cole, General Average Law and Rules, 1928, pp. 2–3; *Phoenix In-*

surance Co. v. *Erie Transportation Co.,* 117 U. S. 312, 321.

The courts have heretofore recognized and applied the insurance analogy. *Pool Shipping Co.* v. *United States, supra; Ralli* v. *Societa, supra; The Andree-The Alexander,* 47 F. (2d) 875; *The Gulf of Mexico,* 1924 A. M. C. 932; *The Lewis H. Goward,* 34 F. (2d) 791.

Mr. D. Roger Englar, with whom *Mr. Leonard J. Matteson* was on the brief, for respondents.

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

The question in this case arises out of a collision at sea between the Norwegian vessel Toluma and the American vessel Sucarseco. Both vessels were at fault and both were damaged. The Sucarseco proceeded on her voyage. The Toluma put into a port of refuge for necessary repairs. To permit these repairs, a part of her cargo was discharged; it was later reloaded and the Toluma completed her voyage. A general average statement was prepared which apportioned the expenses and losses, so far as they were of a general average nature, between the owner of the Toluma and the cargo owners.

Three suits were brought in admiralty and were consolidated for trial. One was a libel for damages brought by the owner of the Toluma against the Sucarseco. Another was a cross libel for damages by the owner of the Sucarseco against the Toluma. The third libel was by the owners of cargo on the Toluma against the owner of the Sucarseco to recover their damages, including the amounts which the cargo owners had paid as general average contributions.

The only question presented here is with respect to the claim of the cargo owners. Their right to recover against the Sucarseco, the non-carrying vessel, is not contested so far as the physical damage to the cargo is concerned. The contest is with respect to the contributions of the cargo owners in general average. The Circuit Court of Appeals, reversing the District Court, allowed that recovery. 72 F. (2d) 690. Because of the importance of the question, which has not been decided by this Court, a writ of certiorari was granted, December 3, 1934.

There is no dispute that both vessels were seaworthy and that the collision was due to the fault in navigation of both vessels equally. No question has been raised as to the correctness of the general average adjustment. As, through the application to the instant case of the rule for the division of the entire loss equally between the vessels,[1] the ultimate share to be borne by the Sucarseco will not be affected by the determination of the present claim of the cargo owners, the Sucarseco is indifferent to the result and the claim is opposed by the Toluma.

The cargo was carried under a provision of the bill of lading, known as the "Jason clause," that in case "of danger, damage or disaster" resulting "from faults or errors in navigation," and if the shipowner "shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied," the owners of the cargo shall contribute with the shipowner in general average "to the payment of any sacrifices, losses or expenses of a general average nature that may be incurred for the common benefit" to the same extent as if the danger, damage or disaster had not resulted from faults or errors in navigation.[2] The clause is substantially to the

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[1] See *The North Star,* 106 U. S. 17; *The Chattahoochee,* 173 U. S. 540.

[2] The applicable clause in the bill of lading is as follows:

"In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of same effect as the one sustained in the case of *The Jason,* 225 U. S. 32, and has received its popular designation from that decision. Petitioner contends that the liability of cargo to contribute in general average results solely from this provision in the contract of carriage; that the owners of the Sucarseco were not parties to that contract; and that the claim of the cargo owners for the refund of their general average contributions is derivative and not directly recoverable from the Sucarseco, the cargo owners being entitled only to an accounting from their carrier (the Toluma) for their ratable proportion of that carrier's recovery. Respondents insist that cargo's contributions in general average are a part of cargo's " collision damage " and are recoverable from the Sucarseco as a tortfeasor in the same manner as physical damage.

While the damages due to a collision, when both vessels are at fault, are divided as between themselves, the innocent cargo owner may recover his full damages from the non-carrying vessel. *The Atlas,* 93 U. S. 302, 315; *The New York,* 175 U. S. 187, 209, 210; *Canada Malting Co.* v. *Paterson Steamships,* 285 U. S. 413, 418. This is so, al-

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shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the ship-owner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness."

though the carrying vessel may be free from liability to the cargo owners by reason of the application of section three of the Harter Act, 46 U. S. C. 192.[3] On a division of the entire damages between the two vessels, the non-carrying vessel may recoup one-half of the amount paid to the cargo owners. *The Chattahooche,* 173 U. S. 540, 554, 555. The direct liability of the non-carrying vessel "for all the damage to cargo" is "one of the consequences plainly to be foreseen," and the responsibility of the carrying vessel to the non-carrying vessel is measured accordingly. *Erie R. Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220, 226.

In the stipulation of facts, the parties agreed that the expenses, for which recovery is now sought as a part of cargo's damage, were "of a general average nature." The description is brief but adequate. It is a description which incorporates the essential conditions of general average. It means that there was a common imminent peril and a voluntary sacrifice or extraordinary expenses necessarily made or incurred to avert the peril and with a resulting common benefit to the adventure. *Columbian Insurance Co.* v. *Ashby,* 13 Pet. 331, 338; *McAndrews* v. *Thatcher,* 3 Wall. 347, 365; *The Star of Hope,* 9 Wall. 203, 228, 229; *Ralli* v. *Troop,* 157 U. S. 386, 394, 395, 403; *The Jason, supra,* pp. 48, 49. It means that the sacrifice or expenses fell upon the whole adventure and were to be assessed in proportion to the share of each in that adventure. *The Star of Hope, supra; Ralli* v. *Troop, supra.* This is the basic consideration in determining the present question.

Prior to the Harter Act, a common carrier by sea could not exempt himself from liability to the cargo owner for damages caused by the negligence of master or crew. *Liverpool & G. W. Steam Co.* v. *Phenix Insurance Co.,* 129

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[3] Act of February 13, 1893, c. 105, 27 Stat. 445.

U. S. 397. The Harter Act, prohibiting, by sections one and two, agreements with a shipowner which would relieve him from responsibility for the proper loading, stowage, custody, care, or delivery of the cargo, or from the duty to exercise due diligence to make the vessel seaworthy, provided in section three that if the shipowner did exercise due diligence " to make the vessel in all respects seaworthy and properly manned, equipped and supplied," neither the vessel nor her owner should be responsible for damages resulting " from faults or errors in navigation or in the management of the vessel." The question then arose whether a shipowner who had exercised that due diligence was entitled to general average contribution for sacrifices made by him, subsequent to a stranding of his vessel, in successful efforts to save vessel, freight and cargo. That right was denied the shipowner in *The Irrawaddy,* 171 U. S. 187. The point of that decision was carefully stated in *The Jason, supra,* p. 54. The Court there said that the authority of *The Irrawaddy* went no further than that "while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence." But, as the Harter Act had relieved the diligent shipowner from responsibility for the negligence of his master and crew, the Court decided in *The Jason* that it was " no longer against the policy of the law " for him to contract with the cargo owners " for a participation in general average contribution growing out of such negligence." Upon this ground, the validity of the " Jason clause," similar to the one now before us, was upheld.

What then is the effect of the " Jason clause "? It in no way changes the essential features of general average contributions. It must still appear that voluntary and successful sacrifices have been made or extraordinary expenses incurred on behalf of those interested in the adventure in order to avert a common imminent peril, with resulting benefit to the adventure upon which the burden of such sacrifices and expenses appropriately rests. As the master of the ship is charged with the duty, and clothed with the power, to determine at the time "whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder," the effect of the "Jason clause" is to invest the master with authority and responsibility to act directly for cargo in relation to cargo's duty to contribute in general average. The master becomes for that purpose the representative of cargo. *Lawrence* v. *Minturn,* 17 How. 100, 109, 110; *The Star of Hope, supra,* p. 230; *Ralli* v. *Troop, supra,* pp. 397, 398; *The Gratitudine,* 3 C. Rob. 240, 257, 258, 260; *Burton & Co.* v. *English & Co.,* 12 Q. B. D. 218, 223. In *The Jason, supra,* p. 54, the Court pointed out that as sacrifices and expenses, in order to justify the general average contribution, must be voluntary and extraordinary, they could not be regarded as made in the performance of the general duty of the shipowner to his cargo. The "Jason clause" was sustained because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility. *Id.,* pp. 55, 56.

It is with this understanding of the effect of the clause that we come to the question as to the right of the cargo owners to include, in the damages they have suffered by reason of the collision, their general average contributions. That the extraordinary expenses, thus shared, were due to the collision cannot be gainsaid. It is because they were thus directly caused, that these expenses form part of the damages to be divided between the two vessels. On this basis they were included in the decree for division made by the District Court and the propriety of the inclusion of these amounts in the total damages to be divided between the vessels is not questioned. But the right to that inclusion springs directly from the tort and in that relation no question is raised as to proximate cause or foreseeable consequences.

The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause. The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision. *The Energia*, 61 Fed. 222; 66 Fed. 604, 608. The right does not stand on subrogation any more than the right of Sucarseco to bring into the division of damages the amount it has to pay to the cargo owners rests on subrogation. See *Erie R. Co.* v. *Erie & Western Transportation Co., supra.* In each case the right arises directly from the tort.

The contention as to remoteness is but another way of presenting the same question. This is not a case of an attempt, by reason of "a tort to the person or property of one man," to make the tort-feasor liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong." See *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 309; *Elliott Steam Tug Co.* v. *Shipping Controller* [1922] 1 K. B. 127, 139, 142; *The Federal No. 2*, 21 F. (2d) 313. Here, cargo as well as ship was placed in jeopardy. That jeopardy was due in part to the negligence of the vessel against which the claim is made. The fact that the vessel and the cargo under the "Jason clause" bear their proportionate shares of the expenses gives Sucarseco no ground for a contention that the expenses themselves, or the share that cargo bears, were not occasioned directly by the tort. In the light of the nature of the general average contributions, and of the event which made them necessary, the fact that they were made under the stipulation in the "Jason clause" is no more a defense to Sucarseco than is the fact that the cargo was placed on board under a contract to carry it. Indeed, Sucarseco makes no contention of immunity. The question arises only because, through recovery by the cargo owners from Sucarseco, Toluma's share of the ultimate division is affected. But that does not establish remoteness. We have the anomalous situation that it is Toluma that is opposing the cargo owners' claim against Sucarseco, while Toluma has collected from cargo its share of the general average expenses on the ground that they were incurred on cargo's behalf and were due to the collision.

As we have said, the "Jason clause" merely distributed a loss for which Sucarseco was responsible and in that view the cargo owners are entitled to recover that part of the loss which they have sustained.

The decree of the Circuit Court of Appeals is

Affirmed.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* WALTERS, COMMISSIONER OF HIGHWAYS, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 183. Argued December 6, 1934.—Reargued January 16, 1935.—Decided March 4, 1935.

1. A statute, valid when enacted, may become invalid by change in the conditions to which it is applied. P. 414.
2. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. P. 415.

3. The power in a State to require a railroad company to bear expenses of separating the grades of the railway and a new highway at crossing is not absolute but is subject to the due process clause of the Fourteenth Amendment; and it does not exist in the particular case if, upon the facts of that case, the exaction would be unreasonable or arbitrary. P. 413.
4. In resisting an imposition upon it, under a state statute, of one-half the cost of an underpass to separate the grades of its main line and a proposed new highway, the railway company adduced, among other facts, that the highway was designed for high-speed through motor traffic across the State, as part of the national system of Federal-aid highways largely planned, financed and supervised by the Federal Government; that it had no local significance; that from the local standpoint there was no need of grade separation; that the underpass was prescribed, not upon consideration of local safety needs, but in conformity to general plans of the federal and state highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high-speed motor vehicle transportation; that the highway would be the greater source of danger; that, far from being a feeder of railway traffic, it would add to the motor competition from which the railway had already suffered severely; and that the tax burden upon the railway was already excessive as compared with that upon the owners of motor vehicles who would use the highway as it competitors. *Held:*

(1) That the State Supreme Court erred in not considering whether the facts showed that the imposition was arbitrary and unreasonable. Pp. 415, 428.

(2) This question should be determined in the first instance by the state court. P. 433.

(3) The state court should also decide whether findings of facts were adequately supported by evidence. *Id.*

5. When the scope of the police power is in question, the special knowledge of local conditions possessed by the state tribunals may be of great weight. *Id.*

167 Tenn. 470; 71 S. W. (2d) 678, reversed.

Appeal from a judgment in a suit of the railway company brought for the purpose of determining the constitutionality of an order, and an underlying statute, requiring it to pay one-half of the expense of obviating a grade crossing.

Mr. Fitzgerald Hall for appellant.

A statute may be reasonable and, therefore, valid at one time or under one set of circumstances, yet unreasonable and, therefore, invalid under different circumstances. A statute may be perfectly valid on its face, yet, applied to given facts, be invalid. While the fundamental principles of the organic law of the Nation remain unchanged, their application to changing conditions must and does call for a restatement of ancient and obsolete rules. *Snyder* v. *Massachusetts,* 291 U. S. 97, 115–116, 117; *Funk* v. *United States,* 290 U. S. 371, 383, 385; *Nebbia* v. *New York,* 291 U. S. 502, 525; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 387; *Abie State Bank* v. *Bryan,* 282 U. S. 765, 766; *United Railways* v. *West,* 280 U. S. 234, 249; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 400; *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310.

Constructing highways and making them safe for non-existent but anticipated fast, heavy, commercial traffic, in direct competition with railroads, is not an exercise of the police power. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 437; *Lawton* v. *Steele,* 152 U. S. 133, 136; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 195; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *Cincinnati* v. *Louisville & N. R. Co.,* 223 U. S. 390, 404; *United States* v. *Boston Elevated Ry. Co.,* 176 Fed. 963; *Fryar* v. *Hamilton County,* 160 Tenn. 216, 219; *State Highway Dept.* v. *Mitchell's Heirs,* 142 Tenn. 58, 66, 72, 74; *Scopes* v. *Tennessee,* 154 Tenn. 105, 111, 112; *State* v. *Cummings,* 130 Tenn. 566, 572; *Coyne* v. *Memphis,* 118 Tenn. 651, 663; *Franklin & Columbia Turnpike Co.* v. *County Court,* 27 Tenn. 342; Elliott, Roads & Streets, 4th ed., §§ 204, 465; Lewis, Eminent Domain, 3d ed., § 6, pp. 13–16; Cooley, Constitutional Limitations, 7th ed., p. 830, quoting with approval the decision of Chief Justice Shaw in *Commonwealth* v. *Alger,* 7 Cush. 53, 84.

If the power exercised was not police, it follows as of course that taking appellant's money to finance the underpass was a taking of private property without due process of law.

The Government of the United States, under the commerce and post roads provisions of the Federal Constitution, may build and construct post roads, but it has no police power, except in the District of Columbia and possibly some territories not a part of any one of the several States. *United States* v. *DeWitt,* 9 Wall. 41, 45; *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659, 667; *Hart Coal Co.* v. *Sparks,* 7 F. Supp. 16, 19; Cooley, Const. Lim., 7th ed., 831–832; 6 R. C. L., § 190, Const. L.

Any exercise of the police power requires investigation and knowledge of the factors involving safety, as distinguished from mere traffic considerations. *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190.

The difference between the engineering and traffic considerations for making a highway safe and convenient for commercial business thereon, and a legitimate exercise of the police power, has been recognized in several recent cases. *Chicago & N. W. Ry. Co.* v. *Railroad Comm'n,* 205 Wis. 506; *Sidney* v. *Wabash Ry. Co.,* 333 Ill. 126; *In re Elimination of Grade Crossings,* 124 Ohio St. 406; *Transit Comm'n* v. *United States,* 284 U. S. 360; *Chicago, St. P., M. & O. Ry. Co.* v. *Holmberg,* 282 U. S. 162.

This Court and state courts have, in the past, frequently held that a railroad could be required to separate a grade crossing at its sole expense. Such cases are no longer controlling where the evidence shows that conditions have entirely changed and that commercial convenience of motor traffic rather than public safety is the motivating and controlling influence of action.

An exercise of the police power is subject to the due process of law clause of the Fourteenth Amendment. *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 196; *Pennsyl-*

vania Coal Co. v. *Mahon,* 260 U. S. 393, 413; *Lochner* v. *New York,* 198 U. S. 45, 56; *Motlow* v. *State,* 125 Tenn. 547, 590; *Campbell* v. *McIntyre,* 165 Tenn. 47, 52–53, and a State may not, even in the intelligent and reasonable exercise of the police power, burden interstate commerce.

Where a new right of way of a commercial transportation company, whether railroad or highway, crosses the right of way of an existing commercial road, the new one must pay the crossing cost. *Dyer County* v. *Railroad,* 87 Tenn. 712, 714.

The Interstate Commerce Commission, in a series of elaborate investigations recently held, has officially recognized that which is of common knowledge, namely, that commercial transportation by motor vehicle, enormous in proportions, is in active and successful competition with the railroads.

This Court, taking judicial knowledge of the growth of commercial transportation by motor vehicle, has recognized the necessity and legality of state action designed in part to protect commerce by railroad from destruction by unregulated, competing, commercial motor transportation. *Railroad Improvement District* v. *Missouri Pacific R. Co.,* 274 U. S. 188, 194; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Sproles* v. *Binford,* 286 U. S. 374, 394; *Stephenson* v. *Binford,* 287 U. S. 251, 271–272; *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92; *Hicklin* v. *Coney,* 290 U. S. 169.

A general system of discrimination against a citizen may be attacked at any of its component parts. Interstate commerce by railroad is being discriminated against, as well as burdened and crippled, in taxation, regulation, and state requirements placing the cost of all grade crossing protection and separation on the railroads alone.

That the Fourteenth Amendment forbids state action of any kind which is unduly discriminatory—whether such action involves taxation, regulation, police power or otherwise—can not be denied. Typical cases sustaining this now elementary proposition follow: *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241, 246; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 160; *Frost* v. *Corporation Comm'n,* 278 U. S. 515, 521-523; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32, 37-40; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251; *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393, 403; *Truax* v. *Corrigan,* 257 U. S. 312, 331-334, 337-339.

The revolution in transportation, and the incidental grade crossing problem, necessitate a restatement of old rules.

Mr. Edwin F. Hunt, Assistant Attorney General of Tennessee, with whom *Mr. Roy H. Beeler,* Attorney General, was on the brief, for appellees.

A State has the constitutional power to require the abolition of grade crossings upon public highways for the reasonable safety of the public. This police power includes the abolition of grade crossings upon newly laid out public highways. *New York & N. E. R. Co.* v. *Bristol,* 151 U. S. 556; *Chicago, M. & St. P. R. Co.* v. *Minneapolis,* 232 U. S. 430; *Missouri Pacific R. Co.* v. *Omaha,* 235 U. S. 121, 127; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U. S. 394; *Missouri, K. & T. R. Co.* v. *Oklahoma,* 271 U. S. 303; *Lehigh Valley R. Co.* v. *Public Utility Comm'rs,* 278 U. S. 24; *Nashville, C. & St. L. Ry. Co.* v. *White,* 278 U. S. 456; *Chicago, St. P., M. & O. R. Co.* v. *Holmberg,* 282 U. S. 162; *Harriman* v. *Southern Ry. Co.,* 111 Tenn. 539; *Chattanooga* v. *Southern Ry. Co.,* 128 Tenn. 399; *Nashville, C. & St. L. Ry. Co.* v. *Drainage District,* 149 Tenn. 490; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Chattanooga,* 166 Tenn. 626; *Baltimore & Ohio R. Co.* v. *Public Utilities Comm'n,* 122 Ohio St. 380; *Chicago & N. W. R. Co.* v.

Illinois Commerce Comm'n, 326 Ill. 625; *Chicago, M. & St. P. R. Co.* v. *Railroad Comm'n,* 187 Wis. 364; *North Dakota Highway Comm'n* v. *Great Northern Ry. Co.,* 51 N. D. 680. Distinguishing: *Chicago & N. W. R. Co.* v. *Railroad Comm'n,* 205 Wis. 506; *In re Elimination of Grade Crossings,* 124 Ohio St. 406; *Sidney* v. *Wabash R. Co.,* 333 Ill. 126.

The police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. *Lake Shore & M. S. R. Co.* v. *Ohio,* 173 U. S. 285, 292; *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561, 592; *Bacon* v. *Walker,* 204 U. S. 311, 317; *Chicago & Alton R. Co.* v. *Tranbarger,* 238 U. S. 67.

The proportion of the expense which a railroad company will be required to bear in the elimination of a grade crossing is a matter exclusively within the control of the legislature. *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561; *Chicago, M. & St. P. R. Co.* v. *Minneapolis,* 232 U. S. 430; *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U. S. 394.

Engagement in interstate commerce does not destroy the right of a State to compel a railroad company to abolish a highway grade crossing. *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U. S. 394.

It is not the public policy of Tennessee to minimize restrictions and taxes on common carriers by motor vehicle to the disadvantage of the railroads.

Whether or not economic conditions have so changed that statutes requiring railroads to bear a part of the cost of grade crossing separations ought to be repealed or modified, presents a question of public policy exclusively within the control of the legislature. *McLean* v. *Arkansas,* 211 U. S. 539, 547; *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569; *German Alliance Ins. Co.* v.

Lewis, 233 U. S. 389, 414; *Green* v. *Frazier*, 253 U. S. 233, 240; *Motlow* v. *State*, 125 Tenn. 547, 589; *Quinn* v. *Hester*, 135 Tenn. 374, 380; *Nashville, C. & St. L. Ry. Co.* v. *Marshall Co.*, 161 Tenn. 236, 247.

The statute affords an opportunity to be heard and an opportunity for judicial review.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit under the Uniform Declaratory Judgment Act of Tennessee,[1] was brought, on November 21, 1931, in the Chancery Court of Davidson County, Part One, by the Nashville, Chattanooga & St. Louis Railway against the State Highway Commissioner and the Attorney General. The purpose of the suit is to secure a determination of the constitutionality of an order entered by the Commission and, as so applied, of Chapter 132 of the Tennessee Acts of 1921, upon which the order rests.[2] The statute authorizes the Commission whenever a state highway crosses a railroad to require the separation of grades if in its discretion "the elimination of any such grade crossing is necessary for the protection of persons travelling on any such highway or any such railroad"; and, without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad, requires the latter to pay in every case, one-half of the total cost of the separation of grades. The order requires the Railway to construct an underpass so as to separate grades where a proposed state highway will cross its main line within the limits of the little town of Lexington; and to bear one-half the cost thereof.

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[1] Public Acts of Tennessee, 1923, c. 29.

[2] Public Acts of Tennessee, 1921, c. 132, entitled "An Act to provide for the elimination of grade crossings on State Highways"; amended 1923, c. 35; 1925, c. 88.

The Railway does not question the power of the State to build the proposed highway; nor its power to require the separation of grades; nor the appropriateness of the plan adopted for such separation; nor the reasonableness of the cost—$17,400. It does not deny that if the proposed highway is built, safety of travel thereon and on the railroad will be promoted by separation of grades. It concedes that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate.[3] The claim of unconstitutionality rests wholly upon the special facts here shown. The main contention is that to impose upon the Railway, under these circumstances, one-half of the cost is action so arbitrary and unreasonable as to deprive it of property without due process of law in violation of the Fourteenth Amendment.

The bill of complaint sets forth in detail the facts relied upon as showing that the action was arbitrary and unreasonable. The answer justifies the imposition solely as an exercise of the police power. Because many of the alle-

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[3] See *Dyer County* v. *Railroad*, 87 Tenn. 712; 11 S. W. 943; *Harriman* v. *Southern Ry. Co.*, 111 Tenn. 538; 82 S. W. 213; *Chattanooga* v. *Southern Railway*, 128 Tenn. 399; 161 S. W. 1000; *Nashville, C. & St. L. Ry.* v. *Drainage District*, 149 Tenn. 490; 261 S. W. 975. Exertion of the power was sustained by this Court in the following cases: *New York & New England R. R.* v. *Bristol*, 151 U. S. 556; *Cincinnati, I. & W. Ry.* v. *Connersville*, 218 U. S. 336; *Chicago, M. & St. P. Ry.* v. *Minneapolis*, 232 U. S. 430; *Missouri Pacific Ry.* v. *Omaha*, 235 U. S. 121; *Erie R. R.* v. *Public Utility Commissioners*, 254 U. S. 394; *Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24. Compare *Chicago, B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561; *Lake Shore & Michigan Southern Ry.* v. *Clough*, 242 U. S. 375; *Missouri, K. & T. Ry. Co.* v. *Oklahoma*, 271 U. S. 303; *Missouri ex rel. Wabash Railway* v. *Public Service Comm'n*, 273 U. S. 126; *Nashville, C. & St. L. Ry.* v. *White*, 278 U. S. 456; *New Orleans Public Service* v. *New Orleans*, 281 U. S. 682.

gations of the bill were denied, much evidence was introduced. That contained in the printed record in this Court occupies, with exhibits, 492 pages. The trial court found that, with one exception,[4] the evidence fully supported every averment of fact in the bill. It held that the order and the statute as applied, in so far as they require the Railway to pay one-half the cost of the underpass, are arbitrary and unreasonable; and that they are void. The decree enjoined the Commissioner from attempting to enforce payment by the Railway; ordered that the entire cost of the project (except for contributions by the Federal Government) be borne by the State Highway Commission; and directed the defendants to pay the costs of the cause. Upon appeal, the Supreme Court of the State reversed that decree; ordered the bill dismissed; and allowed an appeal to this Court. 167 Tenn. 470; 71 S. W. (2d) 678. Consideration of the jurisdiction thereof was ordered postponed to the hearing on the merits.

The Supreme Court declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not " any more " consider " whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions," than it

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[4] It was alleged in the bill that the construction of the underpass was unnecessary. The decree recites: " The court finds from the evidence that there are no facts to sustain this averment and that in the interest of commerce by motor vehicle on the public highways, this was a proper engineering project, properly conceived, located, designed and constructed."

"could consider changed mental attitudes to determine the constitutionality and enforceability of a statute." A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another.[5] A statute valid when enacted may become invalid by change in the conditions to which it is applied.[6] The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably.[7] To this limitation, attention was specifically called in cases which have applied most broadly the power to impose upon railroads the cost of separation of grades. *Cincinnati, I. & W. Ry.* v. *Connersville,* 218 U. S. 336, 344; *Chicago, M. & St. P. Ry.* v. *Minneapolis,* 232 U. S. 430, 441; *Missouri Pacific Ry.* v. *Omaha,* 235 U. S. 121, 127; *Erie R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, 409, 410; *Lehigh Valley R. Co.* v. *Commissioners,* 278 U. S. 24, 34, 35. Compare *Denver & Rio Grande R. Co.* v. *Denver,* 250 U. S. 241, 244; *Southern Ry.* v. *Virginia,* 290 U. S. 190, 196.

First. Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing

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[5] *Kansas City Southern Ry.* v. *Anderson,* 233 U. S. 325; *Poindexter* v. *Greenhow,* 114 U. S. 270, 295. Compare *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Withnell* v. *Ruecking Construction Co.,* 249 U. S. 63, 71; *Chicago, T. H. & S. E. Ry.* v. *Anderson,* 242 U. S. 283.

[6] *Abie State Bank* v. *Bryan,* 282 U. S. 765, 772; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 547; *Perrin* v. *United States,* 232 U. S. 478, 487. Compare *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249.

[7] *Washington ex rel. Seattle Trust Co.* v. *Roberge,* 278 U. S. 116; *Nectow* v. *Cambridge,* 277 U. S. 183; *Delaware, L. & W. R. R.* v. *Morristown,* 276 U. S. 182; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *Eubank* v. *Richmond,* 226 U. S. 137; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Lake Shore & M. S. Ry.* v. *Smith,* 173 U. S. 684; see too, *McLean* v. *Arkansas,* 211 U. S. 539, 547; *Lawton* v. *Steele,* 152 U. S. 133, 137–8.

upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them. The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents. The facts specifically found, or of which the courts could take judicial notice, are these:

1. The decree of the trial court recites, as a finding upon the evidence, " that this underpass is a part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways, the result of which is to afford competition with railroads and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves "; " that in the interest of commerce by motor vehicles on the public highways, this was a proper engineering project, properly conceived, located, designed and constructed "; but " that this underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, widening the pavement et cetera."

2. The State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation.[8] The aim of that legislation is "a connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads";[9] to establish "lines of motor traffic in interstate commerce."[10] The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails.[11] The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed.[12]

To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system. In each year, it has made to each State

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[8] It was largely in anticipation of Federal-aid legislation that the State Highway Commission of Tennessee was created in 1915. Report of the Commissioner, Tenn. Dep't of Highways and Public Works (1926), p. 14; Public Acts of Tennessee, 1915, c. 100, §§ 8, 9.

[9] Report of Chief of (Federal) Bureau of Public Roads for the year ending June 30, 1922, pp. 1, 5. See also Report for year ending June 30, 1923, p. 3.

[10] First Message of President Harding to Congress, April 12, 1921.

[11] See Conference Report on "Bill to provide that . . . the Secretary of Agriculture on behalf of the United States, shall in certain cases, aid the States in the construction, improvement, and maintenance of roads which may be used in the transportation of interstate commerce, military supplies or postal matter." June 16, 1916, Sen. Doc. No. 474, 64th Cong., 1st Sess. See too, H. Rep. No. 26, 64th Cong., 1st Sess. (1916) p. 4; Sen. Rep. No. 134, 67th Cong., 1st Sess. (1921), p. 1. Compare Co-ordination of Motor Transportation, 182 I. C. C. 263, 366 (1932).

[12] Reports of Chief of Bureau of Public Roads (1931) pp. 2–7; (1932) pp. 1–3; (1933) pp. 1–4; (1934) pp. 1–5.

grants in money, proportioned according to various factors, to be expended in defraying up to one-half the cost of constructing therein the designated highways.[13] In addition, it has, through the War Department, allotted to the several States their pro rata shares of surplus war equipment and supplies valued at more than $224,000,000.[14] It has at all times given to the several States the benefit of its economic and physical research; and other aid by its experts and administrators.[15] It has, since the depression, given to the several States emergency grants to be expended in highway construction for the relief of

[13] Act of July 11, 1916, c. 241, §§ 3, 6, 39 Stat. 355; Act of Feb. 28, 1919, c. 69, § 6, 40 Stat. 1200; Act of Nov. 9, 1921, c. 119, §§ 11, 20, 42 Stat. 212; Act of June 19, 1922, c. 227, § 4, 42 Stat. 660; Act of Feb. 12, 1925, c. 219, § 1, 43 Stat. 889; Act of June 22, 1926, c. 648, § 1, 44 Stat. 760; Act of May 26, 1928, c. 755, § 1, 45 Stat. 750; Act of April 4, 1930, c. 105, §§ 1, 2, 46 Stat. 141; Act of June 18, 1934, c. 586, § 4, 48 Stat. 993.

[14] See Reports of Chief of Bureau of Public Roads (1920) p. 25; (1922) p. 29; (1923) p. 27; (1927) p. 1.

[15] The research was instituted by the Department of Agriculture, October 3, 1893, and has been pursued continuously since. See Report of the Special Agent and Engineer for Road Inquiry for 1896, p. 145; Reports of the Director of Office of Road Inquiries from 1897–1904; Reports of Director of Office of Public Roads, 1905–1918; Reports of Chief of Bureau of Public Roads, 1918–1934.

[16] The Act of 1928 appropriated for each of the fiscal years ending June 30, 1930 and 1931, $75,000,000. The Act of 1930 appropriated for each of the fiscal years ending June 30, 1932 and 1933, $125,000,000. The Act of December 20, 1930, c. 19, 46 Stat. 1030, in order "to provide for emergency construction . . . with a view to increasing employment," appropriated $80,000,000, "as a temporary advance of funds to meet the provisions of (the Federal Highway) act as to State funds required on Federal-aid projects." By the Emergency Relief and Construction Act of July 21, 1932, c. 520, Title III, § 301 (a), 47 Stat. 709, 716, a similar "temporary advance" of $120,000,000, was made "for the purpose of providing emergency construction . . . with a view to increasing employment and carry-

unemployment.[16] In the fiscal years ending June 30, 1931, 1932 and 1933, during which this highway was authorized and completed, Tennessee received from the Federal Government, for the highway system, in cash, $11,063,325;[17] and at the close of that period practically the entire expense of building Federal-aid roads in the State was being borne by the Federal Government.[18]

The Secretary of Agriculture, acting through the Federal Bureau of Public Roads, has determined in large measure, not only the location of the Federal-aid highways in the several States, but also their character and

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ing out the policy declared in the Employment Stabilization Act of 1931." By the National Industrial Recovery Act of June 16, 1933, c. 90, Title II, § 204 (a), 48 Stat. 195, "the President is authorized to make grants to the highway departments of the several states in an amount not less than $400,000,000, to be expended by such departments in accordance with the provisions of the Federal Highway Act." By the Act of June 18, 1934, c. 586, 48 Stat. 993, "for the purpose of increasing employment by providing for the emergency construction of public highways," there was appropriated the further sum of $200,000,000, to be similarly expended. Section 14 of the same Act provides: "No deductions shall hereafter be made on account of prior advances and/or loans to the States for the construction of roads under the requirements of the Federal Aid Highway Act or on account of amounts paid under the provisions of Title I of the Emergency Relief and Construction Act of 1932 for furnishing relief and work relief to needy and distressed people."

[17] See Reports of Chief of Bureau of Public Roads, (1931) pp. 34, 55; (1932) pp. 2, 29; (1933) pp. 2, 31.

[18] Estimated cost of Federal-aid roads under construction in Tennessee on June 30, 1933, totalled $4,645,392, of which $2,321,975 was to be defrayed with Federal-aid money, and $2,166,751 with Federal Emergency Construction funds. *Id.* (1933) p. 14, Table 15. See too, Report of State Highway Commissioner of Tennessee for biennium ending June 30, 1934, p. 206–7, Table No. 29, showing disbursements on Federal-aid projects, July 1, 1932 to June 30, 1933, totalling $5,473,229, and receipts from United States Government on those projects of $4,018,219.

their incidents. Early legislation provided that: "The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction."[19] The Act of 1921 required each State to select and submit to the Secretary, for approval as the object of future Federal-aid expenditures, "a system of highways not to exceed 7 per centum of the total mileage of such state"; the system was to "be divided into two classes, one of which shall be known as primary or interstate highways, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways."[20] Congress transferred to the Secretary the powers and duties in relation to highways and highway transport originally conferred upon the Council of National Defense.[21] The War Plans Division of the General Staff and Corps of Engineers of the War Department promptly coöperated with the Bureau of Public Roads "in a study the purpose of which is the selection of those highways which are important from a military standpoint."[22]

Upon the Secretary devolves the duty of prescribing needful rules and regulations, including such recommendations as he might deem necessary for "insuring the safety of traffic on the highways."[23] Both the Federal-aid legis-

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[19] Act of July 11, 1916, c. 241, § 1, 39 Stat. 355.

[20] Act of November 9, 1921, c. 119, § 6, 42 Stat. 212. On June 30, 1934, the total mileage of the designated Federal-aid highway system in Tennessee was 3,982, of which 1,925.1 had been improved with Federal aid. Report of Chief of Bureau of Public Roads, September 1, 1934, p. 18. The mileage of the official state highway system, including the Federal-aid system is 7,247.3. Report of State Highway Commissioner of Tennessee, January 5, 1935, p. 102, Table No. 1.

[21] Act of November 9, 1921, c. 119, § 3, 42 Stat. 212.

[22] Report of Chief of Bureau of Public Roads, October 15, 1920, p. 7.

[23] Act of November 9, 1921, c. 119, § 18, 42 Stat. 212.

lation and the regulations adopted thereunder encourage the elimination of grade crossings.[24] The general principles adopted by the Bureau of Roads to be applied where possible treat " all intersections of a railway and highway at grade " as " a condition dangerous to traffic on the highway—which should not exist in a well designed and completed system "; treat topographic conditions as having only an " incidental bearing "; and refuse to treat " unobstructed view of the railway track from the highway " as constituting a safe crossing.[25] The Federal Government may pay one-half of the total cost of an underpass, even if the State is relieved by contributions of the railroad or others from paying the other half.[26]

3. Federal-aid highways are designed so that motor vehicles may move thereon at a speed commonly much greater than that of railroad trains.[27] The main purpose of grade separation therefore is now the furtherance of

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[24] By the Act of June 19, 1922, c. 227, § 4, par. 3, 42 Stat. 660, " railroad grade separations, whether by means of overhead or underpass crossings," are classed with " bridges," and are thus excepted from the limitations placed upon amount of federal aid which may be expended upon each mile of roadway. Act of July 11, 1916, c. 241, § 6, 39 Stat. 355; Act of February 28, 1919, c. 69, § 5; 40 Stat. 1200; Act of April 4, 1930, c. 105, § 3; 46 Stat. 141. Section 8 of Regulation 6, of Rules and Regulations for Carrying Out the Federal Highway Act (approved July 22, 1922) provides: " Grade crossings occurring in the Federal-aid highway system shall be classified for priority of improvement by agreement between the state highway departments and the Bureau of Public Roads." See too, Report of Chief of Bureau of Public Roads (1924), p. 7.

[25] General Memorandum of the Bureau of Public Roads, No. 13, July 5, 1922.

[26] Compare Act of June 19, 1922, c. 227, § 4, par. 3, 42 Stat. 660; Opinion of Solicitor of Bureau of Public Roads, July 24, 1922.

[27] In Tennessee, prior to 1925, the maximum permissive speed on public highways was 20 miles an hour. Public Acts of Tennessee, 1905, c. 173. By Act of 1925, c. 132, the maximum was increased to 30 miles. By Act of 1931, c. 82, all restrictions on speed were

uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams.[28] The railroad has ceased to be the prime instrument of danger and the main cause of accidents.[29]

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eliminated. The speed of motor vehicles is now often more than 75 miles. Compare Note (1933) 46 Harv. L. Rev. 838.

Prior to 1931, vehicles approaching railroad grade crossings were ordinarily required to come to a full stop at some point not less than 10 nor more than 50 feet from the railroad tracks. Public Acts of Tennessee, 1917, c. 36. By Act of 1931, c. 82, vehicles are not required to slow up or stop on approaching railroad grade crossings unless there is a positive signal of the immediate approach of a train or cut of cars, or when the State Highway Department designates a particular crossing as dangerous. Neither the existing or the proposed crossing at Lexington has been so designated. Compare *Baltimore & Ohio R. Co.* v. *Goodman*, 275 U. S. 66; *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98.

[28] Compare Report of Chief of Bureau of Public Roads (1929) p. 10: "On all roads and especially the important routes included in the Federal-aid system, solution of the problems raised by the increased traffic is not provided merely by building of higher types of surfaces. A general widening of the surfaces is also required, and in view of the greater speeds now customary and legally permissible, the easing and superelevation of curves, the cutting away of banks which obscure vision, and other improvements in detail which contribute to safety. The elimination of dangerous grade crossings is an expensive but urgently required improvement and on densely travelled roads it is already desirable to separate the grades of intersecting highways." See, too, Fisher, Connecticut's Regulation of Grade Crossing Elimination, Journal of Land & Public Utility Economics (1931) 367, 385.

[29] Accidents caused by motor vehicles running into trains amounted in 1928 to 22% of the total of grade crossing accidents; in 1929 to 24%; in 1930 to 26.5%; in 1931, to 28.6%; in 1932, to 30.6%; and in 1933, to 31.3%. Interstate Commerce Commission Accident Bulletins, Nos. 97–102, Table 78. Of the fatalities in automobile accidents in the United States during 1934, 3.3% resulted from collision with

It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the county courts, and paid for out of funds raised locally by taxation or otherwise.[30] They served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible

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railroad trains; of the persons injured, only one-half of 1% (.5%) were injured in such collisions. See pamphlet entitled "Thou Shalt Not Kill," p. 5, issued by The Travelers Insurance Co., February, 1935.

[30] Report of the Commissioner, Tenn. Dept. of Highways and Public Works (1926) p. 13. In 1915 there were 19,668 automobiles in Tennessee; in 1930, 368,259.

of traffic interruptions incident to crossing at grade is now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous.

4. Lexington is a rural community of 1,823 inhabitants located in a sparsely settled territory. The construction of the new highway with the underpass was not designated to meet local transportation needs. It was undertaken to serve as a link in a nation-wide system of highways.[31] State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected. The traffic on that highway was, and is, small. The grade crossing has presented no serious interruption to traffic. The trains are infrequent. Only six trains are operated now each way in every twenty-four hours; five of these moving between 10 P. M. and 6 A. M., when there is substantially no highway travel.[32] The grade crossing on the old route is protected by the most modern electrical device. That the crossing is not dangerous is attested by the fact that during the ten years following January 1, 1921, there were but two minor accidents; and these were settled for $50. That the present facilities are deemed locally both safe and adequate is attested by the fact that neither the city authorities, nor any one else, has suggested elimination of this grade crossing; that the grade crossing is to remain

[31] The old Highway No. 20, from Perryville, on the Tennessee River, to Lexington, is a winding gravel road which passes through several towns and crosses the Railway eight times at grade. The new route is a comparatively straight, paved road, crossing the river a short distance above Perryville, avoiding some of the towns served by the old road, and crossing the Railway only at the Lexington underpass.

[32] At the beginning of the suit, the Railway was operating seven trains every twenty-four hours.

unchanged after the new highway is put into use; and that the Clifton Street route will continue to be used for the local traffic.[33]

5. The underpass required is for a new and additional highway over which State Highway No. 20 is being re-routed, which will be a part of a Federal-aid route between Nashville and Memphis, the best route between those two cities; and which will connect at these termini with highways extending into other States. This highway was planned by the State Highway Department, acting in conjunction with the Bureau of Public Roads of the Federal Government. It is part of the secondary or inter-county system; but because of the expected traffic, the district engineer of the Bureau of Roads, in recommending its approval, characterized it as a route of primary importance. The underpass was prescribed, not upon consideration of local safety needs, but in conformity to general plans of the federal and state highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it is the policy of the federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. The requirement of the underpass, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades, are results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.

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[33] On February 16, 1933, while this suit was still in progress in the trial court, the new Route No. 20, between Perryville and Lexington, was opened to traffic, although a part of the Highway No. 100, connecting Route 20 with Nashville, was not yet paved. A witness for the railroad testified that traffic counts, taken on May 2 and 3, 1933, at the old Clifton Street crossing and at the new underpass, which is on the outskirts of the town, indicated that the underpass was then diverting only 20% of the traffic from the grade crossing.

6. The new highway, paralleling lines of the Railway and intended for rapid-moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway.[34] Buses will operate over the new highway in regular scheduled movements in the same way as passenger trains. Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carriers and by private concerns, will compete for the most profitable classes of freight. The competition besides reducing the volume of traffic will compel reduction of rates.

How disastrously such competition will affect the Railway's traffic and revenues is shown by its own experience since the State commenced, with the aid of the Federal Government, a system of highways paralleling the lines of the Railway. The gross passenger revenue fell from $5,661,011.08 in 1920 to $2,095,942.29 in 1930; and to $1,139,238 in the first nine months of 1931. The Railway carried, in 1920, 4,385,630 revenue pasengers; in 1930 only 680,347; and in the first nine months of 1931, only 370,445. The Railway's freight traffic experienced a similar decline. Of the less-than-carload freight, more than two-thirds was diverted from the railroads to motor trucks. In many

[34] The report of the District Engineer of the Bureau of Public Roads states: "When the Nashville to Linden connection is completed and the balance of this route to Jackson paved, it is expected that a large percentage of the traffic now using State Route No. 1, between Nashville and Jackson, will be diverted to this route, and it is confidently expected that several thousand vehicles will be using the route in the near future." The Railway introduced in evidence traffic counts on Route 1, showing the weekday foreign traffic amounting to 13% and 23% of the total motor vehicle traffic; and truck and bus traffic amounting to 16% and 19% of the total.

classes of carload traffic similar decreases were experienced by rail carriers. In 1921, the railroads brought into Nashville 5,689 cars of livestock—being 69.79 per cent of the total. In 1930, they brought in only 641 cars, being 21.24 per cent of the total. That the decrease in the Railway's traffic was due mainly to increased motor competition following the construction of the new highways, appears from the fact that the decrease began while general business was active; and that, even in the years of economic depression, the Railway's freight traffic was practically constant in the relatively few regions where its rail lines were not paralleled by hard surfaced highways; and that traffic increased when highways paralleling its lines were temporarily closed for reconstruction. The reduction in traffic and depletion in revenues has been particularly severe during the three years preceding 1933.

7. While the Railway, the sufferer from the construction of the new highway, is burdened with one-half the cost of the underpass, the owners of trucks and buses and others, who are beneficiaries of its construction, are immune from making any direct contribution toward the cost. It is true that one-half of the cost is by law to be borne by the highway fund of Tennessee (except in so far as it may be covered by the Federal aid),[35] and that the truck and bus owners and others contribute as taxpayers to that fund. But, while nearly 28 per cent. of the gross revenues of the Railway is required annually to pay the state and local taxes and the cost of maintaining the roadway acquired and constructed at its own expense, the state commercial motor carriers, which are supplied by the State with the roadway on which they move, pay in

[35] The acting chief of the Bureau of Public Roads stated in reply to a letter of the Railway's counsel, that he knew of no reason why the Federal Government would not, upon proper request, pay one-half of the cost of the underpass if it conformed to the Bureau's requirements.

state and local taxes not more than 7 per cent. of their gross revenues. The taxes laid upon truck and bus owners are clearly insufficient to pay their fair share even of the cost and maintenance of the highways which serve them. Motor vehicle taxes of all kinds, ad valorem, privilege, license plate, and others, will not pay for one-half of the annual expenditure in Tennessee for highways. The balance is being paid in part by general property taxes, in part by borrowing and in part by the Federal Government. Of the ad valorem taxes paid by the Railway to the State and the political divisions thereof, about 20 per cent. is allocated directly to roads, some of which are no longer feeders to its traffic, but serve as highways for the traffic taken by its competitors. The relative pro rata tax burden laid upon common carriers by motor vehicle is alleged to be one-fourth of that laid upon the railroads.[36]

Second. The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass. The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to pro-

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[36] The principal taxes paid by motor vehicle owners in Tennessee are the registration fees and gasoline taxes, the proceeds of which are used mainly for highway purposes. See Reports of State Highway Commissioner (1932) pp. 27, 32–3, 241, 285; (1934) pp. 22, 23, 199, 221. Besides these, the state levies a mileage tax upon commercial vehicles. Mileage taxes collected from intrastate operators go into the general state funds; those collected from interstate operators, into the highway fund. In 1932, it was testified, this tax yielded a gross revenue of approximately $100,000; and a net revenue of $40,000 for the general fund, and $18,000 for the highway fund. The ad valorem taxes paid by common carrier motor vehicles are negligible. In 44 of the richest counties, they aggregated in 1928, $1,371.97; in 1929, $1,714.01; in 1930, $1,185.04.

vide the particular convenience rests upon it. *Missouri Pacific Ry.* v. *Nebraska,* 164 U. S. 403; *Missouri Pacific Ry.* v. *Nebraska,* 217 U. S. 196; *Great Northern Ry.* v. *Minnesota,* 238 U. S. 340; *Great Northern Ry.* v. *Cahill,* 253 U. S. 71. These were the authorities relied upon by this Court in *Chicago, St. P., M. & O. Ry.* v. *Holmberg,* 282 U. S. 162, 167, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Drainage Commissioners,* 200 U. S. 561, 592. And it was stipulated that "in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands." But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare *Hadacheck* v. *Los Angeles,* 239 U. S. 394; *Miller* v. *Schoene,* 276 U. S. 272.[37] While moneys raised by general taxation may constitutionally be applied to purposes from which the in-

[37] Early cases establishing the rule that the entire cost of a grade separation may be imposed upon the railroad perhaps reflect the attitude that "the business of railways is specially dangerous," *Thorpe* v. *Rutland & Burlington R. Co.,* 27 Vt. 140, 150; and that "crossing highways and running locomotives, were they not authorized by law, would be nuisances." Mr. Justice Strong, dissenting in *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659, 679. Compare *Woodruff* v. *Catlin,* 54 Conn. 277, 295; 6 Atl. 849.

dividual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry.* v. *Nattin,* 277 U. S. 157, 159; *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Kansas City So. Ry.* v. *Road Imp. Dist. No. 6,* 256 U. S. 658.

It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost. *Chicago, B. & Q. R. Co.* v. *Nebraska,* 170 U. S. 57, 75; *Missouri Pacific Ry.* v. *Omaha,* 235 U. S. 121; that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; *Detroit, F. W. & B. I. Ry.* v. *Osborn,* 189 U. S. 383; *Northern Pacific Ry.* v. *Puget Sound & Willipa Harbor Ry.,* 250 U. S. 332; [38] and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. *Northern Pacific Ry.* v. *Duluth,* 208 U. S. 583, 592; *Cincinnati, I. & W. Ry.* v. *Connersville,* 218 U. S. 336; *Chicago, M. & St. P. Ry.* v. *Minne-*

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[38] By some state courts a different rule has been applied, particularly as to the original cost of the crossing. *Toledo, A. A. & N. M. Ry. Co.* v. *Detroit, L. & N. R. Co.,* 62 Mich. 564, 573; 29 N. W. 500; see *State ex rel. Northern Pacific Ry.* v. *Railroad Comm'n,* 140 Wis. 145, 160–1; 121 N. W. 919.

apolis, 232 U. S. 430; *Erie R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, 409. Compare *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 554. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required.[39]

Here were adduced—as tending to show that it was arbitrary and unreasonable to impose upon the Railway one-half the cost of this underpass—not only the revolution wrought by motor vehicle transportation and the creation and purposes of the Federal-aid highway system; but also the local conditions at Lexington; the character of the place where the underpass was ordered built; the extent of the railroad operations there; the character of the existing highway facilities, and of their use at that point; the location of the proposed highway; the occasion for its construction; the use contemplated; the reason why the underpass was ordered; the depletion of the Railway's revenues resulting from the construction of federal-aided highways, particularly in recent years; the necessary effect of this new highway upon its rail traffic and revenues; and the burden of taxation already borne by the Railway as compared with that of the owners of the motor vehicles who will use the new highway. No case involving like conditions has been found in any of the lower federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State.[40]

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[39] In *Lehigh Valley R. Co.* v. *Commissioners,* 278 U. S. 24, the crossing was over a state highway, which had originally been an " ancient county road laid out in 1811." In *Chicago, M. & St. P. Ry.* v. *Minneapolis,* 232 U. S. 430, the canal and footpath to be crossed were part of a park development.

[40] In the following cases, among others, decided since the Federal-aid Highway Act of 1921, orders of state commissions directing railroads to pay the whole, or part, of the cost of grade separation, on

The Supreme Court of Tennessee did not consider whether in view of the facts relied upon, it was arbitrary and unreasonable to impose upon the Railway one-half the cost of the underpass. It assumed that the state action was valid because it found that the action was taken "to promote the safety of persons traveling the highways at grade crossings as well as to promote the safety of persons traveling the railroads at such crossings by eliminating dangerous grade crossings"; and added: "Admitting the insistence of complainant that the primary object of highway construction and the object of federal contribution to highways is to invite and stimulate interstate traffic or travel upon the highways, it does not follow that the State roads are not primarily designed to serve the people of the State."

Third. We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the state court to hold

modern state highways, in several instances Federal-aid highways, were unsuccessfully challenged as unconstitutional under the particular circumstances; but in none of them, so far as appears, was the charge of arbitrariness supported on a record embodying facts similar to those presented above. *Chicago, N. S. & M. R. Co.* v. *Illinois Commerce Comm'n,* 354 Ill. 58 (1933); 188 N. E. 177; *Gulf, C. & S. F. Ry.* v. *Louisiana Public Service Comm'n,* 151 La. 635 (1922); 92 So. 143; *New Orleans & Northeastern R. Co.* v. *State Highway Comm'n,* 164 Miss. 343 (1932); 144 So. 558; *Chicago, R. I. & P. Ry.* v. *Public Service Comm'n,* 315 Mo. 1108 (1926); 287 S. W. 617; *State ex rel.* v. *Public Service Comm'n,* 297 S. W. 47 (Mo. 1927); *State ex rel.* v. *Public Service Comm'n,* 62 S. W. (2d) 1090 (Mo. 1933); *State ex rel.* v. *Public Service Comm'n,* 334 Mo. 832; 68 S. W. (2d) 691 (1933); *State ex rel.* v. *Public Service Comm'n,* 334 Mo. 985, 992, 995, 1001; 70 S. W. (2d) 52, 55, 57, 61 (1934); *State ex rel.* v. *Public Service Comm'n,* 335 Mo. 180; 72 S. W. (2d) 101 (1934); *North Dakota State Highway Comm'n* v. *Great Northern Ry.,* 51 N. D. 680 (1924); 200 N. W. 796; *Chicago, M. & St. P. Ry.* v. *Railroad Comm'n,* 187 Wis. 364 (1925); 204 N. W. 606.

that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. Compare *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 447; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 548–9; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 692; *Grant* v. *Leach & Co.,* 280 U. S. 351, 363.[41] Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight. Compare *Welch* v. *Swasey,* 214 U. S. 91, 105, 106; *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 365.

We have also no occasion to consider whether the Railway should bear a proportion of the cost of the underpass less than one-half. The propriety of a lesser charge was not, and could not have been, considered by the Commission; and it was not considered by either of the lower courts. It was conceded by counsel for the State that the only questions now reviewable are the validity of the statute which compelled the State Highway Commission to impose upon the Railway one-half of the cost; and the

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[41] See too, *McCandless* v. *Furlaud,* 293 U. S. 67; *Missouri ex rel. Wabash Railway* v. *Public Service Comm'n,* 273 U. S. 126, 131; *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169–172; *Hammond* v. *Farina Bus Line,* 275 U. S. 173, 174–5; *United States* v. *Brims,* 272 U. S. 549, 553; *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327; *Brown* v. *Fletcher,* 237 U. S. 583, 586–8; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 656–7.

validity of the order made thereunder. Compare *Norwood* v. *Baker,* 172 U. S. 269, 290–4; *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U. S. 288; *Thomas* v. *Kansas City Southern Ry.,* 261 U. S. 481; *Road Imp. Dist. No. 1* v. *Missouri Pacific R. Co.,* 274 U. S. 188; *Rowley* v. *Chicago & Northwestern Ry.,* 293 U. S. 102, 112.

Nor is it necessary to consider the contentions of the Railway that the state action here challenged, taken in conjunction with the burdens of taxation and systems of regulation to which the railroads and their competitors are subject, amounts to a denial of equal protection of the laws; and that it discriminates against, and imposes a burden upon, interstate commerce.

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

Reversed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO are of the opinion that there is nothing in the evidence or special facts relied on by the appellant to sustain a finding of arbitrary action by the State of Tennessee or its official representatives; that on the contrary the separation of grades is conceded to be necessary to give protection to travelers against perils created by the railroad; that a decision correct in result may not properly be reversed because the reasoning of the opinion is inadequate or erroneous; and that upon the facts stated in the record as well as upon any others within the range of judicial notice the appellant has failed to sustain the burden of establishing a violation of its constitutional immunities, and the decree should be affirmed.

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

MILLER v. UNITED STATES.

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

No. 342. Argued February 5, 6, 1935.—Decided March 4, 1935.

1. Section 11 (3) of the Act of December 24, 1919, amending § 302 of the War Risk Insurance Act, bringing conclusively within the term "total permanent disability" the specific loss of a hand and an eye, is limited in its operation to compensation allowances and has no application to war risk insurance. P. 438.
2. An administrative regulation, especially one which has the effect of creating an obligation, cannot be construed to operate retroactively unless the intention to that effect unequivocally appears. P. 439.
3. Because it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption, the provision of Veterans' Administration Regulation No. 3140 that the loss of a hand and an eye "shall be deemed to be total permanent disability under yearly renewable term insurance" is invalid. P. 439.
4. To entitle an insured under a policy of war risk insurance to benefits conditioned on total permanent disability, he has the burden of showing not only the character and extent of his injury but also that as the result of the injury he was disabled permanently from following any substantially gainful occupation. P. 440.
5. Under the circumstances of this case, *held* that an insured claiming disability benefits under a policy of war risk insurance had not sustained the burden of proving total permanent disability. P. 442.

It appeared that, while the insured was unable after the injury (loss of an arm and an eye) to follow the occupation in which he was engaged prior to entering the service (surveying), and while because of the injury he was thereafter unable to continue in employments requiring the use of both hands, yet he did undertake other gainful occupations, in which he failed not because of his physical condition but because of his general inaptitude for the work; also, that the policy was permitted to lapse upon his discharge and no claim of total permanent disability was made upon it until twelve years thereafter.

71 F. (2d) 361, affirmed.

CERTIORARI, 293 U. S. 551, to review a judgment affirming a judgment for the United States in an action upon a policy of war risk insurance.

Mr. James A. Lowrey, Jr., with whom *Mr. Wallace Miller* was on the brief, for petitioner.

Mr. Will G. Beardslee, with whom *Solicitor General Biggs* and *Messrs. Wilbur C. Pickett* and *Randolph C. Shaw* were on the brief, for the United States.

Messrs. James T. Brady and *Y. D. Mathes* filed a brief on behalf of the Veterans' Administration.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner enlisted in the United States Army June 7, 1917, and was honorably discharged April 3, 1919. On January 22, 1918, there was issued to him a war risk insurance policy, by the terms of which he was entitled to receive $57.50 per month in the event of his sustaining injuries causing total and permanent disability. No premiums were paid after the date of his discharge, and the policy then lapsed. Claim was made for insurance on June 5, 1931, twelve years later. The claim was disallowed by the Administrator of Veterans' Affairs on April 1, 1932. Thereupon, this action to recover judgment upon the policy was brought.

The facts upon which the action is based follow: On October 26, 1918, while in active service in France, petitioner sustained injuries in a railway accident resulting in the amputation of his right arm. He alleges that, for all practical purposes, the sight of his left eye was destroyed at the same time. Although the evidence shows that the defective condition of the eye was congenital, no point is made in respect of that fact; and for present purposes we put it aside. At the conclusion of the evidence before the trial court, the judge sustained a motion of the government for a directed verdict, on the ground that the injuries did not, as a matter of law, result in total and permanent disability. Verdict and judgment followed accordingly. The Court of Appeals affirmed the judgment, 71 F. (2d) 361, and we brought the case here on certiorari.

Article III of the Act of 1917 (c. 105, 40 Stat. 398, 405) relates to compensation for death or disability. The provisions in respect of insurance are dealt with separately (p. 409) in Article IV of the act; and this separation of the two subjects has been maintained in subsequent acts. The provision in respect of insurance (p. 409) is that upon application to the Bureau, the United States " shall grant insurance against the death or total permanent disability " of enlisted men and other classes of persons named in the act. The provision of the act (§ 302) with respect to compensation was enlarged by the amending act of December 24, 1919, c. 16, § 11(3), 41 Stat. 371, 373, so as to bring conclusively within the term " total permanent disability " the loss of one hand and the sight of one eye; and this has since remained the law. No such amendment was carried into the insurance article of the act; and, in that respect, the statute has never been changed.

Section 13 of the 1917 act, as amended, c. 77, 40 Stat. 555, confers upon the Director of the Bureau authority to make such rules and regulations, not inconsistent with the provisions of the act, as may be necessary or appropriate to carry out its purposes. Under that provision, a regulation was issued March 9, 1918, declaring— "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability." It was while this regulation was in effect that § 302 of the act was amended, as stated above, to provide in respect of compensation that the loss of one hand and the sight of one eye should be deemed total permanent disability. In May, 1930, Regulation 3140 was promulgated. That regulation, among other things, declares that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance."

Succinctly stated, petitioner contends (1) that § 302, as amended, applies to war risk insurance as well as to compensation allowances; (2) that regulation 3140 is within the power of the Administrator of Veterans' Affairs (who succeeded the Director of the Bureau), and controls the present case; and (3) that, the foregoing aside, the evidence was sufficient to justify a verdict in his favor.

First. The argument as to the first point, in brief, is this: The amendment to the compensation article of the act, adopted in 1919, must be construed and applied in the light of the regulation of March 9, 1918, of which regulation congressional knowledge and approval are to be assumed. By that regulation, the bureau adopted a uniform rule applicable alike to compensation and insurance; and, the contention seems to be, since Congress did not by express words limit the operation of the amendment of 1919 to compensation, it is fair to conclude that it was intended that the amendment, conforming to the principle of the regulation, should apply to both compensation and insurance. We see no warrant for that conclusion. When the regulation was adopted, neither Article III nor Article IV contained any specific provision in respect of the disabling effect of the loss of one hand and the sight of one eye. By the amendment, not only was the formal expression of the new rule confined to Article III, but the opening words of the amendment quite clearly indicate a legislative intention to confine its application to that article. These words are—"If and while the disability is rated as total and permanent, the *rate of compensation* [italics added] shall be $100 per month," etc. It is hard to see why the intention of Congress to limit the operation of the amendment to compensation allowances is not thus definitely and clearly manifested.

Second. Regulation 3140 was not adopted until eleven years after the insurance policy had lapsed and petitioner's cause of action thereon had fully matured. Undoubtedly, the regulation in terms declares that permanent loss of the use of one hand and one eye shall be deemed to be total permanent disability under an insurance policy such as that issued to petitioner. But the regulation is both inapplicable and invalid.

It is inapplicable because it contains nothing to suggest that it was to be given a retrospective effect so as to bring within its purview a policy which had long since lapsed and which had relation only to an alleged cause of action long since matured. The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears. *Twenty per Cent. Cases,* 20 Wall. 179, 187; *Chew Heong* v. *United States,* 112 U. S. 536, 559; *Fullerton-Krueger Co.* v. *Northern Pacific Ry. Co.,* 266 U. S. 435, 437. The principle is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only.

It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that *in respect of compensation allowances,* loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it. *United States* v. *200 Barrels of Whiskey,* 95 U. S. 571, 576; *Morrill* v. *Jones,* 106 U. S. 466, 467; *United States* v. *Grimaud,* 220 U. S. 506, 517; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610.

Third. The burden was on petitioner not only to show the character and extent of his injury, but also to show that the result of the injury was to disable him permanently from following any substantially gainful occupation. *Proechel* v. *United States,* 59 F. (2d) 648, 652; *United States* v. *McCreary,* 61 F. (2d) 804, 808. Petitioner lost his right arm; and the proof shows that he had been right-handed. Before the injury he was a practical engineer operating a surveying instrument; but with the loss of his right arm he could not operate such an instrument. In 1919 he obtained employment in a packing house, but found himself unable to retain the employment because it necessitated lifting heavy quarters of meat which he could not do with one arm. He was also unable to take orders for the house because he could not hold the receiver of the telephone and write orders at the same time. After three weeks, he was obliged to give up this employment. From time to time, he obtained other work which involved the use of both hands and which he was obliged to abandon. On the other hand, it appears that he worked for twenty-two months in the business of selling stocks on commission, and for a few months in that of selling goods, from neither of which he received much in the way of income—not because his injury incapacitated him for the work, but because he lacked ability as a salesman. It does not appear that he made any earnest endeavor to fit himself for this work, or any effort to engage in other work which ordinarily a one-armed man with one defective eye could do. See *United States* v. *Thomas,* 53 F. (2d) 192, 195. He testified that he had received an average of $90 a month from the government as compensation since his discharge. He also received $2,500 from the sale of a farm in which he had an interest. He was, therefore, not without resources with which to obtain proper training. It does not appear that he undertook to do so. It is by no means infrequent for one-armed men to make a good living and support others by performing work adapted to their condition. It is clear from the evidence that the failure of petitioner in some of the things he undertook to do was not because of his crippled condition, but because of his general inaptitude for the work. The mere fact that he was unable to follow the occupation of surveyor or to do work of the kind he had been accustomed to perform before his injury does not establish the permanent and total character of his disability. *Lumbra* v. *United States,* 290 U. S. 551, 559. His long delay before bringing suit is wholly incompatible with a belief on his part that he was totally and permanently disabled during the period while his policy was in force. *Id.,* p. 560; *United States* v. *Hairston,* 55 F. (2d) 825, 827. If petitioner thought himself totally and permanently disabled, it is difficult to understand why he waited twelve years before attempting to assert his rights. The only explanation he makes for his delay is that he thought a man had to die to get the insurance. How he discovered his error after the extraordinary lapse of time indicated above we are not told. He was intelligent, had completed the third grade at high school, and a year at military school. It does not seem possible that he had never read the policy, which so plainly insures against total permanent disability. In the light of all the circumstances, his explanation is not credible.

The court below, after reviewing the evidence and the decisions of this and other courts, reached the conclusion that petitioner had not sustained the burden of proof and that the trial court was justified in directing a verdict for the government. That conclusion is well supported by our recent decision in the *Lumbra* case, *supra,* and by other decisions. See, e. g., *Proechel* v. *United States, supra; United States* v. *Thomas, supra; Hanagan* v. *United States,* 57 F. (2d) 860, 861.

Judgment affirmed.

MANUFACTURERS' FINANCE CO. *v.* McKEY, TRUSTEE IN BANKRUPTCY.

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

No. 522. Argued February 13, 14, 1935.—Decided March 4, 1935.

1. The appointment of a receiver upon the application of a creditor is not an act of bankruptcy, except in cases of insolvency. P. 447.
2. A contract by which a corporation, in consideration of moneys to be advanced and services to be rendered, assigned designated accounts receivable and agreed to collect them, turn over the proceeds, as collected, to the assignee, and pay the assignee, as compensation for the advances and services, a specified percentage rate on the net face of the accounts, remains binding on receivers appointed by a federal court to carry on the corporation and its business as a going concern, if it was valid and binding on the corporation. P. 447.
3. The fact that such a contract seems hard and oppressive because of the heavy interest rate exacted of the corporation will not authorize the federal court of equity to ignore it or modify its terms if the contract is free from mistake or fraud and valid by

state law, and if the party claiming under it intervened in the receivership case, not to seek equity but merely for the protection of his legal rights under the contract. P. 448.

4. The maxim "He who seeks equity must do equity" presupposes that equitable, as distinguished from legal, rights have arisen from the subject matter in favor of each of the parties; and it requires that such rights shall not be enforced in favor of one who affirmatively seeks their enforcement, except upon condition that he accord to the other his correlative equitable rights. P. 449.
5. The maxim "He who comes into equity must come with clean hands" does not apply to one who comes in perforce to secure the fruits of a perfectly valid—albeit a hard—contract. P. 451.
6. This maxim, when applicable, requires that the party affected shall be denied relief *in toto*. P. 451.
7. Where, because of an error *in limine*, the merits and measure of a claim on the facts and law applicable have not been inquired into by the two lower federal courts, this Court may reverse the decrees of both and remand to the District Court for further proceedings in accordance with the opinion. P. 453.

72 F. (2d) 471, reversed.

Certiorari, 293 U. S. 552, to review the affirmance of a decree of the District Court, which allowed only in part a demand made by the present petitioner on the receivers of a corporation. The corporation became bankrupt while the case was pending in the court below, and the trustee in bankruptcy was substituted for the receivers.

Mr. Edward I. Rothbart, with whom *Mr. Samuel A. Dew* was on the brief, for petitioner.

Mr. Thomas L. Marshall for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

This writ brings here for consideration certain questions in respect of the enforcement of a contract between petitioner and Grigsby-Grunow Company (hereinafter referred to as the company) made October 5, 1933. The contract purports to be one for the purchase of designated accounts receivable for which petitioner promised to pay 100% of the actual net amounts thereof, less a charge for interest on the purchase money outstanding and less compensation for certain services rendered or to be rendered by petitioner. Fifty per cent. of the actual net amounts was to be paid in cash upon acceptance of the accounts; and the remainder, with specified deductions and additions, was to be paid immediately upon payment of the accounts. All original checks, drafts, notes, etc., received by the company in full or partial payment of any of the accounts so purchased were to be delivered to petitioner at its office on the day of their receipt. Attorneys' fees, costs and expenses incurred by petitioner were to be paid by the company. Compensation for services was to be at the rate of 83½% of 1/30th of 1% of the net face amount of accounts for each day from the date of purchase. Total charges against the company, as estimated by the parties, would equal about 20% per annum upon the outstanding balance of cash advances up to November 24, 1933.

Among other services, petitioner agreed to furnish to the company specified information upon request in respect of customers; to furnish information and advice as to the most desirable method of keeping books, records, and accounts of the company; to give, upon request, financial and business advice; to obtain and have on hand at all times funds to make prompt remittance for acceptable accounts; to supply forms needed for assignment of accounts; to put its credit and collection department at the disposal of the company and to furnish advice and opinions as to the form and legality of the company's sales contracts with its customers.

On November 24, 1933, in a suit brought by a creditor against the company, a federal district court for the northern district of Illinois appointed receivers to preserve the property and assets of the company. The company was solvent, having assets greatly exceeding its liabilities; and the receivers were directed to continue the business as a going concern and to do all things necessary to that end and to preserve the property. They were directed to take charge of all assets, books of account, etc.; to employ and discharge and fix compensation of employees, agents, etc.; to collect, sell and liquidate accounts, etc.; and to purchase on credit or otherwise such supplies and equipment as might be necessary to continue the business as a going concern. All persons were enjoined from interfering with the receivers in their possession of the property, the administration of their trust, or in the performance of the duties imposed upon them.

The receivers refused to pay over to petitioner anything collected on the assigned accounts unless directed to do so by the court. Subsequently, such direction being given, the receivers from time to time paid to petitioner various sums which, together with an amount collected by the petitioner itself, finally liquidated the amount due petitioner up to the time when the receivers were appointed. This liquidation was effected between the date of the receivership and December 29, 1933—a period of 35 days. Petitioner had already (on November 29, 1933) intervened in the receivership proceeding with a petition seeking compliance on the part of the receivers with the terms of its contract; and, after the liquidation to the extent stated above had been effected, petitioner continued the proceeding under its petition, demanding payment at the contract rate of a sum aggregating, at the end of the 35-day period, $4,394.48, together with reasonable attorneys' fees and costs. No accounts were purchased or assigned after the receivership, and the only obligation which remained was to carry out the terms of the contract in so far as they affected the accounts already assigned.

The gross sum which petitioner received under the contract for the time prior to the receivership was equal to the estimated 20% per annum on the moneys actually advanced to the company. The amount which it was claimed had accrued during the 35-day period was equivalent to an average of about 28.3% per annum from the date of the appointment of the receivers. The petition asked for reasonable attorneys' fees without specifying any amount. The only testimony on the subject was that of an attorney who said the sum of $7,800 was reasonable.

The district court entered a decree in favor of petitioner for $1,087.93, being at the rate of 7% instead of 28.3% per annum upon the outstanding balances. That court denied all further relief on the sole ground that petitioner's demand was inequitable and that in making it petitioner had not come into equity with clean hands. The decree was affirmed by the court of appeals. 72 F. (2d) 471. The basis of that court's decision cannot be better stated than in its own words [p. 473]:

" The insistence of appellant upon its claim for the full rate of interest plus attorneys' fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the Company savors too much of the exaction of the pound of flesh from the creditors of the insolvent company to be enforcible in a court of equity. If this case arose in an action at law between the original parties it may well be that the court could not refuse to enforce the contract according to its strictest terms. But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we can not feel that a court of equity is any place for him to press his demands."

February 18, 1934, while the appeal was pending in the court of appeals, a petition in bankruptcy was filed in the federal district court against the company; and this was followed by an adjudication of bankruptcy and the selection, April 16, 1934, and qualification, later, of the respondent McKey as trustee in bankruptcy. Subsequently, upon the application of both parties, McKey was substituted in the court of appeals as appellee.

In connection with the discussion which follows, two considerations are to be borne in mind. 1. When the receivers were appointed November 24, 1933, the company was solvent, having assets exceeding its liabilities in the sum of $13,000,000, and there is nothing in the record to suggest that this condition of solvency did not continue until after the completion of the 35-day period here involved. 2. What effect, if any, an act of bankruptcy might have had upon the life or operation of the contract we need not determine, since it is plain that the appointment of a receiver upon the application of a creditor is not an act of bankruptcy except in cases of insolvency. Title 11, U. S. C. § 21 (a), as amended May 27, 1926, Title 11, U. S. C. Supp. VII, § 21 (a) (5); *Nolte* v. *Hudson Nav. Co.*, 8 F. (2d) 859, 866; *Meek* v. *Beezer*, 28 F. (2d) 343, 345; *In re Edward Ellsworth Co.*, 173 Fed. 699, 700–701; *In re Guardian Building & Loan Assn.*, 53 F. (2d) 412, 415.

The effect of the contract was to bind the company as agent of petitioner to collect the purchased accounts and deliver to the latter the proceeds in kind from day to day as fast as they were collected. The receivers were equally bound.

The extent of the benefit which accrued to the company by reason of the advantages which evidently were expected to result from the opportunity to avail itself of the use of a large part of the proceeds of the accounts in advance of their payment, and from the services of petitioner, is not a matter for judicial inquiry. The parties dealt at arm's length. The contract was voluntarily executed by the board of directors of the company. It is not suggested that there was any mistake or any fraud or overreaching on the part of petitioner. The contract, it is conceded, is valid under the statutes of Illinois as construed by the Supreme Court of the State, *Tennant* v. *Joerns,* 329 Ill. 34; 160 N. E. 160; and, so far as the record discloses, it was performed on the part of petitioner in all respects up to, at least, the appointment of the receivers.

But the court below refused to be bound by the law of Illinois, upon a theory which it had advanced in a former case, *In re Chicago Reed & Furniture Co.,* 7 F. (2d) 885, namely, that a state law can not "abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience." With that view as here applied we are unable to agree.

The contract was in force when the receivers were appointed; and it continued effective until the expiration of thirty-five days thereafter, at which time it was brought to an end. During that period, if there were no default on petitioner's part, the contract, in so far as it remained unperformed, was enforcible against these receivers as theretofore it had been against the company. *Merchants' & Manufacturers' Securities Co.* v. *Johnson,* 69 F. (2d) 940, 945; compare *Fosdick* v. *Schall,* 99 U. S. 235, 251.

The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law. "If he asks no favors, he need grant none. But if he calls on a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases and do equity in order to get equity." *Fosdick* v. *Schall, supra,* at p. 253. The petitioner here did not seek equitable relief. It sought an enforcement of its legal rights; and, as said by the Supreme Court of Pennsylvania, "Legal rights are as safe in chancery as they are in a court of law, and however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant it if the one from whom it must come will be deprived of a legal right." *Colonial Trust Co.* v. *Central Trust Co.,* 243 Pa. 268, 276; 90 Atl. 189. The maxim "he who seeks equity must do equity" presupposes that equitable, as distinguished from legal, rights, substantive or remedial, have arisen from the subject matter in favor of each of the parties; and it requires that such rights shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consent to accord to the other his correlative equitable rights. But it is well settled, this court said in *Hedges* v. *Dixon County,* 150 U. S. 182, 189, "that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract."

Missouri, Kansas & Texas Trust Co. v. *Krumseig,* 172 U. S. 351, dealt with the precise question now under consideration. The situation presented there was the converse of that presented here, but the applicable principle is the same. There, suit was brought in equity in a state court to cancel a mortgage and certain notes secured thereby, on the ground that they embodied a contract bad for usury under a state statute. The suit was removed to a federal district court. That court granted the relief which was sought, conditionally, and its decree was affirmed by the circuit court of appeals. The state law declared such a contract to be wholly void. Both courts, however, invoking the equitable maxim "he who seeks equity must do equity," held that the plaintiff could not have the relief except on the generally recognized equitable condition that he pay to the lender the money loaned together with legal interest. This court, rejecting the view of the lower courts that a federal court in the exercise of its jurisdiction cannot be deprived of the power or relieved of the duty to enforce and apply the established principle of equity embodied in the maxim, said (pp. 358–359):

"We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State. . . . With the policy of the state legislation the Federal courts have nothing to do. If the States . . . think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

Compare *Brine* v. *Insurance Co.*, 96 U. S. 627.

Again, in *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 662, this court declined to apply the maxim in favor of a plaintiff who had failed to prove his case against a defendant, who had filed a cross-bill for defensive relief, holding that the maxim applied only against one who had affirmatively sought equitable relief.

It seems to be conceded, or, if not, it must be, that in an action at law against the receivers the court would have been bound to enforce the contract under review strictly in accordance with its terms. And, not to go beyond the case in hand, the rule is not otherwise where plaintiff, precluded by judicial order from proceeding at law, is obliged to submit the determination of his strictly legal rights to a chancery court because it has plenary control of the remedy.

The maxim that "he who comes into equity must come with clean hands," which the district court invoked and made the basis of its decision, for reasons similar to those already stated, is equally inapplicable. Certainly no unconscionable or inequitable conduct can be attributed to petitioner because it undertook to secure the fruits of a perfectly valid—albeit a hard—contract in the only court to which it could apply without being subject to a charge of contempt. Moreover, the maxim, if applicable, required the district court to halt petitioner at the threshold and refuse it any relief whatsoever—not to compromise with it, as the court did, by allowing a part of what was claimed. It seems plain enough that in no aspect of the case is any equitable principle involved.

The decisions of the court below in the present case and in the *Reed Furniture Co.* case, *supra,* are contrary to every other decision called to our attention or that we have been able to find involving a similar situation. A case practically the same as that presented here is *Merchants' & Manufacturers' Securities Co.* v. *Johnson, supra.* The contracts there involved were identical with the one here, and were likewise governed by the law of Illinois denying to a corporation the defense of usury. A receiver had been appointed to continue the business of the corporate parties to the contract. In deciding the case, the court of appeals of the Eighth Circuit emphasized the fact that the receiver was appointed (as the receivers were here) not to wind up the affairs of the corporations but to carry on their business as going concerns; and it held that he succeeded to their property subject to the contract rights which obtained at the time of his appointment. "He had no greater or different rights than those that might have been asserted by the companies." Reversing a decree of the district court, the court of appeals directed the entry of a decree in favor of the securities company for the full amount claimed, that amount to constitute a special lien upon all accounts receivable still unpaid and upon the proceeds of the same in the hands of the receiver. *In re International Raw Material Corp.*, 22 F. (2d) 920, involved a contract which, although not in identical terms, was in principle the same as that here under consideration. That court, resting upon a New York statute denying to a corporation the defense of usury, enforced the contract against a trustee in bankruptcy. It considered and definitely rejected the doctrine announced in the *Reed Furniture Co.* case, holding there was no justification for nullifying the agreement of the parties because the interest and commissions deliberately arranged were too large to satisfy the ideas of a court. See, also, to the same effect, *In re Gotham Can Co.*, 48 F. (2d) 540; *Ramsey* v. *Marlin Firearms Corp.*, 14 F. (2d) 314; *Estes* v. *E. B. Estes & Sons*, 24 F. (2d) 756.

We see no escape from the logic of these decisions.

The receivers alleged as a defense, apparently by way of recoupment, that they had expended a large sum of money in making collection of the accounts which inured to the benefit of petitioner by assuring to it a return of its advances. The district court found that the receivers, among other things, had expended $35,000 in advertising in order to maintain the good will of the company and preserve its receivables as live and valuable assets, and seemed to think that the petitioner had been benefited thereby. No suggestion, however, is made by either of the lower courts or by the respondent as to how much of these expenditures should be borne by petitioner; and the record affords no information by which the amount can be calculated. Even less does it appear how much, if any, of these expenditures related to the assigned accounts.

Whether, upon further and more definite evidence, under all the circumstances and consistently with the provisions of the contract, petitioner may be held for any part of these expenditures, we do not determine.

Both lower courts refused to allow any amount for attorneys' fees, apparently on the ground, which we have rejected, that to do so would be contrary to equitable principles. The contract seems to contemplate a reasonable allowance for such fees, but the amount, if any, remains to be fixed by the district court upon consideration of all pertinent facts relating to services rendered by the attorneys after the date of the receivership, and with due relation to its ultimate determination upon the merits.

As already appears from what has been said, the decrees below rest wholly on the untenable assumption that petitioner's rights are subject to denial or curtailment in virtue of equitable principles applicable only against one who affirmatively has sought equitable relief; and here that was not the case. The question, or extent, of petitioner's legal rights—relieved of this assumption—has been neither determined nor considered upon the facts or the applicable law. The duty and responsibility of that consideration and determination lie primarily with the lower courts; and, in the light of the peculiar circumstances disclosed by the record, should not, we think, be assumed in the first instance by this court. To the end that such duty and responsibility may be discharged, we conclude that the decrees of both courts should be reversed and the cause remanded to the district court for further proceedings in conformity with the foregoing opinion.[1]

We refrain from expressing any opinion as to the effect of any change of circumstances, due to the receivership and liquidation of petitioner's claims during the period in question, upon the amount, if any, of petitioner's recovery, or any opinion in respect of the law applicable thereto.

Reversed.

HILDEGARD SCHOENAMSGRUBER *v.* HAMBURG AMERICAN LINE.*

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

No. 424. Argued February 8, 1935.—Decided March 4, 1935.

1. In a proceeding in admiralty based upon a contract containing a provision for the arbitration of claims arising out of a breach, an order of the District Court, pursuant to the U. S. Arbitration Act, directing the parties to proceed to arbitration, staying the trial of the action pending the filing of the award, and retaining jurisdiction to enter its decree upon the award, is interlocutory and not appealable. P. 456.
2. The order is not an interlocutory injunction within the meaning of § 129 of the Judicial Code, allowing appeals from interlocutory orders in certain proceedings. P. 456.

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[1] This disposition of the case finds precedent in a large number of decisions of this court, among which the following are cited as examples: *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 372; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 656-7; *Brown* v. *Fletcher,* 237 U. S. 583, 586; *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 692; *United States* v. *Brims,* 272 U. S. 549, 553; *Grant* v. *Leach & Co.,* 280 U. S. 351, 363.

* Together with No. 425, *Gustav Schoenamsgruber* v. *Hamburg American Line.* Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

3. Section 129 of the Judicial Code applies only to suits in equity, except as otherwise specified therein; appeals from interlocutory decrees in admiralty are limited to such only as determine the rights and liabilities of the parties. Jud. Code, § 129, as amended by Act of April 3, 1926. P. 457.

70 F. (2d) 234, affirmed.

Certiorari, 293 U. S. 547, to review a decree dismissing appeals from an order of the District Court for arbitration in a proceeding in admiralty.

Mr. Harry H. Semmes submitted for petitioners.

Mr. Joseph C. Sharp, with whom *Messrs. J. Hampton Hoge* and *S. Hasket Derby* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner in No. 424 is the minor daughter of petitioner in No. 425. Each filed a libel in admiralty in the district court for northern California against respondents claiming damages on account of personal injuries alleged to have been inflicted upon the child while she was a passenger on the Oakland. The libels assert that the wrongful act constituted a breach of respondents' contract to carry the child safely from Hamburg, Germany, to San Francisco. The answers, in addition to denying material allegations of the libels, allege that the contract contained the following provision: "Complaints based on failure to fulfill the terms of this contract, claims for damages, etc., on the part of the passenger must be filed with the representative (agent) of the Hamburg-American Line at the port of destination immediately after the arrival of the ship. In the event that an agreement cannot be reached, both parties agree to refer the matter to the German Consul at the port of destination whose decision will be acceptable to both parties, subject to the laws applicable thereto."

Respondents applied to the court for arbitration under the United States Arbitration Act, 9 U. S. C., §§ 1-15. Opposing the application, petitioners maintained that the child was carried as a passenger, not in pursuance of the contract alleged in the answers, but upon one that contained no provision for arbitration. After hearing and upon consideration of the evidence, the court ordered the parties to proceed to arbitration, stayed trial of the action pending the filing of the award, and retained jurisdiction to make orders and enter decrees contemplated by the Act or otherwise permitted or required by law. 9 U. S. C., § 8. Petitioners appealed; the Circuit Court of Appeals held the orders to be interlocutory and nonappealable and dismissed the appeals. 70 F. (2d) 234.

Claiming that decision to be in conflict with *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons* (C. C. A.–2), 62 F. (2d) 1004, and that the orders are final, petitioners applied for, and this court granted, writs of certiorari. Later, but before argument of these cases, we announced decisions in *Enelow* v. *New York Life Insurance Co.,* 293 U. S. 379, and *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449, which definitely show that the orders are not final and therefore not appealable under § 128, Judicial Code, 28 U. S. C., § 225.[1]

Abandoning their claims that the orders are final, petitioners by supplemental brief argue that they are appealable under § 129, 28 U. S. C., § 227. They rely on the *Shanferoke* case. That decision was based on the *Enelow*

[1] And see *General Electric Co.* v. *Marvel Co.,* 287 U. S. 430, 432. *Arnold* v. *Guimarin & Co.,* 263 U. S. 427, 434. *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701. *Ex parte Peterson,* 253 U. S. 300, 305. *Ex parte Simons,* 247 U. S. 231, 239. *Rexford* v. *Brunswick-Balke Co.,* 228 U. S. 339, 345. *Latta* v. *Kilbourn,* 150 U. S. 524, 539. *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536, 545, *et seq.* *De Liano* v. *Gaines,* 131 U. S. Appendix, p. ccxiv. *Craighead* v. *Wilson,* 18 How. 199, 201.

case. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the *Enelow Case,* they are not interlocutory injunctions within the meaning of § 129. And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor.

Save as therein otherwise specified, § 129 extends only to suits in equity. Its provisions relating to injunctions and receivers were put in present form by the Act of February 13, 1925, 43 Stat. 937. Before that Act, appealability was expressly confined to suits "in equity."[2] Its legislative history shows the omission of the phrase was not intended to remove that limitation.[3] While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction[4] and, except in limitation of lia-

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[2] § 7, Act of March 3, 1891, 26 Stat. 828, as amended February 18, 1895, 28 Stat. 666; June 6, 1900, 31 Stat. 660; April 14, 1906, 34 Stat. 116; March 3, 1911, § 129, 36 Stat. 1134. And see *The Transfer No. 21,* 218 Fed. 636.

[3] See "A General Review of H. R. 10479, Sixty-seventh Congress, to amend the Judicial Code, further to define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes, by the Chief Justice of the United States" (Senate Committee Print, 68th Congress, 1st Session, p. 4). "An analysis of S. 2060, to amend the Judicial Code, further to define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes." (Senate Committee Print, 68th Congress, 1st Session, p. 10.)

[4] *Watts* v. *Camors,* 115 U. S. 353, 361. *The Eclipse,* 135 U. S. 599, 608. *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 194.

bility proceedings,[5] they do not issue injunctions.[6] The Act of April 3, 1926, 44 Stat. 233, added to § 129 a provision granting appeal "from an interlocutory decree in admiralty determining the rights and liabilities of the parties." This specification, taken in connection with the other parts of the section, indicates that Congress did not intend to make appealable any other interlocutory decrees in admiralty. Moreover, there is nothing to indicate that Congress intended to allow repeated appeals in the class of cases to which these belong. That would be contrary to its long-established policy.[7] The orders under consideration may be reviewed on appeal from the final decrees, § 128, Judicial Code. Petitioners' contention that they are interlocutory injunctions under § 129 is without merit.

Affirmed.

GREAT NORTHERN RAILWAY CO. *v.* SULLIVAN.

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

No. 499. Argued February 14, 15, 1935.—Decided March 4, 1935.

1. Where shipments originating in Canada moved to delivery points in the United States on combination through rates, an award of reparation based on a finding by the Interstate Commerce Commission that the proportional rate for that part of the route from the international boundary to destination was unjust and unreasonable in violation of the Act, can not be sustained in the absence of claim or finding that the through rate was unreasonable. P. 462.

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[5] *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. *The San Pedro*, 223 U. S. 365. *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 218. *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 278.

[6] Benedict on Admiralty (5th ed.), § 70. *Paterson* v. *Dakin*, 31 Fed. 682.

[7] *Forgay* v. *Conrad*, 6 How. 201, 205. *McLish* v. *Roff*, 141 U. S. 661, 665.

2. Where a through rate is just and reasonable, there is no damage to the shipper as a result of a participating carrier receiving an undue proportion of the charges. P. 463.

72 F. (2d) 587, reversed.

CERTIORARI, 293 U. S. 551, to review a judgment affirming a judgment of the District Court in a proceeding to enforce an award of reparation by the Interstate Commerce Commission. 142 I. C. C. 543.

Mr. J. P. Plunkett, with whom *Mr. R. J. Hagman* was on the brief, for petitioner.

Mr. Stanley B. Houck, with whom *Mr. Ormie C. Lance* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent sued the railway company in the District Court for Minnesota to recover $3,990.20 awarded by the Interstate Commerce Commission as reparation. 142 I. C. C. 543. That court gave him judgment; the Circuit Court of Appeals affirmed. 72 F. (2d) 587. We are called on to decide whether the uncontroverted facts and those found by the commission are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant.

Plaintiff, a wholesale dealer, bought carloads of lignite at mines on the Canadian Pacific in Alberta, and sold the same to retail dealers and others in North Dakota at Great Northern stations in competition with other fuels. The shipments moved on combination rates, being the sum of proportionals made respectively by the Canadian Pacific and the Great Northern,[1] applicable from mines to destinations, and on through bills of lading issued by the former, routing over its railroad to junction with the latter

[1] Canadian Pacific Tariff No. W–5379, I. C. C. No. W–723. Great Northern I. C. C. No. A–5681, G. F. O. No. 435–G.

at the international boundary and thence over the railroad last mentioned to places of delivery. The combination rates necessarily reflect agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other. Each proportional necessarily was a part of the through rate and was capable of use only as such. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2. They show the basis of division of charges between connecting carriers and serve precisely as do agreed divisions of charges based on joint rates. A proportional differs from a local rate in that it covers only terminal service at place of receipt or at place of delivery but cannot, as does the local rate, cover both. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U. S. 654, 663.[2] There

[2] As to inland hauls of exports or imports by sea to or from foreign countries see Mobile Chamber of Commerce *v.* M. & O. R. Co., 23 I. C. C. 417, 425: "It is easy to be misled by the use of the term 'through bill of lading,' for it implies that the originating carrier has undertaken to carry the traffic from point of origin to an ultimate point of destination—say, from Memphis to Liverpool—and that the originating carrier under the present law is responsible for the fulfillment of this contract of carriage. But the through bill of lading that is given by the rail carriers upon movements of traffic through Mobile . . . to Europe is not at all of this character. It is a receipt on the part of the railroad for the carriage to the port and a receipt by the ship line for the carriage from the port to Europe. This receipt for carriage beyond the port is not given in the name of the rail carrier, but in the name of the steamship company . . . is in reality a separate bill of lading which is attached to the railroad bill of lading . . . This practice of making a divisible bill of lading showing the ultimate destination of the shipment by water, both of the rates being sometimes stated separately—the rate to the port and the rate from the port, or only one rate being stated, that to the port—is a railroad practice instituted for the convenience of all concerned. The ship line is operated in physical connection with the rail line, but the rail line receives none of the ship line's earnings, makes no division of a through rate with the ship, suffers none of its loss, and takes none of its hazards. The furnishing of a through bill of lading

was no applicable joint rate. The Great Northern collected the charges and paid the Canadian Pacific amounts equal to the proportionals established by the latter.

Plaintiff and another complained to the commission alleging the proportionals filed by the Great Northern and other American carriers to be unjust and unreasonable, in violation of § 1. They did not attack the combination or allege aught against the Canadian Pacific proportional. They prayed merely reasonable maximum American proportionals and reparation to the extent of the excess over such maxima. The commission found the American proportionals to be unjust and unreasonable so far as they exceed specified maxima which it made applicable in lieu of those assailed. It made no finding concerning the reasonableness of the Canadian proportionals or of the combination through rates. There being no claim or finding to the contrary, the charges collected on these shipments must be deemed to have been just and reasonable. Indeed, dissenting commissioners, without opposition on the part of the others, state that they are affirmatively shown to be reasonable.

The Great Northern was by the Act required to file tariffs establishing reasonable proportionals to constitute

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in connection with ship-side delivery at the port of Mobile is not a contract by the rail carrier for shipment beyond at a specified rate, or at any rate, nor does it carry with it any of the elements attaching to the through bill issued by a rail carrier with a rail connection. To call it a through bill of lading is therefore in fact a misnomer."

Through bills of lading issued under the Interstate Commerce Act, § 25 (4) (5), do not constitute "an arrangement for continuous carriage or shipment" within the meaning of the Act. Bills of Lading, 52 I. C. C. 671, 730. Export Bill of Lading, 64 I. C. C. 347.

The Commission deals with rates applicable to inland hauls above referred to and with reparation without consideration of charges or factors attributable to transportation by sea or in foreign countries. Ullman *v.* Adams Express Co., 14 I. C. C. 340, 345. Chamber of Commerce of N. Y. *v.* N. Y. C. & H. R. R. Co., 24 I. C. C. 55, 74. Henry Marble Co. *v.* B. & O. R. Co., 146 I. C. C. 414.

and to be kept in force as factors in the combination through rates applicable to plaintiff's shipments. Its failure to specify just and reasonable charges was a violation of the Act. And, if injured thereby, plaintiff is entitled to recover the damages sustained in consequence of such failure. 49 U. S. C. § 8. Plaintiff invokes *News Syndicate Co.* v. *N. Y. Central R. Co.,* 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.* But neither is like this case. In each, shipments moved from an adjacent country into the United States on through rates made by joint action of the participating foreign and American carriers. The American carrier, having violated the Act by failure to file any tariff to cover its part of the transportation, collected freight charges found to be excessive and, as one of two or more joint tort-feasors, was held liable to the extent that the charges it exacted were in excess of what the commission ascertained to be just and reasonable. But here the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of " joint " instead of the " combination " through rates that they did establish.

If defendant's proportional, added to that established by the Canadian Pacific, had produced an unjust rate, then to the extent that the total charge was excessive, plaintiff would have been subjected to a disadvantage in competing with others selling fuel in the same territory. The commission has power to determine rates to be unreasonable in violation of § 1 without determining whether their application has resulted or will result in pecuniary loss or damage to the shipper. It may determine whether a proportional constituting a part of a combination rate violates § 1, without passing upon the validity of the rate as a whole. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 776. But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable. *News Syndicate Co.* v. *N. Y. Central R. Co., supra,* 187. And defendant, enforcing an unlawful charge to be divided between it and the Canadian Pacific, would be liable as a joint tort-feasor for the full amount of the excess. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, 231, *et seq.* *News Syndicate Co.* v. *N. Y. Central R. Co., supra.* *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.*

But the claim before us has no such foundation. Plaintiff seeks to recover the difference between the proportional established by defendant and that found by the commission to be just and reasonable, notwithstanding its fuel was hauled from mines to the competitive field for a just and reasonable charge. That position cannot be maintained, for as to the shipments here involved, the Great Northern proportional cannot be applied save as it is a part of the through rate. There was a single charge which, though based on the combination rate, was precisely the same in amount as if the rate had been jointly made. As shown by our decision in *Louisville & N. R. Co.* v. *Sloss-Sheffield Co., supra,* 234, the division among connecting carriers of charges based on joint rates—those involved in that case were constructed out of existing proportionals—is no concern of the shipper. The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. Morrell & Co. *v.* N. Y. Central R. Co., 104 I. C. C. 104, 128. The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co., supra,* 234. *Parsons* v. *Chicago & Northwestern Ry.,* 167 U. S. 447, 460.

Reversed.

PARAMOUNT PUBLIX CORP. *v.* AMERICAN TRI-ERGON CORP.

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

No. 254. Argued February 4, 5, 1935.—Decided March 4, 1935.

1. The application of an old process to a new and closely analogous subject matter, plainly indicated by the prior art as an appropriate subject of the process, is not invention. P. 473.
2. Evidence of prompt acceptance and great utility in industry of a patented method adds little weight to the claim of invention as opposed to mere mechanical skill, where the need satisfied was not an old and recognized one, but arose only after the patent was applied for and as the result of a public demand for an advance of the art made possible by mechanisms subsequently developed and not covered by the patent. P. 474.
3. A defendant sued for patent infringement is not estopped to set up the defense of no invention by reason of having himself applied, unsuccessfully, for a patent covering the same claims. P. 476.
4. Patent No. 1,825,598, issued September 29, 1931, to Vogt et al. (Claims 5–9, inclusive, and Claim 11) for "a process for producing a combined sound and picture positive film, for talking moving pictures," etc., *held* invalid for anticipation and want of invention.

   The process claimed is for combining sound and picture records on a single film and comprises three steps: first, the simultaneous photographing of a picture record and a record of the accompanying sound, each on a separate negative; second, the separate development of the two negatives in a manner appropriate to each; and third, the printing, either simultaneously or successively, from the two negatives of the sound record and the picture record side by side on a single positive film. It does not embrace either a method or a device for recording or for reproducing sound, or a method of synchronizing the two records, or the use of a single film in the reproduction of combined sound and picture records, or any method or device for printing the positive record from the two separate negatives. Every step in it is an application of the art of photography: simultaneous exposure of the negatives, their separate development, and printing from them a single positive film. It is as applicable to any other form of photographic record as to a photographic sound record—as effective in the production of the one as the other; and its importance to the sound picture industry arises only from the fact that the single film, bearing the two records, for which no patent is claimed, is of great utility in that industry.

71 F. (2d) 153, reversed.

CERTIORARI, 293 U. S. 587, to review a decree sustaining a patent in a suit for infringement. For the decision of the District Court, *contra*, see 4 F. Supp. 462. The patent was applied for March 29, 1922.

Mr. William D. Mitchell, with whom *Messrs. Charles Neave* and *Thomas G. Haight* were on the brief, for petitioner.

Messrs. Theodore S. Kenyon and *George Wharton Pepper*, with whom *Messrs. Thomas D. Thacher* and *S. Mortimer Ward, Jr.*, were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted to review a decree of the Court of Appeals for the Second Circuit, 71 F. (2d) 153, which held valid and infringed the process patent of Vogt and others, No. 1,825,598, of September 29, 1931, "for producing combined sound and picture films." It reversed the district court, which had held the patent invalid for anticipation and want of invention. 4 F. Supp. 462. The several claims involved relate to a method of producing a single photographic film by printing upon it a picture record and a sound record from separately exposed and developed negatives. The positive film thus produced is useful and extensively used in reproducing sound and picture records in the exhibition of "talking moving pictures."

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The respondent, which was the plaintiff below, is a patent holding company, and acquired the patent by assignment. The petitioner, which was the defendant below, is a producer of motion pictures, and the defense of the present suit has been conducted on its behalf by the Electrical Research Products, Inc., a subsidiary of the Western Electric Company.

In order that the precise nature of the claims may be understood, it will be necessary first to describe briefly the procedure and the mechanisms employed in recording and reproducing talking motion pictures, although neither is embraced in the claims of the patent. Several methods have been devised for recording sound and reproducing it in connection with the exhibition of motion pictures. A familiar one is the disc system, by which the sound vibrations are mechanically recorded upon and reproduced from discs by a stylus, which receives the sound vibrations for recording and transmits them from the disc to a loud speaker in reproducing the sound.

Another method, important here, is the photographic film system, in which the sound vibrations are recorded upon a photographic record. In the typical procedure, used by the petitioner, the sound waves to be recorded are received by a microphone so devised as to produce variable electric currents whose variations correspond to the variations in the sound waves received. The electric currents thus produced are amplified and transmitted to two metal threads, arranged side by side so as to form a narrow slit about 1/1000 of an inch in width, called a light valve. The current produces vibration of the metal threads with consequent variation of the light passing through the valve exactly corresponding to the sound vibrations to be recorded. In recording sound, a moving sensitized photographic film is exposed to a beam of light passed through the vibrating light valve which is activated by the electric currents varying according to the sound vibrations. The exposed film is then developed and the "sound record" thus produced is printed from it upon a positive film, where it appears as a series of short parallel lines of varying light density, corresponding to the sound vibrations, which have controlled in turn the variation in the electric current passing to the light valve and the corresponding variations of light passing through it to the sensitized film.

In reproducing the recorded sound the procedure is reversed. The positive sound film is passed before a light slit, from which the light passes through the sound record film to a photoelectric cell, which is devised to produce a variable electric current corresponding to the light variations caused by the moving record film. The electric current thus produced is amplified and passed to a loud speaker, where it is translated into sound vibrations.

Successful operation of the talking motion picture involves synchronization of the sound and picture records. The difficulties of synchronization are obvious where the recorded picture and sounds are separately reproduced by independent mechanisms. Success has been achieved, and convenience in use of the two records secured, by uniting them upon a single positive film and passing it at the requisite uniform speed through a single apparatus designed to reproduce both the sound and the picture. A familiar method of securing the two records on a single film is by photographing simultaneously the picture record and the sound record side by side upon the same strip of film and then printing from the developed negative a single positive film. This method was disclosed in the Haines, British Patent, No. 18,057, of 1906; in the Ries Patent, U. S. No. 1,473,976, of 1923, applied for in 1913; in the French patent to MacCarty, No. 448,757, of 1912; and in the Walker Patent, U. S. No. 1,186,717, of 1916. Another method is by mechanically uniting the two positive records, as by cementing them together, after they have been separately printed from negatives separately exposed and developed. This was disclosed by the Bullis Patent, U. S. No. 1,335,651, of March 30, 1920, applied for in 1915. A third method, which is that claimed by the patent in suit, is by printing the two records on a single positive film from separately exposed and developed negatives.

In petitioner's practice separate photographic films, moving at uniform speed, are separately exposed, so as to record a scene and the accompanying sounds, and are then separately developed. The two records are then printed, side by side, on a single positive film, used for reproducing the picture and the sound. In the typical reproducing apparatus the film passes successively through the picture projector and the mechanism for sound reproduction. Accordingly, synchronization is accomplished by arranging the two records on the positive film in such relative positions that the two records will simultaneously reach the two mechanisms for reproducing them, so that the reproduced sound will accompany the reproduced scene of the picture as it did when they were recorded.

The specifications of the patent state broadly that it is of great advantage to arrange the sound record sequences and the picture record sequences on a single film. They then describe the technical difficulties in developing the negative when the sound and picture records are photographed on a single film. They point out that the picture record is made under changing light conditions, which may result in over or under exposures, which will require correction and a treatment in the development of the negative different from that suitable to the sound sequence, which is recorded under different light conditions. It is said that it is practically impossible to secure the variations in treatment required for developing the two types of record where the two sequences, picture and sound, are photographed upon the same film strip. The specifications then describe the invention as follows:

"According to the present invention the difficulty is overcome by either employing entirely separate films for the simultaneous photographing of the sound and picture negatives, or films which are connected during the photographing, but which are separated from one another before the developing, then separately developing the negatives if and in the manner required to remedy the difficulties, and then printing both sequences—picture and sound—on the different portions of the same positive film."

Respondent relies on Claims 5 to 9, inclusive, and Claim 11 of the patent, of which it is agreed Claim 5 is typical. It reads as follows:

"A process for producing a combined sound and picture positive film, for talking moving pictures, comprising photographing a sequence of pictures on one length of film, and simultaneously photographing on another length of film a corresponding sequence of sounds accompanying the action, separately developing the two negatives in a manner appropriate for each, and printing the sound and picture negatives respectively upon different longitudinally extending portions of the same sensitized film, to form the sound sequences at one side of and along the picture sequence."

It will be observed that the claimed method or process is for combining sound and picture records on a single film and comprises three steps: first, the simultaneous photographing of a picture record and a record of the accompanying sound, each on a separate negative; second, the separate development of the two negatives in a manner appropriate to each; and third, the printing, either simultaneously or successively, from the two negatives of the sound record and the picture record side by side on a single positive film.

It is important to indicate the more significant features of the sound reproduction procedure and mechanisms which are not embraced in the claims. The patent does not claim either a method or a device for recording or for reproducing sound, or a method of synchronizing the two records, or the use of a single film in the reproduction of combined sound and picture records, or any method or device for printing the positive record from the two separate negatives.

While the claims speak of a process or method for producing a combined sound and picture positive film, it is obvious that the process described and claimed has no necessary connection with sound reproduction. The positive film bearing the combined sound and picture records is a product of the photographic art. The method claimed for producing it relates exclusively to that art. It is neither a method of sound recording or sound reproduction. It claims only a process every step in which is an application of the art of photography: simultaneous exposure of the negatives, their separate development, and printing from them a single positive film. The process is as applicable to any other form of photographic record as to a photographic sound record. It is as effective in the production of the one as the other. Its importance to the sound picture industry arises only from the fact that the single film, bearing the two records, for which no patent is claimed, is of great utility in that industry.

An examination of the prior art can leave no doubt that the method, as thus described and clearly restricted by the patent, lacks novelty and invention. The only step in respondent's method, for which any advance could be claimed over earlier methods, is the process of uniting two records on a single positive film by printing them from separate negatives. The Bullis Patent, already mentioned, and the Craig Patent, U. S. No. 1,289,337, of 1918, had shown the simultaneous exposure and separate development of sound and picture films, the advantages of which, as well as the advantages of the double record on a single film, were well known. The claim to invention is thus narrowed to the single contention that the patentees secured the benefit of these well known advantages by resort to the added step of uniting the two separate photographic records, sound and picture, by printing them on a single film.

The practice of printing separate photographs from separately developed negatives upon a single positive film has long been known to photographers. Standard photographic dictionaries, published here and abroad between 1894 and 1912, describe the procedure for "combination printing" of a single positive picture from separately developed negatives.[1] The procedure is shown to have been followed in the laboratories of the Eastman Kodak Company for many years prior to April, 1921, the date claimed for the present patent, and before that date the Company had made special materials for use in combination printing.

The practice was also well known in the motion picture industry. In 1908 the American Mutoscope & Biograph Company made and released in the United States a motion picture, *The Music Master.* This picture was prepared by separately photographing two scenes. From the separately developed negatives a positive was printed, showing the two pictures on the same strip of film, from

[1] Wilson's Cyclopaedic Photography, published by Edward L. Wilson, New York, 1894; Encyclopaedic Dictionary of Photography, by Woodbury, published by Scovill & Adams Co., New York, 1896; Konig, published by Dawbarn & Ward, Ltd., London, 1906; Cassell's Cyclopaedia of Photography, by Jones, published by Cassell & Company, Ltd., 1912. (The references, with quoted portions of the texts, were made a part of the record by stipulation.) The publication last mentioned states that "combination printing had its origin in 1855, when Berwick and Annan, of Glasgow, exhibited a picture printed from two different negatives—a figure and a landscape"; numerous later examples of the practice are given.

which the motion picture was reproduced. The British Downing Patent, No. 6,727, of 1913, discloses methods and apparatus for producing motion pictures, accompanied by printed words used by the actors, the two records being printed on a single positive film from separately exposed and developed negatives. The Messter Patent, U. S. No. 1,286,383, of 1918, and the British Patent, No. 21,467, issued to Rossi in 1909, each discloses a method of printing two separately exposed picture records on a single film. The Craig Patent, already mentioned, calls for separate exposure and development of sound and picture negatives, simultaneously recorded, and their printing on opposite sides of a single film. The Greensfelder Patent, U. S. No. 1,254,684, of 1918, discloses a method for printing, from separately exposed and developed negatives, a sound record and a picture record on the same side of a single positive film. The function of the sound record differed radically from that contemplated by respondent's patent, but this is immaterial so far as its printing is concerned, in which the Greensfelder patent does not substantially differ from that in suit. While these patents did not specifically mention the separate development of the negatives of the two records, it appears that they were photographed separately upon separate negatives, and the record shows that at their dates the state of the art was such as to require separate development of the two negatives. The practice and advantage of separate development are also shown to be well known. This and other evidence in the record abundantly supports the finding of the trial court that as early as 1908 it was common practice in the motion picture industry to print, on standard positive film, composite pictures from separately developed negatives.

The simultaneous photographing of sound and picture records was not novel, separate development of the negatives was well known, the advantage of uniting the two records, sound and picture, on a single film was well known, and the method of uniting two photographic picture records by printing them from the separate negatives was well known.

This use of an old method to produce an old result was not invention. See *Electric Cable Co.* v. *Edison Co.,* 292 U. S. 69, 80, and cases cited. Even if it be assumed that the Greensfelder patent did not anticipate that of respondent, because the sound record there mentioned was designed directly to operate musical instruments, rather than a loudspeaker, all that was novel in the claimed method was its application in the production of a combined sound and picture record, instead of a combination of two picture records. To claim the merit of invention the patented process must itself possess novelty. The application of an old process to a new and closely analogous subject matter, plainly indicated by the prior art as an appropriate subject of the process, is not invention. *Brown* v. *Piper,* 91 U. S. 37, 41; see *Pennsylvania R. Co.* v. *Locomotive Truck Co.,* 110 U. S. 490, 494; *Dreyfus* v. *Searle,* 124 U. S. 60, 64; *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 184, 185. However wide the differences between the procedures and results of sound reproduction from film on the one hand, and picture reproduction on the other, the method of producing photographic sound and picture records and uniting them on the positive film are identical, for both sound and picture records, from the time of exposure of the negatives until the single film is completed. With knowledge of the well understood advantages of the union of the two records on a single film, it required no more than the expected skill of the art of photography to use an old method of printing photographically the two negatives upon a single positive.

Against this conclusion respondents throw the weight of voluminous evidence, showing the practical utility and widespread use of the patented process, which prevailed with the court below as sufficient to establish invention.

It is said that, however simple and obvious the method may appear to be now that it is in successful use, no one before the patentees had used it for producing the union of a sound and a picture record. Respondents also allege that the positive film produced by its method is more useful than any it had been possible to produce by other methods, and that it has found all but universal acceptance. These considerations, it is urged, should turn the scale in favor of invention.

Laying aside the objection that it is only when invention is in doubt that advance in the art may be thrown in the scale, *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664, 685; *Smith* v. *Dental Vulcanite Co.*, 93 U. S. 486, 495, 496, we think the evidence of utility and prompt acceptance of the patented method, in the circumstances of this case, adds little weight to the claim of invention. The greater utility of respondent's film over those effecting the union of the two records by other methods does not establish the novelty of the method. Evidence of great utility of a method or device, it is true, may in some circumstances be accepted as evidence of invention. Where the method or device satisfies an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill. For mere skill of the art would normally have been called into action by the generally known want. See *Loom Co.* v. *Higgins,* 105 U. S. 580, 591; *Krementz* v. *Cottle Co.,* 148 U. S. 556, 560; *Hobbs* v. *Beach,* 180 U. S. 383, 392; *Carnegie Steel Co.* v. *Cambria Iron Co.,* 185 U. S. 403, 429, 430; *Expanded Metal Co.* v. *Bradford,* 214 U. S. 366, 381.

But the state of the motion picture art, as it is disclosed by the present record, indicates that there was no generally recognized demand for any type of film record, for the reproduction of sound to accompany motion pictures, until after the present patent was applied for. See *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59, 73.

Compare *McClain* v. *Ortmayer,* 141 U. S. 419, 428; *Grant* v. *Walter,* 148 U. S. 547, 556.

Before 1926 motion pictures were silent and there was no convincing evidence that the public would prefer the sound picture. In that year Warner Brothers exhibited sound pictures produced by the disc system, provided by the Western Electric Company. At that time the Company had for some years been experimenting with both film and disc systems for recording sound, and it had electrically recorded disc phonographic records which were in commercial use. The addition of sound on disc to motion pictures involved merely the attachment of the phonographic type of turntable to the ordinary motion picture projector, without any extensive modification of the projector or the film printing machines then in use, as was later necessary in order to employ the film method. Moreover, as has already been indicated, skilfully devised mechanisms were required for successfully recording and reproducing sound by the film method, a problem distinct from any method of uniting the sound and picture records upon a single film.

Until these appliances were perfected there could be no pressing and generally recognized demand for the sound film. It was not until after the public interest in sound pictures was disclosed, in the summer of 1926, that the mechanism for recording and reproducing sound by the film method was carried to a state of perfection which would warrant its production in commercial form. The light valve was produced in commercial form in December, 1926, and the first installations were in 1927. A rival system, of the Fox Case Company, for recording and reproducing sound by film, was not brought to completion until after 1926. Other problems engaging the attention of experimenters in this field were the necessary improvement of the photo-electric cell, the devising of suitable emulsion for sound negatives, of apparatus for "mixing" the sound to be recorded, and the mechanical perfection of the apparatus for reproducing sound from film. See *Altoona Publix Theatres* v. *American Tri-Ergon Corp.*, decided this day, *post*, p. 477.

Thus there is no basis shown by this record for the contention that advance in this phase of the motion picture industry was awaiting the development of the combined sound and picture record upon a single positive film. On the contrary, the inference seems plain that the advance awaited the public acceptance of the sound motion picture; that when the public demand became manifest it was still necessary to develop suitable mechanisms, not embraced in the patent, for the reproduction of sound from film. There had long been, ready at hand, knowledge in the photographic art which would enable one skilled in the art to produce the film suitable for use in the new apparatus. Indeed, at some time before 1924, Wente, engaged in research on sound film apparatus for the Western Electric Company, without any knowledge of the work of the patentees of the present patent, had prepared the combined sound and picture positive film by printing it from separate negatives, separately exposed and developed.

The bare fact that several inventors, in the early stages of sound reproduction, working independently, of whose knowledge and skill in the photographic art we know little or nothing, failed to resort to a method, well known to that art, for printing a combination film for which there was then no generally recognized need, does not give rise to the inference of invention.

The court below also rested its decision on the ground that the petitioner is estopped to deny the validity of the patent by the application of Wente, April 8, 1924, who was in the employ of the Western Electric Company, for a patent for an improvement in recording and printing the sound record film, which contained claims broad enough to include the method claimed by respondent. These claims were rejected by the Patent Office as reading on the British Patent 178,442 of the present patentees, and the Greensfelder patent, already mentioned. However inconsistent this early attempt to procure a patent may be with petitioner's present contention of its invalidity for want of invention, this Court has long recognized that such inconsistency affords no basis for an estoppel, nor precludes the court from relieving the alleged infringer and the public from the asserted monopoly when there is no invention. *Haughey* v. *Lee,* 151 U. S. 282, 285.

Reversed.

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

ALTOONA PUBLIX THEATRES, INC. v. AMERICAN TRI-ERGON CORP. ET AL.*

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

No. 255. Argued February 5, 1935.—Decided March 4, 1935.

1. The bringing together of old elements in a mechanism involving no new principle, to produce an old result, however skillfully it be done, and even though the result mark an advance in efficiency and utility, is but an exercise of mechanical skill and not invention. P. 486.
2. It is the claims of a patent that define the invention. P. 487.
3. A deficient claim can not be aided by reading into it parts of other claims or of the specifications. P. 487.
4. A plain absence of invention is not overcome by evidence of utility and commercial success of the thing patented, even though the evidence indicate that a long-felt want was satisfied. P. 487.

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* Together with No. 256, *Wilmer & Vincent Corp. et al.* v. *American Tri-Ergon Corp. et al.* Certiorari to the Circuit Court of Appeals for the Third Circuit.

5. Utility and commercial success are not persuasive evidence of invention where the want satisfied by the device patented was not long-felt or generally recognized at the time of the patent application but arose later as an incident to a subsequent advance in the art attendant upon the creation of a new public demand and upon the development of numerous devices not covered by the patent. P. 488.
6. Under R. S., § 4917, a patentee is not permitted to add by disclaimer a new element to the combination previously claimed, whereby the patent, originally for one combination, is transformed into a new and different patent for the new combination. Such a disclaimer is void. P. 490.
7. A patent amended by disclaimer speaks from the date of the original patent; a reissued patent (R. S., § 4916), with respect to the claim amended, speaks from the date of the re-issue. P. 491.
8. The filing of a disclaimer abandons the claims affected, and they can not be revived upon the ground that the disclaimer was invalid. P. 492.
9. Patent No. 1,713,726, issued May 21, 1929, to Vogt et al., for "a device for phonographs with linear phonogram carriers," *held* void for want of invention as to claims numbered 5, 7, 17, 18, and 19, relating to a combination apparatus for securing uniformity of speed in machines used for recording talking motion pictures, in which the gist of the invention claimed consists of the addition of a flywheel to the cylinder over which the film or ribbon passes near the "translation point" at which the sound is recorded upon or reproduced from it; also *held* void as to claim 9, originally allowed for the arcuate flexing of the film record, and claim 13, for a combination for projecting a narrow line of light upon and through the moving film to a photo-electric cell, both of which claims were invalidated by attempts to add the flywheel device by disclaimers. Pp. 480, 488.

72 F. (2d) 53, reversed.

Certiorari, 293 U. S. 528, to review the affirmance of decrees in favor of the present respondents in two suits brought by them for infringement of their patent. For the District Court's opinion see 5 F. Supp. 32. The cases were tried together and were brought here on a single record. One of the plaintiffs, American Tri-Ergon Corporation, claimed as owner of the patent. The other, Tri-Ergon Holding, A. G., claimed as licensee.

Messrs. Merrell E. Clark and *Thomas G. Haight,* with whom *Messrs. Charles Neave* and *Henry R. Ashton* were on the brief, for petitioners.

Mr. Thomas D. Thacher, with whom *Messrs. S. Mortimer Ward, Jr., Page S. Haselton,* and *Hugh M. Morris* were on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

These cases come here on certiorari to review a decree of the Court of Appeals for the Third Circuit, 72 F. (2d) 53, which affirmed a decree of the district court, 5 F. Supp. 32, holding valid and infringed the patent of Vogt and others, No. 1,713,726, of May 21, 1929, applied for March 20, 1922, for a " device for phonographs with linear phonogram carriers." The two cases were tried together and have been brought here on a single record.

Petitioners, the defendants below, are operators of motion picture theatres whose sound reproduction machines are said to infringe certain claims of the patent in suit. The Radio Corporation of America is defending both cases on behalf of its subsidiary, R. C. A. Photophone, Inc., which supplied the petitioners' machines. Respondents, plaintiffs below, are a patent holding company and a licensee.

Of the nineteen claims of the patent, seven are in issue. Five of them, numbered 5, 7, 17, 18 and 19, relate to a device for securing uniformity of speed in machines used for recording and reproducing talking motion pictures, and are referred to as the " flywheel claims." They may conveniently be considered separately from Claims 9 and 13 which present the flywheel claims in a different aspect. Claim 9, as originally allowed, was for the arcuate flexing of the film record; Claim 13 similarly was for a combination for a means for projecting a narrow line of light upon and through the moving film to a photoelectric cell in sound reproduction. A disclaimer, filed by respondent shortly before the trial, purports, in varying terms, to add the fly-wheel device to each of these claims.

While both courts below have found invention and sustained the patent, the Court of Appeals, as will presently appear in more detail, did not pass on the separate claims in issue, but found invention in a combination of elements not embraced in any single claim. In consequence, the case presents no question of concurrent findings by the courts below that the claims in issue severally involve invention, see *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 180.

The Flywheel Claims.

"Phonograms," or sound records, for the recordation and reproduction of sound, are of several types. They include discs or cylinders to which, and from which, sound vibrations are transmitted mechanically by a stylus in the course of recording, and reproducing, sound. Long strips of waxed paper carrying sound record grooves, similarly made, are used. Other types are long strips of film on which sound is photographically recorded, and long steel wires on which sound variations have been magnetically recorded. The claims relate to an improvement in mechanisms for recording and reproducing sound by the use of linear photographic record carriers. The typical procedure in recording and reproducing sound by the use of photographic film strips is described in *Paramount Publix Corp.* v. *American Tri-Ergon Corp.,* decided this day, *ante,* p. 464, and need not be repeated here.

Both in recording and reproducing sound, by any form of record, uniform speed in the movement of the phonogram is of the highest importance, in order to secure evenness and regularity in the reproduced sound. The specifications state:

" The recording and the reproduction of sound waves by the use of linear phonogram carriers such as film strips, steel wires, and so forth, can only be effected in absolutely satisfactory manner, even after the removal of all other occurring difficulties, when the speed of the record carrier is uniform both for the receiving and the reproduction, and when in both cases no variations of any kind occur. Especially in the case of musical reproductions is the record extremely sensitive to the slightest variations of speed."

They also point out that linear phonograms such as the photographic film, because of their lightness and their want of the momentum afforded by a revolving cylinder or disc record, are peculiarly susceptible to irregularities of movement caused by the play or friction in the projections and connections of the many parts of the propelling apparatus, and declare that:

"According to the present invention, this draw-back which attaches to all hitherto known propulsion mechanisms for linear phonogram records is obviated by the arrangement, that the light sound record has given to it at the controlling point the property of a weighty mass. This is attained by the arrangement that the record carrier (a film strip or the like) is firmly pressed against one or more rollers connecting with a heavy rotating mass, so that the record moves in exact conformity with the rollers and the rotating mass."

The references to a "weighty mass" or "a heavy rotating mass" used to secure uniformity of motion are to the familiar flywheel. The specified "property" of a rotating heavy mass is inertia, the tendency of matter in motion to continue in motion, the force of which is increased by the mass of the moving body. It is the property which gives to the flywheel its peculiar efficacy in securing uniformity of speed in mechanisms with which it is associated.

The first three flywheel claims, 5, 7 and 17, are apparatus claims. The others, 18 and 19, are, in form, method claims, defining the method of securing uniformity in

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movement of the record film by apparatus defined by Claims 5 and 17. Claim 5 reads as follows:

"In phonographic apparatus in which the sound record is formed on an elongated ribbon of inconsiderable mass, having feeding perforations therein, the combination of

[a] means for supporting and progressing the record ribbon from one point to another point and past an intermediate point at which the record is made on the ribbon in recording or from which the record is taken from the ribbon in reproducing, including

[1] a toothed cylinder over a portion of which the ribbon passes adjacent to said intermediate point, the teeth of said cylinder engaging the perforations of the ribbon,

[2] a fly-wheel associated with said cylinder, and

[3] means for rotating said cylinder, under control of said fly-wheel at uniform speed."

Claim 17 is substantially the same as Claim 5, the principal difference being that it uses the word "cylinder" instead of "toothed cylinder."

Claim 7 adds to the essentials of Claim 5 "a resilient connection between said driving member [the shaft] and fly wheel, and stop means for limiting the amount of yielding of said resilient connection." This so-called flexible or elastic flywheel connection, designed to overcome more gradually the inertia of the flywheel, and thus to secure an improved flywheel operation, was anticipated, among others, by the Constable Patent, U. S. No. 1,425,177, of August 8, 1922, applied for June 24, 1918, as the district court found. Its inclusion in Claim 7 may therefore be disregarded as adding nothing more to the present patent than the flywheel without it.

There is no serious contention, nor could there well be, that the combination apparatus, for moving the linear record past the translation point at which the sound is recorded or reproduced, involves invention without the flywheel. Mechanisms for moving linear strips, or ribbons, by passing the strip over a revolving drum or cylinder, are a familiar type in the arts. They have long been used in the motion picture industry when it was desired to employ the linear strips at an intermediate point for sound and picture reproduction, and the like. Such a mechanism, for moving a picture film past the translation point in a motion picture projector, is shown by the Holst Patent, U. S. No. 587,527, of 1897. A like mechanism for recording or reproducing sound, or both, by the use of linear photographic records, is shown in the British Duddel Patent, No. 24,546, of 1902, and the Reis Patent, U. S. No. 1,607,480, of 1923, filed May 21, 1913. Still other mechanisms, like two of the figures attached to the specifications of the patent in suit, show the translation point at the film-carrying cylinder. Examples are the patents of Bock, U. S. No. 364,472, of 1887; Byron, U. S. No. 1,185,056, of 1916; and Pedersen, British Patent No. 115,-942, of 1918. The gist of respondent's contention, as is shown by the claims and the parts of the specifications already quoted, is that by the addition of the flywheel to this familiar mechanism the patentees have succeeded in producing a new type of machine for recording and reproducing sound by the photographic film method. It is insisted that the new device, because of its greater accuracy and precision of film movement, is so useful and constitutes such an advance in the sound motion picture art as to entitle it to the rank of a patentable invention.

The flywheel set upon a revolving shaft is an ancient mechanical device for securing continuity and uniformity of motion when brought into association with any form of machinery moved by intermittent force or meeting with irregular or intermittent resistance.[1] So universal is its

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[1] The addition of the flywheel to the steam engine, in 1758, was said to be "a very important addition to the engine, and though sufficiently obvious, it is ingenious and requires considerable skill and address to make it effective." Robison, Mechanical Philosophy, Vol. 2, p. 105, 1822.

use for that purpose in every type of machinery that standard treatises on mechanics, long before the application for the present patent, gave the mathematical formulae for ascertaining the appropriate weight and dimensions of a flywheel, moving at a given speed, required to overcome known variations in force resistance, and prescribed the standard procedure for locating the flywheel in as direct association as possible with that part of the mechanism at which the intermittent resistance occurs. See article, Mechanics, § 121, Encyclopaedia Britannica, Eleventh Edition, 1911; Angus, Theory of Machines, pp. 261–272, 1917.

The specifications of the patent recognize that disc and cylinder records themselves operate as flywheels and proceed to show how a want of a similar control may be supplied, in mechanisms used for motion picture film records, by the addition of the flywheel. But this was specifically taught by the prior art for the reproduction of sound both from phonographic and film records. There are in evidence two Edison commercial recording machines with cylindrical records, which were used at the Edison Recording Laboratory in New York before 1921. Each has a heavy flywheel mounted directly on the shaft of the record-carrying cylinder. These flywheels produce a high degree of "speed constancy." An application for a patent by Edison in 1879 on a claim for a combination "with the phonograph cylinder and its shaft, of a flywheel" was rejected by the examiner April 7, 1879, as covering the "use of a flywheel as ordinarily used with machinery for the purpose of securing uniformity of motion." Upon reconsideration the claim was again rejected on the ground that the adaptation of the flywheel required only the exercise of "ordinary good judgment" and not the inventive faculty.

The Underhill Patent, U. S. No. 995,390, of 1911, exhibits a phonograph machine with a flywheel to secure uniformity of motion of the record. The specifications state that the flywheel is used for that purpose. The patent of Alexander Graham Bell and others (Bell & Tainter), U. S. No. 341,213, of 1886, discloses a mechanism for recording sound on a photographic plate rotated at uniform speed under the control of a flywheel. Another patent of the same inventors, U. S. No. 341,214, of 1886, discloses a flywheel used in association with a mechanism for moving a linear, wax-coated phonograph record at uniform speed for recording and reproducing speech and other sounds. That the record used was not photographic is unimportant. The problem of securing uniformity of motion of the record is the same for either type of linear sound record, as the present patent itself establishes, by classing together all types of linear records as exhibiting the "problem" to which the patent is directed. The French Dragoumis Patent, No. 472,467, of 1914, shows a film record moved by a cylinder turning on a shaft carrying a large wheel, obviously acting as a flywheel, though not described as such. See *American Road Machine Co.* v. *Pennock & Sharp Co.,* 164 U. S. 26, 38. The flywheel was mounted on the shaft of the record-carrying cylinder at the translation point. Finally, the British Pederson Patent, already referred to, shows a photographic sound record carried by a cylinder as it passes the translation point. His specifications, after pointing out that sound is "exceedingly sensitive to variation in rotating speed," and that it is necessary to obviate this during the recording and reproducing operations, state that this may be done "by providing particularly large flywheels."

There are numerous patents showing the like use of the flywheel in apparatus for reproducing motion pictures from film. That of Holst, already noted, shows in detail an apparatus exhibiting every element of Claim 5 except that its use is for reproducing motion pictures instead of sound from film. The toothed cylinder is located adjacent to the intermediate point which is the point of translation. The flywheel is associated with the cylinder by being attached to the rotary shaft carrying the cylinder.

An improvement to an apparatus or method, to be patentable, must be the result of invention, and not the mere exercise of the skill of the calling or an advance plainly indicated by the prior art. *Electric Cable Joint Co.* v. *Brooklyn Edison Co.,* 292 U. S. 69, 79, 80. The inclusion of a flywheel in any form of mechanism to secure uniformity of its motion has so long been standard procedure in the field of mechanics and machine design that the use of it in the manner claimed by the present patent involved no more than the skill of the calling. See *American Road Machine Co.* v. *Pennock & Sharp Co., supra,* 41. Patents for devices for use both in the motion picture art and in the art of sound reproduction, notably the Holst, the Bell & Tainter, the Dragoumis patents, and the Edison application, already noted, plainly foreshadowed the use made of the flywheel in the present patent, if they did not anticipate it. The patentees brought together old elements, in a mechanism involving no new principle, to produce an old result, greater uniformity of motion. However skilfully this was done, and even though there was produced a machine of greater precision and a higher degree of motion-constancy, and hence one more useful in the art, it was still the product of skill, not of invention. *Hailes* v. *Van Wormer,* 20 Wall. 353, 368; *Grinnell Washing Machine Co.* v. *Johnson Co.,* 247 U. S. 426, 432–434; *Powers-Kennedy Contracting Corp.* v. *Concrete Mixing & Conveying Co.,* 282 U. S. 175, 186. Its application in recording sound or reproducing it, by use of a particular type of linear record, the photographic, analogous so far as the problem of uniformity of motion was concerned to other types used by Bell & Tainter and Dragoumis, was not invention. See *Paramount Publix Corp.* v. *American Tri-Ergon Corp., ante,* p. 464.

There is some suggestion in respondent's brief and argument that the location of the flywheel adjacent to the toothed cylinder is an element in the invention which contributed to the success of the mechanism. But as has already been indicated such location is but the teaching of the art. In any case, the claims call only for the flywheel located upon the shaft or in association with the cylinder. No particular location is mentioned.

The Court of Appeals, in upholding the patent, made no examination of its separate claims, but treated the patent throughout as though it were a combination of five distinct elements, the photoelectric cell, the arcuate flexing of the film, the flywheel, the flexible connection of the flywheel and the optical slit, although nowhere in the patent is any such combination claimed. The patent thus upheld is one which was neither claimed nor granted. Under the statute it is the claims of the patent which define the invention. See *White* v. *Dunbar,* 119 U. S. 47, 51, 52; *McClain* v. *Ortmayer,* 141 U. S. 419, 423–425; *The Paper Bag Patent Case,* 210 U. S. 405, 419; *Smith* v. *Snow, ante,* p. 11. And each claim must stand or fall, as itself sufficiently defining invention, independently of the others. See *Carlton* v. *Bokee,* 17 Wall. 463, 472; *Russell* v. *Place,* 94 U. S. 606, 609; *Leeds & Catlin Co.* v. *Victor Talking Machine Co.,* 213 U. S. 301, 319; *Symington Co.* v. *National Malleable Castings Co.,* 250 U. S. 383, 385; *Smith* v. *Snow, supra;* Walker on Patents, § 220, 6th ed. As none of the flywheel claims as drawn define an invention, none can be aided by reading into it parts of the specifications, or of other claims, which the patentees failed to include in it.

The court below, attributing the rapid development of the sound motion picture industry to the invention in the patent in suit, thought, as respondent earnestly argues here, that its utility and commercial success must be accepted as convincing evidence of invention. But we think that want of invention would have to be far more doubtful than it is to be aided by evidence of commercial success, indicating that it brought realization of a long-felt want. *Smith* v. *Dental Vulcanite Co.,* 93 U. S. 486, 495, 496; *Grant* v. *Walter,* 148 U. S. 547, 556; *DeForest Radio Co.* v. *General Electric Co.,* 283 U. S. 664, 685; compare *McClain* v. *Ortmayer, supra,* 428. Moreover, the record fails to show that there was any long-felt or generally recognized want in the motion picture industry for the device defined by the flywheel claims, or that the use of sound motion pictures was delayed by the inability of those skilled in the art to add a flywheel to the apparatus in order to give the desired uniformity of motion to linear phonograms. See *Paramount Publix Corp.* v. *American Tri-Ergon Corp., supra.* There was no public demand for sound motion pictures before 1926, when the disc system of the Western Electric Company was first publicly used in conjunction with moving pictures. Before change to the photographic film system could be accomplished, it was necessary to await the development of numerous electrical devices not embraced in the present claims. Among them were adequate amplifiers, loud speakers and microphones. Progress in the perfection of these appliances was achieved rapidly, after the public acceptance of the sound picture in 1926, through the efforts of many independent workers in the field. When the need arose for a mechanism suitable to move film records with such speed-constancy as to reproduce the sound successfully, it was forthcoming. Only the skill of the art was required to adapt the flywheel device to familiar types of mechanism to secure the desired result.

Claims 9 and 13.

The court below made no reference to the contention of petitioner, urged here and below, that the patent was rendered invalid by the disclaimer filed shortly before the trial of the present suit. The patent as issued contained the following claims:

"9. The method of translating sound or similar vibrations to or from a film record by the use of light varied in accordance with the sound, which comprises flexing the film arcuately longitudinally at the point of translation and rapidly and uniformly moving the film in a circumferential direction past said point."

"13. An apparatus for reproducing speech, music or the like sounds from vibrations recorded on a film, by the use of a line of light varied in accordance with the sound, comprising a photoelectric cell, means for imparting to the film a rapid and uniform motion longitudinally of the film past said cell, a source of light projection for providing said light, and an objective lens in the path of said light and spaced from the film for directing said light as a converging narrow line impinging on the film at a point in the region of the focal point of said lens, said light passing through the film and on to said cell, the space between said lens and the film being free of obstructions to said light."

In 1933 respondents, by appropriate procedure, disclaimed:

"(b) The method as set forth in claim 9, except wherein the uniformity of movement of the film past the translation point is effected by subjecting the portion of the film passing said point to the control of the inertia of a rotating weighty mass.

"(c) The combination as set forth in claim 13, except wherein a flywheel is operatively connected with the film through means which imparts uniformity of motion of the flywheel to the film."

While the effect of the disclaimer, if valid, was in one sense to narrow the claims, so as to cover the combinations originally appearing in Claims 9 and 13 only when used in conjunction with a flywheel, it also operated to add the flywheel as a new element to each of the combinations described in the claims. The disclaimer is authorized by R. S. § 4917, which provides that when "through inadvertence, accident, or mistake . . . a patentee has claimed more than that of which he was the . . . inventor . . . his patent shall be valid for all that part which is truly and justly his own," provided that he or his assigns "make disclaimer of such parts of the thing patented as he shall not choose to claim . . . stating therein the extent of his interest in such patent." While this statute affords a wide scope for relinquishment by the patentee of part of the patent mistakenly claimed, where the effect is to restrict or curtail the monopoly of the patent,[2] it does not permit the addition of a new element to the combination previously claimed, whereby the patent originally for one combination is transformed into a new and different one for the new combination.

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[2] The disclaimer and re-issue statutes were adopted to avoid the rule that if one claim is invalid the whole patent is void. *Moody* v. *Fiske,* 2 Mason 112, 118; see *Ensten* v. *Simon, Ascher & Co.,* 282 U. S. 445, 452; *Hailes* v. *Albany Stove Co.,* 123 U. S. 582, 589. The use of the disclaimer has been upheld where the elimination from the patent of the matter not relied upon did not operate to enlarge the monopoly of the patent, but narrowed it, as by eliminating in their entirety some of the claims of the patent, *Sessions* v. *Romadka,* 145 U. S. 29, 40; see *Union Metallic Cartridge Co.* v. *United States Cartridge Co.,* 112 U. S. 624, 642, or by striking out an alternative method or device, *Dunbar* v. *Myers,* 94 U. S. 187, 192, 194; *Hurlbut* v. *Schillinger,* 130 U. S. 456; *Carson* v. *American Smelting & Refining Co.,* 4 F. (2d) 463, 469, 470 (C. C. A. 9th), or by limitation of a claim or specification by deletion of unnecessary parts, *Carnegie Steel Co.* v. *Cambria Iron Co.,* 185 U. S. 403, 435, 436; *Marconi Wireless Telegraph Co.* v. *DeForest Radio Telephone & Telegraph Co.,* 243 Fed. 560, 565 (C. C. A. 2nd), or by limiting the claim to a specific type of the general class to which it was applied, *Minerals Separation, Ltd.* v. *Butte & Superior Mining Co.,* 250 U. S. 336, 354; *United Chromium, Inc.* v. *International Silver Co.,* 60 F. (2d) 913, 914 (C. C. A. 2nd); *Seiberling* v. *Thropp's Sons Co.,* 284 Fed. 746, 756, 757 (C. C. A. 3rd).

If a change such as the present could validly be made, it could only be under the provisions of the re-issue statute, R. S. § 4916, which authorizes the alteration of the original invention in a re-issued patent, upon surrender of the old patent, for its unexpired term. Upon the reissue "the specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are." A patent amended by disclaimer thus speaks from the date of the original patent, while the re-issued patent, with respect to the amended claim, speaks from the date of re-issue. If respondent could thus, by disclaimer, add the flywheel to the arcuate flexing claim and to the optical claim, he would in effect secure a new patent operating retroactively in a manner not permitted by the re-issue statute and without subjecting the new claims to revision or restriction by the customary patent office procedure required in the case of an original or re-issued patent. Such transformation of a patent is plainly not within the scope of the disclaimer statute, and the attempted disclaimer as applied to Claims 9 and 13 is void. *Hailes* v. *Albany Stove Co.*, 123 U. S. 582, 587;[3] see *Union Metallic Cartridge Co.* v. *United States Cartridge Co.*, 112 U. S. 624, 642; *Collins Co.* v. *Coes*, 130 U. S. 56, 68; compare *Grant* v. *Walter*,

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[3] *Albany Steam Trap Co.* v. *Worthington*, 79 Fed. 966, 969 (C. C. A. 2d); *Strause Gas Iron Co.* v. *Wm. M. Crane Co.*, 235 Fed. 126, 129, 130 (C. C. A. 2d); *Graselli Chemical Co.* v. *National Aniline & Chemical Co.*, 26 F. (2d) 305, 310 (C. C. A. 2d); *Hudson Motor Car Co.* v. *American Plug Co.*, 41 F. (2d) 672, 673 (C. C. A. 6th); *Corn Products Refining Co.* v. *Penick & Ford, Ltd.*, 63 F. (2d) 26, 30, 31 (C. C. A. 7th); *General Motors Corp.* v. *Rubsam Corp.*, 65 F. (2d) 217, 222 (C. C. A. 6th); *Consumers Tobacco Co.* v. *American Tobacco Co.*, 66 F. (2d) 926, 927 (C. C. A. 3rd); *Fruehauf Trailer Co.* v. *Highway Trailer Co.*, 67 F. (2d) 558, 559, 560 (C. C. A. 6th); *White* v. *Gleason Mfg. Co.*, 17 Fed. 159, 160 (C. C.); *Cerealine Mfg. Co.* v. *Bates*, 77 Fed. 883, 884 (C. C.); *Westinghouse Air Brake Co.* v. *New York Air Brake Co.*, 139 Fed. 265, 267-270 (C. C.).

148 U. S. 547, 553. It is unnecessary to consider whether the flywheel claim, if added to the original Claims 9 and 13, is such a part of the patentee's original conception as to entitle it to the benefit of the re-issue statute. See *Miller* v. *Brass Co.,* 104 U. S. 350, 355; *Hoffheins* v. *Russell,* 107 U. S. 132, 141; *Gage* v. *Herring,* 107 U. S. 640, 645; *Ives* v. *Sargent,* 119 U. S. 652, 663; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.,* 150 U. S. 38, 41–43.

With the invalid disclaimer must fall the original claims as they stood before the disclaimer. The disclaimer is a representation, as open as the patent itself, on which the public is entitled to rely, that the original claim is one which the patentee does not, in the language of the statute, "choose to claim or hold by virtue of the patent." Upon the filing of the disclaimers, the original claims were withdrawn from the protection of the patent laws, and the public was entitled to manufacture and use the device originally claimed as freely as though it had been abandoned. To permit the abandoned claim to be revived, with the presumption of validity, because the patentee had made an improper use of the disclaimer, would be an inadmissible abuse of the patent law to the detriment of the public.

While the precise effect of an invalid disclaimer upon the original claim seems not to have been judicially determined, analogous principles of the patent law are so well recognized as to leave no doubt what our decision should be. It has long been settled that a claim abandoned or rejected in the patent office with the acquiescence of the applicant cannot be revived in a re-issued patent. *Yale Lock Co.* v. *Berkshire Bank,* 135 U. S. 342, 379; *Dobson* v. *Lees,* 137 U. S. 258, 263–265. Nor can an interpretation be given the allowed claims which would revive the claims which were abandoned in order to obtain the patent. *Shepard* v. *Carrigan,* 116 U. S. 593, 597; *Roemer* v. *Peddie,* 132 U. S. 313, 317; *Royer* v. *Coupe,* 146 U. S. 524, 532; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.,* 150 U. S. 38, 40; *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S.

425, 429; *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 443; *Smith* v. *Magic City Club,* 282 U. S. 784, 789, 790; *Smith* v. *Snow, supra.* Similarly, where, in order to secure a re-issued patent, a disclaimer is made of a part of the original claims, the part so disclaimed cannot be revived by a second re-issued patent, *Leggett* v. *Avery,* 101 U. S. 256, nor where the disclaimer is for the purpose of securing an extension of the original patent, *Union Metallic Cartridge Co.* v. *U. S. Cartridge Co., supra,* 644. See *Collins* v. *Coes, supra,* 68; compare *Gage* v. *Herring, supra,* 646. The settled rule that unreasonable delay in making a disclaimer invalidates the whole patent, *Ensten* v. *Simon, Ascher & Co.,* 282 U. S. 445, 452–458; compare *O'Reilly* v. *Morse,* 15 How. 62, 121; *Seymour* v. *McCormick,* 19 How. 96, 106; *Silsby* v. *Foote,* 20 How. 378, 387; *Gage* v. *Herring, supra,* 646; *Yale Lock Mfg. Co.* v. *Sargent,* 117 U. S. 536, 554; *Minerals Separation, Ltd.* v. *Butte & Superior Mining Co.,* 250 U. S. 336, 354, rests upon the similar principle that misuse of the patent, or a part of it, by the patentee in such a manner as to mislead the public or operate to its detriment, deprives the claim of the benefit of the patent laws. The part of the patent disclaimed can stand in no better position because the disclaimer was an unsuccessful misuse of the disclaimer statute.

As Claims 9 and 13 must be held invalid because of the improper disclaimers, and as the remaining claims in issue, the flywheel claims, are held invalid for want of invention, it is unnecessary to determine whether the improper disclaimers as to some of the claims render the entire patent void, as petitioners contend, and as has been intimated but not decided. See *Hailes* v. *Albany Stove Co., supra,* 589; *Marconi Wireless Telegraph Co.* v. *DeForest Radio Tel. & Tel. Co.,* 243 Fed. 560, 565 (C. C. A. 2d); *Seiberling* v. *Thropp's Sons Co.,* 284 Fed. 746, 756, 759 (C. C. A. 3rd).

Reversed.

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

THE ANSALDO SAN GIORGIO I *v.* RHEINSTROM BROTHERS CO.

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

No. 521. Argued February 13, 1935.—Decided March 4, 1935.

1. As a general rule, the measure of damages recoverable from a common carrier for the loss of or damage to the goods is the value of the goods at destination, in the condition they were in when shipped, less the actual arrived value. P. 496.
2. A clause in a bill of lading providing that claims for loss or damage " shall be adjusted on the basis of the invoice value of the entire shipment," thereby relieving the carrier of liability, irrespective of its negligence, where the market value of the shipment at destination, after deduction of loss and damage, was more than the invoice value of the whole shipment, is contrary to public policy and void. P. 498.
3. The agreement can not be sustained even though supported by a valid consideration; and can not estop the shipper from claiming damages measured according to the general rule. *Id.*

73 F. (2d) 40, affirmed.

Certiorari, 293 U. S. 551, to review a judgment reversing a judgment of the District Court upon a libel to recover for damages to cargo.

Mr. Homer L. Loomis, with whom *Mr. Reginald B. Williams* was on the brief, for petitioner.

Mr. D. Roger Englar, with whom *Messrs. Henry N. Longley* and *F. Herbert Prem* were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

Three shipments totalling 4266 barrels of cherries in brine were loaded at Italian ports upon the S. S. Ansaldo San Giorgio I, consigned to the respondent at ports in the

United States. The cargo arrived in bad condition, due to improper stowage, and the respondent filed a libel to recover damages. Trial in the District Court resulted in an interlocutory decree for the respondent.[1] The cause was referred to a commissioner, who found that the containers and the cherries were in good condition when shipped, 162 barrels had become a total loss, and there was additional damage equivalent to a loss of 419 barrels. He computed the damages on the basis of the market value of the goods at destination on the date of arrival. The petitioner resisted any award, relying on the following clause in the bills of lading: "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred." The proof was that, owing to favorable market conditions existing at destination, the market value of all the merchandise which remained, sound as well as damaged, exceeded the values stated in the invoices, plus freight. The commissioner held the quoted clause an invalid stipulation exempting the carrier from liability for negligence, as there was no showing that the shipper had been offered a choice of rates adjusted according to the value placed upon the goods. Upon exceptions, the district court accepted the commissioner's findings, but held the clause a reasonable and lawful agreement for measuring damages, and denied the respondent any recovery.[2] The Circuit Court of Appeals reversed the decree and affirmed the computation of damages submitted by the commissioner.[3] Though no conflict of decision in the federal appellate courts is cited, and the novelty of the question presented

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[1] 1928 A. M. C. 109. The Circuit Court of Appeals affirmed the decree, 26 F. (2d) 1016, and this court denied certiorari, 278 U. S. 633.

[2] 3 F. Supp. 579.

[3] 73 F. (2d) 40.

would not, in the absence of general importance, move us to grant certiorari, we issued the writ [4] because the decision below is alleged to conflict with principles established by our decisions.[5]

The question presented is whether the clause appearing in the bill of lading is valid and constitutes a defense to the shipper's claim for negligent damage to a portion of the consignment.

A common carrier is answerable for loss or damage to the goods transported from any cause save the act of God or the public enemy. The measure of the shipper's recovery is normally the market value of the goods at destination, in like condition as they were when shipped, on the date when they should have arrived.[6] The carrier may exempt himself by contract from liability for the consequences of events beyond his control,[7] but he cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect.[8]

Two so-called valuation clauses have been in frequent use. One is a true limitation agreement. It recites that a sum named in the bill of lading is the agreed value of the goods, or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the carrier's liability

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[4] 293 U. S. 551.

[5] See Rule 38, 5 (b) of this court.

[6] *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral,* 263 U. S. 119, 125, and authorities cited.

[7] *Clark* v. *Barnwell,* 12 How. 272; *York Co.* v. *Central Railroad,* 3 Wall. 107; *Bank of Kentucky* v. *Adams Express Co.* 93 U. S. 174; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427.

[8] *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 384; *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 650; *Boston & Maine Railroad* v. *Piper,* 246 U. S. 439, 445.

for loss or damage shall be limited to the stipulated value. In case of loss or damage, this clause enures to the carrier's but not to the shipper's benefit. The latter can in no event recover more than his actual loss, but may have to take much less. The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had.[9] Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation;[10] or, as has been said, the rate is tied to the release.[11] Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence.[12] The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value.

The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time. This and other federal

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[9] *Hart* v. *Pennsylvania R. Co.,* 112 U. S. 331; *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 223 Fed. 600, 603.

[10] *Hart* v. *Pennsylvania R. Co., supra; Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Pierce Co.* v. *Wells, Fargo & Co.,* 236 U. S. 278; *Boston & Maine Railroad* v. *Piper, supra; Union Pacific R. Co.* v. *Burke,* 255 U. S. 317.

[11] *Union Pacific R. Co.* v. *Burke, supra,* 321.

[12] *Hart* v. *Pennsylvania R. Co., supra,* 340; *Kansas City Southern Ry. Co.* v. *Carl, supra,* 649–50.

courts have decided a number of cases in which it appeared that a bill of lading embodied such a stipulation. In some the parties treated the clause as binding and no decision was made on the point.[13] In one case it was held to be prohibited by the Cummins Amendment to the Interstate Commerce Act,[14] but its validity in cases not controlled by that enactment was not decided. In several cases there are expressions, not necessary to the decisions, to the effect that it is a reasonable and lawful provision for measuring damages.[15] In none was there a decision that a choice of rates was essential to its validity, although there are indications of that view.[16] The contention is that, as no alternative rate applicable to liability measured by full value at destination was here afforded the shipper, the clause is void. The weight of authority in the state courts seems to be in favor of upholding the clause even though no such choice is open to the shipper.[17] There is much to be said in favor of an agreement by which the parties adopt an agreed value as a measure of recovery for loss or damage to goods not delivered by the carrier or damaged in transit. We have no occasion to determine the requirements or the validity of such a contract, as we are of opinion, that whatever is the right view as to such a valuation clause, the one here employed would be unreasonable and contrary to public policy even if supported by a valid

[13] *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 322; *Pennsylvania R. Co.* v. *Olivit Bros.*, 243 U. S. 574; *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31; *The Oneida*, 128 Fed. 687.

[14] *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

[15] *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, *supra; Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, *supra,* 36; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, *supra.*

[16] *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448, 453–4; *Union Pacific R. Co.* v. *Burke, supra,* 320, 321, 323.

[17] See *The Ansaldo San Giorgio I,* 3 F. Supp. 579, 581.

consideration, and cannot estop the respondent to claim damages measured according to the general rule. The contract plainly requires that if, after deduction of all loss and damage, the remaining cargo, in its then condition, is worth more at destination than the whole cargo at place and time of shipment, the carrier shall be wholly exonerated. As pointed out by the court below, if there were a short delivery of fifty cases out of a shipment of one hundred cases, but the market value of the goods delivered at the port of destination were equal to the invoice value of the hundred cases, plus freight, the carrier would pay nothing for negligent loss of half the shipment. Such an agreement is against public policy, as its effect is to relieve the carrier from the consequences of its negligence.[18]

The judgment is

Affirmed.

UNITED STATES ET AL. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 379. Argued February 6, 1935.—Decided March 4, 1935.

1. An order of the Interstate Commerce Commission disapproving reduced rates proposed by a carrier is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning the power of the Commission. P. 504.
2. Such findings should be precise and clear. P. 511.
3. There is a zone of reasonableness between rates that are excessively high and rates that are less than compensatory, within which a carrier is ordinarily free to adjust its charges for itself. P. 506.
4. A rate-schedule initiated by a carrier must be upheld as lawful unless adequate reasons are presented for setting it aside. P. 510.
5. The Commission may not prevent a carrier from reducing its rates to meet competition, merely upon the ground that the reduc-

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[18] Compare *Pearse* v. *Quebec S. S. Co.*, 24 Fed. 285, 287, 288.

tion would disturb the prevailing rate structure, groupings and differentials and possibly lead to a " rate war " between carriers. Pp. 507, 509.

8 F. Supp. 970, affirmed.

Appeal from a decree of the District Court of three judges, which enjoined the enforcement of an order of the Interstate Commerce Commission annulling reductions proposed by the Milwaukee Railroad of some of its rates on coal.

Assistant Attorney General Stephens, with whom *Solicitor General Biggs and Messrs. Carl McFarland, Elmer B. Collins, Daniel W. Knowlton* and *Edward M. Reidy* were on the brief, for the United States and Interstate Commerce Commission, appellants.

Mr. John T. Quisenberry, with whom *Messrs. Walter McFarland, H. H. Larimore, Frank H. Towner,* and *Elmer A. Smith* were on the brief, for the Railroad Companies, appellants.

Mr. C. L. Taylor, with whom *Messrs. O. W. Dynes* and *M. L. Bluhm* were on the brief, for the Chicago, Milwaukee, St. Paul & Pacific R. Co., appellee.

Mr. Earl B. Wilkinson, with whom *Messrs. Michael F. Gallagher* and *Samuel M. Rinaker* were on the brief, for the Binkley Mining Co. et al., appellees.

Mr. Justice Cardozo delivered the opinion of the Court.

On November 22, 1932, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (referred to in this opinion as the Milwaukee) filed with the Interstate Commerce Commission a schedule of rates for the transportation of bituminous coal from mines in Indiana to destinations in northern Illinois. Upon complaint by competing railroads and producers in Illinois, the Interstate Commerce Commission suspended the proposed tariffs and afterwards annulled them. 197 I. C. C. 245; 200 I. C. C. 609. A District Court of three judges has perpetually enjoined the enforcement of the order of the Commission, thereby reinstating the tariffs established by the carrier. 8 F. Supp. 970. The case is here upon appeal. Judicial Code, § 210; 28 U. S. C. § 47a.

The rates in controversy affect the transportation of coal from groups of mines in Indiana known as the Brazil-Clinton and the Linton-Sullivan origin groups to Rockford and Freeport, Illinois, and certain intermediate points. Up to the effective date of the new schedule the rate to Rockford and Freeport from the Brazil-Clinton group had been $1.87 per ton, and from the Linton-Sullivan group $1.92. The proposed change called for a reduction of 17 cents, with the result that the rates between the points mentioned became $1.70 and $1.75 respectively. Reductions ranging from 4 to 10 cents were proposed for other destinations nearer to the point of origin.

In its transportation of bituminous coal the Milwaukee is in competition with lines in Illinois, Indiana and Western Kentucky. We direct our attention first to the situation in Illinois, confining ourselves to facts that have been found by the Commission. For many years there was a parity of rates between the Springfield group in Illinois and the Brazil-Clinton group in Indiana. There was also a customary differential for Illinois groups farther south than Springfield as well as for other groups in Western Kentucky. For example, the rate from Springfield to Rockford was 30 cents less than from mines in southern Illinois. On August 20, 1930, these relations were broken by an order of the Illinois Commerce Commission reducing intrastate rates in Illinois 17 cents a ton. Rates from Springfield to Rockford which had been $1.87 became $1.70; those from southern Illinois, previously $2.17, became $2. Upon the publication of these reductions, Milwaukee complained of them to the Interstate Commerce Commission and asked that they be canceled. 49 U. S. C. § 13. It insisted that the lower schedule would result in undue and unreasonable advantage to persons and localities in intrastate commerce and in undue and unreasonable discrimination against those in interstate commerce. The Commission rendered its decision in March, 1932. It allowed the contested rates to stand in so far as the points of destination were Rockford and Freeport, though it found discrimination, and ordered an increase of five cents a ton, upon shipments to Chicago. Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537. In respect of the Rockford-Freeport traffic, it held that the intrastate rates might reasonably be higher, but that the like was true of the rates to the same points from the groups in Indiana. 182 I. C. C. 537, at pp. 549, 550. "The principal competition of the Illinois producers at these destinations comes from Indiana, and we find no sufficient justification for requiring any of the Illinois rates to these points to be increased until the low rates from Indiana referred to have been placed upon a level more nearly commensurate with the general level of rates in this territory." In brief the ruling was that the Interstate Commerce Commission would keep its hands off until the rates of interstate competitors had been placed upon a sounder basis. It would not stabilize rates at the then prevailing levels when the rate structure as a whole was in need of readjustment and revision. A refusal to interfere with one of the terms of a proportion is very different from an approval of the proportion as a continuing condition. Restraints were not imposed upon the lines in Illinois, but equally they were not imposed upon those in Indiana. The decision was not a mandate to the carriers to preserve undisturbed an existing relation between rates: the decision was a refusal by the Commission to compel an increase of the rates on one side of the relation. Those on the other side were subject to change at the instance of the carriers affected to the same extent as they had been before. The forces of competition were left to do their work.

From the situation in Illinois we turn to that in Indiana and Kentucky. Again we confine ourselves to the report unless testimony is mentioned. Six carriers in addition to Milwaukee are in competition for the carriage of coal from groups in Indiana to points in northern Illinois. These lines are the means of transportation for the product of the coal mines at Princeton and Booneville. They compete also to a slight extent for the carriage of coal from the Brazil and Linton groups, though the testimony is that their traffic from those points is only 1% or less, as compared with 99% belonging to Milwaukee. For all these Indiana routes, group rates have been maintained for many years as the outcome of agreement among the carriers concerned. Rates from Linton-Sullivan were five cents higher than from Brazil-Clinton, those from Princeton seven cents higher than from Linton-Sullivan, and those from Booneville ten cents higher than from Princeton. If Milwaukee is upheld in the reduction of its own schedule from Brazil and Linton northward, there is likely to be an attempt by other Indiana carriers to make proportionate reductions from points along their lines.

The change of rates in Illinois had repercussions also upon tariffs in Kentucky. As far back as 1927, the Commission fixed a differential of 35 cents in favor of the roads from the western Kentucky mines as compared with those from the mines in southern Illinois. Illinois-Indiana Coal Cases, 128 I. C. C. 265; West Kentucky Coal Bureau *v.* Illinois Central R. Co., 172 I. C. C. 279. Upon the lowering of intrastate rates for Illinois carriers, the western Kentucky carriers restored the preëxisting relation between themselves and their Illinois competitors by reducing their own rates to the extent of the established differential. The Commission made an order approving the reduction.

With these changes in the rates in Illinois and Kentucky there remained only the rates from the groups in Indiana that were out of line with the proportion maintained for many years. To restore that proportion Milwaukee filed a new schedule whereby the rates from Brazil-Clinton to Rockford and Freeport, were again placed at a parity with those from Springfield to the same places, the rates from Linton-Sullivan being correspondingly adjusted. This is the schedule that has been disapproved by the Commission. Two reports were filed, one in November, 1933, the other in April, 1934. The first, which came from a division of the Commission, was confirmed by the entire body upon denying a petition for rehearing. Suit for an injunction was promptly started by the carrier. Two days before the day appointed for the hearing, the Commission of its own motion reopened the proceeding, and thereafter filed a second report, amplifying the first one. Following that report the suit was brought to trial upon supplemental pleadings. The carrier took the position: (1) that the order of the Commission was not supported by the findings; and (2) that irrespective of the findings it was not supported by the evidence. The District Court gave a decree for the complainant upon the second ground without passing upon the first. Upon appeal to this court by the Commission and by intervening railroads, the appellees (the Milwaukee and intervening coal producers) renew the grounds of challenge put forward at the trial.

This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454.

"In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *Florida* v. *United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning.

The jurisdiction of the Commission to cancel the proposed schedule was invoked by the protesting carriers and producers under two sections of the statute, subdivisions 1 and 7 of § 15 and subdivision 2 of § 15a. Section 15 (subdivisions 1 and 7) is to the effect that the Commission shall have power to determine the just and reasonable rate when a rate in force or proposed is found to be unjust or unreasonable or unduly discriminatory or otherwise unlawful. Section 15a is to the effect that in the exercise of this power to establish just and reasonable rates the Commission shall give due consideration, among other factors, "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

The second report of the Commission is a long and discursive narrative. Two paragraphs at the end give the key to its meaning [200 I. C. C. 621, 622]:—

"We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"We find that the proposed rates would be unreasonable and in violation of sections 1 (5) [which denounces unreasonable charges] and 15a (2) of the act [which has been summarized above]."

The statement in the second of these paragraphs that the proposed rates would be "unreasonable" must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States, supra,* at p. 213; *Southern Pacific Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 433, 449. There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 636; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 522. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, § 15 a. Those tendencies excluded, "a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best." *United States* v. *Illinois Central R. Co., supra.*

Subjected to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. For an answer to that question, other facts, exhibited with greater particularity in other parts of the report, must be brought forward and considered. Those affecting the Indiana groups may conveniently be stated first; those affecting groups in Illinois afterwards.

Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change. The Indiana carriers by long continued coöperation have maintained a fixed schedule of differentials between mines in the southern group (Princeton and Booneville) and mines farther to the north. There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." *Florida* v. *United States, supra,* at p. 214. As applied to the Indiana groups, the broad conclusions of the report, when related to the supporting findings, amount to this and nothing more, that the new schedule for Milwaukee is likely to be followed by new schedules maintaining the same ratio for other lines in Indiana. Even if the outcome for those lines is a diminution of the profits (the return being none the less compensatory), this without more does not make it wrongful for Milwaukee to restore the long standing parity between Brazil and Springfield. At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States,* 292 U. S. 1, 9. Nothing of the kind is shown. The schedules are to be congealed as they exist, because if not congealed they will be fluid, fluidity is change, and change has the potency, if not the promise, of disturbance. As to conditions in Indiana, this and hardly more is the teaching of the report.

We pass to the relation between the Indiana groups and those in Illinois. As we have seen, parity of rates had been maintained for many years between Indiana lines transporting coal from Brazil-Clinton to northern Illinois and Illinois lines transporting coal from Springfield. There was no complaint by the Commission during those years that the relation was unfair. There was no holding to that effect when orders of the state commission prescribing lower rates in Illinois were kept in operation against the protest of Milwaukee. Intrastate Rates on Bituminous Coal between Points in Illinois, *supra.* The significance of that decision has been considered already in the course of this opinion. As we have striven to make clear, the Commission did not rule that the effect of the new rates was to establish a fair relation, still less the only fair one, between Illinois and Indiana, a relation to be maintained as something fixed and constant. The findings then made are repeated by quotation in the report in this proceeding without comment or explanation that would give them another meaning. If the schedule in controversy is to be rejected as oppressive or unreasonable, the grounds for the rejection must be looked for somewhere else than in the earlier decision.

We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn to new reductions by lines in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion.* The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason. But other remedies even more plainly adequate are at hand in case of need. Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another,

* See the last two paragraphs of the first report by Division No. 2, which the second report has readopted and confirmed.

and may build the structure of the rates accordingly. *Florida* v. *United States,* 292 U. S. 1; *United States* v. *Louisiana,* 290 U. S. 70.

In the light of these considerations it is not the Milwaukee that is subject to the reproach of dealing with the matter piecemeal. All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 773. The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval. In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come.

We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86; *Florida* v. *United States,* 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

The decree should be affirmed, and it is so ordered.

Affirmed.

BALDWIN, COMMISSIONER OF AGRICULTURE & MARKETS, ET AL. v. G. A. F. SEELIG, INC.*

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

No. 604. Argued February 11, 12, 1935.—Decided March 4, 1935.

1. A law or regulation of a State which prohibits the sale of milk imported from another State unless the price paid in that other to the producer was up to the minimum prescribed by the first State for purchases from local producers, is a direct and unconstitutional burden on interstate commerce, whether applied to milk sold by the importer in the cans in which it was imported, or to milk sold by him in bottles in which it was put after importation. Pp. 521, 526.
2. Such a regulation can not be sustained as an exercise of police power upon the ground that economic security of the dairyman works for the sanitary security of the community by insuring both an adequate supply and a wholesome quality of a necessary food. P. 522.

District Court reversed in part; affirmed in part.

CROSS-APPEALS to review a decree of the District Court, of three judges, in a suit brought by Seelig, Inc., a milk dealer, to restrain Baldwin and other state officials from prosecuting it for selling without a license in New York

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* Together with No. 605, *G. A. F. Seelig, Inc.* v. *Baldwin, Commissioner of Agriculture & Markets, et al.* Appeal from the District Court of the United States for the Southern District of New York.

milk imported from Vermont. The decree was for the plaintiff in respect of milk sold in the original packages, but, in respect of milk sold in bottles filled from those cans, relief was denied. See 7 F. Supp. 776, opinion on the application for interlocutory injunction.

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 Baldwin, Commissioner of Agriculture & Markets, et al.

The purposes of the statute are to protect the health and welfare of New York state citizens. It does not discriminate against products coming into the State in interstate commerce. It is concerned with a problem which is predominantly local. *Nebbia* v. *New York*, 291 U. S. 502, 517.

The milk business does not observe state lines, and yet it is predominantly local. The interests involved center about the particular market, and are not diffused throughout the Nation. Supplying fresh milk is a local business, like supplying water (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349); it is not a national business like supplying wheat. (*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.)

Congress has not occupied the field in any exclusive manner; on the contrary, state regulation has received some federal encouragement. Act of Feb. 15, 1927, c. 155, 44 Stat. 1101; 21 U. S. C., § 148.

Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is incidentally affected.

The purposes of the commerce clause are two. The one originally of greater importance was to prevent discrimination by the several States, each designing to favor its own products and the local businesses of its citizens. The other, which has become of constantly increasing importance in recent years, is to authorize Congress to give interstate commerce a uniform regulation.

It will readily be agreed that there are two limitations upon state power corresponding to these two purposes of the commerce clause. The state statute must not be discriminatory, and it must not conflict with any regulation of commerce enacted by Congress.

Assuming that the state statute is not objectionable upon either of those grounds, but puts some incidental burden or restraint upon interstate commerce, the decision as to its validity will depend upon a balancing of the national and local interests practically involved. In other words, a State can burden interstate commerce somewhat, to afford necessary protection to its people, but it cannot burden interstate commerce much merely to protect its people a little. As illustrations that interstate commerce can be affected incidentally by a valid state regulation, see *Plumley* v. *Massachusetts,* 155 U. S. 461; *Hennington* v. *Georgia,* 163 U. S. 299; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Packer Corp.* v. *Utah,* 285 U. S. 105; *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92; *Mintz* v. *Baldwin,* 289 U. S. 346.

A regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce; hence when its subject matter is primarily of local concern, a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any federal regulation, is justifiable under the commerce clause.

The more relevant cases fall roughly into three groups. The first group includes regulations affecting instrumentalities of interstate commerce, such as trains, automobiles, motor trucks and buses. Some of them affect telegraph companies, express companies, ferries and bridges and navigation. Perhaps order-takers should be mentioned here, and the grain elevators of North Dakota. The second group includes regulations of goods by the State of destination, such as cattle quarantines, weights and inspections, laws about oleomargarine and fraudulent and adulterated foods, imported game and liquor. The third group includes regulations of goods by the State of production, such as game and shellfish, hides in New Mexico, Florida oranges, North Dakota wheat, natural gas and petroleum, and water.

Of 66 cases we cite (ignoring a few which are inconclusive or merely incidental to argument) 40 resulted in upholding the state regulation and 26 were adverse. The proportions, at least, seem to be approximately representative, because of 72 cases decided by this Court in the last fifteen years, 49 resulted in upholding state regulation and 23 were adverse.

The process of decision illustrated by cases of state regulatory statutes in fields not taken over by the Federal Government involves answering three questions: First, is the statute sincerely and reasonably directed to a proper purpose of government so that it can be justified under the Fourteenth Amendment. Second, is the purpose primarily a matter of local concern; is it important relatively to the burdens which it is charged with placing upon interstate commerce. Third, is the statute non-discriminatory against interstate commerce.

It does not appear that any neighboring State resents the claim of power in the present instance; Pennsylvania and New Jersey, at least, agree through their statutes that the price of milk paid to the producer should be fixed by the consuming market. The case of natural gas presents some analogies and some differences. *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23;

Peoples Gas Co. v. *Public Service Comm'n*, 270 U. S. 550; *Western Distributing Corp.* v. *Public Service Comm'n*, 285 U. S. 119. The case of goods made by child labor and moving freely in a nation-wide commerce presents no true analogy, not only because of the difference in the commerce but also because of the difference in the purpose for regulating the manufactured goods of extra-state origin. A State regulating the "milk-shed" from which its consumers derive a daily supply of food regulates the entire area with an even purpose related to the product itself; a State forbidding child labor within its borders and forbidding other States to send it the products of their child labor has supplemented a regulation of local health or morals, not directed to anything inherent in the product, by another regulation purely economic in purpose directed at the product. It is doubted that a State can do that; the extent to which a State can "burden" interstate commerce in endeavors to eliminate child labor is suggested by the case of *Chesapeake & Ohio Ry. Co.* v. *Stapleton*, 279 U. S. 587, 593.

The regulation now involved is effective after the milk produced in Vermont has come to New York State and "come to rest within the State." *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 478–479; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 252; *Minnesota* v. *Blasius*, 290 U. S. 1, 8–12; and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 95.

The "original package" has often been suggested as the physical symbol of the importers' interests protected in the name of interstate commerce, and its breaking up as the uttermost limit to which those interests will be protected. Probably this is a rule of thumb, and something will depend upon the relative urgencies of the federal interests and state interests practically involved in a particular case. In recent years it is perceived that there can be no fixed rule for separating interstate commerce from intrastate commerce, because they run into each other as day runs into night; in their extremes they are different but there is no definite and unvarying dividing line. Not always will the "original package" receive immunity from state regulation (*Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506), and in one case federal interests were found to extend beyond the breaking up of the "original package," and "follow the adulterated or misbranded article at least to the shelf of the importer." *McDermott* v. *Wisconsin,* 228 U. S. 115, 135.

Presumably milk bottled in another State and shipped in cases is not sold at retail in an "original package" and may be regulated at that time. *May* v. *New Orleans,* 178 U. S. 496; *Austin* v. *Tennessee,* 179 U. S. 343; *Cook* v. *Marshall Co.,* 196 U. S. 261; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 200–201; *Price* v. *Illinois,* 238 U. S. 446, 454–455; *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304.

Mr. J. Daniel Dougherty, with whom *Mr. John J. O'Connor* was on the brief, for G. A. F. Seelig, Inc.

As the processing and bottling of milk are component parts of the interstate transportation, the District Court was in error in excluding such part of the shipment from the injunctive protection of its decree. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10.

The decisions of this Court in such cases as *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; and *Minnesota* v. *Blasius,* 290 U. S. 1, are not controlling under the facts of this case. Those cases involved the question of local taxation upon goods placed in storage. In the case at bar the Milk Control Law is not a tax statute, nor is the milk brought in from Vermont placed in storage in any manner.

The rule of the "original package" is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. The law does not seek to find what the parties may do, but what, in the usual course, it is expected they will do. *Western Union* v. *Foster,* 247 U. S. 105, 113.

It is admitted that appellee's transportation of the milk from Vermont to New York is interstate commerce. If so, it continues such until it reaches "the point where the parties originally intended that the movement should finally end." *Illinois Central R. Co.* v. *Louisiana R. R. Comm'n,* 236 U. S. 157, 163. Appellee's customers can not be expected to call at the pasteurizing plant for the milk which was ordered to be delivered to their doorsteps. Practice, intent and the typical method followed by the importer determine the unity or continuity of the transaction. The wants of appellee's customers are known, and the milk is transported, not to be held, but to be used. Pasteurization takes place, not because the importer wills it, but because the health regulations require the milk to be so treated. Any interruption in the interstate movement of the milk thus caused is merely casual and incidental, and the transaction is to be treated as single and continuous. The essential unity of the transaction remains the final test. *Swift* v. *United States,* 196 U. S. 375; *Rearick* v. *Pennsylvania,* 203 U. S. 507.

The statutory provision attacked deprives appellee of its property without due process of law. It is invalid under Art. I, § 8 of the Constitution. *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 198; *Minnesota Rate Cases,* 230 U. S. 352; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *St. Louis & San Francisco Ry. Co.* v. *Public Service Comm'n,* 254 U. S. 535; *Lemke* v. *Homer Farmers Elevator Co.,* 258 U. S. 65; *St. Louis-San Francisco Ry. Co.* v. *Public Service Comm'n*, 261 U. S. 369; *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312; *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101; *Michigan Public Utilities Comm'n* v. *Duke*, 266 U. S. 570; *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush* v. *Maloy*, 267 U. S. 317; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *DiSanto* v. *Pennsylvania*, 273 U. S. 34; *Public Utilities Comm'n* v. *Attleboro Steam & E. Co.*, 273 U. S. 83; *Lawrence* v. *St. Louis-San Francisco R. Co.*, 278 U. S. 228; *Furst* v. *Brewster*, 282 U. S. 493; *Anglo-Chilean Nitrate Corp.* v. *Alabama*, 288 U. S. 218.

Mr. Justice Cardozo delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N. Y. Laws of 1933, c. 158; Laws of 1934, c. 126) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc. (appellee in No. 604 and appellant in No. 605) is engaged in business as a milk dealer in the city of New York. It buys its milk, including cream, in Fair Haven, Vermont, from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in forty-quart cans, the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York about 90% is sold to customers in the original cans, the buyers being chiefly hotels, restaurants and stores. About 10% is bottled in New York, and sold to customers in bottles. By concession, title passes from the Seelig Creamery to G. A. F. Seelig, Inc. at Fair Haven, Vermont. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. The validity of that system in its application to producers doing business in New York State has support in our decisions. *Nebbia* v. *New York,* 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. Cf. *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194. From the farms of New York the inhabitants of the so-called Metropolitan Milk District, comprising the City of New York and certain neighboring communities, derive about 70% of the milk requisite for their use. To keep the system unimpaired by competition from afar, the Act has a provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state. The statute, so far as pertinent, is quoted in the margin together with supplementary regulations by the Board of Milk Control.[1]

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[1] Section 258 (m) (4), Article 21-a, New York Agriculture & Markets Law, L. 1934, c. 126, formerly § 312 (g), Article 25, L. 1933, c. 158: "It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions, shall be unlawful."

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to conform to the New York statute and regulations in the sale of the imported product.[2] This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the Act in its application to the complainant, repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. United States Consti-

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Order of New York Milk Control Board, July 1, 1933: "Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the condition involved in such purchase or sale or delivery or receipt, hereby is forbidden."

[2] The application blank contains the following questions which show the form of the required agreement: "Do you agree not to sell within New York State after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?"

tution, Art. I, § 8, clause 3; Fourteenth Amendment, § 1. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), has granted a final decree restraining the enforcement of the Act in so far as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. See opinion on application for interlocutory injunction:—7 F. Supp. 776; and cf. 293 U. S. 522. The case is here on cross-appeals. 28 U. S. C. § 380.

First. An injunction was properly granted restraining the enforcement of the Act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, " except what may be absolutely necessary for executing its inspection laws." Constitution, Art. I, § 10, clause 2; *Woodruff* v. *Parham,* 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112; and see *Brennan* v. *Titusville,* 153 U. S. 289; *Brown* v. *Houston,* 114 U. S. 622; *Webber* v. *Virginia,* 103 U. S. 344, 351; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District,* 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk-shed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside

New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz* v. *Baldwin,* 289 U. S. 346; *Reid* v. *Colorado,* 187 U. S. 137); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. *Asbell* v. *Kansas,* 209 U. S. 251, 256; *Railroad Co.* v. *Husen,* 95 U. S. 465, 472. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy.

Many cases from our reports are cited by counsel for the state. They do not touch the case at hand. The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree. Even so, the borderland is wide between the restraints upheld as incidental and those attempted here. Subject to the paramount power of the Congress, a state may regulate the importation of unhealthy swine or cattle (*Asbell* v. *Kansas, supra; Mintz* v. *Baldwin, supra*) or decayed or noxious foods. *Crossman* v. *Lurman,* 192 U. S. 189; *Savage* v. *Jones,* 225 U. S. 501; *Price* v. *Illinois,* 238 U. S. 446. Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a state may protect its inhabitants against the fraudulent substitution, by deceptive coloring or otherwise, of one article for another. *Plumley* v. *Massachusetts,* 155 U. S. 461; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497. It may give protection to travelers against the dangers of overcrowded highways (*Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92) and protection to its residents against unnecesary noises. *Hennington* v. *Georgia,* 163 U. S. 229. Cf., however, *Missouri, K. & T. Ry. Co.* v. *Texas,* 245 U. S. 484, 488. At times there are border cases, such as *Silz* v. *Hesterberg,* 211 U. S. 31, where the decision in all likelihood was influenced, even if it is not wholly explained, by a recognition of the special and restricted nature of rights of property in game. Interference was there permitted with sale and importation, but interference for a close season and no longer, and in aid of a policy of conservation common to many states. Cf. *Geer* v. *Connecticut,* 161 U. S. 519; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 11; *Silz* v. *Hesterberg,* 184 N. Y. 126, 131; 76 N. E. 1032. None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.

Second. There was error in refusing an injunction to restrain the enforcement of the Act in its application to milk in bottles to be sold by the importer.

The test of the "original package," which came into our law with *Brown* v. *Maryland,* 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. *Woodruff* v. *Parham, supra; Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218, 226. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Texas Co.* v. *Brown,* 258 U. S. 466, 475; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. "A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State." *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. Cf. *McDermott* v. *Wisconsin,* 228 U. S. 115, 133; *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 491; *Brimmer* v. *Rebman,* 138 U. S. 78; *Savage* v. *Jones, supra,* at p. 525; *Western Union* v. *Foster,* 247 U. S. 105, 114; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493. In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 225 N. Y. 397, 403; 122 N. E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression.

The distinction is clear between a statute so designed and statutes of the type considered in *Leisy* v. *Hardin*, 135 U. S. 100, to take one example out of many available. By the teaching of that decision intoxicating liquors are not subject to license or prohibition by the state of destination without congressional consent.[3] They become subject, however, to such laws when the packages are broken. There is little, if any, analogy between restrictions of that type and those in controversy here. In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass. So also the analogy is remote between restrictions like the present ones upon the sale of imported milk and restrictions affecting sales in unsanitary sweat-shops. It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

The decree in No. 604 is affirmed, and that in No. 605 reversed, and the cause remanded for proceedings in accordance with this opinion.

No. 604. Affirmed.
No. 605. Reversed.

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[3] The rule is different today under the Twenty-first Amendment. Art. XXI, § 2.

SWINSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO.

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

No. 383. Argued February 6, 7, 1935.—Decided March 11, 1935.

1. The Safety Appliance Act is liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. P. 531.
2. In an action against a railroad company under the Federal Employers' Liability Act for injuries alleged to have been caused by its failure to provide a car with a "secure grabiron or handhold" as required by the Safety Appliance Acts, the railroad defended on the ground that at the time of the injury the plaintiff (a brakeman) was using the grabiron as a foot brace to enable him to release a handbrake, a use for which, the railroad contended, the device was not intended. There was evidence that the grabiron in question was not sufficiently secure even for its intended use (as a handhold) and also that the use to which it was put by the plaintiff was customary. *Held*, it was error to direct a verdict for the defendant.

72 F. (2d) 649, reversed.

Certiorari, 293 U. S. 546, to review a judgment affirming a judgment upon a directed verdict for the railroad company in an action brought against it under the Federal Employers' Liability Act to recover for personal injuries.

Mr. Ernest A. Michel, with whom *Mr. Tom Davis* was on the brief, for petitioner.

Mr. Warren Newcome, with whom *Messrs. Samuel H. Cady* and *William T. Faricy* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Swinson, a freight brakeman in the employ of the Chicago, St. Paul, Minneapolis and Omaha Railway, brought this action under the Federal Employers' Liability Act, in the federal district court for Minnesota. The accident occurred while he was releasing a handbrake at the end of a tank car. The brake was tightly set. To release it required the application of considerable force to the brake wheel. In order to exert such force, Swinson placed his left foot on the running board, his right foot on a grabiron or handhold, which consisted of a round iron bar bent at the ends, attached horizontally to the under side of the running board, and extending beyond it a few inches. As he exerted foot pressure on the grabiron, the plank to which it was attached split, and one of the bolts securing the grabiron pulled through. As a result, he lost his balance, fell in front of the moving car and was seriously injured. The parties were engaged, and the car was used, in interstate commerce.

Swinson claimed that the Railway was liable, independently of negligence on its part, because it had failed to provide the "secure grabiron or handhold" required by the Safety Appliance Act.[1] The Railway contended that it was not liable because the grabiron had been used by Swinson for a purpose for which it was not intended; since the purpose of Congress in requiring "secure grab irons or handholds" was to supply an appliance to grasp with the

[1] Section 4 of the Federal Safety Appliance Act, Act of March 2, 1893, c. 196, § 4, 27 Stat. 531, provides that "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

hands, not to provide a foot brace or support to secure leverage in releasing a handbrake. Although there was evidence that the grabiron was inadequate and defective even for its so-called "intended use" of being grasped by the hands, and also evidence that the use which Swinson had made of the grabiron was customary, the trial court sustained the Railway's contention and directed a verdict for it. The Court of Appeals affirmed the judgment entered upon the verdict, 72 F. (2d) 649. Certiorari was granted because the precise question, which is of importance, had not been decided by this Court.

The Safety Appliance Act has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. Thus, although the Act was intended primarily for the protection of railroad employees, it was held in *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589, that a traveller on the highway could recover for injury resulting from failure to maintain in usable condition the power brake required by the Safety Appliance Act. Although this section of the Act was originally intended for "greater security to men in coupling and uncoupling cars," it was held in *Davis* v. *Wolfe,* 263 U. S. 239, 243, that a freight train conductor could recover for an injury resulting from failure of a grabiron, which he had grasped while standing on the sill-step and signalling the fireman. There, the Court said that an employee "can recover, if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

As failure of the grabiron was the proximate cause of the injury, it was error to direct a verdict for the defendant. There was evidence on which the jury might have found that the grabiron was not secure for use strictly as a handhold; and that if it had been, it would not have failed, since the use made of it by Swinson did not subject it to appreciably greater strain. There was evidence, also, that use as a foot brace was a natural and not unusual one. For such a use of the grabiron, Swinson was entitled to assume that it was secure. Compare *Lehigh Valley R. Co.* v. *Howell,* 6 F. (2d) 784; *Didinger* v. *Pennsylvania R. Co.,* 39 F. (2d) 798.

Reversed.

ALASKA PACKERS ASSOCIATION *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 465. Argued February 8, 11, 1935.—Decided March 11, 1935.

1. The terms, obligations and sanctions of a contract are subject, in some measure, to the legislative control of the State in which it is made, even though it is to be performed elsewhere. P. 540.
2. Where a contract of employment is made in a State, though for work in another jurisdiction and though the parties expressly stipulate to be bound by the workmen's compensation law of that other jurisdiction, if the State where it is made has a legitimate public interest of its own to insure that the workman shall be compensated for injuries suffered in the course of his employment beyond its borders, it is not prevented by the due process clause of the Fourteenth Amendment from allowing him its own compensation remedy for such injuries and from declining to remit him to his remedy in the other jurisdiction or to substitute that remedy in its own forum. Cf. *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145. Pp. 540, 542.

   The improbability that workers employed in California for seasonal occupation in Alaska, 3,000 miles away, and not to be paid until their return, would be able to apply for compensation when injured in Alaska, or once returned to California would be able to go back to Alaska and successfully prosecute their claims; and the probability that, if without a remedy in California courts, they would be remediless and likely to become public charges on that State, suggest that California has a legitimate public interest in imposing liability for such injuries upon the employer and in providing a remedy for such employees available in California.

3. Legislation affecting the status of employer and employee, within the scope of acknowledged state power and not unreasonable in its exercise, can not be condemned because it curtails the power of the individual to contract. P. 543.
4. The extent to which the statute of one State may qualify or deny rights asserted under the statute of another presents a question under the full faith and credit clause which this Court, upon review of a judgment of a state court, must determine for itself; equally whether the statute of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. P. 547.
5. A conflict thus arising is to be resolved, not by automatically compelling the courts of each State to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and determining the question accordingly. P. 547.
6. Upon the facts of this case, which involves a conflict in the California courts between the workmen's compensation laws of California and Alaska, the interest of Alaska is not shown to be superior to that of California; and therefore the Alaska statute can not be given the effect of denying to the courts of California the right to apply the law of that State. Pp. 544, 550.

In so deciding, the Court assumes that by R. S., §§ 905, 906, the command of the full faith and credit clause is made applicable to territorial statutes with the same force and effect as that of the constitutional provision with respect to statutes of the States.

1 Cal. (2d) 250; 34 P. (2d) 716, affirmed.

Appeal from a judgment affirming an award made by the Industrial Accident Commission of California under the workmen's compensation law of that State.

Mr. Francis Gill, with whom *Messrs. Frank D. Madison, Marshall P. Madison,* and *Eugene M. Prince* were on the brief, for appellant.

The adoption by Alaska of its Workmen's Compensation Act (Sess. L., 1929, c. 25) applicable to industrial injuries in Alaska was within the power of the territorial legislature. Organic Act, § 9, 37 Stat. 514; 48 U. S. C. 77; *North Alaska Salmon Co.* v. *Pillsbury,* 174 Cal. 1, 5. The Alaska act is optional, but had been accepted by the parties in the employment contract, and there is no question that this employment was within its terms. Section 905 of the Revised Statutes of the United States (28 U. S. C. 687) requires full faith and credit to be accorded to territorial statutes. *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55, 64–65.

The Alaska Compensation Act provides exclusive rights and remedies (§ 10); so does the California statute (§ 6). There can not be two exclusive jurisdictions over the same subject matter. Therefore, if the California award was a valid exercise of an exclusive jurisdiction, as it purported to be, it altogether precludes proceedings under the Alaska statute. The statute of Alaska—the jurisdiction in which all the work was done and where the injury occurred—is unquestionably applicable to the case, but it can never be applied unless it is accorded full faith and credit in California, or unless the California award can be disregarded and the appellant subjected in Alaska to another recovery for the same injury. Such double recovery would be contrary to the requirements of due process and would invalidate one or the other of the two statutes on that ground. Consequently, one or the other must give way in any view of the case, and the circumstances of this case require the California courts to give effect to the Alaska statute and to the defense predicated on it.

While we know of no case in which like facts have been presented, we submit that the principles stated in *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, and in *Ohio* v. *Chattanooga Boiler Co.,* 289 U. S. 439, as applied to the facts of this case, require full faith and credit for the Alaska statute.

It is an elementary principle in conflict of laws that the contract is governed by the laws with a view to which the parties make it. *Wayman* v. *Southard,* 10 Wheat. 1, 48. The only significance of the place of making or the place of performance, from the standpoint of conflict of laws, is to determine the intention of the parties as to what law should govern, and these considerations are immaterial when the matter is covered by express contract.

It is true that the California Industrial Accident Commission, an administrative body, can not administer the Alaska act because the Alaska statute provides for the assessment of the statutory compensation in an action in a court of general jurisdiction. But this fact does not justify the denial of the validity and effect of the Alaska statute when pleaded as a defense to proceedings under the California act. Neither is it any excuse or warrant for the failure in this case to recognize Palma's right against appellant as a foreign right, and as such controlled by the rules of its origin (*Cuban R. Co.* v. *Crosby,* 222 U. S. 473; *Slater* v. *Mexican National R. Co.,* 194 U. S. 120); nor does it justify disregarding the limitations upon appellant's liability provided by the Alaska statute. *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U S. 55; *Tennessee Coal, I. & R. Co.* v. *George,* 233 U. S. 354.

Unless the Alaska statute is given effect in California, it is denied operation altogether as a practical matter. The California statute, in such event, has been extended into the jurisdiction of Alaska, has excluded the operation of the Alaska statute and invalidated a contract between the parties which related to Alaska work and which was unquestionably valid under the Alaska law. This is a clear denial of full faith and credit. *New York Life Ins. Co.* v. *Head,* 234 U. S. 139.

If the California statute does not offer an exclusive remedy where the employee has a right to compensation under the act in force at the place of injury, then, under

Ohio v. *Chattanooga Boiler Co.,* 289 U. S. 439, there could be no possibility of recognizing the California act.

The California statute is compulsory (§ 27a). It requires an employer to insure payment of compensation to his employees or to qualify as a self-insurer by posting bonds upon which he must pay premiums (§ 29). Under the decision in this case, appellant can not make an employment contract in California for seasonal work in Alaska exclusively without assuming these and other burdens, notwithstanding the fact that appellant must meet the requirements of the Alaska law as to these same employees.

It is also self-evident that the application of the California Act to injuries in Alaska is more burdensome to the employer than its application to injuries in California, because of the difficulty of defense.

We submit that the State has no reasonable basis for extending, and no power to extend, its compulsory workmen's compensation act to extraterritorial injuries arising from such employment. See *Murray* v. *Joe Gerrick & Co.,* 291 U. S. 315; *Ford, Bacon & Davis* v. *Volentine,* 64 F. (2d) 800; *Industrial Commission* v. *Gardinio,* 119 Ohio St. 539; *Altman* v. *Workmen's Compensation Bureau,* 50 N. D. 215; *Johnson* v. *Industrial Accident Comm'n,* 45 Ohio App. 125; *Post* v. *Burger & Gohlke,* 216 N. Y. 544; *Smith* v. *Heine Safety Boiler Co.,* 224 N. Y. 9; *Perlis* v. *Lederer,* 188 App. Div. 425; *American Mutual Liability Ins. Co.* v. *McCaffrey,* 37 F. (2d) 870. Liability under such a statute is not contractual in any true sense (*Smith* v. *Heine Safety Boiler Co.,* 224 N. Y. 9), but is an obligation in the nature of a tax. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 240. See also, dissenting opinion of Mr. Justice Brandeis in *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, 167.

Still further, in sustaining the award, the Supreme Court of California invalidated the contract of the parties that the Alaska statute should govern the injury. Under the due process clause, freedom of contract can be abridged by state statute only within reasonable limits. *Truax* v. *Raich,* 239 U. S. 33. Here the employer was subject to liability in Alaska for industrial injuries, and the employee had an adequate remedy there. We submit that it was unreasonable to invalidate the agreement of the parties that the Alaska laws should exclusively control their rights and obligations. The fact that the agreement was made in California is not enough to justify the courts of that State in invalidating it. *Smith* v. *Heine Safety Boiler Co.,* 224 N. Y. 9. See also, *New York Life Ins. Co.* v. *Head,* 234 U. S. 149.

The compulsory workmen's compensation act of California could not be applied to an injury in another State under the circumstances shown by this record. Still less can it be applied to an injury in a Territory over which the United States has exclusive jurisdiction. Constitution, Art. IV, § 3, cl. 2. See also, *Murray* v. *Joe Gerrick & Co.,* 291 U. S. 315; *Farmers' Bank* v. *Minnesota,* 232 U. S. 516.

Mr. Everett A. Corten, with whom *Messrs. Elmer P. Delany* and *George C. Faulkner* were on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of California, 1 Cal. (2d) 250; 34 P. (2d) 716, upholding an award of compensation, by the state Industrial Accident Commission, to appellee Palma, against appellant, his employer, and holding that the award does not infringe prohibitions of the Federal Constitution. The award was made in conformity to the statutes of California, where the contract of employment was entered into, rather than those of Alaska, where the injury occurred.

On May 13, 1932, Palma, a non-resident alien, and appellant, doing business in California, executed at San Francisco a written contract of employment. Palma agreed to work for appellant in Alaska during the salmon canning season; the appellant agreed to transport him to Alaska and, at the end of the season, to return him to San Francisco where he was to be paid his stipulated wages, less advances. The contract recited that appellant had elected to be bound by the Alaska Workmen's Compensation Law [1] and stipulated that the parties should be subject to and bound by the provisions of that statute. Section 58 of the California Workmen's Compensation Act [2] was then in force, which provides:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this State, . . ." At that time the California Supreme Court had held in *Quong Ham Wah Co.* v. *Industrial Accident Comm'n*, 184 Cal. 26, 36–44; 192 Pac. 1021 (writ of error dismissed, 255 U. S. 445), that this section was applicable to non-residents of California, since the privileges and immunities clause of the Federal Constitution prevented giving any effect to the requirement that the employee be a resident. The California Workmen's Compensation Act also provides, § 27 (a):

"No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act, . . ."

In August, 1932, after his return from Alaska to California, the employee applied for and later received an

[1] L. 1929, c. 25; Comp. Laws, 1933, c. XXXII, Art. IV.

[2] L. 1913, c. 176; L. 1917, c. 586; L. 1919, c. 471; L. 1923, c. 161, c. 379; L. 1929, c. 227; L. 1931, c. 944.

award by the California Commission in compensation for injuries received by him in the course of his employment in Alaska. On petition for review by the state supreme court, appellant assailed the California statute, as he does here, as invalid under the due process and the full faith and credit clauses of the Federal Constitution. Insofar as the California statute denies validity to the agreement that the parties should be bound by the Alaska Workmen's Compensation Act, and attempts to give a remedy for injuries suffered by a non-resident employee without the state, it is challenged as a denial of due process. Petitioner also insists that as the Alaska statute affords, in Alaska, an exclusive remedy for the injury which occurred there, the California courts denied full faith and credit to the Alaska statute by refusing to recognize it as a defense to the application for an award under the California statute.

In refusing to set aside the award of the state commission, the Supreme Court of California ruled, as in *Quong Ham Wah Co.* v. *Industrial Accident Comm'n, supra,* that § 58 of the California Compensation Act was applicable to Palma, although a non-resident alien; that, as the contract of employment was entered into within the state, the stipulation that the Alaska Act should govern was invalid under § 27 (a). It concluded that the Alaska statute afforded a remedy to the employee in Alaska and held that by setting up the defense of the Alaska statute in California the two statutes were brought into conflict, and that in the circumstances neither the due process clause nor the full faith and credit clause denied to the state the power to apply its own law, to the exclusion of the Alaska Act, in fixing and awarding compensation for the injury.

1. The question first to be considered is whether a state, which may constitutionally impose on employer and employee a system of compensation for injuries to the employee in the course of his employment within the state, *New York Central R. Co.* v. *White,* 243 U. S. 188; *Moun-*

tain Timber Co. v. *Washington,* 243 U. S. 219, is precluded by the due process clause, in the special circumstances of this case, from imposing liability for injuries to the employee occurring in Alaska.

The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals, nor did the judgment of the state supreme court give it any. The statute assumes only to provide a remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur. Compare *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 153. We assume that in Alaska the employee, had he chosen to do so, could have claimed the benefits of the Alaska statute, and that if any effect were there given to the California statute, it would be only by comity or by virtue of the full faith and credit clause. *Bradford Electric Light Co.* v. *Clapper, supra.*

The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. *New York Life Ins. Co.* v. *Head,* 234 U. S. 149, 162–164; *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357, 377; *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 407, 408; compare *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, 75. Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 348; *Compañía General de Tabacos de Filipinas* v. *Collector,* 275 U. S. 87.

But where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure, to the legislative control of the state. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise. *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112, 123; *Mutual Life Ins. Co.* v. *Liebing,* 259 U. S. 209, 214; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 136; compare *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 397–400.

While similar power to control the legal consequences of a tortious act committed elsewhere has been denied, *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542, 547; *Western Union Telegraph Co.* v. *Chiles,* 214 U. S. 274, 278; compare *Western Union Telegraph Co.* v. *Commercial Milling Co.,* 218 U. S. 406, the liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer. See *Bradford Electric Light Co.* v. *Clapper, supra,* 157, 158. The California court has declared: "The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad amounting to a sort of compulsory insurance." *Quong Ham Wah Co.* v. *Industrial Accident Comm'n, supra,* 36. Obviously the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences. That it has power, through its own tribunals, to grant compensation to local employees, locally employed, for injuries received outside its borders, and likewise has power to forbid its own courts to give any other form of relief for such injury, was fully recognized by this Court in *Bradford Electric Light Co.* v. *Clapper, supra,* 156. Objections which are founded upon the Fourteenth Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process.

We cannot say that the statutory requirement of California, that the provisions for compensation shall extend to injuries without the state when the contract for employment was entered into within it, is given such an unreasonable application in the present case as to transcend constitutional limitations. The employee, an alien more than 2,000 miles from his home in Mexico, was, with fifty-three others, employed by petitioner in California. The contract called for their transportation to Alaska, some 3,000 miles distant, for seasonal employment of between two and three months, at the conclusion of which they were to be returned to California, and were there to receive their wages.

The meagre facts disclosed by the record suggest a practice of employing workers in California for seasonal occupation in Alaska, under such conditions as to make it improbable that the employees injured in the course of their employment in Alaska would be able to apply for compensation there. It was necessary for them to return to California in order to receive their full wages. They would be accompanied by their fellow workers, who would normally be the witnesses required to establish the fact of the injury and its nature. The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state.

California, therefore, had a legitimate public interest in controlling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee, and in providing a remedy available to him in California. In the special circumstances disclosed, the state had as great an interest in affording adequate protection to this class of its population as to employees injured within the state. Indulging the presumption of constitutionality which attaches to every state statute, we cannot say that this one, as applied, lacks a rational basis or involved any arbitrary or unreasonable exercise of state power.

It is unnecessary to consider what effect should be given to the California statute if the parties were domiciled in Alaska or were their relationship to California such as to give it a lesser interest in protecting the employee by securing for him an adequate and readily available remedy.

In providing a remedy for a liability which the state was authorized to impose, California was not required by the Fourteenth Amendment to prescribe the Alaska remedy rather than its own. Only the full faith and credit clause imposes on the courts of one state the duty so to enforce the laws of another.

Nor did the State of California exceed its constitutional power by prohibiting any stipulation exempting the employer from liability for the compensation prescribed by the California statute. Legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 157, 158. As the state had the power to impose the liability in pursuance of state policy, it was a rational, and therefore a permissible, exercise of state power to prohibit any contract in evasion of it. *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 571; see *Second Employers' Liability Cases,* 223 U. S. 1, 52; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603, 609.

2. Even though the compensation acts of either jurisdiction may, consistently with due process, be applied in either, the question remains whether the California court has failed to accord full faith and credit to the Alaska statute in refusing to allow it as a defense to the award of the California Commission. Appellant contends that as the provisions of the Alaska statute conflict with those of the California statutes, the full faith and credit clause and R. S. §§ 905, 906, U. S. C., Title 28, §§ 687, 688, requiring that full faith and credit be accorded to territorial statutes, see *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55, 64, 65, compel recognition of the Alaska statute as a defense to the proceedings before the California Commission; that the award of the Commission should accordingly be set aside, leaving the employee to his remedy under the Alaska statute in California, if California provides the remedy, or remitting the parties to their proceeding in Alaska under the territorial statute.

Both statutes are compensation acts, substituting for the common law recovery for negligence a right to recover compensation at specified rates for injuries to employees in the course of their employment. The California Act is compulsory, § 6 (a); the Alaska Act is similarly effective, unless the employer or employee elects not to be bound by it, §§ 1, 31, 35, which in this case they have not done. The California Act is administered by a Commission; the Alaska Act provides for recovery by suit in the courts of the Territory, brought in the judicial division where the injury occurs (§§ 24, 25). Each act provides that the liability imposed and the remedy given by it are in lieu of all others for the injury suffered. §§ 6 (a), 27 (a) of the California Act; §§ 1, 10, 28 of the Alaska Act. While § 58 of the California statute authorizes the Commission to make an award for injuries suffered without the state, when the contract of employment is entered into within, it does not purport to provide, by regulation of the contract of employment or otherwise, that the parties may not resort, without the state, to other remedies given by the statutes in force at the place of injury. Compare *Bradford Electric Light Co.* v. *Clapper, supra,* 153. The Alaska Act, § 25, provides that no action shall be brought under the statute in any court outside the territory, except in the case where it is not possible to obtain service of process on the defendant within the territory; it is conceded that appellant may there be served.

Petitioner, in relying on the Alaska statute as a defense in California, points out that it makes no distinction between residents and non-residents but gives a remedy to every employee injured in the course of his employment in Alaska, and invokes the rule, often followed in this Court, that suits to recover for personal injury are transitory, and that the jurisdiction creating the right may not, by restricting the venue, preclude recovery in any court outside the state having jurisdiction. See *Atchison, T. & S. F. Ry. Co.* v. *Sowers, supra,* 70; *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354. The Supreme Court of California, accepting this view, nevertheless refused to give effect to the Alaska statute because of its conflict with the California compensation act. Since each statute provides a different remedy, the court recognized that, by setting up the Alaska statute as a defense to the award of the Commission, the two statutes were brought into direct conflict. It resolved the conflict by holding that the courts of California were not bound by the full faith and credit clause to apply the Alaska statute instead of its own.

To the extent that California is required to give full faith and credit to the conflicting Alaska statute, it must be denied the right to apply in its own courts a statute of the state, lawfully enacted in pursuance of its domestic policy. We assume, as did the state court, that the remedy provided in the Alaska statute is one which could also be applied by the California courts, except for the conflict. We also assume, as the parties concede, that by R. S. §§ 905, 906, the command of the full faith and credit clause is made applicable to territorial statutes with the same force and effect as that of the constitutional provision with respect to statutes of the states, see *Embry* v. *Palmer*, 107 U. S. 3, 8-10; *Atchison, T. & S. F. Ry.* v. *Sowers, supra*, 64, 65.[3] The subject of our inquiry is therefore whether the full faith and credit clause requires the state of California to give effect to the Alaska statute rather than its own.

It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy. See *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; *Huntington* v. *Attrill*, 146 U. S. 657; *Finney* v. *Guy*, 189 U. S. 335; see also *Clarke* v. *Clarke*, 178 U. S. 186; *Hood* v. *McGehee*, 237 U. S. 611; compare *Gasquet* v. *Fenner*, 247 U. S. 16.

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[3] Section 1, Article IV, of the Constitution provides:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Act of May 26, 1790, c. 11, 1 Stat. 122, provided for the proper authentication of the acts, records and judicial proceedings and declared:

"And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

That of March 27, 1804, c. 56, 2 Stat. 298, extended the provisions of this statute to the public acts, records and judicial proceedings of the territories of the United States. These enactments subsequently became §§ 905, 906 of the Revised Statutes, U. S. C., Tit. 28 §§ 687, 688.

In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. See *Olmsted* v. *Olmsted*, 216 U. S. 386; *Aetna Life Ins. Co.* v. *Dunken*, *supra*, 393.

The necessity is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.

The enactment of the present statute of California was within state power and infringes no constitutional provision. *Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.

This was fully recognized by this Court in *Bradford Electric Light Co.* v. *Clapper, supra,* 157–162. There, upon an appraisal of the governmental interests of the two states, Vermont and New Hampshire, it was held that the Compensation Act of Vermont, where the status of employer and employee was established, should prevail over the conflicting statute of New Hampshire, where the injury occurred and the suit was brought. In reaching that conclusion, weight was given to the following circumstances: that liability under the Vermont Act was an incident of the status of employer and employee created within Vermont, and as such continued in New Hampshire where the injury occurred; that it was a substitute for a tort action, which was permitted by the statute of New Hampshire; that the Vermont statute expressly provided that it should extend to injuries occurring without the state and was interpreted to preclude recovery by proceedings brought in any other state; and that there was no adequate basis for saying that the compulsory recognition of the Vermont statute by the courts of New Hampshire would be obnoxious to the public policy of that state.[4]

If, for the reasons given, the Vermont statute was held to override the New Hampshire statute in the courts of

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[4] The case arose in the federal district court for New Hampshire. The state court had not spoken on the subject.

New Hampshire, it is hardly to be supposed that the Constitution would require it to be given any less effect in Vermont, even though the New Hampshire statute were set up as a defense to proceedings there. Similarly, in the present case, only if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state. While in *Bradford Electric Light Co.* v. *Clapper, supra,* it did not appear that the subordination of the New Hampshire statute to that of Vermont, by compulsion of the full faith and credit clause, would be obnoxious to the policy of New Hampshire, the Supreme Court of California has declared it to be contrary to the policy of the State to give effect to the provisions of the Alaska statute and that they conflict with its own statutes.

There are only two differences material for present purposes, between the facts of the *Clapper* case and those presented in this case: the employee here is not a resident of the place in which the employment was begun, and the employment was wholly to be performed in the jurisdiction in which the injury arose. Whether these differences, with a third—that the Vermont statute was intended to preclude resort to any other remedy even without the state—are, when taken with the differences between the New Hampshire and Alaska compensation laws, sufficient ground for withholding or denying any effect to the California statute in Alaska, we need not now inquire. But it is clear that they do not lessen the interest of California in enforcing its compensation act within the state, or give any added weight to the interest of Alaska in having its statute enforced in California. We need not repeat what we have already said of the peculiar concern of California in providing a remedy for those in the situation of the present employee. Its interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return. Nor should the fact that the employment was wholly to be performed in Alaska, although temporary in character, lead to any different result. It neither diminishes the interest of California in giving a remedy to the employee, who is a member of a class in the protection of which the state has an especial interest, nor does it enlarge the interest of Alaska whose temporary relationship with the employee has been severed.

The interest of Alaska is not shown to be superior to that of California. No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statutes of Alaska be given that effect.

Affirmed.

STEWART DRY GOODS CO. *v.* LEWIS ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 454. Argued February 8, 1935.—Decided March 11, 1935.

1. In determining the validity of a state tax under the Federal Constitution, this Court is not concluded by the name or description found in the Act, but must ascertain for itself the nature and effect of the tax. P. 555.
2. Chapter 149 of the Kentucky Acts of 1930 imposed a tax on the sales of retail merchants determined by the amount of gross sales. On the first $400,000 of gross sales the rate of tax was 1/20 of

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* Together with No. 455, *Levy et al.* v. *Lewis et al.*, and No. 456, *J. C. Penney Co.* v. *Lewis et al.* Appeals from the District Court of the United States for the Western District of Kentucky. Also No. 457, *Kroger Grocery & Baking Co.* v. *Lewis et al.* Appeal from the District Court of the United States for the Eastern District of Kentucky.

1%; a different and increasing rate applied to each additional $100,000 of gross sales up to $1,000,000; the rate on sales over $1,000,000 was 1%. *Held,* the classification of sales for the purpose of the tax was arbitrary and violated the equal protection clause of the Fourteenth Amendment. P. 557.

3. A tax on sales is in effect a tax on the goods sold. P. 556.
4. The tax can not be sustained as an excise on the privilege of merchandising, for there is no reasonable relation between the amount of the tax and the value of the privilege; there is no such relation between gross sales—the measure of the tax—and net profits as will justify the discrimination between taxpayers. P. 557.
5. The contention that the graduation of the tax was adjusted with reasonable approximation to the net earnings of the taxpayers, based upon a claimed relation between gross sales and net profits, *held* not supported by the evidence. P. 558.
6. Convenience of administration does not justify the State in employing this method of taxing gains and ignoring the consequent inequalities of burden. P. 559.
7. The claim that the tax in its actual operation is not shown to be unduly burdensome or harmful to any of the complaining taxpayers, or to amount to confiscation of their property, *held* irrelevant to the issue of inequality, and contradicted by the record. P. 561.
8. Parties challenging the validity of a state statute under the Fourteenth Amendment are not to be denied relief by resort to a forecast of possible amelioration of their situation by the state courts. P. 561.
9. The unrestricted power of a state legislature to determine the amount of an otherwise valid tax applies to excises as well as to other forms of taxation. P. 562.
10. *Clark* v. *Titusville,* 184 U. S. 329; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, and recent chain store tax cases, distinguished. Pp. 564–566.

7 F. Supp. 438, reversed.

Appeals from judgments of the three-judge District Court upholding the constitutionality of the Kentucky Gross Sales Tax and dismissing the bills in four suits brought to enjoin its enforcement. The District Court, on a previous hearing, had dismissed the bills on the ground that complainants had an adequate remedy at law, which judgments were reversed and remanded on appeals to this Court. 287 U. S. 9.

Mr. Robert S. Marx, with whom *Messrs. Frank E. Wood, John C. Doolan, Harry Kasfir,* and *James W. Stites* were on the brief, for appellants.

Messrs. S. H. Brown and *Francis M. Burke,* Assistant Attorneys General of Kentucky, with whom *Mr. Bailey P. Wootton,* Attorney General, and *Mr. Leslie W. Morris* were on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

These are four suits heard by a specially constituted District Court in Kentucky, to enjoin state officers from enforcing an act of that Commonwealth imposing a gross sales tax. The plaintiffs are, respectively, a domestic corporation conducting a department store in Louisville, a partnership operating a similar store in the same city, a Delaware corporation having 21 department stores in Kentucky, and an Ohio corporation maintaining 289 grocery stores within the Commonwealth. Nineteen individuals, partnerships and corporations, proprietors of one or more stores selling various lines of merchandise, intervened as plaintiffs. Interlocutory injunctions issued, but the district court of three judges dismissed the bills for want of equity, being of opinion there was an adequate remedy at law. Upon appeal this court reversed the decrees and remanded the causes.[1] At final hearing the district court found the remedy at law inadequate, but sustained the act and dismissed the bills.[2] The present appeals are upon the merits.

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[1] 287 U. S. 9.

[2] 7 F. Supp. 438; 8 F. Supp. 396.

The statute became a law March 17, 1930. The title and certain sections are copied in the margin; other sections are there summarized.[3] The tax imposed upon the first

[3] Chapter 149, Acts of 1930, p. 475.

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act.

"Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars;

$400,000 of annual gross sales is 1/20th of one per cent. The rate increases on each additional $100,000 of sales between $400,000 and $1,000,000, inclusive, being 17/20ths of one per cent. in the last bracket. On sales over $1,000,000 the rate is one per cent. The increased rates are applicable, however, only in respect of sales in each successive bracket, and therefore the tax burden attributable to $1,100,000 of sales is not one per cent., but a composite ascertained by adding the total tax for the sales falling within the various brackets, and dividing by the dollar-value of all sales. Thus the act requires the merchant to pay in the total .05 per cent. on $400,000 of sales, .305 per cent. on $1,000,000 of sales and .96 per cent. on $15,000,000 of sales.

The appellants charge that the statute violates several sections of the Constitution of Kentucky and several provisions of the Federal Constitution. We shall not stop to enumerate these, since we must sustain the claim that the classification made by § 2 denies the appellants the equal protection of the laws assured by the Fourteenth Amendment.

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eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars."

§ 3 provides for annual returns to the state tax commission, assessment and payment of the tax. § 4 allows certain credits for other taxes. § 7 makes it a misdemeanor, punishable by fine or imprisonment, to fail to file returns and pay the tax.

The trial court's relevant findings are: The act is essentially a revenue measure. The tax is on gross sales, not on gross collections from vendees. Sales made by merchants taxed under any of the brackets of the act are made in competition with like sales of the same character of merchandise by those who are taxed under other brackets. As a general proposition increased volume of sales results in increased profits and increased ability to pay the tax. The rate of profit from retail sales generally varies with the character of the goods sold. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized and the amount of profit. As a general proposition those merchants doing the largest amount of trade are enabled to secure the highest type of management.

In the light of these findings, does the act tax sales in an unequal and arbitrary way, classifying them for the imposition of different rates without reference to any real or substantial distinction, as appellants insist; or does it impose an excise upon the conduct of retail business, reasonably adjusted in amount with regard to substantial differences in the nature of the privilege exercised, as appellees contend?

In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect.[4] "The substance and not the shadow determines the validity of the exercise of the power."[5] The act does not impose an income or profits tax, or a license tax, is not an inspection measure, or a police regulation. The tax is not confined to a par-

[4] *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 298; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 348.

[5] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698.

ticular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class. And the excise is laid in respect of the same activity of each of them—the making of a sale. Although no difference is suggested, so far as concerns the transaction which is the occasion of the tax, between the taxpayer's first sale of the year and his thousandth, different rates may apply to them. The statute operates to take as the tax a percentage of each dollar due or paid upon every sale, but increases the percentage if the sale which is the occasion of the tax succeeds the consummation of other sales of a specified aggregate amount. As found by the court below, the act of making a sale, which with all others made in the taxable year represents a total sales price of $400,000 or less, results in the imposition of a tax of 1/20th of one per cent. upon the price, whereas the making of the same sale by one who has theretofore sold $400,000 but less than $500,000 worth of goods entails a tax of 2/20ths of one per cent., or by one whose prior sales aggregate $900,000, a tax of 17/20ths of one per cent.

In connection with other provisions of the fundamental law, this court has had occasion to analyze similar acts. In *Brown* v. *Maryland,* 12 Wheat. 419, a tax on the occupation of an importer was held a tax on imports obnoxious to the commerce clause. Said the court (p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance . . . All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself." In *Cook* v. *Pennsylvania,* 97 U. S. 566, a tax on the amount of an auctioneer's sales was declared a tax on the goods sold. In *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, a state tax on the business of selling goods in foreign commerce, measured by gross receipts from goods so sold and shipped, was pronounced an impost upon exports. The court said

(p. 297): " . . . nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, decides a privilege tax imposed on sellers of gasoline, fixed at so many cents per gallon sold, is a tax on sales. At page 222 the court said: " Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. . . . To use the number of gallons sold . . . as a measure of the privilege tax is in substance and legal effect to tax the sale." And in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, a federal tax upon motorcycles " sold . . . by the manufacturer " was held to be an excise on the sale, and the doctrine of the *Panhandle* case was reaffirmed.

Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.

The appellees seek to avoid the arbitrary character of the classification of sales for the purpose of imposing the levy by the claim that the act, properly construed, lays an excise upon the privilege of merchandising at retail and the exaction is made only for this privilege. They insist the amount of tax is merely measured by the volume of sales,[6] and in this view the classification is not arbitrary if any reasonable relation can be found between the amount demanded and the privilege enjoyed. They en-

[6] Franchise taxes measured by net income have been sustained, as not constituting a tax on income: *Educational Films Corp.* v. *Ward,* 282 U. S. 379; compare *Macallen Co.* v. *Massachusetts,* 279 U. S. 620; *Pacific Co.* v. *Johnson,* 285 U. S. 480.

deavor to deduce such a relation from the alleged fact that a merchant's net income and his consequent ability to pay increase as the volume of his sales grows. The argument does not advance the case for the validity of the statute. Even in this aspect the classification is arbitrary, for the claimed relation of gross sales—the measure of the tax—to net profits fails to justify the discrimination between taxpayers.

The district court found that "generally speaking" he who sells more is in receipt of a greater profit and hence has larger ability to pay, and upon this basis justified the classification. But it is to be remembered that the act in question taxes gross sales and not net income. As stated in *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit;

and that gross and net profits vary with the character of the business as well as its volume. The trial court made no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance. Expert witnesses, using data assembled from various reporting agencies, endeavored to establish that net profits or net worth grow with increased sales. But their testimony not only indicated great variations within each class selected for comparison, but also showed that in some of the classes representing the greater amount of sales the net profit or addition to net worth is smaller than in a class having less aggregate sales. The best that can be said for this evidence is that, averaging the results of the concerns making the reports, it is true "generally speaking," as the court below put it, that profits increase with sales. The ratio of increase, however, differs in different lines of activity and even as between concerns carrying on the same business, and so many exceptions and reservations must be made that averages are misleading. The proofs submitted are insufficient to support the appellees' contention that the graduation of the tax was adjusted with reasonable approximation to the net earnings of the taxpayers, and that such minor and incidental inequalities as may be found are those always incident in the application of any valid general rule of classification. We think the graduated rates imposed were not intended to bear any relation to net profits. The argument based upon the asserted analogy to a tax upon net income graduated in accordance with the size of the income is unconvincing, for the exaction here demanded is not of that kind.

We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and

Kentucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.

The assertion that a graduated income tax, like the graduated sales tax under consideration, ignores the varying rates of return upon investment of those carrying on similar enterprises, is obviously inaccurate. An income levy, by its very nature, assures equality of treatment, because the burden of the exaction varies with increase or decrease of return on capital invested and with the comparative success or failure of the enterprise. If, as argued, larger merchants are more efficient, their efficiency will be correspondingly reflected in their net earnings. If, as claimed, they are able to procure better management, a tax upon gains will uniformly reflect the effects of such management. And the same principle holds true of every advantage said to inhere in the magnitude of a business.

As we have said, the statute does not purport to levy a tax on incomes. Plainly it does not in fact do so. A merchant having a gross business of $1,000,000, but a net loss, must pay a greater tax than one who has a gross of $400,000, and realizes a substantial net profit. The record discloses such a situation. In the year 1930, 24,186 merchants were subject to the tax. Two of these, whose gross sales amounted to 8 per cent of the gross sales of all merchants, would have paid, but for the interlocutory injunction entered by the court below, more than half of the total tax due by all those subject to the impost. The payment by one of them would have been about $124,000, or $18,000 in excess of the total tax paid by the 24,163 merchants who reported $362,000 of gross sales, and of whom 24,128 had sales totaling less than $400,000; and this taxpayer had in Kentucky in that year a net income of approximately $172,000. The figures for 1931 and 1932 exhibit a like disparity. In the latter year the company last mentioned, though having sales in Kentucky amounting to $11,447,611, would, after payment of the tax, have shown a net loss of over $9,000. To assert that a law, thus operating, reasonably equates the exaction to net income is to ignore the facts.

The appellees say there is no showing that the tax in its actual operation is unduly burdensome or harmful to any of the appellants or amounts to confiscation of their property. The assertion is irrelevant to the issue of inequality, and is, moreover, contradicted by the record. In the case of one plaintiff whose sales in Kentucky in 1930 were over $14,500,000, in 1931 over $13,400,000 and in 1932 over $11,400,000, the net profits in the same state, after deducting the sales tax, would have been in 1930, $48,677, in 1931, $39,358, and in 1932 it would have shown a loss of $9,023. In the light of this demonstration, it is difficult to follow the argument that the constitution of Kentucky, as construed by her courts, is a shield against any tax law imposing an excise, the effect of which is to extinguish all profits, when we are told by appellees in the next breath, that this very statute has been upheld by the Supreme Court of Kentucky against constitutional attack.[7] But if that court had not spoken on the subject, these appellants are not to be denied relief under the Fourteenth Amendment, by resort to a forecast of possible amelioration of their situation by the state courts.

Ignoring the glaring inequalities of burden resulting from the statute, the appellees tell us that if and when the load becomes too heavy upon any taxpayer, he may

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[7] See *Moore* v. *State Board of Charities and Corrections*, 239 Ky. 729; 40 S. W. (2d) 349.

with confidence invoke the Fourteenth Amendment.[8] The position seems to be that different principles govern various forms of taxation, and that what has been held with respect to the unrestricted power of a legislature to determine the amount to be exacted by other forms of taxation has no application to an excise. We are unaware of any such distinction in logic and the authorities sanction none. Every taxing law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the legislature.

To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the courts but in the legislature, and to exercise the usurped power arbitrarily by substituting our conceptions of public policy for those of the legislative body. In *Veazie Bank* v. *Fenno,* 8 Wall. 533, a tax of ten per cent. on the notes of state banks was upheld although it " drove out of existence every State bank of circulation within a year or two after its passage." See *Loan Association* v. *Topeka,* 20 Wall. 655, 663, 664. In *Knowlton* v. *Moore,* 178 U. S. 41, in sustaining an excise tax this court said, " if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied." (P. 60.) See also, *Magnano Company* v. *Hamilton,* 292 U. S. 40; *Fox* v. *Standard Oil Co. ante,* p. 87.

[8] By Public Act No. 24, Laws of 1933, Vermont imposed a graduated gross sales tax increasing from 1/8 of one per cent on sales of from fifty thousand to one hundred thousand dollars to four per cent. on sales above two million dollars. A levy of a similar sort applied in Kentucky, as shown by the facts proved in the present record, would have deprived many merchants in various tax brackets of all net income from their stores. We were informed at the argument that this statute has been held unconstitutional by a court of first instance.

Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that, if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax.

The suggestion is made that the *ad valorem* property tax heretofore laid on Kentucky merchants bears more heavily upon the little dealer than upon his bigger competitor, as the real estate and stock of merchandise of the former is greater in proportion to the business done than is the case with the latter. This fact may indeed be a proper reason for adjusting the tax burden so as better to reflect the fruits of the enterprise; but it can afford no excuse for an arbitrary and unequal imposition as between persons similarly circumstanced. The record fails to show that an income tax or a flat tax on sales would not accomplish the desired end. The adoption of laws of the latter description by many of the states is a practical confirmation of the view that they are effective measures.[9]

The appellees refer to certain decisions of this court, but none of them rules this case. Those claimed to be particularly pertinent will be briefly noted.

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[9] Arizona Laws, 1933, c. 18; California Laws, 1933, c. 1020; Georgia, Code 1930, Supplement, Act of 1929, § 993(316); Illinois, Act of June 28, 1933, Laws, 58th Gen. Assembly, p. 924; Indiana, Burns Ind. Stats., 1933, c. 26, § 64–2601; Iowa, c. 82, Laws 45th Gen. Assembly, Extra Sess., § 37ff; Kentucky, c. 25, Ky. Acts, Special Sess., 1934; Michigan, Public Acts, Sess. 1930, No. 167; Mississippi, G. L. 1934, c. 119; Missouri, Laws, Extra Sess. 1934, p. 155; New York, Cahill's Consol. Laws, 1933 Supp., c. 61, Art. 17, § 390, p. 144; North Carolina, Sess. 1933, c. 445, p. 768; Ohio, Page's Ohio General Code, § 5546–1, p. 859; Oklahoma, First Spec. Sess. 1933, c. 196, p. 456; Pennsylvania, Act Aug. 19, 1932, Special Sess. 1932, § 3, p. 92; South Dakota, Laws, 1933, § 184; Utah, Laws, 1933, c. 63 as amended by c. 20, Second Special Session, 1933; Washington, Laws, 1933, c. 191, p. 869; West Virginia, Act of May 26, 1933, Extra Session, c. 33, p. 219.

In *Clark* v. *Titusville,* 184 U. S. 329, the tax levied consisted of a flat fee exacted for a license which entitled the merchant to conduct business for the ensuing year. The lowest fee was $5.00, for a merchant who during the year preceding that covered by the license had made sales not in excess of $1,000. A $10.00 fee applied to one who had sales between $1,000 and $2,500; a $15.00 fee to one having sales between $2,500 and $5,000; a $25.00 fee to one whose sales were between $5,000 and $10,000; and so on to a fee of $100.00 for the seller of $60,000 worth or more. It is important to note the grounds of attack. One was that the classes were so defined that a merchant with sales of $2,499 would pay at one rate and another with sales of $2,501 would pay at a higher rate; that a merchant whose sales were $1,001 would pay the same fee as one whose sales were $2,499. In overruling this objection, the court relied upon the principle that some injustice is bound to result from any general rule of classification, and equal protection demands only reasonable uniformity in dealing with parties similarly circumstanced. A second objection was that the percentage of tax to sales was greater in the lower than in the higher brackets—that is, that a merchant selling goods for $60,000 or more paid a less percentage of his sales by way of tax than the smaller merchant who sold only $1,000 worth of goods. The objection was unavailing, because the tax did not purport to be fixed upon a percentage of sales. The purpose was to charge a larger license fee to a larger business. Any tax measured by a fixed and uniform percentage of gross sales would impose a heavier burden on the taxpayer having the greater volume of sales. The excise here involved is not of that sort, the sum exacted from the merchant doing the larger business being not only greater in gross amount but larger in proportion to sales, than that demanded of his smaller competitor.

In *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, a licensing ordinance provided for a greater license to be paid by theatres charging a higher rate for tickets than was exacted from those charging lower rates. This court sustained the classification upon the ground that the distinction between the sorts of theatres classified obtains in every large city of the country; and said (p. 69): "It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of its business. In other words, there is a natural relation between the price of admission and revenue, some advantage certainly that determines the choice. . . . The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action." The case falls within the principle that even a small difference in the method of conducting business may be availed of by government in imposing different taxes. It furnishes no support for a tax upon the sales of merchants at rates varying per sale or per dollar with the amount of their respective gross sales.

In several recent cases [10] we sustained the classification of chain stores for taxation at rates higher than those applicable to single stores, and graduated upward on each store as the total number of units in one ownership increased. We found this classification reasonable because of advantages incident to the conduct of multiple stores and obvious differences in chain methods of merchandising as contrasted with those practised in the operation of one store. The instant cases present a classification of quite another kind. The Kentucky statute ignores the form of

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[10] *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Louis K. Liggett Company* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co., ante,* p. 87.

organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other. We hold the act unconstitutional, and reverse the judgment.

Reversed.

MR. JUSTICE CARDOZO, dissenting.

The prevailing opinion commits the court to a holding that a tax upon gross sales, if laid upon a graduated basis, is always and inevitably a denial of the equal protection of the laws, no matter how slight the gradient or moderate the tax.

In the view of the majority, the relation between the taxpayer's capacity to pay and the volume of his business is at most accidental and occasional. In the view of the legislature of Kentucky and of its highest court (*Moore* v. *State Board of Charities and Corrections,* 239 Ky. 729; 40 S. W. (2d) 349), the relation, far from being accidental or occasional, has a normal or average validity, attested by experience and by the judgment of trained observers. The one view discovers in the attempted classification an act of arbitrary preference among groups essentially the same. The other perceives in the division a sincere and rational endeavor to adapt the burdens of taxation to the teachings of economics and the demands of social justice.

A theory readily intelligible, whether it be sound or unsound, underlies the adoption of the graduated levels. Economically, the theory is that there is a minimum of size for business units below which efficiency is less on the average than expansion would tend to make it; that there are intermediate levels within which efficiency is subject on the average to progressive development; and that there is an ultimate level beyond which efficiency, even if promoted, goes forward more slowly and at a diminishing ratio. Socially, the theory is that just as in taxes upon income or upon transfers at death, so also in imposts upon business, the little man, by reason of inferior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne by the big one. For the purposes of retail business, the first or less efficient class is identified by the Kentucky statute with merchants whose gross sales are $400,000 or less; the six intermediate classes begin at that point and end with a million dollars; the final class is made up of those whose sales are over a million. For the first class the effective rate is 1/20 of 1 per cent; for the last it gradually approaches, though it can never quite reach 1 per cent, this by reason of the fact that the taxpayer in the higher brackets gets the benefit of the application of the lower rates to those parts of the gross sales that fall within the lower levels.

For many years Kentucky taxed her retail merchants upon the basis of property or capital employed within the state. Tolman, The Gross Sales Tax in Kentucky, 10 Tax Mag. 89, 112. The tax thus apportioned bore heavily upon the small retailer in comparison with the large one. This was so for several reasons developed with full statistics by students of taxation. Tolman, *loc. cit., supra,* citing Government of Kentucky, Report of the Efficiency Commission of Kentucky, vol. II, p. 232, and Martin & Patton, Operations of Real Estate Tax in Lexington, Ky., (Bureau of Business Research, University of Kentucky, MS.) Perhaps the chief reason is the rapidity of turnover in large scale enterprises, the effect of this mobility being to reduce the value of the property that must be kept on hand at tax day as well as at other times. Tables in the record bear witness in a striking way to the resulting inequality. Upon the basis of a property tax a merchant with sales of $10,000,000 was found to pay less than one-half as much tax per dollar of sales as did a merchant whose sales were $150,000 or less. Cf. Tolman, *loc. cit., supra;* also Statutes of Kentucky, § 4189–2. More concretely, Kroger, one of the petitioners, with gross sales of many millions, paid a tax upon the old basis of only 137/1000 of one per cent in proportion to its sales in comparison with an average of 934/1000 of one per cent paid by the 16,535 merchants whose sales were less than $400,-000 annually. Tolman, *loc. cit., supra.* Kentucky is not chargeable with oppressive discrimination in superseding such a method of taxation by one more nearly equal in its burdens.

The choice of a new method made it necessary for the legislature to strike a balance of advantage. Tolman, *op. cit., supra,* at p. 90; Haig and Shoup, The Sales Tax in the American States, Columbia University Press (1934), p. 159 *et seq.* For a time there was a suggestion of a tax on chain stores only, but a lower federal court had held that method to be unlawful (38 F. (2d) 652), and the decision of this court to the contrary (*State Board of Tax Commissioners* v. *Jackson,* May, 1931, 283 U. S. 527), had not yet been announced. To be sure there was the possibility of a tax upon gross sales at a flat rate without graduated levels, but a burden so imposed might be subject to new objections. In the view of serious students of the problem, a flat tax upon gross sales is not always shifted to the consumer. It is often absorbed more or less by the seller, for a time, even if not permanently, to prevent the falling off of sales.

National Industrial Conference Board, General Sales or Turnover Taxation (1929), pp. 8, 9, *et seq.*; Buehler, Recent Developments of the General Sales Tax, 36 Journal of Pol. Econ. 83, 92, 93. Such at least is the teaching of a school of economists, though the subject is one as to which the learned are divided.[1] At times absorption is accomplished by a reduction of the price even when in form the amount of the tax has been added to the bill. Haig & Shoup, *op. cit., supra,* pp. 29, 31 *et seq.*; Buehler, General Sales Taxation (1932), pp. 194, 195. An impressive body of opinion is back of the view that in so far as the tax is not passed to the consumer the flat rate bears more heavily on the small business than on the large one. This tendency is corrected when the tax is imposed on a graduated basis. One of the consequences of such a tax is to make the shifting of the burden easier for those who pay the lower rates than for those who pay the higher ones. For that reason the flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer, it is said, occupies, both absolutely and relatively, a position of economic superiority by reason of the volume of his business. In that view, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the end at a more genuine equality. By the statute in controversy the Commonwealth of Kentucky is aligned with that position. It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous. *Otis* v. *Parker,* 187 U. S. 606, 609. Responsibility for economic wisdom has been laid upon the legislature. There is finality in its choice, even though wis-

[1] The problem is discussed by STONE, J., with a reference to many treatises on finance, in his dissenting opinion in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 581.

dom may be lacking, unless choice can be found to be so void of rationality as to be the expression of a whim rather than an exercise of judgment.

The question then is whether there is rationality in the belief that capacity to pay increases, by and large, with an increase of receipts. Certain it is that merchants have faith in such a correspondence and act upon that faith. A witness for the petitioners tells us: "The policy prevailing throughout the United States, so far as retail merchandising department stores are concerned, is to get as large a volume as possible with a small percentage of profit, allowing the volume to produce the net profit." If experience did not teach that economic advantage goes along with larger sales, there would be an end to the hot pursuit for wide and wider markets. Official statistics in Kentucky confirm the impulse of her merchants, an impulse shared with merchants everywhere. Tables prepared by a witness on the basis of returns to the State Tax Commission show that persons and corporations whose sales were over $1,000,000 had net earnings between $125,000 and $400,000; those with sales between $600,000 and $800,000 had net earnings of $35,000 to $60,000; those with sales between $200,000 and $450,000 had net earnings of $5,000 to $34,000, with the exception of one concern which was conducted at a loss; and those with smaller sales had net earnings ranging from $10,000 to nothing. This does not mean that an increase of gross sales in one business brought the same increase of net earnings as an increase of gross sales in every other business. It does not mean that larger sales brought net earnings in a mounting ratio, relatively as well as absolutely. It does mean, however, that on the whole, net earnings in a business were higher when sales were large than they were in the same business when sales were comparatively small. In brief there is a relation of correspondence between capacity to pay and the amount of business done. Exceptions, of course, there are. The law builds upon the probable, and shapes the measure of the tax accordingly.

It is no answer to say that as between one business and another, or even as between one person and another engaged in the same business, there will be varying rates of return upon the amount of the investment. This is true also of a tax on net income. Net earnings of $100,000 may represent for one man a return on a capital of $2,000,000 and for another a return on a capital of double that amount, yet the tax will be the same for each. So also it is no answer to say that in the administration of this statute two merchants whose sales are very large are subject to as heavy a tax as many thousands of merchants whose sales are in the lowest brackets. One might as well compare the federal income tax of a banker whose net earnings are in the millions with that of a thousand clerks who by reason of exemptions are to pay no tax whatever. The comparison proves nothing unless it be the obvious fact that taxpayers are few when the count is at the highest level. Once more, it is no answer to say that though capacity to pay is enlarged on the average by an increase of the sales, there are times when sales increase and yet the outcome is a loss. No loss has been suffered by any of the petitioners, unless it be in one instance as the result of inefficiency, and so the findings show. In so far as the statute fails to make allowance for the contingency of loss, it is certainly not arbitrary in its operation as to those realizing a gain, and they will not be heard to complain that it is arbitrary as to others. *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Keeney* v. *New York,* 222 U. S. 525, 536; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180. But the result will not be changed if their standing be assumed. The law has regard in these matters, not to invariable sequences, but to probabilities and tendencies. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69. "The fact that a better taxing system might be conceived does not render the law invalid." *Salomon* v. *State Tax Comm'n,* 278 U. S. 484, 491. At the very least, an increase of gross sales carries with it an increase of opportunity for profit, which supplies a rational basis for division into classes, at all events when coupled with evidence of a high degree of probability that the opportunity will be fruitful.

Many a pertinent analogy reinforces this conclusion. The tax upon a long chain of stores is often at a higher rate than the tax upon a short one (*State Board of Tax Commissioners* v. *Jackson, supra*), yet it may happen that in lean years, still more in financial crises, the greater the number of stores, the less the actual gain. *Fox* v. *Standard Oil Co., ante,* p. 87. The presence of such a possibility does not make the graduation wrongful. The theatre charging a high price for tickets of admission may be taxed at a higher rate than one whose admission price is low. A showing that the revenue of the high priced theatres is less than that of some of the others will not cause the tax to fail. *Metropolis Theatre Co.* v. *Chicago, supra.* McKenna, J., sagely pointed out in that case that the choice between high and low prices had been made by the theatre itself and made in response to its own conception of advantage. A conception good enough for the taxpayer was thought to be good enough for the government. So here, under the challenged statute. Larger and larger sales are sought for by business and sought for with avidity. They are not the products of whim and fancy. They represent a conception of probabilities and tendencies confirmed by long experience. The conception is no more arbitrary in the brain of a government official than it is in the mind of a company director.

The striving to expand being so general, there is no occasion for surprise at the discovery of a relation between profit and expansion when expansion is kept within the bounds of moderation. In tracing that connection it will not do to compare the profits of one line of business with those of a different one viewed in isolation. Many factors enter to make one kind of enterprise more gainful than another. Cf. Tolman, *op. cit., supra,* at p. 112. Moreover, the rule is undoubted that different occupations may be taxed in different ways. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Stebbins* v. *Riley,* 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *Union Bank* v. *Phelps,* 288 U. S. 181. Comparison must be between large and small enterprises in the same line of business, or in many lines of business viewed in combination. This comparison being made, large sales will be found in the main to have the advantage over small ones. There are those who hold that growth may be so large as to make the business clumsy and inefficient, destroying unity of management, but enterprises swollen to that extent are not the common run that fix the patterns of a statute. It is significant that graduation stops according to the plan of the Kentucky statute before size becomes inordinate.

In what has been written the effort has been to show that enhancement of the gross sales has a tendency in respect of the average business enterprise to increase capacity to pay by making the gains larger than they would be if sales were small. This, if it has been made out, will serve without more to sustain the separation into classes that is now under attack. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, 296; *Knowlton* v. *Moore,* 178 U. S. 41, 54. But statistics are not lacking to give color to a broader claim. The studies of the Harvard Bureau of Business Research show (Bulletins 74, 78, 83 and 85) that despite occasional aberrations gross sales have a direct bearing on the ratio of net gain to sales and on the ratio of net gain to net worth.[2] In brief there is not only an increment of profit expressed in terms of dollars, but an increment also when the profit is expressed as a percentage. How far the teachings of these tables are to be credited as accurate, it is not for us to say. *Williams* v. *Mayor,* 289 U. S. 36, 42; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257. They are confirmed by economists of standing who testified for the state. Opposed are other scholars, also men of high repute, who have studied the results of large scale enterprises and small ones, and on the basis of that study advance a different doctrine. They find that the high percentages of profit are more likely to be earned when capital

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[2] Bulletin 74 deals with the operations of department stores for 1927. One set of tables includes stores whose sales are in excess of a million dollars. They are divided into four classes (one million to two million; two million to four million; four million to ten million; ten million and over). Referring to these classes, the report says (p. 10): "While noticeable differences appeared in net profit for stores grouped according to volume of sales, these differences were even greater in the case of total net gain both as a percentage of net sales and as a percentage of net worth. In each instance these figures varied directly with the volume of sales, and a distinctly more favorable showing was made by the larger firms." Another set of tables includes stores whose sales were under a million dollars. Among these the most favorable net profit showing was that of the group with volume of sales between one quarter and one half million. Between half a million and a million, the ratio of increase declined. Even there, however, the showing was more favorable than for stores under a quarter of a million, where the average was one of loss. Bulletins 78, 83 and 85 state the operations for later years with results not greatly different. Even in years of loss, the percentage of loss had in the main a tendency to be lower as the volume of the sales increased. "It is quite clear that the larger stores operated on a distinctly more satisfactory basis than the smaller stores, and that success as measured by earnings varies directly with size." Bulletin 85, p. 8.

and sales are moderate. Epstein, Industrial Profits in the United States, pp. 45, 46, 131, 132. On the other hand, they are not hostile to the doctrine that on the average the net earnings of a business increase absolutely, though not proportionately, as the sales increase in volume.[3] Even as to percentages, the lawmakers of Kentucky were at liberty to reach their own conclusion in the face of these conflicting judgments pronounced by men of learning. If their conclusion is not arbitrary, it is not for us to set them right.

The studies back of these statistics are instructive not merely as to results but also as to causes. Harvard Bureau of Business Research, Bulletin 85, p. 9. Sales on a large scale are accompanied, it seems, by differences of method as well as differences of quantity. Some of the attendant advantages are matters of common knowledge. The big shops having ample capital can get the best locations. This is a form of advertising, productive of good will. The big shops can practise economies impossible for small ones. In particular they can make their purchases in bulk and hence at cheaper prices. The big shops acquire a prestige that makes customers eager to buy of them. Here and there they can even charge a little more than others, at least for high priced goods, or goods not wholly standardized, and the buyer will ignore the difference. If they happen to be department stores, they stimulate a customer to buy at one shop without the bother of going elsewhere. If they happen to be chain stores, they have other methods of attraction. Even management tends to be more efficient unless the business becomes unwieldy by reason of its size. Bulletin 85, *supra*. The president of the Kroger Company tells us: " Kroger trains

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[3] The prevailing opinion in effect concedes " that averaging the results of the concerns making the reports it is true ' generally speaking,' as the court below put it, that profits increase with sales."

its men, having regular training schools and diplomas." As already pointed out, the scheme of the Kentucky statute puts a stop to graduation before size becomes immoderate. From all this it comes about that many avenues of profit closed to the little dealer are open to his big competitor.

The framers of a system of taxation may properly give heed to convenience of administration, and in the search for that good may content themselves with rough and ready compromises. Elaborate machinery, designed to bring about a perfect equilibrium between benefit and burden, may at times defeat its aim through its own elaboration. A crippling result of the decision just announced will be to restrict the choice of means within bounds unreasonably narrow. Hereafter in the taxation of business a legislature will be confined, it seems, to an income or profit tax if it wishes to establish a graduated system proportioning burden to capacity. But profits themselves are not susceptible of ascertainment with certainty and precision except as the result of inquiries too minute to be practicable. The returns of the taxpayer call for an exercise of judgment as well as for a transcript of the figures on his books. They are subject to possible inaccuracies, almost without number. Salaries of superintendence, figuring as expenses, may have been swollen inordinately; appraisals of plant, of merchandise, of patents, of what not, may be erroneous or even fraudulent. In the words of a student of the problem, "statements of profits are affected both by accounting methods and by the optimistic or pessimistic light in which the future is viewed at the time when the accounts are made up." Epstein, *op. cit., supra,* p. 5. These difficulties and dangers bear witness to the misfortune of forcing methods of taxation within a Procrustean formula. If the state discerns in business operations uniformities and averages that seem to point the way to a system easier to administer than one based upon a report of profits, and yet likely in the long run to work out approximate equality, it ought not to be denied the power to frame its laws accordingly.

For answer to all this the thrust will not avail that "it is difficult to be just and easy to be arbitrary." The derogatory epithet assumes the point to be decided. There is nothing arbitrary in rescuing a vast body of taxpayers from the labor and expense of preparing elaborate reports, at best approximately accurate. There is nothing arbitrary in rescuing a government from the labor and expense of setting up the huge and unwieldly machinery of an income tax department with a swarm of investigators and accountants and legal and financial experts. To frame a system of taxation in avoidance of evils such as these is no act of sheer oppression, no abandonment of reason, no exercise of the general will in a perverse or vengeful spirit. Far from being these or any of them, it is a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia.

The argument is made that the principle of graduation, once it has gained a lodgment, may be extended indefinitely, with the result that in some other statute the rate for the upper levels, instead of being confined as it is here to something less than one per cent, may be ten per cent or twenty, thus wiping out profits when business is done on a large scale. A sufficient answer may well be that no such act is now before us; but if this answer be inadequate, another is at hand. The more effective answer is that under the law of Kentucky the danger is illusory. There is no need to consider in respect of an excise upon sales whether the doctrine of *Magnano Co.* v. *Hamilton,* 292 U. S. 40, and *Fox* v. *Standard Oil Co., supra,* could be

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invoked successfully to uphold a destructive measure of taxation if the standard of validity were to be looked for in the Fourteenth Amendment and not in any other law. The significance of whatever distinctions there may be will be weighed when the event arises. For the present it is enough to say that, under the constitution of Kentucky as interpreted by repeated decisions of her highest court, no tax law in the nature of an excise will be upheld if its effect is so drastic as to extinguish profits altogether. *Fiscal Court of Owen County* v. *Cox Co.*, 132 Ky. 738; 117 S. W. 296; *Louisville* v. *Pooley*, 136 Ky. 286; 124 S. W. 315; *Sperry & Hutchinson* v. *Owensboro*, 151 Ky. 389; 151 S. W. 932. Because of those decisions we refused only recently to sustain a statute of Kentucky imposing a prohibitory tax upon the sale of oleomargarine (*Glenn* v. *Field Packing Co.*, 290 U. S. 177, affirming 5 F. Supp. 4), though in *Magnano Co.* v. *Hamilton*, *supra*, a like tax, adopted by the state of Washington, was held to be consistent with the constitution of the nation. The relevant provisions of the Kentucky constitution and of the explanatory judgments of her courts are written by implication into the Kentucky tax act as if put there in so many words. The act is to be interpreted as if it said: "The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low." Such an extinguishment of profits is not the outcome of the tax when the act is applied to the business of these petitioners, and so the court below has found.[4] Such can never be the outcome either under this

[4] A loss of $9,023 would have been suffered by one of the petitioners if the tax had been paid in 1932, but the finding is that for that year the business was conducted without reasonable skill, and that with a change of the methods of management the loss was turned into a profit. At most the operations of that year might call under the Kentucky decisions for a modification of the judgment. The petitioners seek an injunction that will annul the statute altogether.

act or any other as long as the constitution of Kentucky continues what it is today.

The case has thus far been considered almost wholly without reference to the precedents. When these are examined, the conclusion is even clearer. To dwell upon the chain store decisions is needless. *Board of Tax Commissioners* v. *Jackson, supra; Fox* v. *Standard Oil Co., supra; Liggett Co.* v. *Lee,* 288 U. S. 517. They are too recent to be forgotten. Classification in those cases ran athwart the lines of profit, yet it was none the less sustained. There is no magic, however, in the catchword of a " chain." In cases not so recent, other forms of business enterprise have been subjected to graduated taxes on the basis of size alone without reference to profits. Thus, in *Clark* v. *Titusville,* 184 U. S. 329, a license tax was laid upon wholesale and retail merchants, the rate for each class varying progressively with the amount of the gross sales. The court upheld the classification as one reasonably related to capacity to pay. In *Metropolis Theatre Co.* v. *Chicago, supra,* already summarized in this opinion, a tax upon theatres proportioned to the cost of tickets was upheld against the contention of the taxpayer that the price of tickets was unrelated to the profits of the venture. In *Pacific American Fisheries* v. *Alaska,* 269 U. S. 269, a tax had been laid on salmon canneries at graduated levels, the percentage of the tax increasing with the number of cases packed. It was pressed that the tax discriminated against large canneries in favor of small ones. The argument was dismissed with the remark that " classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore." Cf. *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, 228; *Dow* v. *Beidelman,* 125 U. S. 680, 691; *Chicago, Burlington & Quincy R. Co.* v. *Iowa,* 94 U. S. 155, 164; *Chesapeake & Ohio Ry. Co.* v. *Conley,* 230 U. S. 513, 522; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Hope Gas Co.* v. *Hall,* 274 U. S. 284; *Citi-*

zens' Telephone Co. v. *Fuller,* 229 U. S. 322; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688. See also *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 43, 44, which brings the precedents together. Other cases could be added.

In fine, there may be classification for the purpose of taxation according to the nature of the business. There may be classification according to size and the power and opportunity of which size is an exponent. Such has been the teaching of the lawbooks, at least until today.

I am authorized to state that MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

METROPOLITAN CASUALTY INSURANCE CO. *v.* BROWNELL, RECEIVER.

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

No. 20. Argued October 15, 1934.—Decided March 18, 1935.

1. A discrimination in the state law between foreign and domestic casualty insurance corporations, whereby the former are forbidden to limit by agreement to less than three years the time within which suit may be brought against them on their contracts, whereas the latter are free to stipulate for any limitation that is reasonable, is not necessarily a denial of the equal protection of the laws but may be justified by differences between the two classes of corporations with respect to the security and collection of claims against them. Pp. 583–585.
2. The burden of establishing the unconstitutionality of a statute rests on him who assails it, and courts may not declare a legislative discrimination invalid unless, in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. Pp. 584–586.

3. That the legislature has pursued a different policy with regard to life insurance companies, by extending the prohibition here in question to both foreign and domestic companies of that class, does not, of itself, establish that the discrimination between foreign and domestic casualty companies is arbitrary. P. 586.

68 F. (2d) 481, affirmed.

Certiorari, 292 U. S. 620, to review a judgment affirming a judgment against the casualty company in an action against it to recover on an indemnity bond.

Mr. Alan W. Boyd, with whom *Mr. James W. Noel* was on the brief, for petitioner.

Mr. Sidney S. Miller, with whom *Mr. Samuel D. Miller* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on writ of certiorari, 292 U. S. 620, to review a judgment of the Court of Appeals for the Seventh Circuit, upholding an Indiana statute challenged as unconstitutional. § 9139, Burns Anno. Stat. 1926; Indiana Acts, 1865, c. 15, § 6; § 39-1713, Burns Anno. Stat. 1933.

Respondent's predecessor in interest brought suit in the district court for southern Indiana to recover upon an indemnity bond executed by petitioner. The petitioner set up by answer and demurrer that it is a corporation organized under the laws of New York, carrying on in Indiana the business of writing casualty insurance contracts and surety bonds; that the claim for which suit was brought was presented to petitioner more than fifteen months before the suit was begun; that the indemnity bond contained a stipulation that no proceedings upon a claim upon the bond should be brought more than fifteen months after the date of the presentation of the claim; and that the Indiana statute, § 9139, declaring such provision invalid, is void because a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The district court gave judgment on the pleadings for respondent which the Court of Appeals affirmed. 68 F. (2d) 481.

The statute, construed by the Supreme Court of Indiana in *Caywood* v. *Supreme Lodge,* 171 Ind. 410; 86 N. E. 482, as applicable only to insurance corporations organized in states other than Indiana, forbids them to insert in their policies certain specified conditions, not now material, and enacts that "any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and no condition or agreement not to sue for a period of less than three years shall be valid." There is no similar legislation applicable to domestic insurance companies carrying on the same class of business as petitioner. They are free to insert reasonable stipulations in their policies for a short period of limitation, cf. *Caywood* v. *Supreme Lodge, supra.* The statutory period of limitation for suits to recover money on indemnity policies is ten years. § 2-602; Burns Anno. Stat. 1933; cf. *Fidelity & Casualty Co.* v. *Jasper Furniture Co.,* 186 Ind. 566; 117 N. E. 258.

We may assume that the petitioner, by entering the State of Indiana and carrying on business there, is not barred from asserting that its legislation conflicts with the Federal Constitution, *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 497, and we pass directly to the single question presented, whether the prohibition applied here to a foreign casualty insurance company infringes the Fourteenth Amendment because it is not likewise applied to domestic companies. Petitioner does not assail the prohibition as not within the scope of the legislative power or as itself so arbitrary or unreasonable as to be a denial of due process. It is not argued, nor could it be on the record before us, that the restriction would be unconstitutional if applied equally to both classes of corporations. Discrimination alone is the target of the attack.

The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because they differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Power Mfg. Co.* v. *Saunders, supra,* 494. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. *Bond & Goodwin & Tucker, Inc.* v. *Superior Court,* 289 U. S. 361, 366; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, 75. See *Clarke* v. *Deckebach,* 274 U. S. 392, 396.

Here the classification relates to the legislative command that insurance companies shall not by agreement limit the period within which suit may be brought on their contracts to less than three years. The record, briefs and arguments before us are silent as to legislation or other local conditions in Indiana bearing on the question whether there may be differences, in the circumstances attending suits brought against local companies and those brought against foreign companies, such as to justify a difference in the applicable periods of limitation. It is not argued that a reasonable time for bringing a suit against domestic insurance companies of Indiana may not, in some circumstances at least, differ from that for suing foreign corporations. We are not told whether, in 1865 when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes of casualty insurance companies, foreign and domestic, or differences in their business practices within the state, have or have not made more difficult and time-consuming the collection of claims and the preparations for litigation against foreign insurance companies than against domestic companies. But we are asked to say *a priori* that, in the circumstances attending the two classes of suits, there can be no differences pertinent to the legislative command; that there can be no reasonable basis for the legislative judgment that a different period of limitation should be applied to the one than to the other.

It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators.[1] A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537.

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[1] *Erb* v. *Morasch*, 177 U. S. 584, 586; *Stebbins* v. *Riley*, 268 U. S. 137, 143; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 158; *Swiss Oil Corp.* v. *Shanks*, 273 U. S. 407, 413, 414; *Fort Smith Light & Traction Co.* v. *Board of Improvement*, 274 U. S. 387, 391, 392; *Clarke* v. *Deckebach*, 274 U. S. 392; *Silver* v. *Silver*, 280 U. S. 117, 123; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257, 258; *Railway Express Agency* v. *Virginia*, 282 U. S. 440, 444; *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537-541; *Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *Boston & Maine R. R.* v. *Armburg*, 285 U. S. 234, 240; *Lawrence* v. *State Tax Comm'n.*, 286 U. S. 276, 283; *Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535, 547, 548,

The statutes of Indiana disclose a legislative scheme applicable to domestic casualty insurance companies differing radically from that applied to foreign corporations, and in some respects more exacting. Compare chapter 17 of Title 39, Burns Anno. Stat. 1933, with other chapters of that title. A pertinent difference which may be noted relates to the maintenance of a fund with a public officer for the protection of policyholders. Domestic companies are required to maintain with the state commissioner of insurance a guaranty fund in cash or approved securities, Burns Anno. Stat. 1933, §§ 39–1101, 39–1105, to be augmented by the addition of five per cent. of all dividends paid, § 39–118. These provisions appear not to be extended to foreign companies, but they, like foreign corporations writing surety bonds, are permitted to maintain a guaranty fund of a different type with an officer of the state of incorporation. §§ 39–1703, 25–1401, 25–1402, 25–1301, 25–1304, Burns Anno. Stat. 1933.

There is no showing that the situation of foreign corporations, writing casualty insurance contracts in Indiana, is so similar to that of domestic corporations as to preclude any rational distinction between them as regards the time required for negotiating settlements of claims and the determination whether suits upon them should be prosecuted within or without the state. Where the record is silent, we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought. It is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state. For aught that appears such is the actual situation. See *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 548. We cannot say that these considerations may not have moved the legislature to insist that a longer time should be given for bringing suit against foreign companies than the latter. It was competent for the legislature to determine whether such differences exist, and upon the basis of those differences, and in the exercise of a legislative judgment, to make choice of the method of guarding against the evil aimed at. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584; *Insurance Co.* v. *Glidden Co.,* 284 U. S. 151, 158, 159. It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a class rather than to members of it selected by more empirical methods. *Clarke* v. *Deckebach, supra,* 397; *Westfall* v. *United States,* 274 U. S. 256, 259; *Silver* v. *Silver,* 280 U. S. 117, 123.

For reasons already stated the question presented here is not affected by the fact that the Indiana legislature has pursued a different policy with respect to life insurance companies by extending, in 1909, to both domestic and foreign life insurance companies the prohibition applied here. § 39–802, Burns Anno. Stat. 1933. Discriminations between life and casualty insurance companies are not forbidden and cannot be assumed to be irrational. Considerations which may have led to the equality of treatment of foreign and domestic life insurance companies are not disclosed. Whatever they may have been, we cannot assume that they are equally applicable to casualty companies.

Affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent, because they are of opinion that the principles stated and applied in *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490; *Kentucky Finance Corp.* v. *Paramount*

Auto Exchange Corp., 262 U. S. 544; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494; and *Guinn* v. *United States,* 238 U. S. 347, 363, require that the Indiana statute in question, as construed and applied in this case, be held void as contravening the equal protection clause of the Fourteenth Amendment, and that the judgment under review be reversed accordingly.

NORRIS *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 534. Argued February 15, 18, 1935.—Decided April 1, 1935.

1. Exclusion of all negroes from a grand jury by which a negro is indicted, or from the petit jury by which he is tried for the offense, resulting from systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color, is a denial of the equal protection of the laws guaranteed to him by the Fourteenth Amendment. P. 589.
2. Whenever a conclusion of law of a state court as to a federal right is so intermingled with findings of fact that the latter control the former, it is incumbent upon this Court to analyze the facts in order that the enforcement of the federal right may be assured. P. 590.
3. Evidence reviewed and found to establish systematic exclusion of negroes from jury service in two Alabama counties, solely because of their race and color. Pp. 590, 596.

229 Ala. 226; 156 So. 556, reversed.

Certiorari, 293 U. S. 552, to review a judgment affirming a conviction of rape.

Mr. Samuel S. Leibowitz for petitioner.

Mr. Thomas E. Knight, Jr., Attorney General of Alabama, with whom *Mr. Thomas Seay Lawson,* Assistant Attorney General, was on the brief, for respondent.

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

Petitioner, Clarence Norris, is one of nine negro boys who were indicted in March, 1931, in Jackson County, Alabama, for the crime of rape. On being brought to trial in that county, eight were convicted. The Supreme Court of Alabama reversed the conviction of one of these and affirmed that of seven, including Norris. This Court reversed the judgments of conviction upon the ground that the defendants had been denied due process of law in that the trial court had failed in the light of the circumstances disclosed, and of the inability of the defendants at that time to obtain counsel, to make an effective appointment of counsel to aid them in preparing and presenting their defense. *Powell* v. *Alabama,* 287 U. S. 45.

After the remand, a motion for change of venue was granted and the cases were transferred to Morgan County. Norris was brought to trial in November, 1933. At the outset, a motion was made on his behalf to quash the indictment upon the ground of the exclusion of negroes from juries in Jackson County where the indictment was found. A motion was also made to quash the trial *venire* in Morgan County upon the ground of the exclusion of negroes from juries in that county. In relation to each county, the charge was of long continued, systematic and arbitrary exclusion of qualified negro citizens from service on juries, solely because of their race and color, in violation of the Constitution of the United States. The State joined issue on this charge and after hearing the evidence, which we shall presently review, the trial judge denied both motions, and exception was taken. The trial then proceeded and resulted in the conviction of Norris who was sentenced to death. On appeal, the Supreme Court of the State considered and decided the federal question which Norris had raised, and affirmed the judgment. 229 Ala. 226; 156 So. 556. We granted a writ of certiorari. 293 U. S. 552.

First. There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the State. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter* v. *Texas,* 177 U. S. 442, 447, in relation to exclusion from service on grand juries: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370, 397; *Gibson* v. *Mississippi,* 162 U. S. 565." This statement was repeated in the same terms in *Rogers* v. *Alabama,* 192 U. S. 226, 231, and again in *Martin* v. *Texas,* 200 U. S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder* v. *West Virginia, supra; Martin* v. *Texas, supra.* And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination. *Neal* v. *Delaware, supra; Carter* v. *Texas, supra.* Compare *Virginia* v. *Rives,* 100 U. S 313, 322, 323; *In re Wood,* 140 U. S. 278, 285; *Thomas* v. *Texas,* 212 U. S. 278, 282, 283.

The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 593; *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Fiske* v. *Kansas,* 274 U. S. 380, 385, 386; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 745.

Second. The evidence on the motion to quash the indictment. In 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2688 were negroes. The male population over twenty-one years of age numbered 8801, and of these, 666 were negroes.

The qualifications of jurors were thus prescribed by the state statute (Alabama Code, 1923, § 8603): "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box." See Gen. Acts, Alabama, 1931, No. 47, p. 59.

Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson County. The testimony, as the state court said, tended to show that "in a long number of years no negro had been called for jury service in that county." It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County. The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had "never known of a single instance where any negro sat on any grand or petit jury in the entire history of that county."

That testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees. See *Neal* v. *Delaware, supra.* The case thus made was supplemented by direct testimony that specified negroes, thirty or more in number, were qualified for jury service. Among these were negroes who were members of school boards, or trustees, of colored schools, and property owners and householders. It also appeared that negroes from that county had been called for jury service in the federal court. Several of those who were thus described as qualified were witnesses. While there was testimony which cast doubt upon the qualifications of some of the negroes who had been named, and there was also general testimony by the editor of a local newspaper who gave his opinion as to the lack of "sound judgment" of the "good negroes" in Jackson County, we think that the definite testimony as to the actual qualifications of individual negroes, which was not met by any testimony equally direct, showed that there were negroes in Jackson County qualified for jury service.

The question arose whether names of negroes were in fact on the jury roll. The books containing the jury roll for Jackson County for the year 1930–31 were produced. They were produced from the custody of a member of the jury commission which, in 1931, had succeeded the commission which had made up the jury roll from which the grand jury in question had been drawn. On the pages of this roll appeared the names of six negroes. They were entered, respectively, at the end of the precinct lists which were alphabetically arranged. The genuineness of these entries was disputed. It appeared that after the jury roll in question had been made up, and after the new jury commission had taken office, one of the new commissioners directed the new clerk to draw lines after the names which had been placed on the roll by the preceding commission. These lines, on the pages under consideration, were red lines, and the clerk of the old commission testified that they were not put in by him. The entries made by the new clerk, for the new jury roll, were below these lines.

The names of the six negroes were in each instance written immediately above the red lines. An expert of long experience testified that these names were superimposed upon the red lines, that is, that they were written after the lines had been drawn. The expert was not cross-examined and no testimony was introduced to contradict him.[1] In denying the motion to quash, the trial judge expressed the view that he would not "be authorized to presume that somebody had committed a crime" or to presume that the jury board "had been unfaithful to their duties and allowed the books to be tampered with." His conclusion was that names of negroes were on the jury roll.

We think that the evidence did not justify that conclusion. The Supreme Court of the State did not sustain it. That court observed that the charge that the names of negroes were fraudulently placed on the roll did not involve any member of the jury board, and that the charge "was, by implication at least, laid at the door of the clerk of the board." The court, reaching its decision irrespective of that question, treated that phase of the matter as "wholly immaterial" and hence passed it by "without any expression of opinion thereon."

The state court rested its decision upon the ground that even if it were assumed that there was no name of a negro on the jury roll, it was not established that race or color caused the omission. The court pointed out that the statute fixed a high standard of qualifications for jurors (*Green* v. *State,* 73 Ala. 26; *State* v. *Curtis,* 210 Ala. 1; 97 So. 291) and that the jury commission was vested with a wide discretion. The court adverted to the fact that more white citizens possessing age qualifications had been omitted from the jury roll than the entire negro population of the county, and regarded the testimony as being to the effect that "the matter of race, color, politics, religion or fraternal affiliations" had not been discussed by

[1] The books containing the jury roll in question were produced on the argument at this bar and were examined by the Court.

112536°—35——38

the commission and had not entered into their consideration, and that no one had been excluded because of race or color.

The testimony showed the practice of the jury commission. One of the commissioners who made up the jury roll in question, and the clerk of that commission, testified as to the manner of its preparation. The other two commissioners of that period did not testify. It was shown that the clerk, under the direction of the commissioners, made up a preliminary list which was based on the registration list of voters, the polling list and the tax list, and apparently also upon the telephone directory. The clerk testified that he made up a list of all male citizens between the ages of twenty-one and sixty-five years without regard to their status or qualifications. The commissioner testified that the designation "col." was placed after the names of those who were colored. In preparing the final jury roll, the preliminary list was checked off as to qualified jurors with the aid of men whom the commissioners called in for that purpose from the different precincts. And the commissioner testified that in the selections for the jury roll no one was "automatically or systematically" excluded, or excluded on account of race or color; that he "did not inquire as to color, that was not discussed."

But, in appraising the action of the commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons, fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside. There is no ground for an assumption that the names of these negroes were not on the preliminary list. The inference to be drawn from the testimony is that they were on that preliminary list, and were designated on that list as the names of negroes, and that they were not placed on the jury roll. There was thus presented a test of the practice of the commissioners. Something more than mere general asseverations was required. Why were these names excluded from the jury roll? Was it because of the lack of statutory qualifications? Were the qualifications of negroes actually and properly considered?

The testimony of the commissioner on this crucial question puts the case in a strong light. That testimony leads to the conclusion that these or other negroes were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or want of any other qualification. The commissioner's answer to specific inquiry upon this point was that negroes were "never discussed." We give in the margin quotations from his testimony.[2]

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[2] "Q. Did you ever exclude from the jury rolls any negroes because you found first, he was a man under twenty-one years old or over sixty-five, and he was excluded by reason of his age; secondly because he was a person who wasn't esteemed in the community for being a decent and honorable citizen, for good sound common sense and judgment, did you ever see or hear of them not going to take that negro because he wasn't esteemed in the community for good sense and judgment? A. No, sir.

"Q. Did you ever have occasion to say, I can't take that negro because he is a fellow that has a disease which may affect or does affect, his mentality, did you ever say that to yourself, with reference to any particular negro? A. No, sir, negroes was never discussed.

"Q. Did you ever say to yourself as a jury commissioner in compiling those lists, I am not going to take that negro because he has been convicted before of a crime involving moral turpitude, have you ever excluded a negro on that ground, did you ever find any negro

We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted.

Third. The evidence on the motion to quash the trial venire. The population of Morgan County, where the trial was had, was larger than that of Jackson County, and the proportion of negroes was much greater. The total population of Morgan County in 1930 was 46,176, and of this number 8,311 were negroes.

Within the memory of witnesses, long resident there, no negro had ever served on a jury in that county or had been called for such service. Some of these witnesses were over fifty years of age and had always lived in Mor-

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that came within that category, under your personal knowledge in Jackson County? A. I couldn't recall any, no, sir, I don't know.

"Q. Have you ever known of any negro in Jackson County who was excluded by reason of the fact that he could not read English, and that negro at the same time wasn't a free holder or house holder, did you ever say I can't take that negro because he is prohibited under the rules from serving by reason of that provision? A. No, sir.

"Q. Or anybody in your presence? A. It never was discussed.

"Q. You had been a jury commissioner how long? A. I was on it under Bibb Graves administration, 1928, 1929, 1930.

"Q. Three years? A. Yes, sir.

"Q. And you never had occasion to exclude any negro in Jackson County by reason of the disqualifying provisions I have just called to your attention? A. Not to my personal knowledge, no, sir."

gan County. Their testimony was not contradicted. A clerk of the circuit court, who had resided in the county for thirty years, and who had been in office for over four years, testified that during his official term approximately 2500 persons had been called for jury service and that not one of them was a negro; that he did not recall "ever seeing any single person of the colored race serve on any jury in Morgan County."

There was abundant evidence that there were a large number of negroes in the county who were qualified for jury service. Men of intelligence, some of whom were college graduates, testified to long lists (said to contain nearly 200 names) of such qualified negroes, including many business men, owners of real property and householders. When defendant's counsel proposed to call many additional witnesses in order to adduce further proof of qualifications of negroes for jury service, the trial judge limited the testimony, holding that the evidence was cumulative.

We find no warrant for a conclusion that the names of any of the negroes as to whom this testimony was given, or of any other negroes, were placed on the jury rolls. No such names were identified. The evidence that for many years no negro had been called for jury service itself tended to show the absence of the names of negroes from the jury rolls, and the State made no effort to prove their presence. The trial judge limited the defendant's proof "to the present year, the present jury roll." The sheriff of the county, called as a witness for defendants, scanned the jury roll and after "looking over every single name on that jury roll, from A to Z," was unable to point out "any single negro on it."

For this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate. We have carefully examined the testimony of the jury commissioners upon which the state court based its decision. One of these commissioners testified in person and the other two submitted brief affidavits. By the state act (Gen. Acts, Ala., 1931, No. 47, p. 55), in force at the time the jury roll in question was made up, the clerk of the jury board was required to obtain the names of all male citizens of the county over twenty-one and under sixty-five years of age, and their occupation, place of residence and place of business. (*Id.*, p. 58, § 11.) The qualifications of those who were to be placed on the jury roll were the same as those prescribed by the earlier statute which we have already quoted. (*Id.*, p. 59, § 14.) The member of the jury board, who testified orally, said that a list was made up which included the names of all male citizens of suitable age; that black residents were not excluded from this general list; that in compiling the jury roll he did not consider race or color; that no one was excluded for that reason; and that he had placed on the jury roll the names of persons possessing the qualifications under the statute. The affidavits of the other members of the board contained general statements to the same effect.

We think that this evidence failed to rebut the strong *prima facie* case which defendant had made. That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. The general attitude of the jury commissioner is shown by the following extract from his testimony: "I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude." In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan County. It is so sweeping, and so contrary to the evidence as to the many qualified negroes, that it destroys the intended effect of the commissioner's testimony.

In *Neal* v. *Delaware, supra,* decided over fifty years ago, this Court observed that it was a "violent presumption," in which the state court had there indulged, that the uniform exclusion of negroes from juries, during a period of many years, was solely because, in the judgment of the officers, charged with the selection of grand and petit jurors, fairly exercised, "the black race in Delaware were utterly disqualified by want of intelligence, experience, or moral integrity, to sit on juries." Such a presumption at the present time would be no less violent with respect to the exclusion of the negroes of Morgan County. And, upon the proof contained in the record now before us, a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained.

We are concerned only with the federal question which we have discussed, and in view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS did not hear the argument and took no part in the consideration and decision of this case.

PATTERSON *v*. ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 554. Argued February 15, 18, 1935.—Decided April 1, 1935.

1. Upon review of a judgment of a state court disposing of the case on a point of local practice without adjudicating a claim of federal right, this Court must examine the record and determine whether the non-federal ground is adequate to sustain the judgment. P. 602.
2. In the exercise of its appellate jurisdiction over a judgment from a state court, this Court has power, not only to correct error in the judgment under review, but to make such disposition of the case as justice requires; and where any change, either in fact or in law, has supervened since the judgment was entered, which may affect the result, the judgment may be set aside and the cause remanded in order that the state court may be free to act. P. 607.
3. *Semble* that, under § 6434 of the Code of Alabama, the fact that a bill of exceptions was not filed in time, though ground for striking it on motion to the Supreme Court, does not deprive that court of jurisdiction to entertain it. P. 605.
4. The Supreme Court of Alabama affirmed death sentences in two cases in both of which, on the same evidence, it was contended that the defendants, who were negroes, were deprived of constitutional rights by intentional exclusion of all negroes from the grand and petit juries. In one of the cases, this defense was by that court overruled; in the other it was not considered because the bill of exceptions, necessary for its presentation, was held to have been filed too late. Upon review here, this Court, having reversed the judgment in the first case because the constitutional objection was well taken, vacated the judgment in the second case also in order that the state court might be free to reconsider it. P. 607.

229 Ala. 270; 156 So. 567, vacated.

CERTIORARI, 293 U. S. 554, to review a judgment affirming a conviction of rape. Cf. *Norris* v. *Alabama, ante*, p. 587.

Mr. Walter H. Pollak, with whom *Messrs. Osmond K. Fraenkel* and *Carl S. Stern* were on the brief, for petitioner.

Mr. Thomas E. Knight, Jr., Attorney General of Alabama, with whom *Mr. Thomas Seay Lawson,* Assistant Attorney General, was on the brief, for respondent.

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

Petitioner, Haywood Patterson, was indicted with Clarence Norris (the petitioner in No. 534, *ante,* p. 587) and seven other negro boys in Jackson County, Alabama, for the crime of rape. Judgment of conviction was affirmed by the Supreme Court of the State. That judgment, and like judgments in the case of Norris and others, were reversed by this Court. *Powell* v. *Alabama,* 287 U. S. 45.

After the remand, all of the cases were transferred for trial to Morgan County. Patterson was the first of those retried. The jury found a verdict against him which the trial judge set aside as against the weight of evidence. He was then brought to trial for a third time before another Judge, in November, 1933, and was again convicted. The judgment was affirmed by the Supreme Court of the State. 229 Ala. 270; 156 So. 567. This Court granted a writ of certiorari. 293 U. S. 554.

At the beginning of the last trial, as on the previous trial, a motion was made on Patterson's behalf to quash the indictment upon the ground of the exclusion of negroes from juries in Jackson County where the indictment was found. Defendant also moved to quash the trial *venire* in Morgan County because of the exclusion of negroes from jury service in that county. In each of these motions, defendant contended that there was a long-continued, systematic and arbitrary exclusion of qualified negroes from jury service, solely by reason of their race or color, in violation of the Federal Constitution. These motions were the same as those which were made on the trial of Norris, which immediately followed this third trial of Patterson. It was stipulated in the case of

Norris, and the trial court there ruled, that the papers filed and the testimony adduced upon the similar motions on the trial of Patterson should be treated as applicable, and the motions in the case of Norris were thus heard upon evidence which had been submitted on the trial of Patterson. The opinions of the trial judge denying these motions were the same in both cases.

In this aspect, the federal question now sought to be presented on behalf of Patterson is precisely the same as that which we have considered and decided in Norris' case, *ante*, p. 587. But the State, by its Attorney General, contends that this Court has no jurisdiction in the instant case, in the view that the decision of the state court rested entirely upon a question of state appellate procedure and that no federal question is involved. Counsel for defendant opposes that view, and it becomes necessary for us to examine the record in order to determine whether the judgment of the state court is based upon a non-federal ground adequate to sustain it. *Ward* v. *Love County*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22, 24, 25; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282.

The question arises from the action of the Supreme Court of the State in striking defendant's bill of exceptions, which contained the evidence taken by the trial court on the motions to quash, upon the ground that the bill had not been presented in time. So holding, the Supreme Court of the State disregarded all questions reviewable alone by bill of exceptions, and, finding no error in the record as thus considered, affirmed the judgment. The court did not discuss the federal question.

Under the Code of Alabama, a bill of exceptions must be presented "within ninety days from the day on which the judgment is entered," or "within ninety days after the granting or refusing of a motion for a new trial."

Ala. Code, § 6433. Another section of the Code provides that "after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day." Ala. Code, § 6670.

The jury found its verdict against Patterson on December 1, 1933, and the court then adjudged him guilty as charged. On December 6, 1933, he was sentenced to death. The bill of exceptions was presented on March 5, 1934.

Upon the return of the verdict on December 1st, defendant's counsel requested an extension beyond thirty days within which to file a motion for a new trial, stating that a transcript of the testimony would be needed in order to prepare a proper motion. The application was denied, the trial judge stating in effect that defendant's counsel had thirty days within which to make a motion for a new trial, and that, after a motion so made, he might apply to the trial judge for "additional thirty day periods" in order to file an amended motion based upon the transcript. The motion for a new trial was filed on December 29, 1933, and it appears that a copy of the motion papers was received by the Attorney General without objection. On request of defendant's counsel, the motion was continued by the trial judge until February 24, 1934. The Attorney General then moved to strike the motion upon the ground that it had been filed after the expiration of the term of court, at which defendant was tried, and hence that the court was without jurisdiction. It appeared that the term had expired on December 23, 1933. The trial judge granted the motion to strike and the Supreme Court of the State sustained the ruling.

The state court pointed out that the ruling was in accord with *Morris* v. *Corona Coal Co.* (1926), 215 Ala. 47; 109 So. 278, in which the question had been directly presented.[1] The court said that the governing statutes, including § 6670, above quoted, were codified from the Act of 1915, page 707, §§ 1 and 3; that, previously, all motions for new trials were required to be made within the terms; that, as to cases at law, terms were not abolished; that the statute making judgments final after thirty days was restrictive of the rule which had theretofore obtained by which the judgments were deemed to be within the breast of the court until the end of the term; and that the effect of the decision in the *Morris* case was to hold that the statute had not abrogated "the established rule that all judgments become final with the end of the term" and did not extend the thirty day period beyond that time. The court cited several cases to show that the ruling was "in keeping with former decisions through a long period of years."

But the striking of the motion for a new trial did not dispose of the bill of exceptions. It would still have been in time if it had been presented within ninety days from the day of the judgment. It was in time if that day was December 6, 1933, when defendant was sentenced, but it was too late if judgment was entered on December 1, 1933. The Supreme Court of the State took the latter view. The court held that the time for presenting bills of exceptions "runs from the date of the judgment of guilty, not from the date of sentence." The court cited the case of *Lewis* v. *State* (1915), 194 Ala. 1; 69 So. 913, where that rule had been laid down. And in view of this long established rule in Alabama as to the day from which

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[1] In the *Morris* case the verdict and judgment were of December 19, 1924; the motion for a new trial was of December 27, 1924, after the term had expired; and the motion had been passed to January 5, 1925, for hearing.

the time should be reckoned, the state court was undoubtedly at liberty, without violating any federal right, to hold that the bill of exceptions had not been presented within the designated period of ninety days.

There remains, however, a further question. For it does not appear that the failure to file a bill of exceptions in time is sufficient in itself to deprive the state appellate court of jurisdiction. On the contrary, the statute of Alabama expressly denies to the court the authority, on its own motion, to strike a bill of exceptions because not filed in time, and provides for that action only upon motion of a party to the record or his attorney. The statute in terms allows parties to waive the objection. We quote its provisions: "The appellate court may strike a bill of exceptions from the record or file because not presented or signed within the time required by law, but shall not do so *ex mero motu,* but only on motion of a party to the record or his attorney; the object and effect of this statute being to allow parties to waive or consent for the time of signing bills of exceptions." Ala. Code, § 6434. The state court cited its former decisions which construed the "waiver or consent," to which the provision referred, to be "such as is indicated by a failure to move to strike upon submission of the cause on appeal," and held that when such a motion is made, it is the duty of the court to grant it. *Baker* v. *Central of Georgia Ry. Co.,* 165 Ala. 466; 51 So. 796; *Ex parte Hill,* 205 Ala. 631; 89 So. 58; *Ettore* v. *State,* 214 Ala. 99; 106 So. 508; *Beatty* v. *McMillan,* 226 Ala. 405; 147 So. 180.

While we must have proper regard to this ruling of the state court in relation to its appellate procedure, we cannot ignore the exceptional features of the present case. An important question under the Federal Constitution was involved, and, from that standpoint, the case did not stand alone. As the opinion of the state court observes, there was "being considered along with this cause, the appeal of *Clarence Norris* v. *Alabama,* 156 So. 556, from a conviction under the same indictment." 156 So. pp. 567, 568. The validity of the common indictment had been challenged by a motion on behalf of both defendants because of the unconstitutional discrimination. It is true that the *Patterson* case was brought up on a separate appeal, and on a separate record, but it appeared from the record before the court in the *Norris* case that the evidence upon the motions to quash was the same evidence (introduced by stipulation) as that which had been taken in the *Patterson* case. The bills of exceptions had been presented in both cases on the same day, March 5, 1934. When the Attorney General, on February 24, 1934, had moved to strike the motion for a new trial, he had expressly referred to the judgment as having been rendered on December 6, 1933, a statement not obviously inaccurate, because there was an entry of a formal judgment of sentence on that day, and, coming from the Attorney General, the statement may have misled defendant's counsel. If that statement had been correct, the bill of exceptions would have been timely. The Attorney General did not make his motion until May 25, 1934. We are not advised that previous state decisions had dealt with a situation having such unusual incidents.

The decisions in the two cases were announced on the same day. The state court decided the constitutional question against Norris, and it was manifestly with that conclusion in mind that the court approached the decision in the case of Patterson and struck his bill of exceptions. We are not satisfied that the court would have dealt with the case in the same way if it had determined the constitutional question as we have determined it. We are not convinced that the court, in the presence of such a determination of constitutional right, confronting the anomalous and grave situation which would be created by a reversal of the judgment against Norris, and an affirmance of the judgment of death in the companion case of Patterson, who had asserted the same right, and having regard to the relation of the two cases and the other circumstances disclosed by the record, would have considered itself powerless to entertain the bill of exceptions or otherwise to provide appropriate relief. It is always hazardous to apply a judicial ruling, especially in a matter of procedure, to a serious situation which was not in contemplation when the ruling was made. At least the state court should have an opportunity to examine its powers in the light of the situation which has now developed. We should not foreclose that opportunity.

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Dorchy* v. *Kansas,* 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131.

Applying that principle of decision, we vacate the judgment and remand the case to the state court for further proceedings.

Judgment vacated.

MR. JUSTICE MCREYNOLDS did not hear the argument and took no part in the consideration and decision of this case.

SEMLER *v.* OREGON STATE BOARD OF DENTAL EXAMINERS ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 538. Argued March 7, 1935.—Decided April 1, 1935.

1. The fact that an exercise of the police power forbidding certain forms of advertising by dentists will interfere with existing contracts for display signs and press notices does not touch the validity of the regulation. P. 610.
2. A regulation of dentists is not invalid as to them because it does not extend to other professional classes. P. 610.
3. A regulation preventing dentists from advertising their professional superiority and their prices; from use of certain forms of advertising signs; from use of advertising solicitors or publicity agents; from advertising free dental work, free examinations, guaranteed work, and painless operations,—*held* valid under the due process clause of the Fourteenth Amendment, without regard to the truthfulness of the representations or the benefit of the services advertised. P. 611.
4. It is within the authority of the State to estimate the baleful effects of such advertising, and to protect the community not only against deception but against practices which, though they may be free from deception in particular instances, tend nevertheless to lower the standards of the profession and demoralize it. P. 612.

148 Ore. 50; 34 P. (2d) 311, affirmed.

Appeal from the affirmance of a judgment dismissing the complaint in a suit to enjoin the enforcement of a statutory regulation of dentists.

Mr. Frank S. Senn, with whom *Mr. H. R. Colwell* was on the brief, for appellant.

Messrs. Lawrence T. Harris, Harry M. Kenin, and *Frank P. Keenan* were on the brief for appellees.

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

This case presents the question of the validity of a statute of the State of Oregon, enacted in 1933, relating to the conduct of dentists. Oregon Laws, 1933, Chapter 166. Previous legislation had provided for the revocation of licenses for unprofessional conduct, which, as then defined, included advertising of an untruthful and misleading nature. The Act of 1933 amended the definition so as to provide the following additional grounds for revocation:

". . . advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Plaintiff, a dentist practicing in Portland, Oregon, brought this suit in the state court against the members of the State Board of Dental Examiners to enjoin the enforcement of the statute, alleging that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and impaired the obligation of contracts in violation of § 10, Article I, of the Constitution of the United States. The circuit court, overruling this contention, sustained a demurrer to the complaint and, upon the refusal of plaintiff to plead further, the suit was dismissed. On appeal, the Supreme Court of the State took the same view of the federal question and affirmed the judgment. 148 Or. 50; 34 P. (2d) 311. The case comes here on appeal.

Plaintiff alleged in his complaint that he was licensed in 1918; that he had continuously advertised his practice in newspapers and periodicals, and by means of signs of the sort described in the amended statute, and that he had employed advertising solicitors; that in his advertise-

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ments he had represented that he had a high degree of efficiency and was able to perform his professional services in a superior manner; that he had stated the prices he would charge, had offered examination of prospective patients without charge, and had also represented that he guaranteed all his dental work and that his dental operations were performed painlessly. He further alleged that the statements in his advertisements were truthful and were made in good faith; that by these methods he had developed a large and lucrative practice; that through long training and experience he had acquired ability superior to that of the great majority of practicing dentists; that he had been able to standardize office operations, to purchase supplies in large quantities and at relatively low prices, and thus to establish a uniform schedule of charges for the majority of operations; also that he had made contracts for display signs and for advertisements in newspapers, and had entered into other engagements, of which he would be unable to take advantage if the legislation in question were sustained, and, in that event, his business would be destroyed or materially impaired.

Plaintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 363; *Union Dry Goods Co.* v. *Georgia Public Service Comm'n*, 248 U. S. 372, 375, 376; *Sproles* v. *Binford*, 286 U. S. 374, 391; *Stephenson* v. *Binford*, 287 U. S. 251, 276. Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.

We find no basis for the charge of an unconstitutional discrimination. *Watson* v. *Maryland,* 218 U. S. 173, 179; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 43; *Dr. Bloom, Dentist, Inc.* v. *Cruise,* 288 U. S. 588.

The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. *Douglas* v. *Noble,* 261 U. S. 165; *Graves* v. *Minnesota,* 272 U. S. 425, 427. The State may thus afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Graves* v. *Minnesota, supra.* We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals (*Miller* v. *State Board of Dental Examiners,* 90 Colo. 193; 8 P. (2d) 699; 287 U. S. 563), and that it may prohibit advertising that tends to mislead the public in this respect. *Dr. Bloom, Dentist, Inc.* v. *Cruise,* 259 N. Y. 358, 363; 182 N. E. 16; 288 U. S. 588.

Recognizing state power as to such matters, appellant insists that the statute in question goes too far because it prohibits advertising of the described character, although it may be truthful. He contends that the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.

The State court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them." The legislature was aiming at "bait advertising." "Inducing patronage," said the court, "by representations of 'painless dentistry,' 'professional superiority,' 'free examinations,' and 'guaranteed' dental work" was, as a general rule, "the practice of the charlatan and the quack to entice the public."

We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

It is no answer to say, as regards appellant's claim of right to advertise his "professional superiority" or his "performance of professional services in a superior manner," that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners.

The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement. *Booth* v. *Illinois*, 184 U. S. 425, 429; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388, 389.

The judgment is

Affirmed.

PANHANDLE EASTERN PIPE LINE CO. v. STATE HIGHWAY COMMISSION.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 412. Argued February 7, 1935. Reargued March 13, 1935.—Decided April 1, 1935.

1. A statute of Kansas (Laws 1929, c. 225, § 16) which, as construed by the state supreme court, authorized the state highway commission to order a pipe line company, at its own expense, to relocate and make certain other changes in its pipe and telephone lines, then located on a private right of way, to conform to plans adopted for new highways to cross the right of way, deprives the company of its property without due process of law in violation of the Fourteenth Amendment. P. 618.
2. Railroad grade crossing cases and *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, distinguished. Pp. 621, 622.

139 Kan. 185, 849; 29 P. (2d) 1104; 33 P. (2d) 151, reversed.

APPEAL from a judgment of the Supreme Court of Kansas granting a peremptory writ of mandamus to enforce an order of the State Highway Commission.

Mr. G. J. Neuner, with whom *Mr. Chester J. Gerkin* was on the brief, for appellant.

Messrs. Otho W. Lomax and *Wint Smith,* with whom *Mr. Kirke W. Dale* was on the brief, for appellee.

Section 3 of the Act provides that no substantial change shall be made in the state highways unless required by the public safety, and the Act makes no pretense of authorizing the Commission to make a final determination of this fact. The Supreme Court of Kansas has sustained the right of parties litigant to question the necessity in the interest of public safety.

The requirements of notice and hearing are to be implied from the provisions of the statute.

The statute authorizes judicial review of the action of the Commission, and appellant has in fact been granted a full and complete judicial review.

Appellant is not denied the equal protection of the law.

The statute is a valid delegation of the police power. *New Orleans Gas Light Co.* v. *Drainage Comm'n,* 197 U. S. 453, 461; *Erie R. Co.* v. *Utility Comm'rs,* 254 U. S. 394, 410–411; *Missouri, K. & T. R. Co.* v. *Oklahoma,* 271 U. S. 303, 307; *Lake Shore Ry. Co.* v. *Clough,* 242 U. S. 375; *Minneapolis* v. *Railway Co.,* 98 Minn. 380; aff'd, 214 U. S. 497; *Chicago, M. & St. P. R. Co.* v. *Minneapolis,* 232 U. S. 430; *Chicago & Alton R. Co.* v. *Tranbarger,* 238 U. S. 67; *Missouri Pacific Ry. Co.* v. *Omaha,* 235 U. S. 127; *West Chicago R. Co.* v. *Illinois,* 201 U. S. 526; *New York & N. E. R. Co.* v. *Bristol,* 151 U. S. 556; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226.

Mr. Justice McReynolds delivered the opinion of the Court.

The Kansas Highway Commission, administrative agency of the State, without any proceeding in condemnation, ordered the appellant Company to make specified changes in its transmission lines. It refused. By an original proceeding in the Supreme Court, the Commission obtained a peremptory writ of mandamus directing compliance. The Company insists that to enforce the Commission's order would deprive it of property without due process of law, contrary to the 14th Amendment.

Judgment went for the Commission upon the pleadings; there is no dispute concerning the facts; the validity of the statute said to authorize the order is challenged.

Appellant, a Delaware corporation with power to construct and maintain conduits for transporting natural gas, obtained authority to do business in Kansas, May 21, 1930, and during that year purchased from the owners rights of way for pipes, auxiliary telephone lines, etc. Thereafter, these were constructed; the gas passes in both interstate and intrastate commerce.

The Commission, created under c. 225, Acts of 1929, is charged with the duty to lay out, open, relocate, alter, redesignate and reëstablish highways throughout the State. Section 16 of that statute (Supp. Rev. Stats. 1931, also 1933, § 68–415)—copied in the margin*—undertakes to

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* Chapter 225, Session Laws of Kansas, 1929.

"Sec. 16. Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highways, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines grant power to require removal of abutments, wires and pipe lines and other fixtures now upon state highways from the present locations thereon to other designated parts of the right of way. Unless imposed by this section, there are no statutory obligations upon pipe line companies with respect to the construction, maintenance or operation of their lines, whether located upon public highways or private lands.

After the pipes were in operation—1933—the Commission adopted plans for new highways across the Company's right of way at six widely separated places. Permission of the owners of the fee to use the necessary land was obtained; but appellant declined to permit the use of its right of way.

Plans for the new highways called for material changes in the pipe and telephone lines at the crossings—removals, lowerings, casements—estimated to cost above $5,000. All parties admit that the Commission could not make these with reasonable safety. Appellant was willing to do the work if promised repayment of the necessary expense. Purporting to act under § 16, (Dec. 1, 1933), the Commission ordered it to proceed without compensation. That the proposed changes would be proper for new highways as planned is admitted; also that the estimated cost

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or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid."

is reasonable. But appellant denied the existence of power to impose this expense upon it; and for that reason refused to comply with the order until the Commission should agree to refund the outlay.

In its opinion supporting the peremptory mandamus, the court below declared [139 Kan. 185; 29 P. (2d) 1104]:

"The pipe line company's lines are all located on its own rights of way, procured from landowners, and none of the lines is located on, along, or across any previously existing highway."

"The highway commission has acquired rights of way for the highway improvements from landowners, but has not obtained consent of the pipe line company to cross or occupy its right of way. The highway improvements necessitate certain changes in the pipe line company's lines. In some instances it is necessary the pipe line be lowered and encased. In other instances it is necessary the pipe line and telephone line be removed to the outer edge of right of way newly acquired by the highway commission for the purpose of widening existing highways. None of the changes will require the pipe line company to acquire any new or additional right of way."

"The pipe line company contends that, because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained, and the present improvements had been initiated, it is entitled to compensation for all necessary expenditures incurred in making an adjustment of its private use to the later public use of the same rights of way."

"What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to cousers of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway was established before or after the privately owned structures were established."

"There is no contention that exercise of the state's police power over the subject may not be committed to the state highway commission, and this was in fact done by c. 225, Laws 1929."

". . . section 16 of the statute provides in effect that whenever a pipe line is constructed along, upon or across any highway, its location is subject to control by the highway commission. . . . With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, established and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission. . . . The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law."

If carried into effect, the challenged order of the Commission would result in taking private property for public use. *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 523, 524; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 194. A private right of way is an easement and is land. *United States* v. *Welch,* 217 U. S. 333, 339. No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the 14th Amendment. *Chicago, B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226, 241; *Chicago, B. & Q. Ry.* v. *Drainage Comm'rs,* 200 U. S. 561, 593; *McCoy* v. *Union Elevated R. Co.,* 247 U. S. 354, 363; *Chicago, B. & Q. Ry. Co.* v. *Public Utilities Comm'n,* 69 Colo. 275, 279; 193 Pac. 726. See Lewis, Eminent Domain, (3d ed.) § 223.

A claim that action is being taken under the police power of the State cannot justify disregard of constitutional inhibitions. *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240; *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 508; *Southern Ry. Co.* v. *Virginia, supra,* p. 196.

While the court below held that the Commission exercised police power to make public travel safe, and to accomplish that end might require alteration of the lines without compensation, it repudiated the suggestion that the same reasoning would support an order to remove other lawful structures, e. g. compressor stations. "Transmission lines of all kinds," it said, "are on the same footing with railroads with respect to grade crossings." *Erie R. Co.* v. *Public Utility Comm'rs,* 254 U. S. 394, was cited and relied upon.

We cannot accept the view that under the Federal Constitution appellant's transmission lines are upon the same footing as railroads. The opinion below declared there was adequate distinction between the two to justify different classification and treatment under the Act of 1929. And counsel for appellee very properly say: "A railroad grade crossing presents an entirely different problem for public regulation than does a pipeline buried beneath the highway. . . . The twenty-four inch high pressure natural gas transmission line of appellant when buried beneath the surface of such highways certainly is not a constant hazard to vehicular traffic."

The record fails to disclose that appellant's lines were the cause of serious danger to the public. Whatever of this, if any, would follow extensions of the highways across them is not comparable to the hazard incident to the operation of railroad trains. Like any other lawful structure these lines may have presented obstacles to construction of the proposed highways; but this might have been overcome by condemnation proceedings.

We are advised by counsel for the Commission that appellant's Delaware charter "contains no specific reference to any right to intersect or occupy any public highway, public land or waters." Also, that in Kansas "beyond the provisions of the statute, R. S. 1933 Supp., 68–415, [§ 16, c. 225, Acts of 1929] the validity of which is challenged in this case, there are absolutely no statutory obligations or regulations imposed upon pipeline companies with respect to the manner of the construction, maintenance or operation of their lines, whether located upon, along or across public highways or private lands."

Where the circumstances sufficed to show that the public would be subjected to serious danger from moving trains and supported the inference that the railroad company obtained permission to occupy the soil subject to reasonable legislation to prevent such danger, this Court has upheld orders, based upon the state's police power, to change tracks, eliminate grade crossings, etc.

"The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. . . . The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety." *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226, 250, 252.

"The railway company accepted its franchise from the State, subject necessarily to the condition that it would conform at its own expense to any regulations not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted." *Cincinnati, I. & W. Ry. Co.* v. *Connersville,* 218 U. S. 336, 343. *Chicago, M. & St. P. Ry.* v. *Minneapolis,* 232 U. S. 430, 440.

Erie R. Co. v. *Board of Public Utility Comm'rs, supra,* opinion by Mr. Justice Holmes, goes upon the theory that it could be reasonably said that public safety required the changes, and that the order of the Commission " should be regarded as stating a condition that must be complied with if the company continues to use " the soil. Also, "the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires."

Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393, 413, 415–416, Mr. Justice Holmes again writing, elucidates the doctrine of the *Erie's* case.

"As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

Accordingly the court refused to sustain a Pennsylvania statute as an exercise of the police power which forbade the mining of anthracite coal under streets in such a way as to cause the subsidence of any structure used as a human habitation. " The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public.

The police power of a State, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection, and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury. *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556.

New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S. 453, and similar cases concerning pipes in public streets, are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality.

As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the State Highway Commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution.

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

Reversed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result.

HENRY L. DOHERTY & CO. v. GOODMAN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 469. Argued February 11, 1935.—Decided April 1, 1935.

A statute of Iowa (Code, § 11079) provides that, where an office is maintained for the transaction of any business in a county other than that in which the principal resides, service of process in any action arising out of the conduct of such office may be made on any agent or clerk there employed. The statute was construed as authorizing a personal judgment against a nonresident individual who, though never personally within the State, established an office within the State for dealing in securities, a business subjected to special regulation by the State, the service of process having been made upon one who was manager of the office both at the time the contract out of which the suit arose was executed and at the time of the service. *Held,* as so applied, the statute does not violate any right guaranteed by the Federal Constitution. Art. IV, § 2; Fourteenth Amendment, § 1. P. 628.

218 Iowa 529; 255 N. W. 667, affirmed.

Appeal from the affirmance of a judgment entered after the overruling of a special plea to the jurisdiction, in an action for damages arising from a sale of stock.

Mr. Fred W. Lehmann, Jr., for appellant.

No sovereign can by its own act give itself jurisdiction beyond its own borders. *Flexner* v. *Farson,* 248 U. S. 289; Story, Conflict of Laws, par. 539; *Pennoyer* v. *Neff,* 95 U. S. 714; *Cabanne* v. *Graf,* 87 Minn. 510; *Raher* v. *Raher,* 150 Iowa 511.

Cases wherein the defendant is a corporation are not relevant. The corporation is not a citizen and does not have the rights of a citizen. The corporation has no actual presence. Its presence can as well be presumed to attend its humblest employee as its highest official. Neither presumption will violate the rights of any citizen. Neither presumption will deny due process of law if reasonable effort is made to see that the process eventually gets to the legal department. The corporation has no right to do anything in any State save the State where it incorporated. Its exercising any function in any other State can properly be held to be a consent, to the extent of the function exercised, at least, to be subject to the jurisdiction of the State.

We omit also cases which deal with defendants who were present within the State when the cause of action arose and later left the State. *Hess* v. *Pawloski,* 274 U. S. 352; *McDonald* v. *Mabee,* 243 U. S. 90; *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346.

In the cases which involve individual defendants who never were within the State, we find an occasional effort to assert jurisdiction; all of which were thwarted by the courts. *Brooks* v. *Dun,* 51 Fed. 138; *Ralya Market Co.* v. *Armour & Co.,* 102 Fed. 530; *Mordock* v. *Kirby,* 118 Fed. 180; *New York Life Ins. Co.* v. *Dunlevy,* 241 U. S. 518; *Flexner* v. *Farson,* 248 U. S. 289.

Mr. Joseph I. Brody, with whom *Messrs. Clyde B. Charlton* and *George E. Brammer* were on the brief, for appellee.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

In 1926 Henry L. Doherty, citizen of New York, trading as Henry L. Doherty & Company, established an office at Des Moines, Polk County, Iowa, and there through agents carried on the business of selling corporate securities throughout the State. E. A. King, designated as District Manager, took charge of this office in January, 1929, and continued to direct its affairs during the time here important. Under him were clerks and stock salesmen, paid directly from New York.

A salesman operating from the Des Moines office, September 1, 1929, negotiated in that city a sale of stock to appellee Goodman, and out of this the present controversy arose. The only power or authority expressly conferred upon King by Doherty was to sell securities and supervise other employees; he never in terms consented that service of process upon this agent should constitute service upon himself.

Sec. 11079, Iowa Code 1927, also 1931, in effect since 1851, provides:

"When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

July 31, 1931, appellee Goodman commenced an action against Doherty in the District Court, Polk County, wherein he sought only a personal judgment for damages arising out of the sale contract of September 1, 1929. The usual summons or notice commanding the defendant to appear was served upon District Manager King.

Doherty appeared specially. He challenged the jurisdiction of the court; claimed he had not been within the State; King had no authority to accept service of process in his behalf; the alleged service was ineffective; and to hold otherwise would deprive him of rights guaranteed by the Federal Constitution. The District Court, relying upon Code § 11079, overruled the special plea and held the service adequate. Doherty made no further appearance. Judgment against him was affirmed by the Supreme Court.

The cause is here by appeal. Appellant insists that if construed as applicable to him, a citizen of another State never in Iowa, in the circumstances disclosed by the record, § 11079 offends the Federal Constitution, § 2, Art. 4, and § 1, 14th Amendment.

The Supreme Court affirmed the action of the trial court upon authority of *Davidson* v. *H. L. Doherty & Co.,* (1932) 214 Iowa 739; 241 N. W. 700. The opinion in that cause construed § 11079 and, among other things, said:

"By its terms, and under our holding, the statute is applicable to residents of 'any other county' than that in which the principal resides, whether such county be situated in Iowa or in some other state. In other words, the statute does apply to non-residents of Iowa who come within its terms and provisions, as well as to residents. Our construction of the statute has stood since 1887. . . . We adhere to our former holdings that the statute is applicable to individual non-residents who come within its express terms and provisions. . . .

"The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. The citizens of each state of the United States are, under this statute, entitled to all the privileges and immunities accorded citizens of this state.

"The justice of such a statute is obvious. It places no greater or different burden upon the non-resident than upon the resident of this state. . . . A non-resident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. . . . It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents. . . .

"'Four things are, under this statute, essential to the validity of such service. 1. The defendant must have an office or agency in the county. 2. It must be a county other than that in which he resides. 3. The action must grow out of or be connected with the business of that office or agency. 4. The agent or clerk upon whom service is made must be employed in such office or agency.' . . .

"When a non-resident defendant establishes an office or agency for the transaction of business in any county in this state under this statute, he thereby voluntarily appoints his own agent, in charge of said office or agency, as one upon whom substituted service in actions in personam, growing out of that office or agency, may be made. . . . Under our statute, the implied consent to be sued in this state is limited to proceedings growing out of the business transacted through the office or agency in this state. It is required that the agent shall actually receive a copy of the notice of suit and that it shall be read to him. . . . The action must grow out of the business of that very agency. Ample time is given the defendant to appear and defend; there is not only 'reasonable probability' but practical moral certainty that the defendant will receive actual notice of the pendency of the action."

Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation. Laws 1913, c. 137; Laws 1921, c. 189; Laws 1929, c. 10, approved Mar. 19, 1929. The last cited Act requires registration and written consent for service of process upon the Secretary of State. See *Merrick* v. *Halsey & Co.*, 242 U. S. 568. Doherty voluntarily established an office in Iowa and there carried on this business. Considering this fact, and accepting the construction given to § 11079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution.

Flexner v. *Farson,* 248 U. S. 289, much relied upon, does not sustain appellant's position. There the service was made upon one not then agent for the defendants; here the situation is different. King was manager of the appellant's office when the sale contract was made; also when process was served upon him. Moreover, under the laws of Iowa, neither her citizens nor non-residents could freely engage in the business of selling securities.

The power of the States to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. *Hess* v. *Pawloski,* 274 U. S. 352; *Wuchter* v. *Pizzutti,* 276 U. S. 13; *Young* v. *Masci,* 289 U. S. 253. Under these opinions it is established doctrine that a State may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some " provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued."

So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of § 11079 under different circumstances we do not consider.

Affirmed.

BRODERICK, SUPERINTENDENT OF BANKS OF NEW YORK, *v.* ROSNER ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 528. Argued February 15, 1935.—Decided April 1, 1935.

A statute of New Jersey (Corporation Act, § 94 (b)) provides that no proceeding may be maintained in the courts of that State to enforce a stockholder's statutory personal liability arising under the laws of another State, except suits in the nature of "an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties." The Superintendent of Banks of New York brought an action in a New Jersey court against 557 New Jersey stockholders of a New York bank, to recover unpaid assessments levied upon them pursuant to the banking laws of New York. The bank had altogether 20,843 stockholders and more than 400,000 depositors and other creditors, many of whom resided elsewhere than in New Jersey. The court held the action barred by the New Jersey statute; suggested that leave might be granted to file a bill in equity pursuant thereto. *Held:*

1. The New Jersey statute, as here applied, effectively denies to the Superintendent the right to resort to the courts of that State to enforce the liability of stockholders residing there; the complaint conformed to the New Jersey practice and the action would have been entertained but for the statute. Pp. 639, 640.

2. The nature of the cause of action brings it within the scope of the full faith and credit clause; the subject matter is not such as permits considerations of local policy to dominate rules of comity. P. 643.

3. That the assessment was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. P. 644.

4. That the administrative determination of the assessment made in New York may be subject to collateral attack does not justify the New Jersey court in refusing to take jurisdiction of the Superintendent's suit. P. 646.

5. Question whether Superintendent's determinations as to the propriety and amount of the assessment are conclusive, not decided. P. 646.

6. The full faith and credit clause requires that the action of the Superintendent in this case be entertained. P. 647.

113 N. J. L. 305; 174 Atl. 507, reversed.

Appeal from a judgment affirming a judgment sustaining a motion to strike out the complaint in an action brought in the Supreme Court of New Jersey by the Superintendent of Banks of New York to enforce an assessment levied on stockholders pursuant to the banking laws of New York.

Messrs. Carl J. Austrian and *James D. Carpenter, Jr.*, with whom *Messrs. Arthur Ofner* and *Harold N. Cohen* were on the brief, for appellant.

Under § 80 of the New York Banking Law, as interpreted by the New York courts, the levy of an assessment by the Superintendent of Banks is an official or public act, and conclusive in the absence of fraud, bad faith, or clear error of law.

Under Art. IV, § 1, of the Federal Constitution, New Jersey is required: (1) To permit enforcement against stockholders of New York banks residing in New Jersey of the assessment liability provided under Art. VIII, § 7, of the New York Constitution and §§ 80 and 120 of the New York Banking Law; and (2) To recognize the official determination by the New York Superintendent of Banks of the necessity of such assessment, made pursuant to the provisions of § 80 of the New York Banking Law.

The requirement that the assessment may only be enforced through an accounting by a bill in equity, denies to the determination of the Superintendent that conclusive effect which attaches to it under the laws of New York. It amounts to a denial of the right of the Superintendent to resort to the courts of New Jersey in this case, and thus violates the full faith and credit clause and the due process clause of the Fourteenth Amendment.

Mr. Walter J. Bilder, with whom *Mr. Nathan Bilder* was on the brief, for Mary Rosner et al., appellees.

The full faith and credit clause does not compel a State to open and lend its courts to the prosecution of a suit based upon a cause of action created by the statutes of another State. *Texas & Pacific R. Co.* v. *Cox,* 145 U. S. 593; *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U. S. 142; *Spokane & I. E. R. Co.* v. *Whitley,* 237 U. S. 487; *Union Trust Co.* v. *Grosman,* 245 U. S. 412; *Atchison, T. & S. F. Ry. Co.* v. *Nichols,* 264 U. S. 348; *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145; *Dougherty* v. *American McKenna Process Co.,* 255 Ill. 369.

The full faith and credit clause establishes a rule of evidence rather than of jurisdiction. *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373; *Huntington* v. *Attrill,* 146 U. S. 657; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265. The clause obviously can require no more than this: that when a court of one State does entertain a suit which involves a matter as to which the rights of the parties are, on general legal principles, governed by the statutes of another State, the court (of the forum) shall permit those statutes to be put in evidence and shall accord to them the probative effect of establishing those rights. This requirement, however, is far different from a mandate to the courts of each State *in invitum* to take jurisdiction of suits based upon causes of action created by the statutes of other States. Cases distinguished: *Pulsifer* v. *Greene,* 96 Me. 438; *Royal Arcanum* v. *Green,* 237 U. S. 531; *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145; *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544; *Whitman* v. *National Bank,* 176 U. S. 559; *Dennick* v. *Central R. Co.,* 103 U. S. 11; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *Con-*

verse v. *Hamilton,* 224 U. S. 243; *Converse* v. *Aetna National Bank,* 212 U. S. 565; *Bernheimer* v. *Converse,* 206 U. S. 516; *Texas & Pacific R. Co.* v. *Cox,* 145 U. S. 593; *Marin* v. *Augedahl,* 247 U. S. 142; *Kennedy* v. *Gibson,* 8 Wall. 498. There is a fundamental difference between the effect which the full faith and credit clause and the related Act of Congress secure to a foreign judgment, and the effect which they secure to a foreign statute.

The determination of the Superintendent is not conclusive under the laws of New York; but only presumptive evidence. This provision of the New York statute is not binding upon and would not be recognized by the courts of other States. It is a mere rule of procedure.

But even if the Superintendent's determination were conclusive under the laws of New York, the courts of New Jersey would be under no constitutional obligation to give it the same conclusive effect in New Jersey; for that determination is not a judgment or judicial proceeding (Const., Art. IV, § 1; Rev. Stats., § 905). Nor is his determination a public act within the meaning of the full faith and credit clause, since it is not a statute. By making no provision as to any other "public acts," Congress evinced its own understanding that no other acts were intended by the constitutional clause. Accord: *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145.

Even if appellant were permitted by the New Jersey law to prosecute his action in a court of law he would be put to the same proof as he would in a court of equity in New Jersey. Hence, appellant's complaint against the New Jersey statute on the score of its requiring him to bring an equity action in the nature of an accounting instead of an action at law is without substance. Distinguishing: *Whitman* v. *National Bank,* 176 U. S. 559; *Hancock* v. *Farnum,* 176 U. S. 640.

The argument based on the impracticability of the equity remedy is irrelevant to any constitutional question in this case. The question is whether that which the New Jersey statute prohibits is constitutional; not whether that which it permits is legally valid or available. Furthermore, the criticism derived from the large number of the depositors and stockholders, does not arise from any intrinsic fault in the New Jersey statute but from a mere circumstance connected with the New York bank itself.

The absolute right of a stockholder to have a court pass upon the necessity for and extent of the enforcement of stockholders' liability in a judicial proceeding was declared by the highest court of New York in the case of *Assets Realization Co.* v. *Howard,* 211 N. Y. 430.

The New Jersey statute and judgment do not deprive the creditors of the Bank of their property without due process of law, or violate the constitutional provision guaranteeing privileges of citizens.

Mr. David Friedenberg, with whom *Messrs. Howard Ewart, Benjamin Gross,* and *James Mercer Davis* were on the brief, for Charles P. Anderson et al., appellees.

Section 94b of the New Jersey Corporation Act, and the judgment of the court below based thereon, do not violate the full faith and credit clause of the Constitution, Art. IV, § 1.

The assessment by the Superintendent of Banks of New York is not conclusive under the law of that State.

The assessment is not a public act within the meaning of the constitutional provision. *Crippin, Lawrence & Co.* v. *Laighton,* 69 N. H. 540. Concededly, the Constitution and banking laws of New York upon which appellant founds his alleged cause of action are public acts within the meaning of the constitutional provision. *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 154, 155.

The assessment is not a judicial proceeding within the full faith and credit clause.

The National banking assessment cases are not in point.

The full faith and credit clause does not require a State to provide a court and method of enforcement of judgments of sister States. *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265; *Andrews* v. *Andrews,* 188 U. S. 14; *Alabama State Bank* v. *Dalton,* 9 How. 522.

The full faith and credit clause is not jurisdictional, but merely provides a rule of evidence. *McElmoyle* v. *Cohen,* 13 Pet. 312; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 292; *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373; *Clifford* v. *Williams,* 131 Fed. 100; *Israel* v. *Israel,* 130 Fed. 237. And one very important and logical result of this statement is that a State need not provide a court within which, and a procedure by which, the judgment of a sister State may be sued upon. *Anglo-American Provision Co.* case, *supra.* See also: *Weidman* v. *Weidman,* 274 Mass. 118.

Section 94b of the New Jersey Corporation Act plainly intends that the law courts of New Jersey should not have jurisdiction over suits to enforce the statutory liability of stockholders of foreign corporations, and that the Court of Chancery of New Jersey should have sole jurisdiction to entertain such suits. The statute is thus in the same category as the section of the New York Code of Civil Procedure referred to in the *Anglo-American Provision Company* case, *supra.*

It is respectfully submitted that, under the authority of the case of *Anglo-American Provision Co.* v. *Davis Provision Co., supra,* a State could constitutionally pass an act, the effect of which would be that the State did not provide any means of enforcing a judgment of a sister State; and if it provided a certain remedy for enforcing such judgment, whether the same were a reasonable remedy or otherwise, it could not be compelled to afford a different procedure.

Distinguishing: *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Aetna National Bank,* 212 U. S. 567; *Con-*

verse v. *Hamilton,* 224 U. S. 243; *Selig* v. *Hamilton,* 234 U. S. 652; and *Marin* v. *Augedahl,* 247 U. S. 142. In none of them was there involved a statute passed by the legislature of the forum in which the plaintiff chose to bring his suit to enforce the stockholder's liability to assessment, which deprived the courts of that State of jurisdiction to determine a suit of that nature. The only point made therein was that a court of one State, having general jurisdiction, could not on the ground of policy or in its discretion refuse to enforce the judgment or give effect to the judicial proceedings of a sister State.

The State of New Jersey is not required by the full faith and credit clause to enforce in its courts the cause of action created by the New York Constitution and banking laws in favor of appellant, whether the liability of the shareholders thereunder be deemed contractual or otherwise. *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265.

The decisions of this Court involving the Minnesota laws were based upon the existence of judicial proceedings in that State.

The public acts, i. e., statutes, of one State are not required by the full faith and credit clause to be given in every other State the same effect as they have in the State of their enactment.

Causes of action created by the laws of a State are enforced in a sister State only by comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99; *Stewart* v. *Baltimore & Ohio R. Co.,* 168 U. S. 445; *Brown* v. *Perry,* 104 Vt. 66; *Texas & Pacific R. Co.* v. *Cox,* 145 U. S. 593; *Dexter* v. *Edmands,* 89 Fed. 467; *Hancock National Bank* v. *Ellis,* 172 Mass. 39; *State ex rel. Bossung* v. *District Court,* 140 Minn. 494; *Flagg* v. *Baldwin,* 38 N. J. Eq. 219; *Broderick* v. *Stephano,* 314 Pa. 408; *Bond* v. *Hume,* 243 U. S. 15, 22.

Under the doctrine of comity, a State may constitutionally refuse to enforce a transitory cause of action created by the laws of a sister State. *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142; *Dougherty v. McKenna Process Co.*, 255 Ill. 369; *Spokane & I. E. R. Co.* v. *Whitley*, 237 U. S. 487; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 409.

The refusal of New Jersey to extend its comity so as to enforce appellant's alleged cause of action in its Supreme Court does not raise a federal question, and, therefore, is not reviewable by this Court.

Section 94b of the New Jersey Corporation Act does not violate the due process clause of the Fourteenth Amendment.

The judgment below was properly entered, and the propriety of such entry is not reviewable by this Court.

Appellant, as Superintendent of Banks of New York, is without right or authority to maintain the alleged cause of action in New Jersey.

Mr. J. H. Harrison submitted for The Bobdon Co. et al., appellees.

The Superintendent of Banks of New York is a mere statutory receiver, does not have title to the assets of the bank, and has not, as of right, any standing in courts outside of the State of New York. *Matter of Union Bank*, 204 N. Y. 313; *Yokohama Specie Bank* v. *Chinese Merchants Bank*, 219 App. Div. 256.

The Superintendent may obtain access to the courts of New Jersey only through the exercise of comity.

The courts of law of New Jersey are not the proper forum for the enforcement of this assessment.

Section 94b of the Corporation Act of New Jersey does not violate the Constitution of the United States or Amendments thereof. *Western National Bank* v. *Reckless*, 96 Fed. 70; *Missouri* v. *Lewis*, 101 U. S. 22.

It has generally been held by the courts that the full faith and credit clause is not jurisdictional but merely provides a rule of evidence. *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373; *Clifford* v. *Williams,* 131 Fed. 100; *Israel* v. *Israel,* 130 Fed. 237.

It is important to note that in this case there has been no judicial proceeding of any kind in the State of New York by virtue of which the relation between the Superintendent of Banks and the Bank of the United States was fixed. See *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230.

It would be most unreasonable and unjust for this Court to hold that a State is compelled by the full faith and credit clause of the Constitution to give effect to the *ex parte* determination of an administrative officer of another State.

Section 94b is not violative of the Fourteenth Amendment.

The entry of a judgment, final in form, by the New Jersey Supreme Court was proper.

By leave of Court, *Mr. John W. Bricker,* Attorney General of Ohio, and *Messrs. W. Dale Dunifon* and *J. Roth Crabbe* filed a brief on behalf of Mr. Samuel H. Squire, Superintendent of Banks of Ohio, as *amicus curiae,* supporting the contention of appellant that § 94b of the New Jersey Corporation Act is unconstitutional.

Mr. Justice Brandeis delivered the opinion of the Court.

Pursuant to Article VIII, § 7, of the Constitution of New York, its Banking Law (Consolidated Laws, Chapter Two) provides, § 120:

"The stockholders of every bank will be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The Bank of the United States is a corporation organized under the Banking Law of New York and had its places of business in New York City. Its outstanding capital stock is $25,250,000 represented by 1,010,000 shares of $25 par value. On November 17, 1933, Joseph A. Broderick, as Superintendent of Banks of the State of New York, brought, in the Supreme Court of New Jersey, this action against 557 of its stockholders who are residents of New Jersey, to recover unpaid assessments levied by him upon them pursuant to law.

The defendant moved to strike out the complaint on the ground, among others, that, by reason of § 94 (b) of the Corporation Act of New Jersey (2 Comp. Stats. p. 1656), it failed to set out a cause of action enforceable in any court of that State. The section, first enacted March 30, 1897, provides:

"No action or proceeding shall be maintained in any court of law in this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

Broderick seasonably claimed that to sustain the asserted bar of the statute would violate Article IV, § I, of the Federal Constitution which provides that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"; and the legislation of Congress enacted pursuant thereto. The trial court sustained the motion to strike out the complaint, *Broderick* v. *Abrams,* 112 N. J. L. 309; 170 Atl. 214, on the ground that the statute of the State constituted a bar to the action. Judgment against the plaintiff with costs, was entered in favor of each of the defendants, and the judgment was affirmed by the Court of Errors and Appeals "for the reasons expressed in the opinion" of the trial court, 113 N. J. L. 305; 174 Atl. 507. An appeal to this Court was allowed.

First. The conditions imposed by § 94 (b) of the New Jersey statute upon the bringing of suits to enforce such assessments, as here applied, deny to the Superintendent the right to resort to the courts of the State to enforce the assessment of liability upon the stockholders there resident. The requirement that the proceeding be by bill in equity, instead of by an action at law, would, if standing alone, be no obstacle. But by withholding jurisdiction unless the proceeding be a suit for an equitable accounting to which the "corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties," it imposes a condition which, as here applied, is legally impossible of fulfillment. For it is not denied that according to the decisions of the New Jersey courts "necessary parties" means those whose presence in a suit is essential as a jurisdictional prerequisite to the entry of judgment, so that no decree can be made respecting the subject matter of litigation until they are before the court, *Wilkinson* v. *Dodd,* 40 N. J. Eq. 123, 130; 3 Atl. 360; *In re Martin,* 86 N. J. Eq. 265; 98 Atl. 510; *McBride* v. *Garland,* 89 N. J. Eq. 314; 104 Atl. 435; and that to secure jurisdiction personally over those who are not residents of New Jersey, or engaged in business there, is impossible. *Pen-*

noyer v. *Neff*, 95 U. S. 714; *Wilson* v. *American Palace Car Co.*, 65 N. J. Eq. 730; 55 Atl. 997; *Papp* v. *Metropolitan Life Ins. Co.*, 113 N. J. Eq. 522, 530; 167 Atl. 873. The corporation has no place of business in New Jersey; only a few of the many stockholders and creditors have either residence or place of business there.

Moreover, even if it were legally possible to satisfy the statutory condition by making substituted service by publication upon non-resident stockholders and creditors, compare *Kirkpatrick* v. *Post*, 53 N. J. Eq. 591, 594; 32 Atl. 267; 53 N. J. Eq. at 641; 33 Atl. 1059, the cost would be prohibitive. The number of the stockholders is 20,843; the number of depositors and other creditors exceeds 400,000; and the amounts assessed against the individual defendants are relatively small—against some only $50. The aggregate of sheriff's fees alone as to the non-resident defendants, aside from expenses of publication and mailing, would exceed the aggregate amount due from the New Jersey stockholders.[1] The suggestion, in the opinion of the Supreme Court, that leave might be granted to file a bill in equity is, therefore, without legal significance.

Second. But for the statute, the action would have been entertained. Compare *Young* v. *Masci*, 289 U. S.

[1] It is stated by counsel, without contradiction, that, under the New Jersey practice, before substituted service can ever be made, the sheriff must have made as to each non-resident defendant a return *non est inventus*. New Jersey Public Laws, 1922, c. 88, entitles the sheriff to a fee of $1.50 for making an affidavit of non-residence as to each defendant. After such affidavit the plaintiff, it is said, would be required to make applications for leave to effect substituted service on each of the absent defendants and to present the essential facts showing the necessity therefor, setting forth the residence and place of business of each. Besides notice sent to each, it would be necessary to publish the notice once a week during four consecutive weeks in some newspaper. N. J. P. L. 1912, c. 155, § 13; N. J. Chancery Rules, 36-38. It is estimated that the 420,000 names of non-resident defendants would fill at least 80 newspaper pages of 8 columns each.

253. New Jersey has provided courts with jurisdiction of suits of like nature and procedure otherwise appropriate for their determination. *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 620; 101 Atl. 375; *Graham* v. *Fleissner*, 107 N. J. L. 278; 153 Atl. 526; *Western Nat. Bank* v. *Reckless*, 96 Fed. 70. Compare *Cochrane* v. *Morris*, 10 N. J. Misc. 82; 157 Atl. 652. The plaintiff is not, as in *Booth* v. *Clark*, 17 How. 322, a foreign receiver. He sues as an independent executive in whom has been vested by statute the cause of action sued on, *Converse* v. *Hamilton*, 224 U. S. 243, 257. The complaint is in conformity to the state practice, see 112 N. J. L. 309, 310; 170 Atl. 214; *Beatty* v. *Lincoln Bus Co.*, 11 N. J. Misc. 938; 169 Atl. 286; and it sets forth the facts essential to a recovery against the stockholder under the law of New York. It shows that the requirements of a valid assessment and of the right to enforce the same by action at law have been complied with, alleging, among other things: that, on December 11, 1930, Broderick, pursuant to § 57 of the New York Banking Law, took possession of the Bank's business and property; that since May 6, 1931, he has been engaged in liquidating the same; that prior to July 1, 1932, he determined, pursuant to §§ 80 and 120, that the reasonable value of the assets of the Bank was not sufficient to pay the creditors in full and that there was due them $30,000,000 in excess of such reasonable value; that the deficiency then fixed and determined has continued ever since; that upon the Superintendent of Banks is imposed the duty of making assessment upon the stockholders and enforcing the liability of stockholders for the benefit of the creditors and that actions to enforce the liability are to be brought in the name of the Superintendent;[2] that

[2] Section 80 of the New York Banking Law provides: "In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against

prior to July 1, 1932, he determined that an assessment of $25 against each stockholder for each share of stock held by him was required for the payment of the Bank's indebtedness; that he duly made upon each stockholder a demand for the payment thereof on August 8, 1932; and that among the stockholders upon whom such demand was made and who failed to pay are the several defendants.

Third. The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. *McKnett* v. *St. Louis & San Francisco Ry.*, 292 U. S. 230, 233. A "State cannot escape its constitutional obligations [under the full faith and credit clause] by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415.[3] It is true that a State can legislate only with reference to its own jurisdiction, *Bonaparte* v. *Tax Court*, 104 U. S. 592; *Olmsted* v. *Olmsted*, 216 U. S. 386; and that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes. See *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, *ante*, p. 532, at p. 546. But the room left for the play of conflicting policies is a narrow one. One State need not enforce the penal laws of another. *Huntington* v. *Attrill*, 146 U. S. 657. A State may

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such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable."

[3] *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, is not to the contrary; there no claim was made under the full faith and credit clause.

adopt such system of courts and form of remedy as it sees fit. It may in appropriate cases apply the doctrine of *forum non conveniens*. *Anglo-American Provision Co.* v. *Davis Provision Co., No. 1,* 191 U. S. 373. But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. *Christmas* v. *Russell,* 5 Wall. 290, 300. Compare *Atchison, T. & S. F. Ry.* v. *Sowers,* 213 U. S. 55; *Tennessee Coal, Iron & Railroad Co.* v. *George,* 233 U. S. 354. For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.

Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. "So much so," as was said in *Converse* v. *Hamilton,* 224 U. S. 243, 260, "that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin [New Jersey] may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration." Compare *Bernheimer* v. *Converse,* 206 U. S. 516, 532. In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For "the act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 551. Compare *Royal Arcanum* v. *Green,* 237 U. S. 531; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *McDermott* v. *Woodhouse,* 87 N. J. Eq. 615, 618, 619; 101 Atl. 375.[4] Obviously, recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders.

Fourth. The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being nonresidents, could not have been personally served with process. *Converse* v. *Hamilton,* 224 U. S. 243, 252, 260. The reason why in that case the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the nonresident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assessment because statutes are "public acts" within the meaning of the clause, *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 155; *Alaska Packers Assn.* v. *Industrial Accident Comm'n, ante,* p. 544;

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[4] See, too, *Canada Southern Ry.* v. *Gebhard,* 109 U. S. 527, 537–8; *Hawkins* v. *Glenn,* 131 U. S. 319, 329; *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U. S. 221, 229–230; *Harrigan* v. *Bergdoll,* 270 U. S. 560, 564.

and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter State. Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other States.

The Superintendent is an independent executive on whom the legislature has conferred large responsibilities, compare *Isaac* v. *Marcus,* 258 N. Y. 257, 263–5; 179 N. E. 487; *Matter of Broderick,* 235 App. Div. 281; 257 N. Y. S. 382; among them, the determination of the questions involved in stockholders' liability. He must decide whether there is a deficiency of assets which requires resort to that liability; and if so, what proportion of the full liability it is necessary to enforce; and when the assessments shall be paid. It is urged that unlike the assessment involved in *Converse* v. *Hamilton, supra,* that laid by the New York Superintendent is not conclusive as to its propriety and amount. The contention rests primarily upon a misconception of a provision in § 80 of the Banking Law, to the effect that "the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated." This provision does not declare, as a rule of substantive law, that the determination is open to attack in an action to enforce the stockholders' liability. It merely provides, as in the case of other official acts, a method of proof without the calling of witnesses. Thus it prescribes a rule of evidence; and may possibly affect the manner of pleading.[5] But with such matters we have here no concern. It is enough, for present purposes, that a complaint alleging the stock ownership of the defendants, the assessment, the demand, and failure to pay, together with the determination of the value of assets and liabilities, referred to in § 80, sets forth a good cause of action.[6] *Broderick* v. *Aaron,* 147 Misc. 854; 264 N. Y. S. 15; *Broderick* v. *Betco Corp.,* 149 Misc. 245; 267 N. Y. S. 139; *Broderick* v. *American General Corp.,* 71 F. (2d) 864; compare *Broderick* v. *Stephano,* 314 Pa. 408; 171 Atl. 582; *Broderick* v. *McGuire,* 119 Conn. 83; 174 Atl. 314. Even if the administrative determination of the assessment made in New York is subject to attack in a suit brought there or in any other State, that fact would not justify New Jersey in denying to the Superintendent the right to bring this suit.

Fifth. The Superintendent contends that his assessment is a "public act" within the meaning of the full faith and credit clause, and is entitled to receive in every other State of the Union, the same recognition accorded to it by the laws of New York. He insists that, while under the law of New York defenses personal to individual stockholders are open to them whenever and wherever sued, *Selig* v. *Hamilton,* 234 U. S. 652, 662–3, his determinations as to the propriety and amount of the assessment, in so far as they involve merely the exercise of judgment, are conclusive; and are not subject to review by any court, except on grounds for which equity com-

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[5] Compare *Broderick* v. *McGuire,* 119 Conn. 83, 101–103; 174 Atl. 314.

[6] Before the adoption of § 80 by the Laws of 1914, c. 369, the Superintendent was required to allege and prove the facts necessitating the assessment. *Cheney* v. *Scharmann,* 145 App. Div. 456; 129 N. Y. S. 993; see *Matter of Empire City Bank,* 18 N. Y. 199, 211–213. By the Laws of 1934, c. 494, further changes, of no importance here, have been made in this section.

monly affords relief against administrative orders. He argues that his powers and duties in respect to the assessment of stockholders, and the proceeding to enforce liability therefor, are substantially the same as those imposed by the National Banking Act on the Comptroller of the Currency, *Van Tuyl* v. *Scharmann,* 208 N. Y. 53, 63; 101 N. E. 881; *Matter of Union Bank of Brooklyn,* 176 App. Div. 477, 485; 163 N. Y. S. 485; *Broderick* v. *Aaron,* 151 Misc. 516, 523; 272 N. Y. S. 219; and that, as to these, it has been settled by an unbroken line of authorities beginning with *Kennedy* v. *Gibson,* 8 Wall. 498, 505, that the Comptroller's determination is conclusive in an action at law to enforce the stockholders' liability; being subject, like other administrative orders, only to a direct attack for fraud or error of law by appropriate proceedings in equity.[7] *United States* v. *Knox,* 102 U. S. 422, 425. Whether this contention is sound, we have no occasion to consider now. See *Broderick* v. *Adamson,* 148 Misc. 353, 369–371; 265 N. Y. S. 804. It is sufficient to decide that, since the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged public policy of New Jersey could be controlling, the full faith and credit clause requires that this suit be entertained.

Reversed.

MR. JUSTICE CARDOZO is of the opinion that the judgment should be affirmed.

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[7] *Casey* v. *Galli,* 94 U. S. 673, 681; *National Bank* v. *Case,* 99 U. S. 628, 634–5; *DeWeese* v. *Smith,* 106 Fed. 438, 445, aff'd, 187 U. S. 637; *Murray* v. *Sill,* 7 F. (2d) 589; *Crawford* v. *Gamble,* 57 F. (2d) 15; *B. V. Emery & Co.* v. *Wilkinson,* 72 F. (2d) 10; see *Studebaker* v. *Perry,* 184 U. S. 258, 266; *Rankin* v. *Barton,* 199 U. S. 228, 232. Compare *Bushnell* v. *Leland,* 164 U. S. 684; *Korbly* v. *Springfield Savings Institution,* 245 U. S. 330; *Aldrich* v. *Campbell,* 97 Fed. 663.

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RY. CO.*

CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 479 and 480. Argued February 12, 13, 1935.—Decided April 1, 1935.

1. Section 77 of the Bankruptcy Act, added by Act of March 3, 1933, which provides a method whereby any railroad engaged in interstate commerce and which is insolvent, or "unable to pay its debts as they mature," may be reorganized through proceedings taken on its application in the bankruptcy court, during the pendency of which that court is given exclusive jurisdiction of such "debtor" and its property wherever located, is, in its general scope and aim, within the power of Congress "to establish uniform laws on the subject of bankruptcies." Constitution, Art. I, § 8, cl. 4. Pp. 667, 675.
2. The bankruptcy power is not limited to the rules on the subject which prevailed in England and the Colonies at the time of the adoption of the Constitution. P. 668.
3. The bankruptcy power is adaptable to new conditions; its nature and extent are to be fixed by the gradual processes of historical and judicial inclusion and exclusion. The tendency of interpretation has been progressively liberal. Pp. 668, 671.
4. The expression "unable to meet its debts as they mature," used in § 77 of the Bankruptcy Act as an alternative to "insolvent," means something less than "bankruptcy" or "insolvency," and may be construed to include a debtor who, although unable to pay promptly, may do so if given time. P. 672.

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* Together with Nos. 481 and 482, *Chase National Bank* v. *Chicago, R. I. & P. Ry. Co.;* Nos. 483 and 484, *Mississippi Valley Trust Co.* v. *Chicago, R. I. & P. Ry. Co.;* Nos. 485 and 486, *Harris Trust & Savings Bank* v. *Chicago, R. I. & P. Ry. Co.;* Nos. 487 and 488, *New York Trust Co.* v. *Chicago, R. I. & P. Ry. Co.;* and Nos. 489 and 490, *Reconstruction Finance Corp.* v. *Chicago, R. I. & P. Ry. Co.,* all on certiorari to the Circuit Court of Appeals for the Seventh Circuit.

5. Section 77 is none the less a law on the subject of bankruptcies although the reorganization proceeding does not involve an adjudication of bankruptcy. P. 672.

6. In a reorganization proceeding under § 77, the bankruptcy court has jurisdiction to enjoin creditors who hold collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under power of sale in the notes, where such sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it. P. 675.

7. This power is to be deduced:

(a) As a power inherent in the court of bankruptcy as a court of equity, to protect its jurisdiction. P. 675.

(b) From Jud. Code, § 262, which authorizes courts of the United States to issue all writs necessary for the exercise of their respective jurisdictions. *Id.*

(c) From § 2 (15) of the Bankruptcy Act, investing courts of bankruptcy with authority in equity and power to make orders necessary for the enforcement of the provisions of that Act. P. 676.

8. Such an injunction does not infringe § 67 (d) of the Bankruptcy Act, since it does not impair the liens of the pledgees but merely suspends enforcement by sale of the collateral pending further action. P. 676.

9. Such an injunction, applied to threatened sales of collateral under contracts made before the enactment of § 77, is not such an impairment of contract obligations as violates the due process clause of the Fifth Amendment. P. 680.

10. Such an injunction may be granted in a summary proceeding. P. 681.

11. The contention that the note-holding creditors were not given sufficient notice or a full opportunity to be heard in the present case is without merit. P. 682.

12. A district court having jurisdiction of a reorganization proceeding under § 77, *supra,* may issue process for service outside of its district. P. 682.

13. The power given the Reconstruction Finance Corporation, by § 5 of the Act creating it, to take over and liquidate collateral accepted by it as security, does not render it more immune than other lenders to the control of the bankruptcy court, over the sale of bonds pledged by railroads, in proceedings under § 77 of the Bankruptcy Act. P. 684.

14. Reorganization proceedings under § 77 must be diligently pursued; creditors must not be subjected to irreparable injury by unreasonable suspension of their remedies. P. 684.

72 F. (2d) 443, affirmed.

Certiorari, 293 U. S. 550, to review decrees affirming an interlocutory decree of the District Court, in bankruptcy, enjoining the sale of bonds held by five banks and the Reconstruction Finance Corporation as security for collateral notes of the above-named railway company. Each of the parties enjoined, petitioners here, took two appeals to the court below—one allowed by that court, the other by the District Court.

Mr. Herbert A. Friedlich, of counsel for Continental Illinois National Bank & Trust Co., and *Mr. Paul D. Miller,* of counsel for the Chase National Bank, argued the cause for all five of the banks and trust companies. These petitioners all united in one brief, from which the following summary of points is taken. The appearances on the brief were: *Messrs. Isaac H. Mayer, Carl Meyer, David F. Rosenthal,* and *Herbert A. Friedlich* for the Continental Illinois National Bank & Trust Co.; *Messrs. Henry Root Stern* and *Paul D. Miller* for the Chase National Bank; *Messrs. T. M. Pierce* and *S. Mayner Wallace* for the Mississippi Valley Trust Co.; *Mr. Hal C. Bangs* for Harris Trust & Savings Bank; and *Messrs. Edwin W. Sims, Franklin J. Stransky,* and *James P. Carey, Jr.,* for the New York Trust Co.

By § 77 (n), the jurisdiction of a bankruptcy court in a proceeding under § 77 is the same as that of the court in an ordinary bankruptcy proceeding, unless such jurisdiction is inconsistent with § 77.

A bankruptcy court is without jurisdiction in an ordinary bankruptcy proceeding to restrain a pledgee from exercising his contract right to sell collateral validly pledged to him by the bankrupt, even though the pledged collateral consists of secured obligations of the bankrupt. This want of jurisdiction exists because (a) the Bankruptcy Act expressly preserves the rights of the pledgee, and (b) a bankruptcy court has no jurisdiction (save in specified cases not here material) to deal with property not in the actual or constructive possession of the bankrupt.

Section 77 does not confer upon a bankruptcy court proceeding under that section jurisdiction to issue such a restraining order, since there is nothing in that section which negatives either of the two bases of the rule that a bankruptcy court is without authority to issue such a restraining order in an ordinary bankruptcy proceeding. In fact, various provisions of § 77, as well as its legislative history, show clearly that Congress intended that the court should not possess authority to issue such a restraining order.

Section 2 (15) of the Bankruptcy Act, which provides generally that the court may issue such orders as may be necessary for enforcing the Act, is in no sense a source of jurisdiction, and confers no greater powers in the matter of enjoining sales of pledged collateral upon a court proceeding under § 77 than it has in the past been construed to confer upon a bankruptcy court in an ordinary voluntary proceeding.

If, as petitioners contend, the District Court was without jurisdiction to issue the injunction, a consideration of the effect, if any, of a sale of the pledged collateral upon a plan of reorganization is irrelevant. Petitioners contend, however, that there was no evidence before the District Court which sustains its conclusion that the injunction was "necessary for the enforcement of the provisions of § 77."

As construed and applied by the courts below, § 77 violates the Fifth Amendment by depriving petitioners of a substantial and preëxisting vested right, i. e., the right to sell the pledged collateral, upon default, at such time as they may select. Even if the injunction be held to affect merely petitioners' remedy, it was an unreasonable and arbitrary modification and postponement of such remedy, in violation of the Fifth Amendment.

The decision of the court below (which is predicated on a theory applicable to § 77–B of the Bankruptcy Act, as well as to § 77) overturns a rule of bankruptcy law upon the basis of which, in part at least, literally hundreds of millions of dollars of now outstanding short-term collateral loans were made. The hazard of having short-term liquid loans converted into frozen loans for an indefinite period will inevitably tend sharply to restrict credit, contrary to one of the underlying purposes of § 77, and at a time when Congress and the Administration are endeavoring to accomplish the opposite result.

The territorial limits imposed by Congress upon District Courts apply to courts of bankruptcy. An injunction, operating *in personam,* can be supported only by jurisdiction over the persons enjoined, and the District Court had no jurisdiction over those petitioners which were not parties to the proceeding and which were neither residents of nor present within the Northern District of Illinois. The "exclusive jurisdiction" over the "debtor and its property wherever located" conferred upon the court by § 77 (a) is the same as that possessed by a bankruptcy court in an ordinary bankruptcy proceeding. Section 77 does not extend either the territorial limits of the court or the court's jurisdiction *in personam* over non-residents.

Messrs. A. A. Berle, Jr., and *Cassius M. Clay,* with whom *Solicitor General Biggs* and *Mr. Stanley Reed* were on the brief, for the Reconstruction Finance Corp., petitioner in Nos. 489 and 490.

The express provisions of § 77 negative the implication of the power to grant the order either in a summary or a plenary proceeding, where the sale of the collateral (as here) is permitted by the terms of the pledge agreement and does not require judicial proceedings. The petition on which the order was granted is insufficient as a bill in a plenary suit. If a summary proceeding would lie, the affidavit filed with the petition does not properly allege anything in support thereof.

In ordinary bankruptcy proceedings, the law has been well settled for many years that the court may not, under any provision of the Bankruptcy Act here applicable, enjoin the sale, either of the obligations of other companies, which constitute the bulk of the collateral held by this petitioner, or of the $7,575,000 face amount of the debtor's own obligations, likewise comprised in its collateral.

The common-law right involved, recognized both in bankruptcy and in equity receiverships, is not impaired by the enactment of § 77, subdivision (n) of which provides that, in proceedings thereunder and consistent with the provisions thereof, the rights and liabilities of creditors shall be the same as in ordinary bankruptcy proceedings. Furthermore, subdivision (1) of § 77, which authorizes the court to stay " the commencement or continuance of any judicial proceeding to enforce any lien upon the estate " of the debtor, by expressly authorizing the court to stay only judicial proceedings, negatives the intent that the sale of collateral may be enjoined, when sold under a power of sale contained in the pledge agreement and without the aid of judicial proceedings. This construction alone gives effect to the words " commencement or continuance of any judicial proceeding." There is no other provision of § 77 which in any way confers upon the court the power to issue injunctions. It should also be noted that subdivision (1) of § 77 is applicable only to judicial proceedings to enforce " any lien." A pledgee of negotiable securities has a greater interest therein than a mere lien. That the rule in ordinary bankruptcy has not been changed by the enactment of § 77 is strengthened by the construction which several courts have placed upon a similar provision of § 74 and by the legislative history of both enactments. Authority for the injunction is not granted by subclause 15 of § 2 of the Bankruptcy Act, the so-called "omnibus clause," for, as this Court has held, subclause 15 of § 2 must be construed with regard for the express provisions of the Bankruptcy Act which are applicable to this case. Subclause 15 of § 2 has never in the past been construed to authorize a bankruptcy court to enjoin the sale of pledged collateral.

Regardless of these considerations, § 77 must be construed with § 5 of the Reconstruction Finance Corporation Act (under the authority of which the loans from this petitioner involved in this case were made), which expressly empowers the Reconstruction Finance Corporation to take over and liquidate collateral accepted by it as security for such loans. The express provisions of § 5 of the Reconstruction Finance Corporation Act are controlling in this case, if they are to be given any practical effect, consistent with the underlying purposes of the Reconstruction Finance Corporation.

Patently, this is not a case of a reconciliation of an earlier statute with a later enactment containing inconsistent provisions. This Court should not permit a derivation of power from subclause 15 of § 2 of the Bankruptcy Act, couched in general language, to prevail over a power expressly granted by Congress under § 5 of the Reconstruction Finance Corporation Act.

The economic policy of financing railroads by short-term loans secured by pledge was recognized by the Congress in the Reconstruction Finance Corporation Act, and given specialized administrative control by the Interstate Commerce Commission; that policy should not be called into question as is done by the construction placed upon § 77 by the decision of the Circuit Court of Appeals.

Affirmance of that decision would endanger normal commercial processes. Uneconomic corporate holdings will tend to be perpetuated.

The supposed distinction between interruption of a remedy and impairment of a right is meaningless in this case. Since the injunction is based upon the assumption that it is necessary until a plan of reorganization for the debtor can be effected, the contractual right is invaded without substituting an equally efficient and adequate remedy.

The Congress, through the Reconstruction Finance Corporation Act, elected to follow the policy during the existing emergency of financing railroads by short-term collateral loans from this petitioner. Each transaction is controlled by the Interstate Commerce Commission as guardian of the soundness of the financial policy involved. This amounts to a congressional determination of policy which should not be overriden by a strained statutory construction.

The findings of the District Court that sale of the collateral would in effect prevent the debtor's reorganization and that "it is necessary to the enforcement of the provisions of § 77" that the sale of said collateral be enjoined "pending the preparation and consummation of a reorganization plan" are mere assumptions and nothing more.

Under the express provisions of § 77, the noteholder is entitled both to vote on his note and in the various classes of creditors in which the collateral falls; hence, there can be no such shifting of classes of creditors or changes in the size of the various classes of creditors as will prevent the preparation and effectuation of a plan. In any reorganization of the debtor the secured obligations of other companies comprised in this petitioner's collateral must be treated as outstanding, as they would have to be if they were still held in the treasury of the debtor. The validity of the pledge in this case is not questioned. To deny to the pledgee holding collateral the benefit of his contract is to give other creditors of the debtor, and the debtor himself, an advantage for which they have not bargained.

The assumption that the injunction is necessary for the effectuation of a plan is entirely unsupported. No necessity has been shown.

On the contrary, the power to sell collateral, instead of tending to prevent the consummation of a plan, will in practice expedite it.

The present injunction purports to be a final disposition of the issue until a plan of reorganization under § 77 can be effected. As a matter of fact, there is no plan proposed by any of the interested parties. Unless this Court now affords the relief to which this petitioner is entitled, the latter can have no assurance that it will not suffer irreparable injury.

Mr. Elihu Root, Jr., with whom *Messrs. George W. Wickersham, Edward C. Bailly, Wilkie Bushby, Joseph Schreiber, W. Lloyd Kitchel,* and *Eugene J. Conroy* were on the brief, for the Bondholders Protective Committees, respondents.

Mr. Edward W. Bourne, with whom *Messrs. James H. McIntosh* and *Clifton P. Williamson* were on the brief, for the Protective Committee for the Chicago, R. I. & P. Ry. Co. General Mortgage Bonds, respondent.

Mr. Marcus L. Bell, with whom *Messrs. W. F. Dickinson* and *W. F. Peter* were on the brief, for the Trustees in Bankruptcy, respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On June 7, 1933, The Chicago, Rock Island & Pacific Railway Co. filed a petition seeking a reorganization under

§ 77 of the Bankruptcy Act, in the federal District Court for the Northern District of Illinois, Eastern Division, alleging that it was "unable to meet its debts as they mature." Nine of the debtor's subsidiaries thereafter joined in the proceedings as permitted by subdivision (a) of the section. On September 26, 1933, the debtor filed a petition for instructions which alleged that it had outstanding collateral notes secured by mortgage bonds, part of which were issued by it, part by corporations forming a part of the system; that it had been unable to pay interest on its funded debt secured by mortgage liens on various portions of its property; that it would be obliged to default on interest about to become due on other mortgage bonds of the system; that the value of the collateral securing each of the outstanding notes is substantially in excess of the loan thereby secured; that if holders of the notes should sell the collateral it would cause a substantial and irreparable loss to the trust estate; and that a forced sale of the collateral at the present time might result in a substantial deficiency judgment against the debtor and the depletion of the respective interests in the trust estate of all creditors in proportion to the rank and lien of the obligations by which their claims or interests therein are evidenced. The petition prayed that the court determine whether it should enjoin the holders of the collateral notes, in the event of a default, from selling any of the collateral.

Practically all of the collateral held by the banks and the Reconstruction Finance Corporation consists of bonds of the debtor and its subsidiaries. These bonds are secured by mortgages on the property of the system; and the collateral, therefore, constitutes fractional interests in the liens created thereby. The collateral pledged to the banks consists of bonds of the Rock Island or of bonds (guaranteed by the debtor) of one of the subsidiary corporations, wholly owned and operated under lease by the debtor. Six of the collateral notes, aggregating $13,659,877.58, are held by the Reconstruction Finance Corporation and are secured by collateral of the face value of $41,702,465.85.[1] The remaining notes, aggregating $4,125,000 in amount, and secured by collateral of the face

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[1] The collateral pledged with the notes held by the Reconstruction Finance Corporation consists of the following securities:

Listed Collateral:	
The Chicago, Rock Island and Pacific Railway Company First and Refunding 4% Gold Bonds	$7,575,000.00
St. Paul and Kansas City Short Line Railroad Company First Mortgage 4½% Gold Bonds	9,374,500.00
Rock Island, Arkansas and Louisiana Railroad Company First Mortgage 4½% Gold Bonds	3,862,000.00
Total	$20,811,500.00
Unlisted Collateral:	
The Chicago, Rock Island and Gulf Railway Company Extension First Mortgage 5% Bonds	$6,927,000.00
The Chicago, Rock Island and Gulf Railway Company Carrollton Branch 6% Bonds	331,000.00
Kankakee & Senaca Railroad Company 4½% Bonds	352,000.00
Rock Island and Dardanelle Railway Company First Mortgage 5% Bonds	100,000.00
Rock Island Memphis Terminal Depot First Mortgage 5% Bonds	900,000.00
Rock Island Memphis Terminal First Mortgage 5% Bonds	400,000.00
Rock Island Omaha Terminal First Mortgage 5% Bonds	906,000.00
Rock Island Improvement Company:	
Blue Island Shops Bonds	199,000.00
Cedar Rapids Terminal Bonds	369,732.99
Little Rock Mortgage Bonds	278,492.49
Peoria Terminal Mortgage Bonds	290,247.86
First and Collateral 5% Bonds	3,310,000.00

value of $14,409,000,[2] are held severally by five banks—The Chase National Bank and the New York Trust Company, of New York City, the Continental Illinois National Bank and Trust Company and Harris Trust and

Unlisted Collateral—Continued.

Trinity & Brazos Valley Receiver's Certificates.	$747,492.51
Trinity & Brazos Valley First Mortgage Bonds (now pledged under Colorado & Southern Mortgage; C. R. I. & P. has agreed to pledge them with Reconstruction Finance Corporation upon release from that Mortgage May 1, 1935)	4,380,000.00
Total	$19,490,965.85
Assignment of Chicago, Rock Island and Pacific Railway Company's distributive share in assets of Railroad Credit Corporation, approximately	1,400,000.00

[2] The notes held by the five banks and the collateral securing the same are as follows:

	Amount of loan	Collateral	
		C. R. I. & P. Refunding 4% bonds	St. Paul & Kansas City Short Line 4½% Gold Bonds
Chase National Bank	$2,000,000	$3,253,000	$3,956,000
Continental Illinois Bank and Trust Co	1,250,000	1,307,000	2,758,000
New York Trust Co	500,000	800,000	1,010,000
Harris Trust & Savings Bank	250,000	405,000	490,000
Mississippi Valley Trust Company	125,000	190,000	240,000
	4,125,000	5,955,000	8,454,000

The $4,125,000 was reduced to $3,866,923.34 by application of Debtors' deposits in the Continental and Mississippi Valley banks.

The St. Paul and Kansas City Short Line $4\frac{1}{2}$% Gold Bonds are mortgage bonds of a corporation whose capital stock is owned by the Debtor; and they are guaranteed principal and interest by it.

Savings Bank, of Chicago, and Mississippi Valley Trust Company, of St. Louis. Each of the collateral notes contains a provision that it shall become due in case of, among other events, (1) non-payment of interest, (2) insolvency of the debtor, (3) appointment of a receiver for the debtor. Each note held by a bank provides also that it shall become due in case of non-payment of interest on any of the notes held by the Reconstruction Finance Corporation. And all the outstanding notes provide that:

"Upon default of any kind hereunder, the payee may sell in . . . New York City, or elsewhere . . . all or any of the security held for the payment of this note, at any broker's board or at public or private sale, without . . . notice . . . And the payee may be the purchaser of any or all property, rights and/or interests so sold. . . ."

None of the noteholders was a party to the proceeding. No noteholder was ever served with process; and only the two Chicago banks were residents of the district. But notice of the intention to present the petition for instructions had been sent by registered mail to each of the noteholders, and also to the five protective committees representing security holders of the system.[3] All of these parties were represented at the hearing. The holders of the collateral notes appeared specially, and objected to the jurisdiction of the court on the ground that (1) it had no jurisdiction of the person; (2) no jurisdiction over, or possession of, the property, the sale of which was about to

[3] Protective Committee for The Chicago, Rock Island & Pacific Railway General Mortgage 4% Bonds; Protective Committee for The Chicago, Rock Island & Pacific Railway First and Refunding 4% Gold Bonds and Secured 4½% Gold Bonds Series A; Protective Committee for the St. Paul & Kansas City Short Line 4½% Gold Bonds and Rock Island, Arkansas and Louisiana 4½% Gold Bonds; Protective Committee of the Burlington, Cedar Rapids and Northern Consolidated 5% Gold Bonds; Protective Committee for the Chicago, Rock Island & Pacific Railway, 30-year 4½% Convertible Bonds.

be restrained; and (3) no jurisdiction to grant in a summary proceeding the injunction suggested; but it was stipulated that the noteholders might present argument and file briefs on the merits without waiving their special appearances. The Chairman of the Protective Committee of the First and Refunding Bonds of the Debtor, set forth the facts relied upon as showing that unless the sale of the collateral was enjoined, it would be impossible to prepare, and secure approval of, a plan of reorganization. All of the appellants contend that the injunction entered, as hereinafter stated, was without legal justification. Only the banks renew here the challenge to the jurisdiction of the court to make the order in this proceeding.

The Chicago, Rock Island and Pacific system comprises over 8,000 miles of line, extending into more than one-fourth of the states of the Union, and into 20 federal judicial districts. At the commencement of this reorganization proceeding, its capitalization outstanding in the hands of the public was $459,059,808. Of this, $128,909,211 was in preferred and common stocks; $312,365,720 in bonded indebtedness; and $17,784,877 in the collateral notes here in question. In addition to the above, there were pledged as security for some issues of its funded debt bonds and stocks of the system aggregating $145,749,050; and as security for the collateral notes, the bonds and stocks above mentioned, aggregating $54,711,465. If, pending the reorganization, trustees for the bondholders and these noteholders should sell the pledged securities, the capitalization outstanding in the hands of the public would to that extent be expanded; and the aggregate capitalization might thereby become as much as $659,520,323.

By the Act of March 3, 1933, c. 204, 47 Stat. 1467, original jurisdiction, in addition to that theretofore exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, was conferred upon courts of bankruptcy "in proceedings for the relief of debtors," as provided in §§ 74, 75 and 77 of the act. We are here concerned only with § 77. That section contains provisions for the reorganization of railroads engaged in interstate commerce. It permits any railroad corporation which is insolvent or unable to meet its debts as they mature to effect a plan of reorganization.

It provides for the filing of a petition by the railroad corporation in a court designated by the act. If the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located. The act requires that the railroad corporation shall be referred to in the proceedings as a "debtor," and permits any corporation, the majority of the capital stock of which is owned, or substantially all of whose properties are operated, by the debtor under lease or operating agreement, also to file a petition in the same proceeding stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization in connection with the plan of the original debtor.

Other provisions of the section direct that a plan of reorganization shall include a proposal to modify or alter the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities or otherwise; that it shall provide adequate means for its execution; that the term "creditor" includes "all holders of claims, interests, or securities of whatever character against the debtor or its property"; and that, if the plan is not proposed or accepted or confirmed within a reasonable time to be fixed by the judge, he may dismiss the proceeding.

Before acceptance of any plan, the Interstate Commerce Commission is directed to hold a public hearing, following which it shall render a report recommending a plan which "will, in its opinion, be equitable, will not discriminate unfairly in favor of any class of creditors or stockholders, will be financially advisable . . . and will be compatible with the public interest." The commission is required to state fully the reasons for its conclusions. The plan is then to be submitted to the creditors and stockholders of the debtor for acceptance or rejection. No plan may be finally approved by the commission until it has been accepted in writing by or on behalf of creditors holding two-thirds in amount of the claims of each class affected by the plan, and by or on behalf of stockholders holding two-thirds of the stock of each class.

Upon approval by the commission, the judge, after hearing, shall confirm the plan if satisfied, among other things, that the plan affords adequate protection for the realization by creditors of the value of their securities, liens and claims in one of the ways pointed out by the section. Upon confirmation of the plan, it is to be binding not only upon corporation and all stockholders and creditors generally, but upon all secured creditors of each class of which two-thirds in amount shall have accepted the plan. For convenient reference, various pertinent excerpts from § 77 are reproduced in the margin.[4]

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[4](a) Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the railroad corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission hereinafter called the commission: . . . If the petition is so approved, the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. The railroad corporation shall be referred to in the proceedings as a "debtor." Any corporation, the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium,

On November 22, 1933, the district court, after a hearing, entered an order reciting that each of the collateral notes contained provisions that, in case of the insolvency

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by any railroad corporation filing a petition as a debtor under this section, or substantially all of whose properties are operated by such a debtor under lease or operating agreement may file, with the court in which such other debtor had filed such a petition, and in the proceeding upon such petition under this section, a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of such other debtor; and thereupon such court shall have the same jurisdiction with respect to it, its property and its creditors and stockholders as the court has with respect to such other debtor. . . .

(b) A plan of reorganization within the meaning of this section (1) shall include a proposal to modify or alter the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; . . . (3) shall provide adequate means for the execution of the plan, which may, so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended, include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; . . . The term "creditors" shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, . . .

(c) Upon approving the petition as properly filed the judge . . . (7) if a plan of reorganization is not proposed or accepted, or, if proposed and accepted, is not confirmed, within such reasonable time as the judge may, upon cause shown and after considering any recommendation which has been filed by the commission, allow, may dismiss the proceeding; . . .

(d) Before creditors and stockholders of the debtor are asked finally to accept any plan of reorganization, the Interstate Comof the railway company or the appointment of a receiver or the non-payment of interest when due, the holder thereof might sell and dispose of the collateral; that there was

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merce Commission shall after due notice hold a public hearing at which the debtor shall present its plan of reorganization and at which, also, such a plan may be presented by the trustee or trustees, or by or on behalf of creditors of the debtor, being not less than 10 per centum in amount of any class of creditors. Following such hearing, the commission shall render a report in which it shall recommend a plan of reorganization (which may be different from any which has been proposed) that will, in its opinion, be equitable, will not discriminate unfairly in favor of any class of creditors or stockholders, will be financially advisable, will meet with the requirements of subdivision (g) of this section, and will be compatible with the public interest. In such report the commission shall state fully the reasons for its conclusions, . . . Thereafter the plan of reorganization recommended by the commission shall be submitted in such manner as the commission may direct to the creditors and stockholders of the debtor for acceptance or rejection, together with the report or reports of the commission thereon; . . .

(e) A plan of reorganization shall not be finally approved by the commission until it has been accepted in writing and such acceptance has been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan, and by or on behalf of stockholders of the debtor holding two-thirds of the stock of each class: *Provided, however,* That if adequate provision is made in the plan for the protection of the interests, claims, and liens of any class of creditors or stockholders in the manner provided in clauses (5) and (6) of subdivision (g) of this section, then the acceptance of the plan by such class of creditors or stockholders shall not be requisite to the approval of the plan; . . .

(g) Upon such approval by the commission, and after hearing such objections as may be made to the approved plan, the judge shall confirm the plan if satisfied that . . . (6) the plan provides with respect to any class of creditors the acceptance of which is requisite to the confirmation of the plan, and who would not become bound by the plan under the provisions of subdivision (h) of this section, adequate protection for the realization by them of the value of their securities, liens, and claims, either (a) by the sale of such property subject to their liens, if any, or (b) by the sale free of such liens at not less than danger that the holders would claim that one or more of the events entitling them to sell such collateral had occurred; that a sale of the collateral or any part thereof by the Reconstruction Finance Corporation or by the banks would be inconsistent with the purposes of § 77 and would hinder, impede, obstruct, delay, and, in effect, prevent the orderly preparation and consummation of a plan of reorganization; that the district court, under § 77, had exclusive jurisdiction of the debtor and its property wherever located; that under paragraph 15 of § 2 of the Bankruptcy Act, the court had power to make such orders, issue such process and enter such judgments as might be necessary for the enforcement of the act; and that it was

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a fair upset price, and the transfer of such liens to the proceeds of such sale, or (c) by appraisal and payment in cash of either the value of such liens and claims or, at the objecting creditors' election, the value of the securities allotted to such liens and claims under the plan. Section 57, clause (h), of this Act shall be applicable to the appraisal of securities under this section, and the value of the unpaid balance shall be appraised as an unsecured claim; . . .

(h) Upon such confirmation the provisions of the plan shall be binding upon . . . (7) all secured creditors of each class of which two-thirds in amount shall have accepted the plan. . . .

(l) In addition to the provisions of section 11 of this Act for the staying of pending suits against the debtor, such suits shall be further stayed until after final decree [and] the judge may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree.

. . . . .

(n) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

. . . . .

necessary for the enforcement of § 77 that the holders of the collateral be enjoined and restrained from selling or disposing of the same pending the preparation and consummation of a reorganization plan. Following these recitals, the Reconstruction Finance Corporation and the banks were restrained and enjoined from converting, selling or otherwise disposing of the collateral or any part thereof until further order of the court.

An appeal followed to the circuit court of appeals where, upon full consideration, the decree of the district court was affirmed. 72 F. (2d) 443. The case was brought here on certiorari.

The questions which we are called upon to determine relate to the construction of § 77 in certain particulars; to its constitutionality; and to the powers of the district court which were here asserted and exercised.

First. The constitutional validity of the section in its general scope and application is not assailed, the subject being passed without discussion by any of the parties. Nevertheless, grave doubt has been expressed in respect of that question; and since the question is inherently fundamental, we deem it necessary to consider and dispose of it *in limine*—postponing, however, for later consideration the limited contention of the banks, in which the Reconstruction Finance Corporation seems not to join, that the due process clause of the Constitution is infringed by the special application made of § 77 in respect of the injunction.

Article I, § 8, cl. 4, of the Federal Constitution vests Congress with the power "to establish . . . uniform laws on the subject of bankruptcies throughout the United States"; and the simple question is—does § 77 constitute a law on the subject of bankruptcies? While attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible. As early as 1833, Mr. Justice Story said that whatever might have been the rule of the English law on the subject, Congress might pass an act authorizing a commission of bankruptcy at the petition of the debtor; and that no distinction, practically or even theoretically, could be made between bankruptcies and insolvencies. 2 Story on the Constitution, 4th ed., § 1111. From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.

The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender. Anything in the nature of voluntary bankruptcy was unknown to that system. The persons who were permitted to fall within the term "bankrupt" were limited to traders. But the notion that the framers of the Constitution, by the bankruptcy clause, intended to limit the power of Congress to the then-existing English law and practice upon the subject long since has been dispelled.

In *Waring* v. *Clarke,* 5 How. 441, this court held that the grant extending the judicial power to all cases of admiralty and maritime jurisdiction was not limited to, and was not to be interpreted by, what were cases of admiralty jurisdiction in England when the Constitution was adopted. Nor is the implied power of Congress over the subject arising from that jurisdictional clause and the general coefficient clause (Art. I, § 8, par. 18) of the Constitution to be thus confined. *Detroit Trust Co.* v. *The Barlum,* 293 U. S. 21, 42–43; *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 385–387.

The same, it was said in the *Waring* case, is true in respect of other grants of power; and the bankruptcy clause was cited, p. 458, as an example. *In the Matter of Edward Klein,* decided by Mr. Justice Catron sitting on circuit, and printed in 1 How. 277, it was definitely decided that the extent of the power of Congress was not limited to the principle upon which the English bankruptcy system was founded; and that decision was cited with approval by this court in *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 186. Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring* v. *Clarke, supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted. *Patton* v. *United States,* 281 U. S. 276, 288, and cases cited. See, also, *Callan* v. *Wilson,* 127 U. S. 540, 549; *Dimick* v. *Schiedt,* 293 U. S. 474, 476, 487; *West* v. *Gammon,* 98 Fed. 426.

But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations. Those limitations have never been explicitly defined, and any attempt to do so now would result in little more than a paraphrase of the language of the Constitution without advancing far toward its full meaning. Judge Cowen, in *Kunzler* v. *Kohaus,* 5 Hill 317, 321, a decision which was approved by this court in *Hanover National Bank* v. *Moyses, supra,* said that the power was the same as though Congress had been authorized "to establish uniform laws on the subject of any person's general inability to pay his debts . . ." Probably the most satisfactory approach to the problem of interpretation here involved is to examine it in the light of the acts, and the history of the acts, of Congress which have from time to time been passed on the subject; for, like many other provisions of the Constitution, the nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial "inclusion and exclusion." Compare *Davidson* v. *New Orleans,* 96 U. S. 97, 104; *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 648.

The first act, that of 1800, so far ignored the English law, which was confined to traders, as to include bankers, brokers and underwriters as well. The act of 1841 added merchants; and other additions have been made by later acts until now practically all classes of persons and corporations are included. See *Friday* v. *Hall & Kaul Co.,* 216 U. S. 449, 454. The act of 1800 was one exclusively in the interest of the creditor. But the act of 1841 took what then must have been regarded as a radical step forward by conferring upon the debtor the right by voluntary petition to surrender his property, with some exceptions, and relieve himself of all future liability in respect of past debts. The act of 1800, like the English law, was conceived in the view that the bankrupt was dishonest; while the act of 1841 and the later acts proceeded upon the assumption that he might be honest but unfortunate. One of the primary purposes of these acts was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes," and to give him "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244.

By the act of 1867, as amended by the act of 1874, c. 390, § 17, 18 Stat. 178, 182, the debtor for the first time was permitted either before or after an adjudication in bankruptcy, to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge.

The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railway corporations had been definitely excluded from the operation of the law in 1910 (c. 412, § 4, 36 Stat. 838, 839), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become "insolvent or unable to meet its debts as they mature."

Equity receiverships, resorted to for that purpose, have never been satisfactory, for many reasons. Partly, no doubt, in recognition of that situation, Congress, by § 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is "unable to meet its debts as they mature." The last phrase, since it is used as an alternative for the word "insolvent," obviously means something less than a condition of "bankruptcy" or "insolvency" as those words are employed in the law. See Bankruptcy Act, § 1 (15), which defines an "insolvent" as one whose assets, at a fair valuation, are not sufficient to pay his debts. It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended. Obviously, § 77 does no more than follow the line of historical and progressive development projected by previous acts.

As outlined by that section, a plan of reorganization, when confirmed, cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874. It is not necessary to the validity of either that the proceeding should result in an adjudication of bankruptcy. The constitutionality of the old provision for a composition is not open to doubt. *In re Reiman,* 20 Fed. Cas. 490, 496–497, cited with approval in *Hanover National Bank* v. *Moyses, supra.* That provision was there sustained upon the broad ground that the "subject of bankruptcies" was nothing less than "the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." That it was not necessary for the proceedings to be carried through in bankruptcy was held not to warrant the objection that the provision did not constitute a law on the subject of bankruptcies. The same view sustains the validity of § 77. Both contemplate an adjustment of a failing debtor's obligations; and although actual bankruptcy may not supervene in either, they are none the less laws on the subject of bankruptcies. With due regard for consistency, the constitutional validity of the one cannot well be sustained and that of the other denied, as this court quite evidently recognized in *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527.

That case involved an act of the Canadian Parliament by which railway companies unable to meet their engagements might unite with their creditors in the preparation of "schemes of arrangement" to be filed in the court of chancery. A scheme was deemed agreed to by the holders of mortgages, bonds, stocks, rent charges and preferred shares when assented to in writing by a designated majority of the holders of each class of security. The scheme when confirmed by the court became binding upon the non-assenting minority and this court held it to be thus binding upon bondholders who were citizens of the United States and who sued in courts of the United States to recover on their bonds. The "scheme" of the Canadian law was not unlike the "plan" of § 77. The significant part of the court's opinion, so far as the question now under discussion is concerned, is the following, which appears at p. 536:

"The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of the creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character."

After pointing out that the Canadian law was in accordance with the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies; that it took the place in England and Canada of foreclosure sales in the United States "which in general accomplish substantially the same result with more expense and greater delay," the court added (p. 539):

". . . It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress 'to establish . . . uniform laws on the subject of bankruptcy throughout the United States.' Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail."

It is unnecessary to consider the criticism, sometimes made, that these excerpts are *dicta* merely, since we are of opinion that they are sound in principle.

It follows, from what has now been said, that § 77, in its general scope and aim, is within the power conferred by the bankruptcy clause of the Constitution; and we so hold.

Second. Under § 77 does the bankruptcy court have authority to enjoin the sale of the collateral here in question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it? By § 2 of the Bankruptcy Act (U. S. C. Title 11, § 11), courts of bankruptcy are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." They are essentially courts of equity, and their proceedings inherently proceedings in equity, the words "at law" probably having been inserted only with regard to clause (4) of § 2, which confers authority to arraign, try, and punish bankrupts and others for violations of the act. *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240. Their adjudications and orders constitute in all essential particulars decrees in equity. *Idem,* 241. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions" recognizes and declares the principle. An example of its application is found in *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 229, where we held that a federal court, having first acquired jurisdiction of the subject matter, could enjoin the parties from proceeding in a state court of concurrent jurisdiction "where the effect of the action would be to defeat or impair the jurisdiction of the federal court." An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the court "until the object of the suit is accomplished and complete justice done between the parties." *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221.

Moreover, by § 2 (15) of the Bankruptcy Act (U. S. C., Title 11, § 11), courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.

The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of § 2 (15) of the Bankruptcy Act or of § 262 of the Judicial Code.

The injunction does not infringe § 67 (d), U. S. C. Title 11, § 107 (d). The substance of that provision is that *bona fide* liens shall not be affected by anything contained in the Bankruptcy Act. The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton* v. *New,* 283 U. S. 318, 321, and cases cited. A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised. So far as constitutional power is concerned, there is no difference between an injunction restraining the enforcement of a real-estate mortgage and one restraining the enforcement of a pledge by the sale of collateral security. Such differences as exist affect not the power but the propriety of its exercise—that is to say, the discretion of the court. Such an injunction, as just indicated, is within the contemplation of § 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section. Compare *Straton* v. *New, supra.* Nor does § 57 (h), 11 U. S. C. § 93 (h), also invoked by petitioners, have any pertinent application to the question under discussion in the light of the provisions, purpose and aim of § 77.

Petitioners urge that the injunction is precluded by a consideration of subdivision (l) of § 77, which confers authority upon the court to enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree. The point made is that the granting of this express power to enjoin *judicial* proceedings brought to enforce liens negatives the authority to stay the enforcement of liens by *non-judicial* proceedings, in accordance with the maxim *expressio unius est exclusio alterius.* But clause (15) of

§ 2 is still in the act; and it would be an unwarranted use of the maxim, which is only an aid to construction, to apply it in such a way as to work a destruction, *pro tanto,* not only of that clause, but of § 262, Judicial Code, and of the general principle upon which both are based.

Third. It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization. Both courts below so found. The findings of the district court are in the form of recitals in the order, but are nevertheless in substance and in effect findings of fact. The circuit court of appeals approved these findings, and added that without some control over the disposition of the collateral, " the presentation of a satisfactory plan of reorganization might as well be abandoned." These concurrent findings of the two courts, as this court has often held, should be accepted as conclusive unless clearly erroneous. *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67; *Stuart* v. *Hayden,* 169 U. S. 1, 14; *Dun* v. *Lumbermen's Credit Assn.,* 209 U. S. 20, 23–24.

We are not impressed with the attempt of petitioners to show that the record entirely fails to justify the conclusion of the courts below in that regard. It must be borne in mind that, in addition to the collateral aggregating more than $54,000,000, held by petitioners, there was outstanding additional collateral pledged as security in the sum of over $145,000,000, bringing the total up to approximately $200,000,000, a sum equal to nearly half of the capital then issued and in the hands of the public. At the time the injunction was applied for, there was danger that the noteholders would claim that the right of sale under the terms of the collateral notes had been brought into existence; and with the pendency of the reorganization proceedings and the suspension of the payment of interest, it well cannot be doubted that there also was danger that the noteholders would proceed to exercise their rights of sale under the collateral notes. Such action on the part of these noteholders might well precipitate similar action by other holders of pledged collateral.

It is necessary, under § 77, first to prepare a plan and then to submit it, perhaps with other suggested plans, to the Interstate Commerce Commission for consideration and recommendation. The plan having been assented to by two-thirds of each class of the stockholders and creditors and approved by the commission, must then, and only then, be submitted for approval to the district court. In the reorganization of a great railroad system like that here concerned, these various steps call for a degree of consideration and an extent of detailed work almost beyond the power of appreciation. The sale of the collateral securities from time to time during the progress of this consideration and work well might require such changes of detail in the plan, entailing new and perhaps difficult reconcilements of views among many and conflicting interests, as to force an abandonment of the proceeding.

It must be apparent, if we consider only the impressive facts set forth in the forepart of this opinion in respect of the extensive operations of the railway company and its subsidiaries, the extent, multiplicity and variety of their obligations, the complicated nature of their capital structure, the great volume of their securities held as collateral by many and widely-separated creditors, and other circumstances, that without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out. The preparation of any plan the important details of which could survive the changes in, and the consequent fluctuation and disturbance of, the financial structure, brought about by recurring sales of collateral, would seem to be a practical impossibility. Under all the circumstances, we are of opinion that the district court properly exercised its discretion in favor of respondents.

Fourth. We find no substance in the contention of the petitioning banks that § 77, as applied by the court below to permit an injunction restraining the sale of the collateral, violates the Fifth Amendment. The basis of the contention is that since, by the terms of the pledge, the pledgors are empowered on default to sell the collateral at such times as they may select, § 77, as thus applied, deprives them of their property—that is to say, impairs or destroys their contractual rights—without due process of law.

The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder* v. *Bull,* 3 Dall. 386, 388, it was said that among other acts which Congress could not pass without exceeding its authority was " a law that destroys or impairs the lawful private contracts of citizens." The broad reach of that statement has been restricted (*Legal Tender Cases,* 12 Wall. 457, 549–550); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. *Legal Tender Cases, supra; Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 480–482, 484; *Highland* v. *Russell Car Co.,* 279 U. S. 253, 261. And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. See *Hanover National Bank* v. *Moyses, supra,* at p. 188. So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted.

The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy. As already appears, this court has upheld the power of a court of bankruptcy to stay the enforcement of the remedy under a real-estate mortgage; and the remedy under a pledge, so far as constitutional power is here concerned, presents a situation strictly analogous in character.

Fifth. It is next contended that the court was without power to issue the injunction in a summary proceeding. Obviously, an application for an injunction against the immediate enforcement of a remedy is not the assertion of an adverse claim. The bonds deposited as collateral were not in the hands of purchasers, but in the hands of creditors as security. That the equity which the debtor retained was a property interest, was not and could not be disputed by the creditors; nor was the claim of the creditors in respect of their rights in the collateral security or the rank of their liens questioned by the debtor. In short, no adverse claim was brought forward by either of the parties to the controversy. The only question was in respect of the creditors' remedy; and the sole point is as to the authority of the bankruptcy court to delay for a reasonable time an interference with the reorganization proceeding which would result from an immediate sale of the collateral. The court below dealt adequately with the situation, and its conclusions find ample support in the decisions. See, for example, *In re Purkett, Douglas & Co.,* 50 F. (2d) 435, 438; *John Matthews, Inc.* v. *Knickerbocker Trust Co.,* 192 Fed. 557; *Allebach* v. *Thomas,* 16 F. (2d) 853.

The Reconstruction Finance Corporation raised the question in the district court by a demurrer, asserting that the allegations of the debtor's petition were insufficient.

But in a summary proceeding, as the term itself implies, the merits of the controversy are determined without the formality in respect of pleadings which is required in actions at law or suits in equity. In such a proceeding we see no reason why the allegations of the petition may not be helped out by timely affidavits. Doubt has been expressed by lower federal courts as to the propriety of a demurrer in such a proceeding. *In the Matter of Snelling,* 202 Fed. 258, Judge Morton aptly said, "Summary procedure implies, I think, a single hearing . . . at which the merits of the controversy are investigated and decided, without much regard to the formal pleadings." See, also, *In re Rockford Produce & Sales Co.,* 275 Fed. 811, 813. In any event, we think, as against demurrer, conceding its propriety, the petition is sufficient. Pertinent allegations are epitomized in the early part of this opinion.

The contention of the petitioners that they were not given sufficient notice or a full opportunity to be heard is quite evidently without merit. They had ten days' previous notice by registered mail of the application for the injunction. All appeared specially and participated in the hearings, for which ample time was allowed. Briefs were filed on both sides, and additional memoranda were presented to the court by the Reconstruction Finance Corporation and one of the banks.

Sixth. The territorial jurisdiction of the district court is assailed by three of the banks on the ground that they were located outside the Northern District of Illinois. The contention is that the district court was without power to issue its process for service outside the district. Section 77 (a) provides that after the petition of the railroad company is approved, " the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located." Congress may authorize the civil process of a federal district court to be served upon persons in any other district. *Toland* v. *Sprague,* 12 Pet. 300, 328; *United States* v. *Congress Construction Co.,* 222 U. S. 199, 203–204; *First Nat. Bank* v. *Williams,* 252 U. S. 504, 510. There are other cases to the same effect, but it is unnecessary to cite them. Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a single state, but in numerous instances reach into many districts and many states. The lines of the Rock Island system extend into 20 districts and 14 States. Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a single district court. The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any State when necessary to effectuate the purposes of the law. As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located, the federal district court is given exclusive jurisdiction by the precise language of § 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees. Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property, and this includes, by necessary inference, the power to send process to that end for service upon the persons to be enjoined wherever they may be found within the United States.

It is said that the words "wherever located" mean wherever located *within the district.* But considering the nature of the property involved, the number of districts and states over which it is distributed, and the manifest policy of avoiding ancillary administration as far as possible, a construction so narrow must be rejected as at war with the whole spirit and purpose of the law.

Seventh. The Reconstruction Finance Corporation contends that §§ 77 and 2 (15) of the Bankruptcy Act must be limited by the provisions of § 5 of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5), which empowers the corporation to take over and *liquidate* collateral accepted by it as security. The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of enforcement of the Bankruptcy Act, including § 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations. We are unable to find such an exception in the authority to liquidate collateral held as security—an authority enjoyed in common with any other lender of money who has taken the trouble to provide for it in his contract with the borrower. What is given to the lender in either event is a remedy which, when subject to the control of the bankruptcy court under given circumstances in the one case, is equally so in the other.

Finally. Petitioners insist, with much force, that the injunction, granted in November, 1933, and still operative, is likely, if continued, to result in irreparable injury. We do not interpret the order, as suggested by the Reconstruction Finance Corporation, as continuing the injunction in force until a plan of reorganization is effected or the proceeding under § 77 dismissed. On the contrary, we understand that the injunction may at any time be dissolved upon application and proper notice and showing. It contemplates, as we have already suggested, only reasonable delay.

It is true that no plan has yet been consummated; and, so far as the record shows, none has been prepared or is in the course of preparation. If this long delay were without adequate excuse, the retention of the injunction for the long period which has intervened since it was granted could not be justified. But the delay is obviously due to the many doubts and uncertainties arising from the present litigation. Until they are finally resolved, the consummation, or even the preparation, of any definite plan is plainly impracticable. With those doubts and uncertainties now removed, the proceeding should go forward to completion without further delay, or be dismissed.

The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted. Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude, should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined.

Decree affirmed.

MR. JUSTICE BRANDEIS took no part in the decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INTER-MOUNTAIN LIFE INSURANCE CO.

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

No. 537. Argued March 5, 7, 1935.—Decided April 1, 1935.

1. Assets reserved by an insurance company against matured unsurrendered and unpaid coupons attached to its twenty-payment life coupon nonparticipating policies *held* not "reserve funds required by law" within the meaning of § 245 (a) (2) of the Revenue Act of 1921, allowing deduction of a percentage of the mean of such reserve funds in computing the net income of life insurance companies. P. 690.
2. Reserves against such matured and unsurrendered coupons are not essentially insurance reserves, and the latter alone constitute the base on which the deduction allowed by § 245 (a) (2) is to be computed. P. 690.
3. The rule that ambiguities in tax statutes are to be resolved in favor of the taxpayer has no application to provisions for deductions; they are allowable only when plainly authorized. P. 689.

71 F. (2d) 962, reversed.

CERTIORARI, 293 U. S. 553, to review a judgment affirming a decision of the Board of Tax Appeals redetermining a deficiency in the income tax of the insurance company.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. James W. Morris, Norman D. Keller,* and *Edward H. Horton* were on the brief, for petitioner.

Mr. A. R. Serven, with whom *Mr. Stephen W. Downey* was on the brief, for respondent.

By leave of Court, *Messrs. Homer Hendricks, George M. Wolcott,* and *O. H. Chmillon,* and *Messrs. Thomas Watters, Jr.,* and *Edwin R. Morrison* filed briefs as *amici curiae,* in support of the contentions of respondent.

Mr. Justice Butler delivered the opinion of the Court.

The question for decision is whether assets held by the company in 1922 against matured and unpaid coupons attached to 20-payment life coupon nonparticipating policies, constituted a reserve fund required by law within the meaning of § 245 (a) (2) of the Revenue Act of 1921.[1]

That section declares that net income means gross income less, among other permissible deductions, an amount equal to four per cent. of the mean of the " reserve funds required by law " held at the beginning and end of the taxable year. Respondent, a stock company, incorporated under Utah law and commenced business in 1911. The laws of that State require, as a condition of doing life insurance business, that the assets of the company shall equal or exceed all liabilities for losses reported, expenses, taxes and other outstanding liabilities, including the legal reserves. And they prescribe the rate of interest to be assumed, and the mortality table to be used, for the purpose of making valuations of life insurance policies and determining the reserves required to be maintained.[2]

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[1] " Sec. 245. (a) That in the case of a life insurance company the term ' net income ' means the gross income less— . . . (2) An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subdivision, of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year . . ." 42 Stat. 261.

[2] Revised Statutes of Utah, 1933, Title 43, c. 3, § 4. " No stock company shall do any insurance business in this state before its capital is fully paid up. Said capital must be unimpaired, that is, the assets of such company must equal or exceed all liabilities for losses reported, expenses, taxes and other outstanding liabilities, including the legal reserves as provided in sections 43-3-12 . . ." § 12. " For the purpose of making valuations of life insurance policies and of determining the reserves required to be maintained therefor under the provisions of this title the rate of interest assumed shall be 3½ percent per annum, and the rate of mortality shall be established by the table known as the 'American Experience Table of Mortality' for policies issued after January 1, 1910 . . ."

The record contains a specimen policy for $10,000, applicable to age 35, issued in consideration of 20 annual premiums of $420.90. Attached are 19 coupons maturing serially on anniversary dates of the policy, beginning with the first and ending with the nineteenth. Each coupon is a promise that at its maturity the company will pay the amount specified to the owner of the policy.

The policy states: The company will credit insured the face amount of any matured coupon as it becomes due and pay compound interest thereon, thereby creating a fund to the credit of the insured which may be applied to the payment of premiums or at any time withdrawn in cash; and, if not so applied or withdrawn prior to his death, it will pay the coupon values with interest to date of death to the beneficiary in addition to the face amount of the policy. The insured during the first year or within a month after the due date of the second annual premium may elect to convert the coupons as they mature into paid-up life additions to the policy which are only reconvertible into cash surrender value.

At the end of 20 years, if all premiums have been paid in cash and if the amount of each matured coupon has been left with the company to accumulate at interest, then upon surrender of the policy and all coupons the insured shall select one of the following options: A guaranteed cash payment of $8,000; a paid-up policy for $14,130, subject to insurability; a guaranteed annual income of $490 for at least 20 years and as many more as the insured shall survive; a paid-up policy for $10,000 and an annual income of $174.40 during life. At the end of 15 years the company will issue a fully paid-up policy of $10,000 upon surrender of the original policy and the first 14 coupons representing values left on deposit at compound interest.

The mean of the company's reserve funds in 1922 set up against liabilities other than matured coupons was $942,751.40. Later herein these are referred to collectively as "insurance reserves." The company claimed and the

Commissioner allowed as a deduction four per cent. of that amount. It carried a separate reserve against matured, unsurrendered and unpaid coupons, the mean of which in that year was $136,523.39. In its return the company deducted four per cent. of that amount, but the Commissioner disallowed the item. The Board of Tax Appeals, in harmony with its prior constructions of the clause in question,[3] held the coupon reserve deductible. It was sustained by the court, following cases in that and other Circuit Courts of Appeals.[4] 71 F. (2d) 962. That being in conflict with a recent decision of the Court of Claims,[5] this court granted a writ of certiorari.

In the reserves required by the laws of Utah and of the other States in which the company issues policies of the described class, there is included an amount sufficient to cover not only all elements of insurance but also the coupon liability. We are not here dealing with reserves in relation to solvency of the company. The thing to be ascertained is the meaning that Congress intended by the language "4 per centum of the mean of the reserve funds required by law." The clause to be construed relates exclusively to life insurance companies. It is intended to define a deduction which they are permitted to make in the calculation of the net amount to be taxed. The rule that ambiguities in statutes imposing taxes are to be resolved in favor of taxpayers does not apply. Deductions are allowed only when plainly authorized.

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[3] Standard Life Insurance Co. of America, 13 B. T. A. 13. Reserve Loan Life Insurance Co., 18 B. T. A. 359. Farmers Life Insurance Co., 27 B. T. A. 423. Missouri State Life Insurance Co., 29 B. T. A. 401. Atlas Life Insurance Co., 29 B. T. A. 750.

[4] *Commissioner* v. *Standard Life Ins. Co.* (C. C. A.–3), 47 F. (2d) 218. *Commissioner* v. *Western Union Life Ins. Co.* (C. C. A.–9), 61 F. (2d) 207. *Commissioner* v. *Great American Life Ins. Co.* (C. C. A.–10), 70 F. (2d) 133.

[5] *Continental Assur. Co.* v. *United States,* 8 F. Supp. 474. Cf. *Minnesota Mutual Life Ins. Co.* v. *United States,* 66 Ct. Cls. 481. *Massachusetts Mutual Life Ins. Co.* v. *United States,* 56 F. (2d) 897.

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Ilfeld Co. v. *Hernandez,* 292 U. S. 62, 66. *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440.

The word "reserve" has many meanings. Accounts creating reserves are set up in almost every line of business, and funds evidenced by the book entries are held for many and widely different purposes. As the Act does not permit corporations other than insurance companies to make deductions of the kind here under consideration, "reserve funds" may not reasonably be deemed to include values that do not directly pertain to insurance. In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts. The premiums include enough, over and above what is needed to maintain proper insurance reserves, to provide for the discharge of coupon liability according to the terms of the policy. The coupon values are the equivalent of cash and may be used to pay premiums on the face amount of the policy, to procure additional insurance, to lessen the number of annual premiums, or otherwise to obtain insurance protection. The amounts so applied cease to exist as coupon liabilities and automatically become a part of the life insurance reserves. These differ essentially from coupon liability. Life insurance matures only upon the death of the insured and the life reserve is based upon that contingency, whereas liability on the matured coupons depends upon no contingency. It follows that the insurance reserves alone constitute the base on which the deduction is to be computed. Reserves against matured coupons are excluded. *McCoach* v. *Insurance Co. of N. A.,* 244 U. S. 585, 589. *United States* v. *Boston Insurance Co.,* 269 U. S. 197, 202. *New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, 119. *Duffy* v. *Mutual Benefit Ins. Co.,* 272 U. S. 613, 618–619. *Continental Assurance Co.* v. *United States,* 8 F. Supp. 474.

Reversed.

DECISIONS PER CURIAM, FROM JANUARY 8, 1935, TO AND INCLUDING APRIL 1, 1935*

No. 603. PEOPLES TAXICAB CO. *v.* WICHITA, KANSAS, ET AL. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted January 5, 1935. Decided January 14, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 165–166; *Hebert* v. *Louisiana*, 272 U. S. 312, 316–317; *American Railway Express* v. *Kentucky*, 273 U. S. 269, 272–273; *Secor* v. *Fulton*, 293 U. S. 517. *Mr. Thomas E. Elcock* for appellant. *Mr. H. W. Hart* for appellees. Reported below: 140 Kan. 129; 34 P. (2d) 545.

No. 610. STEPHENS, ADMINISTRATRIX, ET AL. *v.* PENNSYLVANIA. Appeal from the Superior Court of Pennsylvania. Jurisdictional statement submitted January 5, 1935. Decided January 14, 1935. *Per Curiam:* The appeal herein is dismissed upon the ground that the jurisdictional statement fails to disclose any properly presented substantial federal question. Rule 12. *Rosen* v. *Fry*, 293 U. S. 526. Leave to proceed further herein *in forma pauperis* is denied. *Mr. Walter Thomas* for appellants. *Mr. Russell J. Brownback* for appellee. Reported below: 114 Pa. Super. 126; 173 Atl. 869.

No. —, original. UNITED STATES *v.* WEST VIRGINIA. January 14, 1935. Motion for leave to file bill of com-

*For decisions on petitions for certiorari, see *post*, pp. 699, 705; for rehearing, *post*, p. 731.

plaint granted and process is ordered to issue returnable on Monday, April 1, 1935.

No. —, original. UNITED STATES *v.* ARIZONA. January 14, 1935. Motion for leave to file bill of complaint granted and process is ordered to issue returnable on Monday, April 1, 1935.

No. —, original. EX PARTE FIRST NATIONAL BANK OF CINCINNATI. January 14, 1935. The motion for leave to file petition for writ of mandamus is denied. *Messrs. Ralph Royall* and *James F. Hubbell* for petitioner.

No. 373. THATCHER ET AL. *v.* COUNTY OF SAN DIEGO ET AL. Appeal from the District Court of Appeal, 4th Appellate District, of California. Argued January 15, 1935. Decided January 21, 1935. *Per Curiam:* Judgment affirmed. *Roberts* v. *Richland Irrigation District,* 289 U. S. 71. *Mr. Irve C. Boldman,* with whom *Mr. W. H. Metson* was on the brief, for appellants. *Mr. Harvey H. Atherton,* with whom *Mr. Francis V. Keesling* was on the brief, for appellees. Reported below: 138 Cal. App. 503; 32 P. (2d) 979.

No. 400. IRONES ET AL. *v.* AMERICAN SECURITIES CO. Appeal from the Supreme Court of California. Argued January 15, 1935. Decided January 21, 1935. *Per Curiam:* Judgment affirmed. *Roberts* v. *Richland Irrigation District,* 289 U. S. 71; *Thatcher* v. *County of San Diego,* decided this day, *supra.* *Mr. C. L. Byers,* with whom *Mr. Challen B. Ellis* was on the brief, for appellants. *Mr. George Herrington,* with whom *Messrs. W. H. Orrick* and *W. J. Kenney* were on the brief, for appellee. Reported below: 220 Cal. 566; 32 P. (2d) 343.

No. 387. Cape Fear Railways, Inc., *v.* United States et al. Appeal from the District Court of the United States for the Eastern District of Virginia. Argued January 18, 1935. Decided January 21, 1935. *Per Curiam:* Decree affirmed. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286; *Florida* v. *United States,* 292 U. S. 1, 9; *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, 324; *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Chicago, I. & L. Ry.* v. *United States,* 270 U. S. 287, 295. *Mr. Moultrie Hitt,* with whom *Mr. G. Kirby Munson* was on the brief, for appellant. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Daniel W. Knowlton, Elmer B. Collins,* and *J. Stanley Payne* filed a brief on behalf of the United States and Interstate Commerce Commission, appellees. *Messrs. Richard B. Gwathmey, Thomas W. Davis,* and *Frank W. Gwathmey* filed a brief on behalf of the Atlantic Coast Line R. Co., appellee. Reported below: 7 F. Supp. 429.

No. 18, original. United States *v.* Arizona. Motion submitted January 18, 1935. Decided January 21, 1935. A rule is ordered to issue requiring the defendant to show cause, on or before February 4, next, why an order should not issue restraining interference by the defendant, Arizona, its officers, agents, and employees, with the construction of Parker Dam pending the final determination of this suit.

No. 16, original. Nebraska *v.* Wyoming. January 21, 1935. Motion to dismiss submitted by *Mr. Joseph C. O'Mahoney* in behalf of counsel for defendant.

No. —, original. Ex parte Callahan. February 4, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Miss Sophy Callahan, pro se.*

No. —, original. Ex parte Land Owners Assn. February 4, 1935. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Mr. Dean G. Acheson* for petitioner.

No. —, original. Ex parte Abbott. February 4, 1935. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Mr. Charles S. Abbott, pro se.*

No. 344. Atlantic Coast Line R. Co. *v.* Florida et al.; and

No. 345. Florida et al. *v.* United States et al. Appeals from the District Court of the United States for the Northern District of Georgia. February 4, 1935. These cases are restored to the docket and assigned for reargument on Monday, March 4, next; and the attention of counsel is directed to the following points upon which the Court desires to hear argument: (1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates; (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what should be the measure of an award of restitution; and (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission.

Counsel are also requested to point out what differences, if any, there are between the evidence before the District Court and that before the Interstate Commerce Commission.

No. 18, original. United States *v.* Arizona. February 4, 1935. Return to rule to show cause presented.

No. 233. Frederick *v.* United States. On certificate from the Circuit Court of Appeals for the Eighth Circuit. Argued October 18, 1934. Dismissed February 11, 1935. *Per Curiam:* In view of the provisions of Public Resolution No. 1, 74th Congress, approved January 28, 1935, the certificate herein is dismissed to the end that further proceedings may be had in accordance with the Resolution. *Messrs. Warren E. Miller* and *Oscar W. Worthwine* for Frederick. *Mr. Will G. Beardslee* and *Solicitor General Biggs,* with whom *Messrs. Wilbur C. Pickett* and *W. Marvin Smith* were on the brief, for the United States.

No. 347. Earwood, Guardian, *v.* United States. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. February 11, 1935. *Per Curiam:* The petition for certiorari in this case is granted. In view of the provisions of Public Resolution No. 1, 74th Congress, approved January 28, 1935, the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to that Court with instructions to determine whether the District Court should have directed a verdict on the merits, and to enter judgment accordingly. *Mr. Walter McElreath* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *Randolph C. Shaw* for the United States. Reported below: 71 F. (2d) 507.

No. 18, original. United States *v.* Arizona. February 11, 1935. It is ordered that this cause be assigned for hearing on the application for an interlocutory injunction on Monday, March 4, next, at the head of the call for that day, and that the defendant, its officers, agents, and employees, be, and they hereby are, restrained from interfering with the construction of Parker Dam pending the hearing and determination of said application.

No. 478. Fox Film Corp. *v.* Muller. On writ of certiorari to the Supreme Court of Minnesota. Argued February 11, 1935. Decided February 18, 1935. *Per Curiam:* As it appears that no final judgment has been entered, the writ of certiorari is dismissed as improvidently granted. *Beaupre* v. *Noyes,* 138 U. S. 402; *National Life Ins. Co.* v. *Scheffer,* 131 U. S. (Appx.) cciii. *Mr. James D. Shearer,* with whom *Mr. Percy Heiliger* was on the brief, for petitioner. *Mr. Abram F. Myers* filed a brief on behalf of respondent. Reported below: 192 Minn. 212; 255 N. W. 845.

No. 675. Chandler *v.* Marlatt, Executor. Appeal from the Supreme Court of Ohio. Motion to dismiss submitted February 9, 1935. Decided February 18, 1935. *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,* 293 U. S. 52; *Wetzel* v. *Fulton,* 293 U. S. 531; *Kagarise* v. *Railroad Commission,* 293 U. S. 527. *Mr. William K. Gardner* for appellant. *Mr. Thomas H. Garry* for appellee. Reported below: 128 Oh. St. 642; 193 N. E. 75.

No. 412. Panhandle Eastern Pipe Line Co. *v.* State Highway Comm'n. Appeal from the Supreme Court of Kansas. February 18, 1935. This case is restored to the docket and assigned for reargument on Monday, March 11 next. The Court especially desires to hear argument with respect to the rights and privileges of the appellant as a pipe-line company, and the obligations and burdens imposed upon the appellant, under the statutes of the State of Kansas.

No. 702. Carter et al. *v.* Burnett, Tax Collector. Appeal from the Supreme Court of Florida. Jurisdictional statement submitted February 12, 1935. Decided March 4, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Toyota* v. *Hawaii,* 226 U. S. 184, 191–192; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537. *Mr. Edwin Brobston* for appellants. No appearance for appellee. Reported below: 116 Fla. 699; 156 So. 698.

No. —, original. Ex parte Poresky. March 4, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Joseph Poresky, pro se.*

No. 13, original. United States *v.* Oregon. March 4, 1935. Motion for order appointing a Receiver and motion for leave to file supplemental answer submitted by *Mr. L. A. Liljeqvist* for the defendant with leave to the complainant to reply thereto by Friday next on motion of *Solicitor General Biggs.*

No. —, original. Ex parte Kenner. March 11, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Hiddleston Kenner, pro se.*

No. 580. State Automobile Insurance Assn. *v.* Glick, Administratrix. On writ of certiorari to the Supreme Court of Nebraska. Argued March 11, 1935. Decided March 18, 1935. *Per Curiam:* As it appears that the judgment of the state court rested upon a nonfederal ground adequate to support it, the writ of certiorari is dismissed as improvidently granted. *Mr. Guy C. Chambers,* with whom *Mr. George B. Boland* was on the brief, for petitioner. *Mr. Herbert Baird,* with whom *Messrs. Richard F. Stout* and *Allen W. Field* were on the brief, for respondent. Reported below: 127 Neb. 350; 255 N. W. 57.

No. —. [844]. NATURAL GAS CO. OF WEST VIRGINIA *v.* PUBLIC SERVICE COMM'N ET AL. Appeal from the Supreme Court of Appeals of West Virginia. April 1, 1935. Upon consideration of the petition of the appellant, Natural Gas Company of West Virginia,

It is ordered that the appellees herein, the Public Service Commission of West Virginia and the City of Wheeling, and each of them, their agents, servants, attorneys and representatives, be, and they are hereby, enjoined from in any manner enforcing or attempting to enforce the order of the Public Service Commission of the State of West Virginia, dated December 15, 1934, as amended December 18, 1934, requiring the Natural Gas Company of West Virginia to put into effect a rate of forty-four cents per thousand cubic feet, subject to a prompt payment discount of two cents per thousand cubic feet, for natural gas for domestic, commercial, and municipal use in West Virginia, pending the final determination of the above-entitled cause by this Court, or until further order by this Court. *Messrs. David E. Mitchell, Donald O. Blagg, Frederick H. Wood, Harold A. Ritz,* and *H. D. Rummel* for appellant.

No. —, original. EX PARTE WALTER. April 1, 1935. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. James Walter, pro se.*

DECISIONS GRANTING CERTIORARI FROM JANUARY 8, 1935, TO AND INCLUDING APRIL 1, 1935.

No. 563. Grovey *v.* Townsend. January 14, 1935. Petition for writ of certiorari to the Justice Court, Precinct No. 1, Harris County, Texas, granted. *Messrs. J. Alston Atkins* and *Carter W. Wesley* for petitioner. No appearance for respondent.

No. 569. United States ex rel. Kassin *v.* Mulligan, U. S. Marshal. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. David P. Siegel* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 73 F. (2d) 274.

No. 580. State Automobile Insurance Assn. *v.* Glick, Administratrix. January 21, 1935. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Messrs. Guy C. Chambers* and *George B. Boland* for petitioner. *Messrs. Richard F. Stout, Allen W. Field, Jr.*, and *Herbert W. Baird* for respondent. Reported below: 127 Neb. 350; 255 N. W. 57.

No. 600. Hallenbeck, Receiver, *v.* Leimert, Receiver. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Walter T. Fisher, R. M. Ashcraft, F. G. Awalt,* and *George P. Barse* for petitioner. *Mr. Daniel M. Healy* for respondent. Reported below: 72 F. (2d) 480.

No. 582. Helvering, Commissioner of Internal Revenue, *v.* Rankin, Executor. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. John W. Townsend* for respondent. Reported below: 73 F. (2d) 9.

No. 594. Federal Land Bank of St. Louis *v.* Priddy, Circuit Judge. February 4, 1935. Petition for writ of certiorari to the Supreme Court of Arkansas granted. *Messrs. Scott W. Hovey, John Thorpe, Peyton R. Evans*, and *J. R. Crocker*, and *Miss May T. Bigelow* for petitioner. *Mr. C. C. Wait* for respondent. Reported below: 189 Ark. 438; 74 S. W. (2d) 222.

No. 601. Peters Patent Corp. *v.* Bates & Klinke, Inc. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Joseph B. Jacobs, Benjamin A. Levy*, and *Harold E. Cole* for petitioner. *Mr. Herbert B. Barlow* for respondent. Reported below: 73 F. (2d) 303.

No. 611. Ivanhoe Building & Loan Assn. *v.* Orr, Trustee. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Maurice J. Zucker* and *Abraham Alboum* for petitioner. *Messrs. Charles E. Hendrickson* and *Saul Nemser* for respondent. Reported below: 73 F. (2d) 609.

No. 602. Hartley, Executor, *v.* Commissioner of Internal Revenue. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. H. B. Fryberger, H. C.*

Fulton, and *E. L. Boyle* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman*, and *Messrs. James W. Morris, John MacC. Hudson*, and *H. Brian Holland* for respondent. Reported below: 72 F. (2d) 352.

No. 612. California Oregon Power Co. *v.* Beaver Portland Cement Co. et al. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. A. E. Reames* for petitioner. *Mr. W. Lair Thompson* for respondents. Reported below: 73 F. (2d) 555.

No. 625. Realty Associates Securities Corp. et al. *v.* O'Connor et al. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Alfred T. Davison* and *James N. Rosenberg* for petitioners. *Messrs. George C. Levin, Sydney Krause, George J. Hirsch, Archibald Palmer*, and *Samuel M. Brook* for respondents. Reported below: 74 F. (2d) 61.

No. 663. Snyder *v.* Commissioner of Internal Revenue. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Henry M. Ward* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman*, and *Messrs. James W. Morris* and *J. P. Jackson* for respondent. Reported below: 73 F. (2d) 5.

No. 347. Earwood, Guardian, *v.* United States. See *ante*, p. 695.

No. 640. Stott Realty Co. *v.* Heymann et al. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted.

Messrs. Samuel S. Burman and *Edgar G. Braun* for petitioner. *Messrs. Walter Ewing Hope* and *H. Struve Hensel* for respondents. Reported below: 73 F. (2d) 1003.

No. 588. Stelos Co., Inc. *v.* Hosiery Motor-Mend Corp. et al.; and

No. 653. Hosiery Motor-Mend Corp. et al. *v.* Stelos Co., Inc. February 18, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Henry Gilligan, J. Preston Swecker,* and *Vernon E. Hodges* for Stelos Co. *Messrs. Noah A. Stancliffe, Hugh M. Morris, Julian S. Wooster,* and *Donald Malcolm* for Hosiery Motor-Mend Corp. et al. Reported below: 72 F. (2d) 405.

No. 635. Hamburg-American Line *v.* Elting, Collector of Customs. February 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Roger O'Donnell, Lambert O'Donnell,* and *William J. Peters* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 73 F. (2d) 272.

No. 696. Kenward *v.* The Admiral Peoples. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. The motion for leave to proceed further *in forma pauperis* is also granted. *Messrs. John P. Hannon* and *Andrew G. Haley* for petitioner. *Messrs. Wallace McCamant* and *W. Lair Thompson* for respondent. Reported below: 73 F. (2d) 170.

No. 717. Louisville Joint Stock Land Bank *v.* Radford. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted.

Messrs. John E. Tarrant, John W. Davis, and *Wm. Marshall Bullitt* for petitioner. *Messrs. Harry H. Peterson, P. O. Sathre, William Lemke, Edwin A. Krauthoff, David A. Sachs, Jr., Herbert C. Lust,* and *Frank Rives* for respondent. Reported below: 74 F. (2d) 576.

No. 574. DOLEMAN, ADMINISTRATOR, *v.* LEVINE. March 4, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. James C. Waters, Jr.,* and *Nathan A. Dobbins* for petitioner. *Messrs. Wilson L. Townsend, Edward S. Brashears,* and *Albert F. Beasley* for respondent. Reported below: 64 App. D. C. 25; 73 F. (2d) 842.

Nos. 659 and 660. MOTLOW *v.* STATE EX REL. KOELN. March 4, 1935. Petition for writs of certiorari to the Supreme Court of Missouri granted. *Messrs. Patrick H. Cullen* and *Clem F. Storckman* for petitioner. *Messrs. Frank H. Haskins, Harry S. Rooks, James T. Blair,* and *Oscar Habenicht* for respondent. Reported below: 336 Mo. 40, 50; 76 S. W. (2d) 417, 421.

No. 661. AWOTIN *v.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO. March 4, 1935. Petition for writ of certiorari to the Appellate Court, First Division, of Illinois, granted. *Messrs. Samuel A. Ettelson* and *Edward C. Higgins* for petitioner. *Mr. Daniel M. Healy* for respondent. Reported below: 275 Ill. App. 530.

No. 662. KIMEN *v.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO. March 4, 1935. Petition for writ of certiorari to the Appellate Court, First Division, of Illinois, granted. *Messrs. Samuel A. Ettelson* and *Edward C. Higgins* for petitioner. *Mr. Daniel M. Healy* for respondent. Reported below: 275 Ill. App. 638.

No. 649. Bull, Executor, *v.* United States. March 4, 1935. Petition for writ of certiorari to the Court of Claims granted. *Messrs. David A. Buckley, Jr.*, and *L. M. Black* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 79 Ct. Cls. 133; 6 F. Supp. 141.

No. 693. United States *v.* Mack et al. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for the United States. *Messrs. Louis Halle* and *Milton R. Kroopf* for respondents. Reported below: 73 F. (2d) 265.

No. 678. Minnie *v.* Port Huron Terminal Co. et al. March 11, 1935. Petition for writ of certiorari to the Supreme Court of Michigan granted. *Messrs. Jesse P. Wolcott* and *Eugene F. Black* for petitioner. *Mr. Leo J. Carrigan* for respondents. Reported below: 269 Mich. 295; 257 N. W. 831.

No. 773. Escoe *v.* Zerbst, Warden. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. April 1, 1935. The motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. *Mr. Jack Escoe, pro se.* No appearance for respondent. Reported below: 74 F. (2d) 924.

No. 686. Hollins *v.* Oklahoma. On petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma. April 1, 1935. The motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. *Messrs. Charles H. Houston* and *William L. Huston* for petitioner. *Mr. Mac Q. Williamson* for respondent. Reported below: 56 Okla. Cr. 275, 284; 38 P. (2d) 36.

No. 751. Mobley *v.* New York Life Insurance Co. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Sidney C. Mize* for petitioner. *Messrs. Louis H. Cooke, Wm. H. Watkins,* and *P. H. Eager, Jr.,* for respondent. Reported below: 74 F. (2d) 588.

DECISIONS DENYING CERTIORARI FROM JANUARY 8, 1935, TO AND INCLUDING APRIL 1, 1935.

No. 632. Ryan et al. *v.* Nordbye, Judge. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. James Ryan* and *Frank McKee, pro se.* No appearance for respondent. Reported below: 73 F. (2d) 1011.

No. 555. Needham *v.* United States. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leslie A. Needham, pro se. Solicitor General Biggs* and *Mr. Harry S. Ridgely* for the United States. Reported below: 73 F. (2d) 1.

No. 564. Northern Trust Co., Administrator, *v.* Woodson, Alien Property Custodian, et al. January 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Aubrey B. Fennell* for petitioner. *Solicitor*

112536°—35——45

General Biggs, Assistant Attorney General Sweeney, and *Messrs. Harry LeRoy Jones* and *Frank W. Mondell* for respondents. Reported below: 63 App. D. C. 351; 72 F. (2d) 723.

No. 568. United States Building & Loan Assn. et al. *v.* McClelland, State Commissioner. January 14, 1935. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Fred S. Caldwell* for petitioners. *Mr. Paul P. Prosser* for respondent. Reported below: 95 Colo. 292; 36 P. (2d) 164.

No. 571. Grate *v.* United States. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. P. H. Cullen* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Wilbur C. Pickett, W. Marvin Smith,* and *Young M. Smith* for the United States. Reported below: 72 F. (2d) 1.

No. 573. Davis *v.* Jefferson Standard Life Insurance Co. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Louis M. Denit* for petitioner. *Mr. Shepard Bryan* for respondent. Reported below: 73 F. (2d) 330.

No. 576. Excelsior Motor Mfg. & Supply Co. et al. *v.* Sound Equipment, Inc. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John E. Hughes, George A. Chritton, Samuel A. Harper,* and *William Cogger* for petitioners. *Mr. Ralph F. Potter* for respondent. Reported below: 73 F. (2d) 725.

No. 581. Carson et al. *v.* Long-Bell Lumber Corp. et al. January 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John S. Leahy, Walter H. Saunders, John T. Barker, Floyd Jacobs, David M. Proctor,* and *Mitchell J. Henderson* for petitioners. *Mr. Jesse Andrews* for respondents. Reported below: 73 F. (2d) 397.

No. 637. Spruill *v.* O'Toole et al. January 21, 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. 85; 74 F. (2d) 559.

No. 575. Compagnie Generale Transatlantique *v.* Elting, Collector of Customs. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roger O'Donnell, Lambert O'Donnell* and *William J. Peters* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* for respondent. Reported below: 73 F. (2d) 321.

No. 578. Waldock, Trustee, *v.* Choctaw Lumber Co. et al. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Finis E. Riddle* and *Robert L. Davidson* for petitioner. *Messrs. I. N. Watson, Henry N. Ess, Paul Barnett,* and *Elton L. Marshall* for respondents. Reported below: 73 F. (2d) 1021.

No. 579. Waldock, Trustee, *v.* Choctaw Lumber Co. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Finis E. Riddle* and *Robert L. Davidson* for petitioner. *Messrs. I. N. Watson, Henry N. Ess, Paul Barnett,* and *Elton L. Marshall* for respondent. Reported below: 73 F. (2d) 1021.

No. 583. Title Guaranty & Surety Co. et al. *v.* Missouri ex rel. Stormfeltz. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Floyd E. Jacobs, Mitchel J. Henderson,* and *Laurence H. Watres* for petitioners. *Mr. E. H. Gamble* for respondent. Reported below: 72 F. (2d) 595.

No. 584. Irving Trust Co., Trustee in Bankruptcy, *v.* Bankers Trust Co., Trustee. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William D. Whitney* for petitioner. *Mr. Sol M. Stroock* for respondent. Reported below: 73 F. (2d) 296.

No. 587. Kaempfer et al., Trustees, *v.* Reinecke. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick L. Pearce* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 72 F. (2d) 469.

No. 589. Biddle *v.* Irving Trust Co., Trustee;

No. 590. Deutsch *v.* Same;

No. 591. Hammond *v.* Same;

No. 592. Irving Trust Co., Trustee, *v.* Mendes et al.; and

No. 650. Bell *v.* Irving Trust Co., Trustee. January 21, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Eldon Bisbee, Paul D. Miller,* and *H. G. Pickering* for petitioner in No. 589. *Mr. Jerome A. Strauss* for petitioner in No. 590. *Mr. Joseph M. Hatfield* for petitioner in No. 591. *Mr. Henry Gale* for petitioner in No. 592, and respondent in Nos. 589, 590, 591, and 650. *Mr. Joseph Lorenz* for petitioner in No. 650. *Messrs. Joseph Lorenz, Martin Conboy, David Asch,* and *Arthur Garfield Hayes* for respondents in No. 592. Reported below: 73 F. (2d) 121.

No. 596. Harris *v.* Coca-Cola Co. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messers. Alex. W. Smith, Jr.,* and *Victor Lamar Smith* for petitioner. *Messrs. Marion Smith* and *Harold Hirsch* for respondent. Reported below: 73 F. (2d) 370.

No. 621. United States *v.* Rizzo, Claimant. January 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Biggs* for the United States. *Mr. Milton R. Kroopf* for respondent. Reported below: 73 F. (2d) 1010.

No. 643. Duke *v.* Committee on Grievances of the Supreme Court of the District of Columbia et al. February 4, 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. *Mr. Jesse C. Duke, pro se.* No appearance for respondents.

No. 644. STEELE *v.* NEW YORK. February 4, 1935. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James Steele, pro se.* No appearance for respondent. Reported below: 241 App. Div. 875; 271 N. Y. S. 979.

No. 655. KNIGHT *v.* ADERHOLD, WARDEN. February 4, 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. *Miss Reba Ray Knight, pro se.* No appearance for respondent. Reported below: 73 F. (2d) 374.

No. 562. JORDAHL ET AL. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, ET AL. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Cattron Rigby* for petitioners. *Messrs. Emanuel Weitz, Albert C. Wall,* and *Eli Whitney Debevoise* for respondents. Reported below: 71 F. (2d) 973.

No. 593. BOWLES *v.* UNITED STATES. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Norman S. Bowles, pro se.* *Solicitor General Biggs* and *Messrs. James W. Morris* and *John H. McEvers* for the United States. Reported below: 73 F. (2d) 772.

No. 595. JONES *v.* NATIONAL BANK OF CHESTER COUNTY ET AL. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Charlotte F. Jones, pro se.* No appearance for respondents. Reported below: 72 F. (2d) 195.

No. 597. Squier *v.* Houghton et al. February 4, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frank Hendrick* for petitioner. *Messrs. Henry M. Wise* and *Gordon Knox Bell* for respondents. Reported below: 241 App. Div. 809; 271 N. Y. S. 951.

No. 614. United States ex rel. Colonial Brick Corp. *v.* Federal Surety Co. et al. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Leonard J. Ganse* and *Louis M. Denit* for petitioner. *Messrs. Walter L. Clark, Edmond M. Cook,* and *Roszel C. Thomsen* for respondents. Reported below: 72 F. (2d) 961.

No. 615. United States ex rel. Colonial Brick Corp. et al. *v.* Federal Surety Co. et al. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Leonard J. Ganse* and *Louis M. Denit* for petitioners. *Messrs. Walter L. Clark, Edmond M. Cook,* and *Roszel C. Thomsen* for respondents. Reported below: 72 F. (2d) 964.

No. 599. Minnesota Mining & Manufacturing Co. *v.* Guth. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Whitman Taylor* for petitioner. *Mr. Francis E. McGovern* for respondent. Reported below: 72 F. (2d) 385.

No. 613. Norwich Union Indemnity Co. *v.* Simonds. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied.

Messrs. James G. Nye and *Albert C. Gillette* for petitioner. *Mr. Edward L. Boyle* for respondent. Reported below: 73 F. (2d) 412.

No. 617. LIPMAN *v.* GOEBEL ET AL. February 4, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Abram N. Pritzker* for petitioner. No appearance for respondents. Reported below: 357 Ill. 315; 192 N. E. 203.

No. 618. OHIO LOCOMOTIVE CRANE CO. *v.* DENMAN, ADMINISTRATOR; and

No. 619. SAME *v.* UNITED STATES. February 4, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. J. Brunenkant* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Morton K. Rothschild,* and *H. Brian Holland* for respondents. Reported below: 73 F. (2d) 408.

No. 622. UNITED STATES EX REL. KROGER GROCERY & BAKING CO. v. INTERSTATE COMMERCE COMMISSION. February 4, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Harry Friedman* for petitioner. *Messrs. Nelson Thomas* and *Daniel W. Knowlton* for respondent. Reported below: 64 App. D. C. 43; 73 F. (2d) 948.

No. 623. ROBINSON ET AL. *v.* HOME INSURANCE CO. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edgar Watkins* and *Edgar Watkins, Jr.,* for petitioners. *Mr. George T. Cann* for respondent. Reported below: 73 F. (2d) 3.

No. 626. Roelker, Receiver, *v.* Bromley-Shepard Co., Inc. et al. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George B. Springston* for petitioner. *Mr. Richard B. Walsh* for respondents. Reported below: 73 F. (2d) 618.

No. 627. New York *v.* Arnold, Trustee in Bankruptcy. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert P. Beyer* for petitioner. *Mr. Louis W. Arnold, Jr.,* for respondent. Reported below: 73 F. (2d) 283.

No. 629. E. M. Loew's, Inc. et al. *v.* New England Theatres, Inc. et al. February 4, 1935. Petition for writ of certiorari to the Superior Court of Suffolk County, Massachusetts, denied. *Mr. Edward O. Proctor* for petitioners. *Messrs. Jacob J. Kaplan, Lee M. Friedman,* and *Percy A. Atherton* for respondents. Reported below: 287 Mass. 485.

No. 630. Kasimov et al. *v.* Soltz, Trustee in Bankruptcy. February 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. A. L. Greenspun* for petitioners. No appearance for respondent. Reported below: 71 F. (2d) 1010.

No. 668. Belt et al. *v.* United States. February 11, 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. J. S. Belt, pro se.* No appearance for respondent. Reported below: 73 F. (2d) 888.

No. 669. Spruill *v.* Crawford. February 11, 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. 118; 75 F. (2d) 522.

No. 616. Washington Railway & Electric Co. *v.* Hazen et al. February 11, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. S. Russell Bowen* and *Edwin D. Detwiler* for petitioner. *Messrs. E. Barrett Prettyman* and *W. A. Roberts* for respondents. Reported below: 64 App. D. C. 57; 74 F. (2d) 461.

No. 620. Young *v.* United States. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Warren E. Miller* and *Oscar W. Worthwine* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Wilbur C. Pickett,* and *W. Marvin Smith* for the United States. Reported below: 73 F. (2d) 690.

No. 624. Woo *v.* United States. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Morgan Owen* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 73 F. (2d) 897.

No. 631. Yonejiro Nakasuji *v.* Seager, U. S. Collector of Customs, et al. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the

Ninth Circuit denied. *Messrs. Arthur E. Cook* and *J. Edward Keating* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* for respondents. Reported below: 73 F. (2d) 37.

No. 639. Hamann *v.* Stickle, Ancillary Receiver. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John A. Cline* for petitioner. *Mr. Ralph Stickle* for respondent. Reported below: 71 F. (2d) 294.

No. 641. Beaumont *v.* Helvering, Commissioner of Internal Revenue. February 11, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. John W. Townsend* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 63 App. D. C. 387; 73 F. (2d) 110.

No. 647. New York, New Haven & Hartford R. Co. *v.* Hoffman. February 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John M. Gibbons* and *Edward R. Brumley* for petitioner. *Mr. Thomas J. O'Neill* for respondent. Reported below: 74 F. (2d) 227.

No. 688. Green *v.* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. February 18, 1935. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Carl Green, pro se.* No appearance for respondent. Reported below: 126 Ohio St. 512; 186 N. E. 365.

No. 460. Lyders *v.* Petersen et al. February 18, 1935. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, Division 1, of California, denied. *Messrs. James F. Brennan* and *Harold M. Sawyer* for petitioner. *Mr. Herbert W. Clark* for respondents. Reported below: 139 Cal. App. 303; 33 P. (2d) 1030.

No. 633. Consolidated Title Securities Co. *v.* Hopkins, County Assessor. February 18, 1935. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Oliver P. Morton* for petitioner. *Mr. Everett W. Mattoon* for respondent. Reported below: 1 Cal. (2d) 414; 35 P. (2d) 320.

No. 636. Jones *v.* Commissioner of Internal Revenue. February 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Y. Gladney* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 72 F. (2d) 114.

No. 638. Kendrick Coal & Dock Co. *v.* Helvering, Commissioner of Internal Revenue. February 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Stanley B. Houck* and *W. Yale Smiley* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *S. Dee Hanson* for respondent. Reported below: 72 F. (2d) 330.

No. 651. Ziccardi *v.* Travelers Insurance Co. et al. February 18, 1935. Petition for writ of certiorari to the Superior Court of Suffolk County, Massachusetts, denied.

Mr. Walter B. Grant for petitioner. *Mr. Edmund L. Jones* for respondents. Reported below: 287 Mass. 588; 192 N. E. 29.

No. 652. T. W. WARNER CO. *v.* ANDREWS ET AL. February 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eli J. Blair* for petitioner. *Messrs. Abraham M. Lowenthal* and *Allan C. Rowe* for respondents. Reported below: 72 F. (2d) 287.

No. 654. RALPH A. FREUNDLICH, INC. ET AL. *v.* FLEISCHER STUDIOS, INC. ET AL. February 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max Shlivek* for petitioners. *Mr. Louis Nizer* for respondents. Reported below: 73 F. (2d) 276.

No. 721. MINCHELLA *v.* DOELL, WARDEN. March 4, 1935. 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. 642. VIEAU ET AL. *v.* SYRACUSE WASHING MACHINE CORP. ET AL. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Victor Levine* for petitioners. *Mr. John F. Neary* for respondents. Reported below: 72 F. (2d) 410.

No. 645. FIRST NATIONAL BANK OF BEAVER FALLS *v.* UNITED STATES. March 4, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John E.*

Hughes and *William Cogger* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 79 Ct. Cls. 744; 8 F. Supp. 484; 9 *id.* 424.

No. 646. Richmond Hosiery Mills *v.* Rose, Former Collector of Internal Revenue. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 73 F. (2d) 315.

No. 656. Philadelphia Contributionship for the Insurance of Houses from Loss by Fire *v.* MacLaughlin, Administratrix. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Charles J. Biddle* and *F. E. S. Morrison* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. H. Brian Holland* and *Edward H. Horton* for respondent. Reported below: 73 F. (2d) 582.

No. 664. Morley *v.* University of Detroit. March 4, 1935. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Don M. Harlan* for petitioner. No appearance for respondent. Reported below: 269 Mich. 216; 256 N. W. 861.

No. 666. Atlantic Coast Line R. Co. *v.* Gillis. March 4, 1935. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Thomas W. Davis* and *F. L. Willcox* for petitioner. *Mr. Louis M.*

Shimel for respondent. Reported below: 175 S. C. 223; 179 S. E. 62.

No. 673. Levine *v.* Shell Eastern Petroleum Products, Inc. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. A. Alan Lane* and *Alexander Wolf* for petitioner. *Mr. F. Wright Moxley* for respondent. Reported below: 73 F. (2d) 292.

No. 674. Sun-Herald Corp. *v.* Duggan, Collector of Internal Revenue. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Neil P. Cullom* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Frederick W. Dewart* for respondent. Reported below: 73 F. (2d) 298.

No. 682. Northern Kentucky Telephone Co. *v.* Southern Bell Telephone & Telegraph Co. et al. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. M. J. Hennessey* for petitioner. *Mr. John C. Doolan* for respondents. Reported below: 73 F. (2d) 333.

No. 683. Northern Trust Co., Executor, *v.* Edenborn. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. *Messrs. R. E. Milling, A. B. Freyer,* and *R. C. Milling* for respondent. Reported below: 74 F. (2d) 374.

No. 684. Mann *v.* Edenborn. March 4, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. *Messrs. R. E. Milling, A. B. Freyer,* and *R. C. Milling* for respondent. Reported below: 74 F. (2d) 374.

No. 687. AMERICAN SURETY CO. *v.* MORAN, RECEIVER. March 4, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Charles A. Douglas, Jo V. Morgan, Hugh H. Obear,* and *Edmund D. Campbell* for petitioner. *Messrs. J. Bruce Kremer, George B. Springston,* and *Herbert M. Bingham* for respondent. Reported below: 64 App. D. C. 127; 75 F. (2d) 646.

No. 733. PRICE *v.* UNITED STATES. March 11, 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. Walter D. Price, pro se.* No appearance for the United States. Reported below: 74 F. (2d) 120.

No. 681. MORGENTHAU *v.* STEPHENS ET AL. On petition for writ of certiorari to the Supreme Court of Kansas. March 11, 1935. The petition for writ of certiorari in this cause is denied upon the ground that the judgment sought herein to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors,* 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson,* 287 U. S. 599; *Louisville & Nashville R. Co.* v. *Parker,* 287 U. S. 569; *Wagner Tug Boat Co.* v. *Meagher,* 287 U. S. 657; *Missouri State Life Ins. Co.* v. *Johnson,* 288 U. S. 609. *Messrs. Alexander M. Bull, W. W. Brown,* and *Joseph M. Bryson* for petitioner. *Mr. Douglas Hudson* for respondents. Reported below: 140 Kan. 220; 36 P. (2d) 316.

No. 672. Carl Schmid, Inc. *v.* Stevens. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. Crichton Clarke* for petitioner. *Messrs. F. O. Richey* and *B. D. Watts* for respondent. Reported below: 73 F. (2d) 54.

No. 685. Twin Coach Corp. *v.* Blount et al. March 11, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Douglas D. Felix* for petitioner. *Mr. John M. Murrell* for respondents. Reported below: 116 Fla. 356; 156 So. 244; 157 *id.* 925.

No. 690. Hilliard *v.* Pennsylvania R. Co. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Homer H. Marshman* for petitioner. *Mr. Norman A. Emery* for respondent. Reported below: 73 F. (2d) 473.

No. 692. J. B. Schermerhorn, Inc. *v.* Holloman, Treasurer, et al. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Hugh A. Ledbetter* and *Maxwell M. Mahany* for petitioner. No appearance for respondents. Reported below: 74 F. (2d) 265.

No. 700. Ford, Bacon & Davis, Inc. *v.* International Combustion Engineering Corp. et al. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold C. McCollom* for petitioner. *Mr. Sanford H. E. Freund* for respondents. Reported below: 73 F. (2d) 991.

No. 701. Thomasville *v.* American Surety Co. March 11, 1935. Petition for writ of certiorari to the

112536°—35——46

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Omer W. Franklin* for petitioner. *Mr. E. K. Wilcox* for respondent. Reported below: 73 F. (2d) 584.

No. 703. GLEISCH *v.* BENNETT, TRUSTEE IN BANKRUPTCY. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter B. Milkman* for petitioner. *Mr. David Haar* for respondent. Reported below: 73 F. (2d) 998.

No. 707. JAMES STEWART & CO., INC. *v.* NATIONAL SHAWMUT BANK OF BOSTON. March 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. J. Wilmer Latimer* for petitioner. *Mr. Thomas Hunt* for respondent. Reported below: 69 F. (2d) 694.

No. 691. BOWMAN BILTMORE HOTELS CORP. ET AL. *v.* ROBERTS, RECEIVER, ET AL. March 18, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Wm. H. Page, Richard M. Page, Frank C. Laughlin, Spotswood D. Bowers,* and *Jos. F. Mulqueen, Jr.,* for petitioners. *Messrs. Carl M. Owen, Charles E. Hughes, Jr., Charles Franklin, George Welwood Murray, Harold C. McCollom, Martin A. Schenck,* and *Paxton Blair* for respondents. Reported below: 265 N. Y. 170.

No. 676. JAMES A. HEARN & SON, INC. *v.* UNITED STATES. March 18, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edmund S. Kochersperger* for petitioner. *Solicitor General Biggs, Assistant*

Attorney General Wideman, and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 260; 8 F. Supp. 698.

No. 677. Barnes *v.* Boyd et al. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Franklin Fairleigh* for petitioner. *Messrs. George E. Price* and *Robert S. Spilman* for respondents. Reported below: 73 F. (2d) 910.

No. 679. Buchanan et al. *v.* United States. March 18, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Camden R. McAtee* and *Edmund F. Trabue* for petitioners. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* for the United States. Reported below: 80 Ct. Cls. 850.

No. 680. Creel *v.* Creel. March 18, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Edwin J. Creel, pro se. Messrs. Leon Tobriner* and *Selig C. Brez* for respondent. Reported below: 63 App. D. C. 384; 73 F. (2d) 107.

No. 689. Oregon-Washington Railroad & Navigation Co. *v.* Strauss & Co., Inc. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Henry W. Clark* and *Arthur C. Spencer* for petitioner. *Messrs. William P. Ellis* and *Wallace McCamant* for respondent. Reported below: 73 F. (2d) 912.

No. 695. Liberty Bank of Buffalo *v.* Buffalo. March 18, 1935. Petition for writ of certiorari to the

Supreme Court of New York denied. *Mr. R. Randolph Hicks* for petitioner. *Mr. Herbert A. Hickman* for respondent. Reported below: 265 N. Y. 543; 193 N. E. 312.

No. 697. City Loan & Guaranty Co. *v.* Kaplan, Trustee in Bankruptcy. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. E. Garling* for petitioner. No appearance for respondent.

No. 699. Mashunkashey et al. *v.* United States. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Finis E. Riddle* for petitioners. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Mr. Pedro Capo-Rodriquez* for the United States. Reported below: 72 F. (2d) 847; 73 *id.* 487.

No. 706. Dean et al. *v.* Tokheim Oil Tank & Pump Co. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Max W. Zabel* and *Joseph H. Milans* for petitioners. *Messrs. Wallace R. Lane* and *John F. Oberlin* for respondent. Reported below: 73 F. (2d) 32.

No. 712. Wadsworth Electric Manufacturing Co. *v.* Sachs et al. March 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Walter F. Murray* and *Arthur C. Denison* for petitioner. *Messrs. Oscar W. Jeffery* and *John W. Peck* for respondents. Reported below: 71 F. (2d) 850.

No. 777. Worsley *v.* Worsley. April 1, 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. *Mr. James C. Crouch* for petitioner. No appearance for respondent. Reported below: 64 App. D. C. 202; 76 F. (2d) 815.

No. 781. Flannigan *v.* Nebraska. April 1, 1935. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William Ritchie, Jr.,* for petitioner. No appearance for respondent. Reported below: 127 Neb. 640; 256 N. W. 321.

No. 789. Edwards *v.* Aderhold, Warden. April 1, 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. Edison J. Edwards, pro se.* No appearance for respondent. Reported below: 73 F. (2d) 997.

No. 719. Wolfe et al. *v.* International Re-Insurance Corp. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, for the reason that application therefor 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). *Mr. Wendell P. Barker* for petitioners. *Mr. Alfred C. Bennett* for respondent. Reported below: 73 F. (2d) 267.

No. 735. Troutman et al., Receivers, *v.* Compton, Trustee. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 1, 1935.

The motion to strike the name of Henry B. Troutman from the title of this case is granted. The petition for writ of certiorari herein is denied. Mr. Justice Stone took no part in the consideration or decision of this application. *Messrs. Wm. L. Ransom* and *Robert E. Coulson* for petitioners. *Mr. Hartwell Cabell* for respondent. Reported below: 74 F. (2d) 734.

No. 698. Forest Products Chemical Co. *v.* Commissioner of Internal Revenue. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. F. E. Hagler* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Carlton Fox* for respondent.

No. 705. Montaigne, Assistant Tax Commissioner of Delaware, *v.* Rossville Alcohol & Chemical Corp. et al. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Amos J. Peaslee* for petitioner. *Messrs. Godfrey Goldmark* and *Jay Leo Rothschild* for respondents. Reported below: 73 F. (2d) 301.

No. 709. Thomas et al. *v.* Central Hanover Bank & Trust Co. et al., Trustees, et al. April 1, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. W. Bissell Thomas, W. B. O'Connell, Leslie C. Garnett,* and *Joseph Low* for petitioners. *Messrs. John J. Hamilton* and *Paul E. Lesh* for respondents. Reported below: 64 App. D. C. 96; 75 F. (2d) 227.

No. 710. LOCATELLI *v.* CITY OF MEDFORD. April 1, 1935. Petition for writ of certiorari to the Massachusetts Superior Court in and for the County of Middlesex denied. *Mr. Felix Forte* for petitioner. No appearance for respondent. Reported below: 287 Mass. 550; 192 N. E. 57.

No. 711. FIDELITY PHENIX FIRE INSURANCE CO. *v.* VALLONE ET AL. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Louis R. Bryan* for petitioner. *Mr. Edward S. Boyles* for respondents. Reported below: 74 F. (2d) 137.

No. 714. PORTNER, TRUSTEE, *v.* TEXAS ET AL.; and

No. 715. PORTNER, TRUSTEE IN BANKRUPTCY, ET AL. *v.* SAME. April 1, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. F. D. Wright* and *Ellis Douthit* for petitioners. No appearance for respondents. Reported below: 74 F. (2d) 269.

No. 716. GENERAL RUBBER CO. *v.* UNITED STATES. April 1, 1935. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Messrs. John W. Davis, Paul H. Arthur,* and *Joseph F. Lockett* for petitioner. *Solicitor General Biggs, Assistant Attorney General Jackson,* and *Mr. Charles D. Lawrence* for the United States. Reported below: 73 F. (2d) 225.

No. 718. VIRGINIA BEACH BUS LINE *v.* CAMPBELL. April 1, 1935. 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. No appearance for respondent. Reported below: 73 F. (2d) 97.

No. 723. Pacific Air Transport *v.* Farley. April 1, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. William J. Donovan* and *Henry Herrick Bond* for petitioner. *Solicitor General Biggs* and *Messrs. Carl L. Ristine, W. Marvin Smith,* and *Lee A. Jackson* for respondent. Reported below: 75 F. (2d) 765.

No. 724. Missouri Pacific R. Co. *v.* Pipkin. April 1, 1935. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J. White, Thomas B. Pryor,* and *Harry L. Ponder* for petitioner. *Mr. Wm. R. Donham* for respondent. Reported below: 189 Ark. 890; 75 S. W. (2d) 801.

No. 725. Sweeney, Administratrix, *v.* Boston & Maine Railroad. April 1, 1935. Petition for writ of certiorari to the Supreme Court of New Hampshire denied. *Mr. Robert W. Upton* for petitioner. *Mr. George H. Warren* for respondent. Reported below: 87 N. H. 90; 174 Atl. 676.

No. 727. Grossman et al. *v.* Hudspeth County Conservation & Reclamation District No. 1 et al. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Del W. Harrington* for petitioners. *Mr. W. H. Burges* for respondents. Reported below: 75 F. (2d) 152.

No. 729. Currin, Receiver, et al. *v.* Nourse, Trustee in Bankruptcy, et al. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Floyd E. Jacobs, William B. Bostian, James A. McDermott,* and *Clarence A. Randolph* for petitioners. *Messrs. Arthur Mag, Roy B. Thomson, Paul R. Stinson, I. J. Ringolsky, Ben L. Shifrin,* and *Frank P. Barker* for respondents. Reported below: 74 F. (2d) 273.

No. 734. Mellin, Trustee, et al. *v.* Monsen et al. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Michael J. Ahern* for petitioners. *Mr. Walter E. Wiles* for respondents. Reported below: 74 F. (2d) 411.

No. 728. Cox et al. *v.* New York Central R. Co. et al. April 1, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. John Jay McKelvey* for petitioners. *Mr. Clive C. Handy* for respondents. Reported below: 265 N. Y. 411; 193 N. E. 251.

No. 730. Missouri Pacific R. Co. *v.* Jones, Administrator. April 1, 1935. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. W. T. Henry* for petitioner. *Messrs. S. P. Jones* and *Wright Patman* for respondent. Reported below: 124 Tex. 234; 76 S. W. (2d) 1044.

No. 731. Louisiana Highway Comm'n *v.* Farnsworth. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William W. Ogden* and *Rodney P. Woods, Jr.,* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 910.

No. 732. Rosser *v.* United States. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John L. Abbot* for petitioner. *Solicitor General Biggs* and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 498.

No. 736. Erickson et al. *v.* Commissioner of Internal Revenue. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John Noble* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 74 F. (2d) 327.

No. 737. Cappetta *v.* Atlantic Refining Co. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph A. Cantrel* for petitioner. *Mr. George E. Beers* for respondent. Reported below: 74 F. (2d) 53.

No. 738. McAuliffe et al. *v.* Doherty. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Paul B. Sargent, William H. Lewis,* and *George L. Dillaway* for petitioners. *Messrs. Robert G. Dodge* and *Harold S. Davis* for respondent. Reported below: 74 F. (2d) 800.

No. 739. Harrison et al. *v.* Barngrover et al. April 1, 1935. Petition for writ of certiorari to the Texas Court of Civil Appeals denied. *Mr. William D. Gordon* for petitioners. *Messrs. Will E. Orgain* and *E. B. Pickett* for respondents. Reported below: 72 S. W. (2d) 971; 72 *id.* 967.

No. 742. Flat-Marks Realty Corp. *v.* Silver Lunch Stores, Inc. April 1, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Meyer Kraushaar* for petitioner. *Mr. Joseph Sterling* for respondent. Reported below: 74 F. (2d) 210.

PETITIONS FOR REHEARING, FROM JANUARY 8, 1935, TO AND INCLUDING APRIL 1, 1935

No. 565. Cusick *v.* Whipp, Warden. 293 U. S. 623. January 21, 1935. Petition for rehearing denied.

No. 161. United States *v.* Spaulding. 293 U. S. 498. February 4, 1935. Petition for rehearing denied.

No. 234. United States ex rel. Chicago Great Western R. Co. et al *v.* Interstate Commerce Commission et al. *Ante,* p. 50. February 4, 1935. Petition for rehearing denied.

No. 545. Highway Trailer Co. *v.* Commissioner of Internal Revenue. 293 U. S. 626. February 4, 1935. Petition for rehearing denied.

No. 581. Carson et al. *v.* Long-Bell Lumber Corp. et al. *Ante,* p. 707. February 4, 1935. Petition for rehearing denied.

No. 608. SPRUILL *v.* BALLARD ET AL. 293 U. S. 625. February 4, 1935. Petition for rehearing denied.

No. 609. SPRUILL *v.* SUPREME COURT, DISTRICT OF COLUMBIA. 293 U. S. 625. February 4, 1935. Petition for rehearing denied.

No. 637. SPRUILL *v.* O'TOOLE ET AL. *Ante,* p. 707. February 4, 1935. Petition for rehearing denied.

No. —, original. EX PARTE MOONEY. *Ante,* p. 103. February 11, 1935. Petition for rehearing denied.

No. 69. FOX *v.* STANDARD OIL CO. *Ante,* p. 87. February 11, 1935. Petition for rehearing denied.

No. 573. DAVIS *v.* JEFFERSON STANDARD LIFE INSURANCE CO. *Ante,* p. 706. February 11, 1935. Petition for rehearing denied.

No. 249. MCCREA *v.* UNITED STATES. *Ante,* p. 23. See *ante,* p. 382.

No. —, original. EX PARTE CALLAHAN. *Ante,* p. 693. February 18, 1935. Petition for rehearing denied.

No. 102. SMITH *v.* SNOW ET AL. *Ante,* p. 1. February 18, 1935. Petition for rehearing denied.

No. 208. WAXHAM *v.* SMITH ET AL. *Ante,* p. 20. February 18, 1935. Petition for rehearing denied.

No. 589. Biddle *v.* Irving Trust Co., Trustee. *Ante,* p. 708. February 18, 1935. Petition for rehearing denied.

No. 214. Forrest *v.* Jack, Receiver. *Ante,* p. 158. March 4, 1935. Petition for rehearing denied.

No. 439. Wiloil Corporation *v.* Pennsylvania. *Ante,* p. 169. March 4, 1935. Petition for rehearing denied.

No. 562. Jordahl et al. *v.* Irving Trust Co., Trustee. *Ante,* p. 710. March 4, 1935. Petition for rehearing denied.

No. 644. Steele *v.* New York. *Ante,* p. 710. March 4, 1935. Petition for rehearing denied.

No. 643. Duke *v.* Committee on Grievances et al. *Ante,* p. 709. March 11, 1935. Petition for rehearing denied.

No. 669. Spruill *v.* Crawford. *Ante,* p. 714. March 11, 1935. Petition for rehearing denied.

No. 187. Dingfelder et al. *v.* The Brenta II et al.; and

No. 188. Boera et al. *v.* The Brenta II. 293 U. S. 579. March 11, 1935. Motion for leave to file petition for rehearing denied.

No. 651. Ziccardi *v.* Travelers Insurance Co. et al. *Ante,* p. 716. March 18, 1935. Petition for rehearing denied.

No. 688. Green *v.* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. *Ante,* p. 715. March 18, 1935. Petition for rehearing denied.

No. 460. Lyders *v.* Petersen et al. See *ante,* p. 716. April 1, 1935. The petition for rehearing in this case is denied. The Court finds that respondents caused unnecessary parts of the record to be printed, amounting, in all, to 125 pages. The cost of such printing, assessed by the Clerk at $256.40, will be charged to respondents. Rule 13, par. 9.

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,* pp. 464, 477. April 1, 1935. Petition for rehearing denied.

No. 342. Miller *v.* United States. See *ante,* p. 435. April 1, 1935. Petition for rehearing denied.

No. 424. Hildegard Schoenamsgruber *v.* Hamburg American Line; and

No. 425. Gustav Schoenamsgruber *v.* Same. See *ante,* p. 454. April 1, 1935. Petition for rehearing denied.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 8, 1935, TO AND INCLUDING APRIL 1, 1935.

No. 557. Vulcan Manufacturing Co. *v.* Maytag Co. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 21, 1935. Dismissed with costs, per stipulation of counsel, on motion of *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. 598. Jones & Laughlin Steel Corp. *v.* Vang et al., Receivers, et al. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 21, 1935. Dismissed on motion of *Mr. Frederick L. Leckie* for petitioner. *Messrs. Otto Wolff, Jr.,* and *H. V. Blaxter* for respondents. Reported below: 73 F. (2d) 88.

No. 634. Zenith-Detroit Corp. *v.* Bendix Stromberg Carburetor Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. February 4, 1935. Dismissed per stipulation, on motion of *Messrs. Merrell E. Clark* and *George L. De Mott* for petitioner. *Messrs. Arthur H. Boettcher, Seward Davis,* and *Charles A. Brown* for respondent. Reported below: 73 F. (2d) 62.

No. 694. United States *v.* Certain Lands in Louisville et al. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. March 11, 1935. Dismissed on motion of *Solicitor General Biggs* for the United States.

No. 640. Stott Realty Co. *v.* Heymann et al., Trustees. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. March 11, 1935. Dismissed per stipulation, on motion of *Messrs. Samuel S. Burman* and *Edgar G. Braun* for petitioner. *Messrs. Walter Ewing Hope* and *H. Struve Hensel* for respondents. Reported below: 73 F. (2d) 1003.

No. 767. United States *v.* Kuramoto. Appeal from the District Court of the United States for the Western District of Washington. March 11, 1935. Dismissed on motion of *Solicitor General Biggs* for the United States.

No. 628. United States *v.* Belcher. Appeal from the District Court of the United States for the Northern District of Alabama. April 1, 1935. Motion of appellant to dismiss the appeal and that mandate issue forthwith submitted by *Solicitor General Reed* for the appellant and by *Mr. Borden H. Burr* for the appellee in opposition thereto, and the motion granted.

ORDER FIXING FEES FOR UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

In pursuance of section 29 of the amendments enacted by section 28 of the act of Congress approved August 5, 1909 (c. 6, § 28, 36 Stat. 11, 91, 105).

It is now here ordered by this Court that the following revised table of fees to be charged in the United States Court of Customs and Patent Appeals be, and the same is hereby, adopted and approved, viz:

There shall be paid for each admission to practice, including certificate thereof, two dollars. For each certificate under seal, one dollar. For making or copying any record or other paper and certifying the same, per folio of 100 words, fifteen cents. For filing and docketing each customs appeal, six dollars, this fee to be in full of all fees in the case: *Provided,* That when an appeal is taken by the United States, no payment of fees shall be required. For filing and docketing each patent appeal, twelve dollars, this fee to be in full of all fees in the case, except the charge for preparing and supervising the printing of the record. For preparing the record or transcript in patent cases for the printer, or such parts thereof as may be required under the rules of the court, indexing the same, supervising the printing thereof, and distribution of copies under the rules, to be paid for by appellant, for each printed page of the record, twenty-five cents: *Provided,* That where the necessary copies of any record as printed for the use of any of the tribunals of the United States Patent Office are furnished, charges under this item will be limited to any additions printed here under the

112536°—35——47

clerk's supervision. For certifying a printed record, two dollars.

It is further ordered that the fees and costs to be allowed the marshal shall be, and hereby are, fixed the same as those allowed the marshal of the Supreme Court of the United States.

January 14, 1935.

INDEX.

112536°—35——48

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